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THE CARSWELL COMPANY, LIMITED
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TABLE OF THE NAMES OF CASES

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DEROCHE, CO. C.J. DECEMBER 16TH, 1908.

COUNTY COURT OF HASTINGS.

HALLIWELL v. ZWICK.

Limitation of Actions — Claims for Professional Services — Cross-accounts—Items More than 6 Years Old—Effect of Later Items — Statute of Frauds — Promise to Pay for Services Rendered to Third Persons — Claim against Executor—Corroboration—Entries in Books—Evidence.

Action by the executrix of John Earl Halliwell, a deceased solicitor, against a physician, to recover a balance alleged to be due for professional services rendered by the deceased to the defendant. The defence was payment by contra account and cash. The defendant also brought into Court the sum of $45.49.

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

F. E. O'Flynn, Belleville, and G. G. Thrasher, Stirling, for defendant.

DEROCHE, CO. C.J.:—In this action the plaintiff claims the sum of $349.89 as fees and disbursements of her deceased husband against the defendant, the plaintiff bringing the action as executrix of the last will and testament of the late John Earl Halliwell, deceased. She, however, gives credit against this claim for $192.75, being the amount of a bill for medical services rendered by the defendant to herself and her husband $122.75, and also the sum of $60 counsel fee charged by her late husband, but which had been adjusted in his lifetime, and the sum of $10 for subsequent medical services. This leaves a balance of $157.14, which the plaintiff as executrix claims against the defendant.

There is no dispute between the parties as to the services rendered in connection with these various items, but the defendant rendered medical services to the father and mother of John Earl Halliwell, deceased, amounting to $32.90, also to Lawrence Halliwell, brother of the late John Earl Halliwell, amounting to $28.50, and also to the deceased sister, Charlotte Halliwell, amounting to $50.25, making in all $111.65, which he contends should also be set off against the claim of the plaintiff, which would then leave a balance of $45.49, and which sum the defendant acknowledges as being due, and brings the same into Court with his statement of defence.

The whole issue, therefore, is in relation to these three items for medical services rendered by the defendant, Dr. Zwick, to the relatives of the deceased, the defendant alleging that the deceased J. Earl Halliwell requested him to attend these members of the family, and promised to pay the bill.

It is argued by the counsel for the plaintiff that a promise to pay is not necessarily implied in a request that a benefit be conferred upon a third person, and his argument in this regard is quite correct; but the defendant in this case goes further and says that there was a distinct promise to pay. The plaintiff's counsel says that, even though there was a promise to pay, it was of such a nature that it should have been in writing, under the Statute of Frauds, and there was no writing. The defendant, Dr. Zwick, swears that the deceased Halliwell requested him to attend these various persons, and said he would pay, or, as Dr. Zwick expressed it in another portion of his evidence, Halliwell said to charge it to him and he would pay it.

I take it from the defendant's evidence that at the time this promise was made, if made at all, in connection with each of the persons attended, there had not yet been any service rendered to that person. In relation to this case the rule as to whether the Statute of Frauds applies or not, is well laid down in De Colyar on Guarantees at p. 67: "At the time the promise is made there must be some person actually liable in the first instance to the promisee for the debt, default, or miscarriage guaranteed against, or, at all events, the creation of such liability at some future time must be contemplated as the foundation of the contract." Most of the cases cited by the plaintiff's counsel on this point are under that rule, but in each case the thought is there that

there is a third person actually liable in the first instance, or the creation of such liability contemplated. In this case I cannot see that there is such a condition of things, if I am to believe the defendant and take the promise as given by him as established; because from his standpoint there never was any person actually liable to him for the debt, nor was the creation of such liability contemplated. The only liability was that of the deceased Halliwell, and so it cannot be said he was guaranteeing the debt of another, and therefore I think that the Statute of Frauds does not apply, and, if the promise is well established in evidence, then it was good, even though not in writing.

But the plaintiff's counsel argues also that the question of such a promise is a material issue, to establish which there must be corroborative evidence as against the estate of a deceased person, and his point is of course well taken, so I must inquire whether there is a sufficient corroboration of the evidence of Dr. Zwick to establish this promise. The corroboration consists in the fact that the books of Dr. Zwick in which he kept his accounts, shew this whole account as charged against J. Earl Halliwell, the deceased, and not against the several members of the family, but each item of the account shews for which particular member of the family the service was rendered. Then Mrs. Zwick, wife of the defendant, swears she often saw Halliwell call for Dr. Zwick at his office and go up with him. Also a Mr. Crier, a bookkeeper for Dr. Zwick at that time, testifies that Halliwell came to him and asked to have the account made out in these separate parts, one bill shewing the charges against himself and wife, another bill, services rendered to father and mother, a third, services rendered to Charlotte, his sister, and a fourth, services rendered to his brother Larry. (I should say that all these persons were living together in the same house. There is some evidence that the deceased Halliwell was boarding with his father and mother; there is also some evidence that the father had a means of livelihood, and after his death the mother had some estate, and also that Charlotte had some means of paying this account if she so desired, at least after the mother's death). These accounts were made out in that way, the account being charged against J. Earl Halliwell, and underneath it the words "for Charlotte," "for father and mother," or "for Larry," as the case might be, and were handed to John Earl Halliwell. Mr. Crier says also that Halliwell at that time said he wanted them separ-

ated so he would know how much to charge to each. Dr. Zwick says Halliwell asked him for the separated accounts in this way, giving the reason that he wished to know how much each cost him, but in the examination for discovery of Dr. Zwick he swore that Halliwell asked for these accounts that he might know what it had cost each one. As against this, however, the stenographer for the late John Earl Halliwell testifies that when he received these accounts in his office he said to her that he did not see why he should be asked to pay these accounts, but that each member of the family for whom medical services were rendered should pay his or her own bills.

On the whole I am inclined to think (although not any too well satisfied on the point) that there is sufficient corroboration of the evidence of Dr. Zwick that the deceased Halliwell did request him to perform these services in these three bills mentioned, and promised to pay him for them.

The next question raised by the counsel for the plaintiff is that, in any event, these 3 bills are barred by the Statute of Limitations. There is no doubt of them being barred by the statute, none of them being later than 1900, unless, as is suggested by the counsel for the defendant, these earlier items are drawn in by the later items which are within the last 6 years, and the authority quoted for this contention by the defendant's counsel is the case of Hamilton v. Matthews, 5 U. C. R. 148.

It seems clear on reading the authorities that, previous to Lord Tenterden's Act, 9 Geo. IV. ch. 14, on the authority of the case of Catling v. Skoulding, it had been held that where there were running open accounts between two parties, and unsettled, the statute did not apply to either account, even though some of the items were more than 6 years old, and it was on the authority of that case that the learned Judges in the case of Hamilton v. Matthews decided against the application of the Statute of Limitations, although Hamilton v. Matthews was decided after Lord Tenterden's Act. I notice, however, that Robinson, C.J., in his judgment says: "I do not see why this case does not come within the decision in Cattling v. Skoulding, though not easy to reconcile with the statute"—meaning, I suppose, Lord Tenterden's Act. I notice further that in this case of Hamilton v. Matthews the defendant supplied the articles for which he claimed a set-off on the express understanding and with the intention that they were to go towards liquid-

ating the account that the intestate had against him. This strikes me as very important in considering this matter.

Now I wish to notice the case of Williams v. Griffiths, 41 R. R. 685. The whole tenor of the remarks of the learned Judges in that case was that such a decision as Catling v. Skoulding would not be good since Lord Tenterden's Act, and I wish to notice particularly the case of Cottam v. Partridge, 11 L. J. N. S. C. P. 161. In this case there were cross-accounts, as in the case before us, and very much the same questions to decide, and the counsel, arguing against the application of the Statute of Limitations, quoted Catling v. Skoulding as his chief authority, and argued that it had not been overruled by Williams v. Griffiths, which I have cited above, The counsel arguing in favour of the Statute of Limitations applying, contended that Catling v. Skoulding was not law since Lord Tenterden's Act, and had been overruled by Williams v. Griffiths, and it was held by the learned Judges, all agreeing, that since Lord Tenterden's Act Catling v. Skoulding was not good law, Tindal, C.J., in his judgment saying, at p. 165: "It is contended that, notwithstanding the statute 9 Geo. IV. ch. 14, there has been here such a dealing between the parties as will take the items in this account which accrued more than 6 years before action brought, out of the operation of that statute. Now, that before that statute this case would have fallen within the authority of Catling v. Skoulding, I do not deny. Nor do I suggest that that case was not properly decided. But, as I read the statute of 9 Geo. IV. ch. 14, the case of Catling v. Skoulding can be no longer applicable." Coltman, J., at p. 166, says: "As there was in this case no evidence to shew distinctly that goods were by agreement between the parties received as payment, there is nothing to take the case out of the operation of the enacting part of Lord Tenterden's Act." Erskine, J., at p. 168, says: "Then, the effect of the cases which have been cited is that in one case a statement made by the debtor before the delivery of the goods was admitted to shew that they were sent as payment; and in another a similar statement was received, after the payment, to shew on what account it had been made. But there is no evidence in this case of any declaration before the goods sent, such as 'I will give some goods in part payment of the sum due from me to you,' nor after the goods are furnished, is there anything said, as 'I have sent you some goods, which you will set against your account with me.' There is simply a de-

livery of goods by one tradesman to another in the ordinary course of business. There is no delivery as payment, and therefore nothing which brings this within the proviso in the statute. It falls, therefore, within the prohibiting and enacting part of the statute, and is a debt barred by it." Then Cresswell, J., says: "Since Lord Tenterden's Act no delivery of goods, unless it amounts to a payment, can be admitted to bar the Statute of Limitations."

It seems to me that this decision of Cottam v. Partridge settles conclusively the case under consideration. There was in this case no understanding at the outset that one account should be set off against the other. There was nothing during the currency of the accounts to shew that the deceased intended that the accounts of either should operate as a payment to the other, except that Dr. Zwick testifies that casually in the street, and he cannot say when or where, the deceased Halliwell said to him incidentally, apparently in discussing the accounts, that they might jump accounts, but there is nothing whatever to corroborate this testimony, and therefore I must deal with the accounts as they appear in the books; and on the authority of this case, Cottam v. Partridge, it seems to me that these 3 bills of Dr. Zwick, for which he claims credit, are barred by the Statute of Limitations, and therefore the plaintiff is entitled to her full claim.

I therefore direct judgment to be entered for the plaintiff for the sum of $157.14, which, of course, includes the $45.49 paid into Court by the defendant, and the plaintiff is to have full costs of the action, and the counterclaim or set-off of the defendant is dismissed with costs.

DECEMBER 21ST, 1908.

DIVISIONAL COURT.

RE MCNEIL AND PLOTKE.

RE MCCULLY AND PLOTKE.

Mines and Minerals—Applications Recorded—Disputes—Dismissal by Mining Recorder—Appeal to Mining Commissioner—Status of Appellants — Discovery of Mineral — Staking — False Affidavit — Abandonment of Claim — Mines Act and Amendments—"Indicate"—Fraud—New Trial.

Appeals by John J. McNeil and C. C. McCully from a decision of the Mining Commissioner in the matter of two

appeals taken by the appellants from a decision of a Mining Recorder, whereby he dismissed their disputes against the applications of Plotke, and confirmed Plotke's claim upon the property in question.

The appeals were heard by FALCONBRIDGE, C.J., BRITTON, J., RIDDELL, J.

J. Lorn McDougall, Haileybury, for McNeil.

J. E. Day, for McCully.

W. M. Douglas, K.C., and A. G. Slaght, for Plotke.

RIDDELL, J.:—The disputes had been entered separately, and were tried separately before the Recorder; the appeals to the Commissioner were also entered separately, but the appeals were tried together, as they involved the same questions, except that each appellant, in addition to the claim that Plotke's application could not be sustained, claimed that he should be awarded the property in competition with the other.

The evidence was taken before the Commissioner on 31st August, 1908. At the hearing it was suggested that the evidence taken upon a former occasion in reference to the same property might be put in, but that was objected to by Mr. Slaght, and that course was not adopted, but by consent the evidence taken before the Recorder was put in, with leave to supplement that evidence by viva voce testimony.

There were two applications by Plotke under consideration by the Recorder, Nos. 10265 and 10332 1-2, and he found that, while some doubt might be entertained about No. 10265, "the application . . . recorded as No. 10332 1-2, upon which a discovery of valuable mineral was reported in favour of the said Plotke, . . . should be confirmed, and the disputes of the said C. C. McCully and John J. McNeil dismissed."

Upon the appeal to the Commissioner, he thought he was bound by the decision of this Divisional Court in Re Cashman and Cobalt and James Mines Limited, 10 O. W R. 658, first to investigate the rights of the appellants to an interest in the property, and, if neither had such an interest, he thought it was not open to him to reverse the Recorder's decision as to the validity of the Plotke claim. The actual decision in the Cashman case does not go that far, but no fault can be found with the Commissioner's manner

of marshalling the questions to be tried. He cannot be said to have been wrong in first determining the status of the appellants.

He finds that neither McNeil nor McCully has any claim to the property by reason of the supposed fact that their staking, &c., were not in accordance with the Act in particulars which will require consideration. But he adds: "It is not open to me to investigate the strict legality of the Plotke claims; were that question open, I am by no means sure that I could agree with the Recorder in upholding their validity."

The appeals were, therefore, dismissed and without costs, solely upon the ground of the absence of status of the two appellants to sustain an appeal from the Recorder to the Commissioner.

Upon the appeal before us, it was agreed by counsel for the appellants that in case the Court were of opinion that the Commissioner was wrong in the ground upon which he rested his judgment, the case might be remitted to him to deal with it upon the merits. The question upon which the Divisional Court divided in Re Wright and Coleman Development Co., 12 O. W. R. 248, now in appeal, therefore, does not arise here.

In order to appreciate the objections to the status of the appellants, it will be necessary to go back into the history of this property.

In 1907, 13th November, certain claims made by H. A. McNeil (not the appellant here) and Plotke were cancelled upon the ground that neither had made a discovery of valuable mineral. Some or all of the posts of these former stakings remained upon the property, but it is not clear how many, or which, or how long.

15th November, Plotke alleges that a discovery was made and staking done by one Douglas for him.

16th November, Plotke's application for this was recorded as application No. 10263. As to this application, the Commissioner, upon a former proceeding before him, says (judgment 27th December, 1907, after holding that he cannot give effect to the appeal then before him): "Were I permitted to do so, I would without hesitation find as a fact that that application is invalid, that in fact the staking and discovery claimed by the affidavit of Douglas to have been made and done on 15th November, 1907, was never really made or done." The Commissioner nowhere retracts this

expression of opinion: and the evidence is, I think, overwhelming that he was right in his opinion.

16th November, H. A. McNeil had a number of men upon this property, and these did some staking, leaving certain blanks, as it was doubtful who would go to the Recorder's office to record the claim. One Labrick came to the property on the next day, and it was decided that he should record.

18th November, Lebrick does record the claim for H. A. McNeil; upon the same day McNeil files a dispute of Plotke's application No. 10263.

5th December, it is alleged that Douglas made a new discovery and staking for Plotke, and this is recorded on 6th December as No. 10332 1-2.

In respect of this claim the Commissioner in the same judgment (27th December, 1907), says: "I have no hesitation in saying that if I considered the matter open to me to determine upon this appeal, I would have no hesitation in finding that application No. 10332 1-2 should not have been recorded." It appears, however, that the application in question was afterwards inspected (20th January, 1908), and valuable mineral found, as appears by the Inspector's report filed 10th February, 1908.

6th December, it is said that H. A. McNeil again staked; but this staking was not followed up by any claim, and it does not seem to have been based on any discovery.

6th December, the Recorder dismissed the dispute of McNeil against claim 10263.

12th December, McNeil takes an appeal from this decision to the Commissioner.

20th December, upon this matter coming before the Commissioner, it came to the notice of McNeil that the Recorder had recorded application No. 10332 1-2, whereupon he appealed against that act, and the two appeals came on together on 23rd or 24th December.

Upon this day the evidence was retaken before the Commissioner, and upon the proceedings it is alleged that the Commissioner said or suggested that neither Plotke nor McNeil might be entitled to the property. One Everall hearing this, it is said, determined to try to procure the property for McCully and others. He went there 24th December, the snow being a foot and a half deep, so deep that it was impossible to make a discovery perhaps—at all events he found McNeil's shaft 12 feet deep, found a vein shewing at 10 feet

from the top, though it is said to have shewed at the top also. He claims to have made 4 discoveries, but did only one staking. He put down the discovery post at the McNeil shaft, and then he says put down posts 1, 2, 3, and 4.

In respect of this the Commissioner in the judgment now under appeal says: "No original discovery of any kind appears to have been made by or on behalf of McCully, the licensees who staked on his behalf admittedly having staked the properties already existing when they went upon it."

27th December, the Commissioner dismisses the appeals of H. A. McNeil, upon the sole ground that he has no locus standi to prosecute the appeals. It was in this judgment that the Commissioner made the references to the merits of applications Nos. 10263 and 10332 1-2, already set out.

No appeal was taken from this judgment, and, consequently, the decisions of the Recorder were absolute. But the Commissioner recommended the Recorder to have an inspection of all the alleged discoveries, in that way to procure cancellation of claims that seemed to be clearly "invalid and made in direct violation and apparently in fraud of the Act." It was, it would seem, upon this recommendation that the inspection of the discovery alleged in 10332 1-2, already referred to, was made.

The ground upon which the Commissioner held that McNeil had no status was that Labrick had made a false affidavit as to his having been on the ground on 16th December-

28th December, McCully filed his application and also a dispute against No. 10332 1-2.

1908, 13th January, John J. McNeil, the present appellant, is alleged to have staked, and upon the next day he filed a dispute against applications Nos. 10263 and 10332 1-2.

3rd March, the trial of the dispute by John J. McNeil of claims 10263 and 10332 1-2 before the Recorder is had.

10th March, McCully filed a dispute against 10263, and this is tried on 28th March.

28th July, the Recorder gave judgment on the disputes and applications of J. J. McNeil and McCully, holding that 10332 1-2 was good, and dismissing the disputes of McNeil and McCully, confirming the record of 10332 1-2.

Appeals were had by both McNeil and McCully to the Commissioner, and he on 9th September gave judgment dismissing the appeals without costs, on the sole ground already spoken of, i.e., the want of status of the appellants.

The objection to the position of McNeil is very simple. It is said that at the time (13th January, 1908) the discovery and staking were made by him, there were the two Plotke applications and the McCully application pending—that the affidavit of discovery (form 14) contains, added at the end of paragraph 2, the words "except applications 10263 and 10332 1-2, the validity of which I have disputed."

It is said that the provisions of sec. 157 have not been complied with, and that the affidavit is not sufficient. The case of Re Isa Mining Co. and Francey, 10 O. W. R. 31, is relied upon in support of that contention. In that case the appellant was an applicant for a working permit; he was by the legislation then in force, (1906) 6 Edw. VII. ch. 11, sec. 141 (11), required to swear "that the land at the time of its being staked out was not in occupation or possession or or being prospected for minerals by any other licensee, and that (he) has no knowledge and had never heard of any adverse claim by reason of prior discovery or otherwise." It was in that state of the law that the affidavit of the applicant was made, and the Court held that the affidavit "not only did not negative the matters required to be negatived, but shewed that there were adverse claims and the knowledge of the applicant of the existence of them:" 10 O. W. R. at p. 32.

The stringency of the provision just referred to was much relaxed by the statute of 1907, 7 Edw. VII. ch. 13, sec. 39, which was passed a few days before the decision in the Isa case; and even the later provision is not precisely the same as that for a mining claim.

The former provision for the case of a mining claim was found in sec. 157 of the Act of 1906—the affidavit filed for the applicant must shew "that the deponent has no knowledge and has never heard of any adverse claim by reason of prior discovery or otherwise." The Act of 1907 changes this to read "at the time of staking out . . . there was nothing on the lands to indicate that they were not open to be staked out for a mining claim under this Act, and that the deponent verily believes they were so open, and that the applicant is entitled under the provisions of this Act to be recorded for the claim."

The Isa case is not conclusive against McNeil, by reason of the different wording of the sections. It must, however, I think, be obvious that the mere swearing and filing of an affidavit in the exact words of the section would not be effec-

tive, unless the affidavit itself were substantially true. It never could be that a perjurer would have higher rights than an honest man.

I think it well to consider, first, when lands are "open to be staked out for a mining claim under this Act."

Section 132 provides that "a licensee who discovers valuable mineral on any lands open to prospecting as specified in sec. 131 . . . shall have the right to stake out . . a mining claim thereon." Section 131 specifies lands "not . . . (1) under staking or record as a mining claim . . . not expired, lapsed, abandoned, or cancelled."

It seems clear that the fact that a certain property has been staked out as a mining claim will not prevent that being open if such claim be expired, lapsed, abandoned, or cancelled. And the fact that there may be upon the property staking of the most perfect character or working of any character, will be unimportant if the claim be abandoned, &c. A claim may be abandoned expressly under the provision of sec. 165; by neglect under 166, and perhaps by implication from conduct. Neither method involves interference with the staking, &c., and consequently a piece of property may be open, though staked in the most perfect way. Bearing this in mind, it would be a monstrous result if the licensee entering upon and staking out land upon which he had a perfect right to enter and stake, should not be allowed to have some advantage of his staking. Section 157 must then, I think, be read so as to give effect to the work lawfully done.

The section cannot mean that at the time of the staking "there was nothing in the lands to indicate" to a stranger that some person was or might be making a claim to the property. With such an interpretation the licensee, knowing from actual inspection that a claim had been cancelled, or expressly abandoned, would be unable legally to make any claim upon the property if any stakes were left when he made his discovery, &c. The section must, I think, mean only that the deponent must be able to say—"Knowing what I do, seeing the position and condition of the ground, staking, &c., this is open to my staking. While what I see here might suggest to an outsider that somebody is or may be making a claim, I am in possession of facts which justify me in saying that there is nothing here to indicate to me that I should not stake." The word "indicate" is a very loose one, ranging in its connotation from a mere hint or suggestion to a scientific demonstration. The dictionaries

say—"give reason to expect, give a knowledge of, shew as something existing or taking place" (Standard); "point out, shew, suggest, serve as a reason or ground for inferring, expecting," &c. (Century). The word in this statute must be interpreted in view of the subject matter and of the remainder of the affidavit required. And if the deponent is in possession of facts which will entitle him honestly to say that what there is on the land does not indicate to him that the land is not open—that is, "does not serve as a ground for inferring" that the land is not open—I think he may well take the affidavit required. And I do not think that the mere fact that he adds, for the greater caution, that there are applications the validity of which he is disputing, is fatal. The "except" clause in the present affidavit is not very happily placed or worded. Apparently the only noun which can be qualified by this clause is the word "nothing" in the first line, and in respect of that the applications are not on, i.e., in situ upon, the lands at all.

I am of opinion that, as regards the affidavit, the form is not fatal; and that, as regards McNeil, the only matter which requires consideration is his right to stake at all. He asserts that the alleged discovery and staking under claim 10263 are a bare-faced fraud. The Commissioner in his former judgment seems to agree with him. If that be so, no discovery having in fact been made, the provision of sec. 134 that the staking shall be after the discovery (and cf. sec. 132) has not been complied with, and sec. 166 works an abandonment. The claimant McNeil then cannot be barred by this alleged discovery or staking.

Then as to 10332 1-2, he says that this should not have been recorded; there were not a real discovery and a real staking. As we have seen, the Commissioner thought in his former judgment that this contention was well founded, that, if the appellant in that proceeding, H. A. McNeil, had any locus standi, he (the Commissioner) would without hesitation find that this application should not have been recorded; and I must say that the evidence is very strong that the contention of the present appellant McNeil is well founded.

In my view, the Commissioner, in investigating the status of McNeil, must, if no other objection appears, determine as a fact whether the staking, &c., of Plotke were in accordance with the Act, both in respect of the manner of staking and in respect of whether the staking was preceded by a genuine discovery. If Plotke is entitled to be held as having in all

respects complied with the Act, then clearly McNeil is out, and there will be no necessity of considering his status: if not, the status of McNeil is established unless the McCully staking, &c., stands in the way.

In respect of McCully, the Commissioner finds that there was no original discovery of any kind, and that the licensees who staked on his behalf staked upon the discoveries already existing. If this be so, then the staking of McCully was not in accordance with the Act, and therefore cannot stand in the way of McNeil.

McNeil has, therefore, it would seem, the right to have investigated the validity of the Plotke applications, and also that of the McCully application, if both the Plotke applications are held to be bad.

It is not conclusive against the McCully claim that H. A. McNeil had already staked on 6th December; this staking may have been of such a character that under sec. 161 the claim was abandoned; or it may be that there had been to the knowledge of McCully's licensees an abandonment in fact (if there could be such a thing outside of the statutory provisions—this it is not here necessary to decide). And in any case the staking by H. A. McNeil on 6th December cannot interfere with the staking by John J. McNeil on 13th January. There is no evidence of identity between H. A. McNeil and John J. McNeil so as to cause John J. to be bound by any estoppel by record in proceedings at the instance of H. A., if there were any such estoppel against any one, which I do not decide.

As to the position as appellant of McCully, in view of what I have said, I think he is not ousted from the status of an appellant of necessity by the stakings of Plotke; whether he is so or not by that of 6th December, we are not in possession of sufficient findings to enable us to determine; but I think that the Commissioner is right in finding that there was no discovery on behalf of McCully under sec. 132, and consequently, in my view, the appeal of McCully must be dismissed, and with costs.

In respect of the appeal of McNeil, I think there must be a new trial. The method to be pursued upon such new trial, I do not think we should prescribe. The costs of the former proceedings, of this appeal, and of the new trial, should be dealt with by the Commissioner.

I have not considered the effect of sec. 140 of the Act of 1908, differing as it does from the previous legislation.

FALCONBRIDGE, C.J., and BRITTON, J., agreed in the result.

CARTWRIGHT, MASTER. DECEMBER 22ND, 1908.

CHAMBERS.

TRACEY v. TORONTO R. W. CO. AND GRAND TRUNK R. W. CO.

Parties—Joinder of Defendants — Cause of Action—Joint Liability—Tort.

The plaintiff was a passenger on a car of the Toronto Railway Company on 7th October last, and was then seriously injured by a collision of a freight train of the Grand Trunk Railway Company with the car in which she was travelling.

The statement of claim alleged joint negligence of both defendants (paragraphs 6 and 7). Then paragraphs 8 and 9 alleged joint negligence, and stated in what it consisted. Paragraph 10 gave particulars of the negligence of the Toronto Railway Company, and paragraph 11 gave similar particulars as to the Grand Trunk Railway Company.

The defendants moved for an order that plaintiff elect against which defendant she would proceed.

Frank McCarthy, for defendants.

T. N. Phelan, for plaintiff.

THE MASTER:—A similar motion was made in Collins v. Toronto, Hamilton, and Buffalo R. W. Co., 10 O. W. R. 84, 115, 263, where the cases are cited. At that date Bullock v. London General Omnibus Co., [1907] 1 K. B. 264, was only lately decided. But now in Snow's Annual Practice, 1909, at p. 162, it is noted under Order XVI., R. 4, which corresponds with our Rule 186, and the learned authors say that by that case "it has now been decided that the joinder in an action of defendants against whom the right to any relief *in respect of or arising out of the same transaction* (the

italics are theirs) is authorized by this Rule, *and the Rule applies to tort as well as contract.*" If this be the case, the general principle governing the joinder of defendants would seem to be that there must be a cause of action, i.e., the subject matter or grievance founding the action (see p. 165), in which all the defendants are more or less interested, although the relief asked against them may vary; but that separate causes of action against separate defendants, quite unconnected and not involving any common question of law or fact, cannot safely be joined in one action.

While the judgment in that case on this point was technically obiter, yet it seems proper to follow it, in view of the above citations and of the judgment of the Divisional Court in Collins v. Toronto, Hamilton, and Buffalo R. W. Co., supra.

The motion will be dismissed, with costs in the cause.

BRITTON, J. DECEMBER 22ND, 1908.

ELECTION COURT.

RE WEST PETERBOROUGH DOMINION ELECTION.

BURNHAM v. STRATTON.

Parliamentary Elections—Petition — Preliminary Objections —Hearing—Jurisdiction of Single Judge—Service of Petition—Order Extending Time for, after Expiry of Statutory Time, and for Substituted Service—Objection to Service—Whether Preliminary Objection—Waiver of other Objections—Jurisdiction to Extend Time—Proper Case for Extension and Substituted Service.

Hearing of preliminary objections.

G. H. Watson, K.C., and Grayson Smith, for respondent.

J. E. Jones, for petitioner.

BRITTON, J.:—The petition was filed on 21st November, 1908. The 10 days allowed by sec. 18 of the Controverted Elections Act for service expired on 1st December, without service having been made.

On 2nd December counsel for the petitioner applied, ex parte, to me for an order extending the time for service and for substitutional service. The material used in obtaining the order was, first, an affidavit by petitioner's solicitor, that after the filing of the petition at Toronto it was sent to him for service at Peterborough, and that he received the petition on 25th November, made inquiry on that day at Peterborough for the respondent, and learned that he would be in Toronto the next day. He sent the petition to Toronto. The respondent could not be found in Toronto on 26th November, so petition was returned to Peterborough, and on the morning of 27th November was placed in the hands of the deputy sheriff at that place. Second, an affidavit by the deputy sheriff that he had the petition at Peterborough and endeavoured on 27th, 28th, and 30th November to serve it upon the respondent, but could not find him.

The order made on 2nd December is as follows (omitting the formal parts): "Upon the application of the complainant, upon reading the affidavits of Frederick J. A. Hall, and W. H. Moore, filed, and the exhibits therein referred to, and upon hearing what was alleged by counsel for the complainant: (1) it is ordered that the time for service of the petition herein be and the same is hereby extended till the 12th day of December, 1908; (2) it is further ordered that a copy of the petition and of notice of the date of presentation thereof, and a copy of the deposit receipt and of the appointment of the petitioner's solicitor, may be served upon the respondent by delivering such copies to Roland Glover or such other clerk as may be in charge of respondent's office at Peterborough; (3) and it is further ordered that the costs of this order be costs in the matter of the said petition."

After obtaining the order of 2nd December, it does not appear that there was any further effort to effect personal service upon the respondent, but on the following day, viz., on 3rd December, a copy of the petition, together with the other papers mentioned in the order, was delivered to Roland Glover at Peterborough.

The respondent was not personally served with a copy of the petition and the other papers mentioned, or any of them.

On 8th December the respondent filed in the office of the Registrar of the High Court of Justice at Toronto prelimi-

nary objections pursuant to sec. 19 of the Act. These objections are as follows:—

(1) That the security provided by statute herein was not properly given, and not until some time after the petition in question was filed.

(2) The said security was not given in bank bills or in gold or in Dominion notes or legal tender.

(3) The alleged copy of the security and notice thereof were not verified.

(5) The original petition herein and copies thereof were not signed by the petitioner in person.

(6) The signature of the petitioner was not verified.

(7) The petition herein and the copies thereof were not in form, and were not indorsed in accordance with the provisions of the statute and the rules governing the same.

An appointment was obtained from me for Monday the 14th December to hear the parties upon such objections and grounds.

Mr. Jones objected to the jurisdiction, contending that one Judge could not alone hear or determine any matter which would or possibly could have the effect of setting aside or dismissing out of Court the petition. This objection cannot prevail. "The Court shall hear the parties upon such objections and grounds, and shall decide the same in a summary manner:" sec. 19. "The Court," in the province of Ontario, is "the High Court of Justice" or any Judge thereof: see sec. 2, sub-sec. j (1). By sec. 38 two Judges are required for the trial of an election petition. "Trial Judges" means the two Judges "trying an election petition or performing any duty to which the enactment in which the expression occurs has reference." The preliminary objections may be disposed of by one Judge, subject to an appeal to the Supreme Court of Canada in certain matters, as provided in sec. 64.

Mr. Jones cited the decision of Mr. Justice Osler in the Algoma Election Case, where he declined to proceed as a single Judge. That was an entirely different case. It was a provincial election, and the trial was for corrupt practices. The summons was issued under secs. 187 and 188 of the Ontario Election Act. I quite agree that under that Act and the amendments then in force, it was necessary that two rota Judges should preside.

Mr. Watson objected:—

(1) That there was no jurisdiction to make the order of 2nd December; that the 10 days allowed by sec. 18 for service having expired, and no application having been made within the time for an allowance of further time, the matter was at an end.

(2) That, even if there was power to make the order after the expiration of the 10 days, the order actually made was not authorized, because it was not shewn that there were in this case any special circumstances of difficulty in effecting personal service.

(3) That the service actually made upon Roland Glover should not be deemed personal service, or allowed.

It was objected that the questions now raised are not preliminary objections within the meaning of the Act. I do not feel quite sure that the question of jurisdiction to make the order is such preliminary objection.

Section 19 deals with what may be done "after the service of the petition and the accompanying notice." "The respondent may present . . . preliminary objections or grounds of insufficiency against the petition or the petitioner, or against any further proceeding therein."

It was held in the Montmagny Dominion Election Case, 15 S. C. R. 1, that "service not made when it should have been made," and "that service was not made on the person to whom it should have been made," were properly preliminary objections, and these were dealt with by the Court.

In the South Leeds Dominion Election Case Mr. Justice Osler held, 27th June, 1891, that the objection that a proper notice was not served with the petition ought not to be considered as a preliminary objection, but should be taken by way of motion to set aside the petition.

Having regard to the Montmagny case and sec. 64 as to what is appealable, I treat these objections as preliminary ones, or, at all events, as objections I have power to deal with. Mr. Watson abandons all other objections; logically he must do so, as, according to his contention, there has been no service. I do not think the respondent should be considered as having waived his right to press the objections named, by reason of putting them in after the so-called service relied upon by the petitioner.

Upon the argument the respondent's affidavit was filed, and he was present in person, and his evidence was tendered upon any point upon which information was desired by the

Court or by the petitioner. The petitioner did not ask for any adjournment or for leave to put in any evidence, and the argument proceeded upon the material before me. The respondent was not personally served, and he could have been within the extended time had reasonable efforts been made for the purpose. There was no evidence to shew or from which it could be inferred that the respondent was attempting to evade service.

Was there jurisdiction to make the order on 2nd December allowing further time?

It was held in the Glengarry Dominion Election Case, 14 S. C. R. 453, that the time within which the trial of an election petition must be commenced cannot be enlarged beyond the 6 months from the presentation of the petition, unless an order had been obtained on application made within said 6 months. The decision of the Court was by Fournier, Henry, and Taschereau, JJ. Sir W. J. Ritchie, C.J., and Gwynne, J., dissented. This decision was under secs. 32, 33, ch. 9, R. S. C. 1886. Part of sec. 32 is: "The trial of every election petition shall be commenced within 6 months from the time when such petition has been presented. . . ." Section 33: "The Court or a Judge may, notwithstanding anything in the next preceding section, from time to time enlarge the time for the commencement of the trial, if, on an application for that purpose, supported by affidavit, it appears to such Court or Judge that the requirements of justice render such enlargement necessary."

Henry, J., in the Quebec County Dominion Election Case, 20 S. C. R. at p. 447, said the order extending the time must be made within the 6 months.

Decisions are not wanting, and very clear-cut decisions, that the time for commencing the trial cannot be extended beyond the 6 months, except by an order, application for which must be made within the 6 months named.

Prior to the cases cited it had been expressly decided otherwise.

In the Algoma Dominion Election Case in the Ontario Court of Appeal, 10th January, 1888, reported in the volume of election decisions 1884-1891, Osler, J., 1 Ont. Elec. Cas. 463, said: "We have recently held in the Kingston Case, not reported, that the time may be enlarged under sec. 33, notwithstanding the expiration of the 6 months. The petition is not out of Court, and, having regard to the interpretation clause, sec. 2, and to sec. 35, and the construction

which has in other cases been placed on language similar to that of sec. 33, I think it reasonably clear that the power to enlarge is not necessarily to be exercised only within the 6 months, but may in a proper case be exercised after that time has expired." He refers to Wheeler v. Gibbs, Banner v. Johnston, and Lord v. Lee, to which I will refer later.

If the case of allowance for longer time (sec. 18) for effecting service cannot be distinguished from enlarging the time (sec. 40) for commencement of trial, then the petition would seem to have no further life. In determining whether the case can be distinguished, the petitioner at this stage is entitled to the benefit of any doubt. The respondent has knowledge of the petition and of its contents. As a matter of information, the service is, of course, a merely formal matter. While the respondent is entitled to the benefit of every objection that can be made for non-compliance with the law, the allowance of the additional time and allowing substitutional service cannot result in any hardship.

In attempting to distinguish between enlarging the time for trial and extending the time or giving further time for service, no assistance can be had from the words used, for, in the ordinary legal sense, to enlarge a rule or order or notice means to extend the time for compliance with it.

Wheeler v. Gibbs, 3 S. C. R. 374, was cited in the Glengarry case. It was distinguished rather than overruled. In Wheeler v. Gibbs an appeal was quashed because the appellant had not given notice of setting down the case for hearing, nor obtained from the Judge who tried the petition further time for giving notice, as required by the sec. 48 of the Supreme and Exchequer Court Act. Afterwards, the appellant applied to and obtained from the trial Judge an order extending the time for giving notice, and upon the matter coming again before the appellate Court it was held that the power of the trial Judge could be exercised after the expiration of the original time, even so long after, and after an abortive attempt to get the case argued in the Supreme Court. Henry, J., took part, and he also was with the majority in the Glengarry case. Reading the two cases, and considering that this is only a matter of service, at the very commencement of the proceedings, when, as might well often happen, the first 10 days would be exhausted before the petitioner could know that there would be difficulty in effecting personal service, I think it could not have been the intention of the Act to nip in the bud the petition because

of inability to serve, and accidental omission, or omission because of inability to apply for additional allowance of time within the first 10 days. Full effect should be given to all the words in sec. 18. I cannot say that there is any general rule that where jurisdiction is given to extend time, such jurisdiction must be exercised within the period first mentioned. The position of the matter as to the petitioner and the public—and in all the cases public rights have been considered—is very different now from what it will be when the parties are at issue and the petition ripe for trial. The respondent should be allowed to make a counter-attack if he can. That is something the electors may be interested in.

If the interpretation of sec. 18 is to be according to its words, then the application before the expiration of 10 days is not compulsory; if one may venture outside of the words, I am bound to say that in dealing with the addition of time for serving the petition, it is not the necessary meaning that the application for such additional time shall be made before the expiration of 10 days from filing the petition.

In Banner v. Johnston, L. R. 5 H. L. 157, at p. 170, the Lord Chancellor said: "What we have to look at in substance is this: is it contrary to the meaning of the word 'extend' to give longer time after the original time has passed? Time is not a material with respect to which it may be said that, the matter itself having ceased, there is no further subject to operate upon. Although the time has passed, it may well be that the legislature intended to say there should be a power in the Court of Appeal to say that it would be reasonable that an additional time should be given."

Lord v. Lee, L. R. 3 Q. B. 404, is a case where it was held that after the expiration of the time for making the award, and even after the award was made, the Judge had power to enlarge the time for making, and the award was held valid.

Consolidated Rule 353 expressly gives power, in matters to which the Rules are applicable, to enlarge the time, although application not made until after expiration of time allowed. This Rule does not apply to election cases. The argument from the Rule is that such Rule being necessary in High Court matters, express authority to do things out of time is necessary in all matters, especially in election proceedings. I do not think the argument can be pushed to that length. I am pressed on the one hand by the decision in the Glengarry case, and on the other with the distinction

that ought to exist, and which, in my opinion, does exist, between the extension of time of service of petition (like a writ of summons) and the extension of time for commencement of trial; and in the result I hold that there was jurisdiction to make the order for allowance of further time for service of petition herein.

(2) Should the order of 2nd December have been made? On the application for the order my attention was not specially called to sub-sec. 2 of sec. 18. The petition had not complied with the evident intention of the Act. That section contemplates two applications, if necessary by reason of "special circumstances of difficulty in effecting" personal service: (1) for longer time ; and (2) for substitutional service, if, within the longer time allowed, personal service could not be effected.

Section 17 is as follows: "An election petition under this Act, and notice of the date of the presentation thereof, and a copy of the deposit receipt, shall be served as nearly as possible in the manner in which a writ of summons is served in civil matters, or in such other manner as is prescribed." No other manner is "prescribed," unless it be the personal service required by sec. 18.

The service of a writ of summons in civil matters is provided for by Con. Rule 146, which is: "Where service is required, the writ may be served in any county or district in Ontario, and the service thereof shall be personal; but, if it appears to the Court or a Judge, on affidavit, that the plaintiff is unable to effect prompt personal service, the Court or Judge may order substituted or other service by advertisement or otherwise."

The application was made ex parte. If, for want of proper information as to the facts, the petitioner has obtained an improper order, it was at his own risk. It did appear to me, on affidavit, that the petitioner was unable to effect prompt personal service of the petition and notices, and so, in the exercise of my discretion, I made the order. The respondent being a business man of large interests in different parts of Canada, the service upon his clerk, Roland Glover, or upon the clerk in charge of respondent's office at Peterborough, should be as good as personal service, and therefore should be deemed personal service. Assuming that at that time I had jurisdiction to make any order allowing further time, I do not think the order bad by reason of its directing substitutional service as well, in one order. Rule

146, in my opinion, applies, and the petitioner had up to that time been unable to effect "prompt personal service."

(3) As to the third objection, the service was, in fact, in accordance with the order made. It is not open to me now to interfere. If the order was not made in the proper exercise of a judicial discretion, and if that is the subject of appeal, the matter will be rightly disposed of by the appellate Court.

In the Montmagny Dominion Election Case, 15 S. C. R. 1, defective service was set up as one of the preliminary objections. The objection was dismissed by the Superior Court of Lower Canada, and allowed on appeal by the Supreme Court of Canada. That case goes a long way against what may be called substitutional service. The decision in that case, however, is based on art. 57 of the Code of Civil Procedure in Quebec, and there is no such provision as in our Rule 146. There was no order allowing substitutional service in that case.

For the reasons given, I must disallow the preliminary objections. Costs in the matter of the petition.

DECEMBER 22ND, 1908.

DIVISIONAL COURT.

GIOVINAZZO v. CANADIAN PACIFIC R. W. CO.

Master and Servant — Injury to Servant and Consequent Death—Workmen's Compensation Act—Notice Prescribed by sec. 9—Reasonable Excuse for Failure to Give—Administrator Suing under Fatal Accidents Acts—Letters of Administration—Reasonable Promptitude—Actionable Negligence—Workman Run over by Train in Railway Yard—Findings of Jury—Sec. 3, cl. 5, of Act—Licensee—Statutory Duty—Defective System—Sec. 3, cl. 1—New Trial—Amendment of Pleadings.

Appeal by defendants from judgment of CLUTE, J., upon the findings of a jury, in favour of plaintiff in an action by the administrator of the personal estate of Michelo Giovinazzo, deceased, to recover damages for the killing of the intestate, who was an employee of the defendants, owing to their negligence.

I. F. Hellmuth, K.C., for defendants.

H. L. Dunn, for plaintiff.

The judgment of the Court (MEREDITH, C.J., MACMAHON, J., TEETZEL, J.), was delivered by

MEREDITH, C.J.:—The acts of negligence complained of, as set out in the statement of claim, are, in substance, that on 18th September, 1907, the deceased was employed by the defendants as a workman on the tracks of their railway in their yard at Toronto Junction; that when the deceased was proceeding home from his work across the tracks of the yard, a locomotive came along one of the tracks, and, just as the deceased and his companions crossed the track in front of the locomotive, the engine-driver in charge of it caused it to let off, with a loud hissing noise, a large quantity of steam; that this steam "formed a dense cloud and completely enveloped the deceased and prevented him from hearing locomotives or cars approaching on other tracks near him, and from seeing in what direction he should go to avoid being struck;" and that, while he was in this situation, another locomotive "came along, moving backwards in the same direction on another track," close to the first track, and knocked the deceased down and so injured him that he died on the following day.

The specific negligence charged is: (1) that no person was stationed on the tender of the locomotive which struck the deceased to give warning of its approach, and that no signal of its approach was given by bell, whistle, or otherwise; (3) that the engine-driver in charge of the other locomotive improperly and unnecessarily caused it to let off the steam just as the deceased and his companions crossed the track in front of the locomotive.

The claim is made both under the Workmen's Compensation for Injuries Act and the common law.

The defendants in their statement of defence, besides denying the allgations of the statement of claim, plead the want of the notice prescribed by sec. 9 of the Act.

Neither in the statement of claim nor by any subsequent pleading does the plaintiff set up any ground for excusing the failure to give the statutory notice.

The action is brought on behalf of the father and mother of the deceased, both of whom reside in Italy, and the plaintiff is a brother of the deceased.

Upon the argument two objections which, as contended, were fatal to the plaintiff recovering were relied on: (1) that no actionable negligence was proved; (2) that there was nothing shewn to dispense with the necessity of the statutory notice.

Dealing first with the second of these objections, the facts are that the deceased had no relative in America but the plaintiff, who, at the time of the accident, was working on a railway near Kenora; that, having heard of the death of his deceased brother, he wrote to the Italian Consul for the purpose of ascertaining if the report of the death was true, and received word from him on 7th November that it was true; that the plaintiff then waited for his pay, which was delayed, and, when it was received, proceeded to Toronto, arriving there on 5th December; that he there, on the following day, saw the Consul for the purpose of learning the particulars of his brother's death, and the name of a lawyer to whom he should go; that, having received the desired information, he on the same day consulted Mr. Dunn, of the legal firm who are his solicitors in the action, and instructed him to ask the defendants for a settlement, and left the case in his hands; that, after learning of his brother's death on 8th November, the plaintiff wrote to Italy, presumably to his father or mother, and, as he says, got instructions from them to bring an action, 4 or 5 days after he set out for Toronto; that the solicitor advised him that letters of administration must be taken out; that there was some delay in arranging for the giving of an administration bond, but that the papers were executed on 19th December, and filed in the Surrogate Court on 21st December, and the grant of the letters of administration was made on the 30th of that month; that on 13th January following the solicitors obtained a copy of the proceedings at the inquest which had been held upon the body of the deceased; that conferences with the Consul and an interpreter followed throughout January; and that on 26th February notice of the accident was given to the defendants.

Mr. Dunn accounted for the delay in giving the notice, or some of it, by saying that he was under the impresion that until the letters of administration were obtained the notice could not be given.

During the course of the argument at the trial when this objection was raised, counsel for the defendants, after my brother Clute had observed in answer to an argument of

his, "But he took prompt action in getting letters, he gave bondsmen," replied, "I do not want to press this matter unduly against a fellow practitioner."

My brother Clute eventually ruled that there was reasonable excuse for the want of notice.

Section 9, which requires notice of the injury to be given, provides that the notice must be given within 12 weeks after the occurrence of the accident causing the injury, and that in the case of death the want of the notice shall not bar the action which the Act gives, if the Judge is of opinion hat there was reasonable excuse for the want of notice.

The 12 weeks expired on 12th December (the accident having happened on the 19th, and not on the 18th September, as stated in the pleadings).

The position of matters on the 12th December was that the necessary documents for obtaining letters of administration had not been completed, owing, however, to no neglect or delay on the part of the plaintiff or of his solicitor, both of whom were then apparently not informed of the circumstances under which the accident had happened, though the defendants must have been aware of them from the first, as an inquest was held.

Any delay after the 13th December is not, in my opinion, to be considered. The notice to be effective must be given within the 12 weeks, and the only question for the trial Judge was whether there was a reasonable excuse for not giving it within that period.

That the decision of the trial Judge is open to review upon appeal is settled; and it is also settled by decisions binding upon us that neither ignorance of the necessity of giving the notice nor the knowledge by the company of the accident standing alone is a reasonable excuse for not giving the notice within the meaning of sec. 9. Both or either of these may, we think, be regarded as elements of the excuse, but "something more is required, whether personal to the individual injured or to the employed or to both:" per Osler, J.A., in O'Connor v. City of Hamilton, 10 O. L. R. 529, 536, 6 O. W. R. 227; and, as was said by the same learned Judge in Armstrong v. Canada Atlantic R. W. Co., 4 O. L. R. 560, 568, 1 O. W. R. 612, "What may constitute reasonable excuse for not giving the notice is not defined, and must depend very much upon the circumstances of the particular case."

The circumstances of this case, as I have detailed them, are peculiar, and, in our opinion, warranted the learned trial Judge in holding that there was reasonable excuse for not giving the notice. The deceased was a foreigner, having no relation in America but the plaintiff, who, having no pecuniary interest in the continuance of his life, had no right of action against the defendants; he was also a foreigner, and was working many hundred miles from the place at which the deceased was killed; he had no knowledge of the circumstances under which the death had happened, and did not even know that the report of his brother's death was true until 7th November. The father and mother, who were the only persons having a right of action, resided in Italy; with them the plaintiff promptly communicated, as soon as he learned that his brother was dead, and did not obtain authority to act for them until 4 or 5 days after he left Kenora for Toronto. The date when he left Kenora is not stated, but he reached Toronto on 5th December, and immediately put himself in communication with the Italian Consul there; being advised by him to do so, he on the following day saw a solicitor and gave instructions to him to obtain letters of administration of his brother's estate; there was no unreasonable delay in obtaining the letters of administration, and they were granted on 30th December. Up to this time the circumstances under which the death occurred were apparently not known to the plaintiff, for on 13th January his solicitor obtained a copy of the proceedings at the inquest, presumably in order to possess himself of that knowledge, and, in addition to all this, the solicitor was of opinion that until the plaintiff was clothed with administration of the deceased's estate he could not give the requisite notice.

It may be that as the delegate of his father and mother he might have given the notice, but he could not have given it in any other capacity until the grant of the letters of administration had been made.

As I have said, these circumstances were, in our opinion, sufficient to warrant the ruling of the trial Judge, or, at all events, we cannot, having regard to them, say his ruling was wrong.

It is further to be observed that counsel for the defendants, at the trial, if he did not actually give up the objection based on the want of notice, at least indicated to the trial Judge that if his opinion was against his contention he would acquiesce in that opinion.

There is more difficulty in dealing with the other objection, in view of the findings of the jury that the negligence with which they found the defendants were chargeable, was "blowing off steam or hot water at such a critical moment with such a large number of employees between the tracks," and also because "a proper look-out was not kept in a proper place on both engines when backing," and of the fact that there is no finding of any fact from which an inference can be drawn that the defendants owed any duty to the deceased that steam or hot water would not be blown off where that was done, or to keep the look-out which they find was not kept.

The plaintiff's case can not, we think, be supported under the provisions of clause 5 of sec. 3 of the Workmen's Compensation for Injuries Act, the provisions of which are that "Where personal injury is caused to a workman . . . (5) by reason of the negligence of any person in the service of the employer who has the charge or control of any points, signal, locomotive, engine, machine, or train upon a railway, tramway, or street railway, the workman, or, in case the injury results in death, the legal personal representatives of the workman, and any persons entitled in case of death, shall have the same right of compensation and remedies against the employer as if the workman had not been a workman of or not in the service of the employer nor engaged in his work."

The effect of this legislation being, therefore, to give the workman and his legal personal representatives the same right in respect of the acts of negligence mentioned in clause 5, as they would have had if the workman had not been a workman of or not in the service of the employer nor engaged in his work, it becomes necessary to consider what would have been their rights if the deceased had not occupied that relation to the defendants.

It appears to us that the position of the deceased, in view of the provisions of clause 5, and the absence of any finding that he occupied any other position, was that of a mere licensee, to whom the defendants owed no duty to use care to protect him, and who had no right to complain of an injury happening to him owing to the way in which they carried on their business on their own premises: Beven on Negligence, 3rd ed., p. 442, note 3.

The same observations apply to the other negligence found by the jury; the statutory duty imposed upon railway

companies by sec. 276 of the Railway Act (Dominion) with respect to trains or cars moving reversely having no application except where they are passing over a highway at rail level.

There was, however, an aspect of the case developed in the evidence, but not stated in the pleadings or dealt with by the jury, which may entitle the plaintiff to recover.

There was evidence that the deceased and other workmen in the employment of the defendants, in large numbers, were in the habit of crossing the railway tracks in the way in which the deceased crossed in going to and returning from their work, and there was some evidence that this course was taken not only with the knowledge but by the direction of the defendants (p. 16 of the shorthand notes).

If this were found by the jury to be the fact, we do not see why the defendants are not liable to answer for the injury done to the deceased, upon the ground that the system which they had in use at the place of the accident was a defective one within the meaning of clause 1 of sec. 3, and one which exposed their workmen to unnecessary danger.

As this aspect of the case was not dealt with by the jury, or indeed presented at the trial, the verdict and judgment cannot be allowed to stand, but it would be unfair that the action should be dismissed on that account, as that would leave the plaintiff without any remedy, because the time within which an action must be brought has now elapsed.

Under all the circumstances, therefore, the order to be made is that the appeal be allowed, the judgment pronounced at the trial reversed, and a new trial directed, and that the costs of the last trial and of the appeal be costs in the cause, unless otherwise ordered by the Judge before whom the action shall be retried, and that the plaintiff should have leave to amend his statement of claim as he may be advised.

CARTWRIGHT, MASTER. DECEMBER 23RD, 1908.

CHAMBERS.

MACKENZIE v. GOODFELLOW.

Security for Costs—Action by Solicitor for Libel—R. S. O. 1897 ch. 68, sec. 10 — Criminal Charge—Barratry—Action not Trivial or Frivolous.

Motion by defendant for order for security for costs in an action for libel, under R. S. O. 1897 ch. 68, sec. 10.

J. E. Jones, for defendant.

Plaintiff, in person, contra.

THE MASTER:—For the purposes of this motion it is admitted that "the plaintiff is not possessed of sufficient property to answer the costs of the action" if judgment is given for the defendant.

The motion was, however, opposed on the ground, amongst others, that the alleged libel involves a criminal charge, and that the action is not trivial or frivolous. I agree with the latter proposition.

The defendant has refused to publish any retractation or apology, so that he cannot invoke sec. 6 of the Libel Act. The part of the article complained of is as follows: "Lawyer Mackenzie was in town over Sunday, and, judging from the report taken from to-day's 'Star,' which appears in another column of this issue, his mission was in connection with another attempt to unseat the mayor and 5 members of the council. Also to quash the by-law in relation to the assessment of the Midland Engine Works. It is a pity the Courts will countenance the dirty work of Mackenzie in unseating councils and quashing local option and other by-laws. There are, doubtless, those behind the movement who will stoop so low as to disregard principal (sic), and even sell their birthright for a mess of pottage. Shame on the man who has so little respect for the name he bears (if he has none for the town or its officials) as to associate himself with men who are continuously (sic) thrusting their noses into other people's business, and stirring up strife, where otherwise peace, quietness, and harmony would reign."

The innuendo is, first, that plaintiff was thereby vilified in his capacity as a solicitor, and secondly, that it is alleged that in his legal practice he was a common barrator.

So far as I am aware, this is the first case in which that word has come under consideration in this province. Its history and all other information respecting it are to be found in vol. 5, p. 617, of that very useful work, the 20th Century Cyclopædia of Law and Procedure. It therein appears that, though not very usual, such a charge can still be made. As lately as the case of Commonwealth v. Davis, 11 Pick. 432, a defendant in the State of Massachusetts was convicted of the offence of barratry. There, that great master of the common law, Shaw, C.J., expounds the nature of

the crime and what is necessary for proof, stating (p. 435) that "three acts would be sufficient" for a conviction.

It seems clear that the article complained of *may* be held to charge at least three such acts against the plaintiff, and also that it may be held to make the charge of barratry against him, and that it may be held to apply to plaintiff.

It, therefore, follows that under the decisions in Smyth v. Stephenson and Drumm v. O'Beirne, 17 P. R. 374, the motion should be dismissed with costs to plaintiff in any event.

I have not dealt with the other grounds urged against the motion. They will still be open to plaintiff if the motion goes further.

DECEMBER 23RD, 1908.

DIVISIONAL COURT.

RE DEWEY AND O'HEIR CO.

DEWEY AND O'HEIR CO. v. DEWEY.

Covenant—Restraint of Trade—Breach—Evidence—"Interested in" Business—Finding of Fact—Reversal of Master's Finding—Damages—Technical Breach—Company—Control of Directorate—Application for Winding-up Order.

Appeal by the defendant in the action from order of ANGLIN, J., in the Weekly Court of 8th October, 1908, 12 O. W. R. 726, dismissing an appeal from the report of the local Master at Hamilton assessing damages to be paid by defendant at $5,000; and appeal by the defendant from order of RIDDELL, J., in Chambers, dismissing a petition by the defendant for an order for the winding-up of the company.

A. M. Lewis, Hamilton, for defendant.

A. O'Heir, Hamilton, for the company.

The judgment of the Court (BOYD, C., MAGEE, J., LATCHFORD, J.), was delivered by

BOYD, C.:—The history of this Dewey-O'Heir combination discloses a deplorable state of affairs. There is a double

appeal, one on the application to wind up the Dewey and O'Heir Company, and the other an appeal from the report of the Master in Dewey and O'Heir Co. v. Dewey. Both were argued together in the Divisional Court, and many of the facts and transactions and documents in evidence before us are common to both appeals, and both may be disposed of together. The business in question, that of ice and coal dealers, was begun by the Deweys in Hamilton in 1887, and carried on till the end of 1903. There was then formed the combination with the O'Heirs, who acquired a half interest in the business, which in 1904 took the shape of a limited joint stock company, in which the Deweys and the O'Heirs had an equal amount of stock. The papers and legal work connected with the incorporation and agreements connected therewith were drawn and done by the solicitor for the O'Heirs, who also acted for the Deweys. It was understood by the Deweys that a partnership equality was to exist in the joint stock company. It appears that the patent was drawn up with 3 provisional directors, one Dewey (Daniel) and two O'Heirs, and upon organization thereafter it was understood (says Dewey) that there were to be 4 directors, two Deweys and two O'Heirs, thus preserving the equipoise which already (and has since) existed in the equal division of stock. But this was opposed by the O'Heirs, and the matter was left in abeyance, as the conduct of affairs was satisfactory for some years. The scheme of the company was that provision should be made for paying D. R. Dewey, as manager and president, and Hugh O'Heir, as secretary, an equal sum for their services by way of bonus out of profits, and this was to be to enable them to provide for their families. Payments were made down to October, 1906. Hugh O'Heir was then paid $250, and nothing was paid to D. R. Dewey, on the ground that he had been intoxicated frequently and had neglected the business he was to do. Upon the weight of evidence, this does not appear to be a well-founded excuse. Matters were brought to a climax by D. R. Dewey, about 15th November, transferring his stock to his wife, also a shareholder, and thereby disqualifying himself from remaining a director. The other O'Heir directors filled up the vacancy in November by appointing the wife of Hugh as third director. And so has remained the directorship since then, without reference to the shareholders, before whom, of course, nothing could be changed, and indeed nothing done because

of the dead-lock owing to the equal holding of stock by the opposing parties.

There was an agreement signed by the parties in January, 1904, by which D. R. Dewey bound himself for the period of 10 years, within a radius of 30 miles from Hamilton, not to be engaged in or carry on directly or indirectly or be interested in the ice and coal business, and his wife covenanted that her husband should not be interested in or carry on any such business, and that he should not be employed by or work for any one engaged therein except the coal company about to be formed.

On 31st October the company advertised for a new manager, and on the same day two writs were issued, one by D. R. Dewey and the other by his wife, claiming the same relief against the company, for an account of its affairs, etc., but neither was prosecuted.

On 9th November, 1906, the O'Heirs, in the name of the company, began an action against D. R. Dewey to recover a coal account, and obtained judgment for about $500.

The Deweys frequently offered to sell out to the O'Heirs or to buy out the O'Heirs, but with no result. To forward this movement, and as leverage to try to force a sale of the business, D. R. Dewey says he had cards printed in November, saying he was still in the ice business, and asking for orders, and sent them to persons who might bring it to the attention of the O'Heirs. With his covenant not to go into business, this seems futile, but his excuse is that he was not then aware of the covenant.

In February and March, 1907, D. R. Dewey's son Frank made arrangements to get ice and an office, and to go into an ice business, which was begun about 1st April, 1907.

On 1st April (about) an action was begun by the company against D. R. Dewey to restrain him from engaging in the ice business proposed or started by his son, and an ex parte injunction was obtained on 3rd April, which was on 15th continued until trial. On 5th April, 1907, an action was begun by the company against D. R. Dewey and wife to make her liable on the covenant for her husband's conduct, which is the present action.

On 9th April the company examined D. R. Dewey ostensibly as a judgment debtor, but really in order to obtain evidence to be used (and which was used) in the action against his wife. This examination was put in, and, having read it, I am bound to say that it was unfairly conducted

so as to extort admissions from one who was not represented or protected by counsel.

At the trial of this action against the wife, she admitted a breach of the covenant, and judgment for a reference as to damages was made on 10th May. Before the trial she conveyed her shares to a son called Tracey, and an action was brought by the company to have this declared void as against creditors, and judgment was obtained to this effect on 14th January, 1908, and reference to Master to bring in creditors. On 19th September, 1907, Tracey reconveyed the 50 shares (half the stock) to his mother, and she has never ceased to be a shareholder on the books of the company. The new business started by the son is called the Dewey Co., and the father admitted in his examination as a judgment debtor that he had distributed cards about the ice business during and previous to March, signed by himself (I have given his explanation as to this), and that he was managing the new business for a week or so after 1st April till he was stopped by the injunction. Since then, he says, he has not had a hand in the new business or worked for it, and has no money in it and no interest in it.

The Master upon the reference has found that the new business has been and is the business of D. R. Dewey, and has allowed the damages to be assessed from its inception in April for two seasons till August, 1908, and finds the wife liable on her covenant to the extent of $5,000. This appears rather a startling result behind the back of the son Frank, who claims sole interest in it, and has put his money into it, and in the face of the fact that the O'Heir Co. had obtained an injunction against the father engaging in that new business. To justify the Master's finding, the evidence should be not far from such as would warrant the committal of D. R. Dewey for breaches of the injunction.

To my mind, this is not a case for the application of the doctrine as to continuing injuries, and the damages should not have been carried on for such a lengthened period after the judgment of reference. In my opinion, the evidence is entirely wanting to induce the conclusion that the new business is that of the father. The great weight of evidence and inference is in favour of its being the son's business. It may be that the old business of the Dewey-O'Heir suffered loss in the seasons of 1906 and 1905, but that may have been not merely from the competition and lower prices offered by the new concern, but from the change in the management

from D. R. Dewey to Hugh O'Heir, as well as from general sympathy with the Deweys in view of the way in which they had been shouldered out of the directorate and employment in the Dewey-O'Heir Co. The father, D. R. Dewey, was without means, and under restraint of his covenant and the injunction not to do any business in opposition to the old company, and old customers may very well have rallied to patronize the son's attempt to support the family. . . .

[Synopsis of the evidence taken upon the reference.]

The father swears he put no money in the new business—is not and was not interested in it, and has not been engaged by or working for it.

No doubt, an element of suspicion is introduced in the preliminary stages before April by the appearance and conduct of the father. But he has given explanation, and it would be most unfair to the son, who is not a party, and to the wife, who presumably knows nothing of the details, as she was not called or in any way examined, to conclude, upon such uncertain evidence, that the business is not that of the son, and that the father's acts have resulted in material damage to the joint stock company.

What the father appears to have done is this. While yet president of the company, in November, he caused the cards to be printed which are exhibits 2, 3, and 4, saying he was still in the ice business, and to reserve orders for him, as he will call in person later on. Some of these he circulated in November, in view, he says, of bringing the company to terms. He appears to have sent one or two later in March, but it is negatived that this was done with the knowledge of the son. All of his acts are consistent with the conclusion that it was the son who was actually getting up the new business, and that the father considered that he might lend a hand. I am induced to think that the father was not fully aware of the nature of the restraint which he had laid upon himself by his agreement entered into before the formation of the joint stock company, and that he did not appreciate his legal position until steps were taken by the plaintiff to stop his activity in getting up the new company. They had enough evidence of his canvassing to found proceedings and obtain an injunction. The same evidence availed to launch the action against the wife on her covenant, but after the injunction was served upon him I think he became quiescent and passive, and did no act which would expose him to be attached for contempt of Court. The plaintiffs

did succeed in nipping in the bud what the father intended to do as manager of the new business, and he accordingly dropped out of all interference, and did nothing of which legal cognizance can be taken.

Some evidence was given about a few customers of the new company whose accounts were set off against supplies obtained by the Dewey household, it may be by the father. In the circumstances, this is not to be wondered at, nor does it make against the son's claim to be the owner of the new business. He and his parents lived under one roof—he was the money-maker; his father had nothing to do, and could do nothing, and it was only a matter of filial obligation that the son's moneys from the business should defray the household expenses. The father might take his ease at home or in the son's office, and give his opinion and advice (if he did so) and denounce the O'Heirs outside, without breach of the covenant. All these and the other things proved against the husband do not shew that he is "interested in" the new business, in its legal import.

"Interested" means proprietary or pecuniary interest, and not interest of a domestic or sentimental character: Smith v. Hancock, [1894] 1 Ch. 209, affirmed [1894] 2 Ch. p. 377. In that case the business was the wife's, and the husband did various acts at the inauguration of it, such as assisting in obtaining a lease of the premises, writing and handing out circulars, introducing his nephew, who carried on the business, to various persons likely to advance the business. In appeal Lindley, L.J., said: "As the defendant and his wife are living together, I feel no doubt he is interested in her, and perhaps also in his nephew. Further, if the wife gets any profit out of the business, she may very likely make use of it in adding to her husband's comforts:" p. 386.

D. R. Dewey was subjected to rigorous supervision; one of the joint stock company followed him in the streets, watched his movements at the ice docks, strolled into the new office and saw him seated there passing the time, but beyond suggestion and suspicion nothing has been contributed in the way of evidence against him—much less against the defendant.

I differ toto cœlo from the conclusion of the Master. The utmost damage which, in my view, can be extracted from the evidence, most favourably construed for the plaintiffs, is this, that they may have lost through the acts of D. R. Dewey the custom of the persons I have named, viz.:

Mackie's account, of $21.20; Humphrey's account, of $38.27; Frank's account, of $74.95; Lucas's account, of $26.32= $160.74. Allowing for profit the 20 per cent. claimed by Hugh O'Heir, that would leave the damages payable by the defendant to the plaintiffs at some $32.

The Master has probably been misled by the frame of the judgment upon which the reference was based. It is too loosely drawn up in declaring that the defendant is liable under covenant for the damages sustained by the plaintiffs by reason of the acts of D. R. Dewey in the pleadings mentioned, and in it being referred to take account of the breaches of the defendant's covenant in the pleadings mentioned. The case was not tried on this aspect of breaches, but what occurred was this: Mr. Washington, for the defendant, said, "I am prepared to admit there was a technical breach of the covenant, so as to save time, and if on amended defence the defendant does not succeed, there will have to be a reference." That was the entire admission, "a technical breach," and in truth nothing more has been proved by all this mass of evidence.

Again, I think the Master did not sufficiently regard the order for injunction which had been granted by himself as local Judge on 3rd April, 1907. By its terms the defendant was restrained from engaging in or carrying on, directly or indirectly, or being interested in, the business of dealing in ice, and from being employed by or working for any person engaged in any such business, etc. I do not know when that was served on the defendant, but it had, when served, the effect of arresting what he had in project. That restraining order should considerably affect the subsequent investigation of what happened and the appraisal of the evidence.

But, not to dwell at further length upon details, I think the net result must be to dismiss the application to wind up. However unfortunate the position of the wife and the Deweys may be in that relation, it was precipitated by the husband's act in transferring his stock, and so becoming disqualified. Though there may be a dead-lock in the company, it is no worse than other cases where a party in power by virtue of more stock, or by possession of the directorate, tyrannizes over the party which is "under." The circumstances are such as might well have warranted Mr. Justice Riddell in dismissing the petition without costs. We cannot disturb that term, but we can withhold costs of this appeal from his decision, as we do. The appeal from the Master

will be so disposed of as, if possible, to deliver the litigants from further controversy in this direction. The amount of damages should be reduced to $32, with costs of action up to the trial as on the County Court scale, without set-off, for the reason that taxation will be simplified if all the costs of the reference on the High Court scale are given to the appellant. The order may dispose of the case on further directions, on these lines: costs of plaintiffs on the lower scale, plus $32 damages, to be set off against costs on the higher scale of the reference and of this appeal and hearing on further directions.

The dismissal of the application to wind up will be without prejudice to an application of like character upon the changed circumstances as to the solvency of the company and as to the appointment of the directorate, as to which the evidence is not clear that the management is legally constituted; but this aspect being only incidentally referred to, and not made a ground of attack, should be left open for further discussion, if any one interested chooses to move.

DECEMBER 23RD, 1908.

DIVISIONAL COURT.

REX v. BRADLEY.

Liquor License Act—Conviction for Offence against sec. 112 —Amendments by 7 Edw. VII. ch. 46, sec. 5, and 8 Edw. VII. ch. 54, sec. 6—Construction — Liability of Owner or Person having Control of Unlicensed Premises for Illegal Keeping or Selling by Occupant.

Motion by defendant to make absolute a rule nisi quashing his conviction under sec. 112 of the Liquor License Act and amendments.

J. Haverson, K.C., for defendant.

J. R. Cartwright, K.C., and E. Bayly, K.C., for the informant.

The judgment of the Court (BOYD, C., MAGEE, J., LATCHFORD, J.), was delivered by

BOYD, C.:—The Liquor License Act, R. S. O. 1897 ch. 245, sec. 112, provides for the liability of occupants of any house, shop, room, or other place in which any disposal of liquors contrary to the Act has taken place. The person

actually contravening is called the "actual offender," and for the purposes of the section any person being an owner or lessee in actual occupation and possession of the premises, or any one who, being in actual occupation and possession, leases or sublets any part thereof in which liquors are kept for sale, etc., shall be deemed to be an occupant (unless the leasing or subletting is with the written sanction of the board of license commisssioners): sub-sec. 3.

The cases here provided for are threefold:—

(1) The owner
(2) The lessee
(3) Any one

being in actual occupation and possession of the premises, who transfers part in which liquors are kept.

Next comes the amendment of 1907, by which a sub-section is added to sec. 112 (7 Edw. VII. ch. 46, sec. 5), dealing with unlicensed premises: "In the event of the premises being an unlicensed tavern, the owner or lessee hereinbefore mentioned who sublets to or permits to be occupied by any other person any part of the premises in which liquor is sold or left for sale shall be conclusively held to be an occupant. . . . and may be prosecuted jointly with or separately from the actual offender."

Here is a twofold class:—

(1) The owner
(2) The lessee

in actual occupation and possession who permits part to be occupied by any other person.

And, lastly, there is the amendment of 1908, under which the present conviction is placed, 8 Edw. VII. ch. 54, sec. 6, by which the words "hereinbefore mentioned" are struck out and these words substituted, "or other person having control of said premises, whether in or out of possession."

Then the amended reading of the sub-section will be as follows: "In the event of the premises being an unlicensed tavern, the owner or lessee or other person having control of said premises, whether in or out of possession, who sublets to or permits to be occupied by any person any part of the premises in which liquor is sold, etc., shall be conclusively held to be an occupant."

Here the threefold class is restored, and the clause deals with:—

(1) The owner,
(2) The lessee,
(3) Other person having control of the premises.

whether in or out of possession who sublets or permits to be occupied any part of the premises.

This is, to my mind, the correct analysis of the language used: at the time of dealing with the property the owner or lessee is always in control by legal presumption, but the amendment is meant also to provide for the case of some other (neither owner nor lessee) who has control of the premises, and so can permit part of the place to be occupied.

The former provision as to the owner or lessee "being in actual occupation and possession" is superseded by the phrase "whether in or out of possession." That is the equivalent substituted for so much of the earlier clause, and it leaves the new words "having control of the premises" to be applicable only to the "other person." The word "other" does not appear to add to the word "person."

But, even if the whole phrase "having control of the premises, whether in or out of possession," applies to the 3 classes, it would mean the one who has such control at the time the permission is granted—not at the time subsequently when the liquor is sold and the offence committed. If this be the correct reading of the new law, it means a very stringent exercise of legislative power, placing the owner, etc., at the mercy of the actual occupant who has gone in under him.

In the case of licensed premises it is possible that the owner may get protection by obtaining the sanction of the license commissioners to the change of occupation, but it leaves the owner of unlicensed premises (in a place, e.g., where local option prevails) to take the risk of his tenant's acts and misconduct. I had a contrary opinion during the argument, thinking that the owner must be one who has control at the time of the contravention, but subsequent consideration has induced the other conclusion.

Then, what are the facts in evidence here? Bradley, the defendant, was the owner of the Pacific Hotel in Owen Sound, and lived on Manitoulin Island (it is said.) He leased the hotel, with the exception of the bar-room part, over a year ago, to one Fleming. The bar-room part he leased on 7th March, 1908, to one Storms, for a month, which would end on 6th April. The rent of $25 was payable in advance. The lease contained this clause: "Yielding and paying therefor monthly during the said term the sum of $25 monthly hereafter: the first of such payments to be made on the day of the date hereof." That seems to imply that the tenancy may go on after the first month, but there is no direct evidence of what happened, except that it is assumed in

the evidence that a tenant of the owner's was in occupation at the time of the offences, which are proved to have taken place on 7th May and 23rd May, 1908. A lease is put in, made on 30th May by Bradley to one Hudson for one month and monthly thereafter, which is not important now, as being after the offences. The conviction charges keeping for sale up to the 4th June, but there is no evidence as to anything done after the seizure on 23rd May. Both leases contain covenants not to sell intoxicating liquors on the premises. The owner had no knowledge of the illegal acts, and no interest in the proceeds.

An important date not referred to during the argument, but pointed out afterwards by my brother Magee, is that the last amendment came into force on 14th April, 1908, after the lease to Storms had been made. Bradley was then an owner out of actual occupation and possession, and would not fall within the enactment in force, at the date the first month expired, on 6th April. The reasonable inference from the evidence is that the then tenant continued to hold on the same terms: Doe v. Bell, 5 T. R. 472: and, if so, the continued lease from 7th April (the date of the first offence) would relate to the 7th March, at a time when the owner out of possession was not liable for the act of his tenant in unlicensed premises. In other words, the tenancy in this case began under the Act of 1907, which was in force till 14th April, 1908, and continued presumably till after 23rd May, the date of the last offence. Whatever may be the real fact as to the tenancy during the period of the offences, the evidence does not shew that the tenant was there with the permission of the owner granted since the new law or after 14th April, 1908. The case is thus not proved to be under the late amended statute, even if the statute has the wide meaning I am reluctantly inclined to place upon it.

The conviction is quashed without costs.

OSLER, J.A. DECEMBER 23RD, 1908.

C.A.—CHAMBERS.

FITZGERALD v. CHARLTON.

Appeal to Court of Appeal—Leave to Appeal from Order of Divisional Court—Small Amount Involved—No Special Reasons for Treating Case as Exceptional—Dismissal of Servant—Questions of Fact—Leave Refused.

Motion by defendants for leave to appeal to the Court of Appeal from the order of a Divisional Court affirming the judgment of BRITTON, J., at the trial, in favour of plaintiff in an action by servant against master for wrongful dismissal.

J. H. Clary, Sudbury, for defendants.

H. S. White, for plaintiff.

OSLER, J.A.:—Upon the principle usually acted upon in dealing with motions of this kind under sec. 76 of the Judicature Act, leave must be refused. The amount is small, the judgment being for $247 only, and the Court below unanimous. There are no special reasons for treating the case as exceptional, nor does it come within any of the other itemized conditions mentioned in the above section, under which it might be appealable.

Mr. Clary has stated his position, and, indeed, argued his case very fully. So far as regards the point of law which he relies upon, namely, that where there has been a clear and unqualified retractation of the dismissal by the master and an offer to reinstate the servant upon the old terms, the latter has no ground of action, having sustained no damage, the Divisional Court appears to have been inclined, as I am myself, to agree with him, but the case turns wholly upon the question of fact whether there really was here such a retractation and offer of re-employment. If this rested upon the evidence of William and Thomas Charlton alone, perhaps it ought to have been inferred that there was, though I think even this admits of some doubt, as there are qualifications in the latter's evidence which might make one hesitate, as the trial Judge seems to have done, before accepting it unreservedly. But the letter of 14th October of the other

defendant partner, John Charlton, who had dismissed plaintiff by his former letter of 6th October, does appear to be an unqualified affirmation of the dismissal. I do not think that its effect is removed by the fact, so much pressed by Mr. Clary, that the plaintiff did not disclose, in his letter of 10th October to John Charlton, to which the latter's letter of the 14th was a reply, the conversation of the 8th between himself and Thomas and William Charlton, relied upon as a withdrawal of the dismissal. Considering the circumstances in which the letter of dismissal was written by John Charlton, namely, that it was rather against the wish and remonstrance of Thomas, it looks as if John had taken the matter into his own hands, and that, for the reasons assigned by him, he was fully resolved that the plaintiff's employment by the firm should come to an end. This, at all events, is a view which the evidence admits of, and I do not think that, where so trifling a sum is involved, leave to appeal can properly be given to review the decision of the Court below in this respect.

The motion must be dismissed with costs.

CARTWRIGHT, MASTER. DECEMBER 24TH, 1908.

CHAMBERS.

BUCKNALL v. MITCHELL.

Third Party Procedure—Settlement between Plaintiff and Defendant—Notice of Discontinuance Served by Defendant on Third Parties—Rule 430 (1)—"Plaintiff"—O. J. Act, sec. 2 (5).

Motion by third parties to set aside a notice of discontinuance served by defendant.

W. D. McPherson, K.C., for third parties.

R. C. H. Cassels, for defendant.

THE MASTER:—The defendant, having settled with the plaintiff, served a notice of discontinuance on the third parties. The settlement was made after examination of defendant for discovery. The defendant, in giving notice of discontinuance, assumed to act under Rule 430 (1). The third parties move to set it aside, so as to have a dismissal on the merits, or on the terms imposed in Schlund v. Foster, 11 O. W. R. 175.

I understand that it was conceded that nothing had been done to prevent the application of Rule 430 (1), if the Rule applied to third party proceedings. But it was contended that this was not the case.

It is plain that it does not mention third party proceedings. And it was contended that "action," as defined in Rule 6 (e) and O. J. Act, sec. 2, sub-sec. 3, does not apply to third party proceedings, because the amendment by Rule 6 (e) making "action" include garnishee and interpleader proceedings must be interpreted by the maxim "expressio unius exclusio alterius."

In reply the counsel for defendant relied on the very wide definition of "plaintiff" given in O. J. Act, sec. 2, sub-sec. 5—than which, indeed, nothing wider can be imagined, and which is most certainly applicable in its terms to a defendant asking relief against third parties. And he argued that Rule 5, which says that "the interpretation clauses of the Judicature Act shall apply to these Rules, unless there is anything in the subject or context repugnant thereto," shews that the word "plaintiff" in Rule 430 must be interpreted by O. J. Act, sec. 2, sub-sec. 5, in which case it would plainly allow what was done in this instance.

This view is supported by In re Salmon, 42 Ch. D. 363, where Fry, L.J., said: "The scheme of the Rules appears to me to be to make the proceedings against the third party an independent proceeding in which the defendant is to be the actor." Also in McChenne v. Gyles, [1901] 1 Ch. 287, this third party procedure was discussed. At p. 299 Vaughan Williams, L.J., said it is "in the nature of an action by the defendant against the third party." At p. 300 Romer, L.J., said: "You must treat the claim of the defendant against the third party as if it were a claim on a writ of summons." At p. 301 Cozens Hardy, L.J., said of the Judicature Act, that it "treats the third party procedure as analogous to a cause instituted by the defendant as plaintiff against the third party."

If these opinions are correct (and it is not for me at least to say they are not), then Rule 3 can be invoked by defendant, and that Rule says: "As to all matters not provided for in these Rules, the practice, as far as may be, shall be regulated by analogy thereto."

It is not improbable that the service of a notice of discontinuance in a case such as the present was never thought of by the framers of the Rules. Or it may have been thought

that it was not likely to be of frequent occurrence, or that it was sufficiently provided for by the definition of plaintiff given in the Act.

As at present advised, I cannot see why the notice was thought necessary or advisable. In Wheeler v. Town of Cornwall, 4 O. L. R. 120, it was decided that when in a similar case the defendant had settled with the plaintiff, the proceedings abated, and the third party could have his costs against the defendant. And an order to that effect was made without prejudice to an action by defendant against the third party. If the claim against the third party was for contribution or indemnity, it would seem difficult for him to take any fresh action successfully after settling with the plaintiff, without the consent of the third party. I do not express any opinion as to the reasonableness of any such reservation of right to the defendant against the third party in such a case.

Here the defendant seems to have acted within his rights. This may derive support from the concluding words of paragraph 1 of the order for directions made on 29th October, that the same Rules of Court applicable to an ordinary action should be applicable to the issues between the defendant and the third parties, which words were inserted at the request of the third parties themselves, if that makes any difference.

The motion must be dismissed. As the point is new, there will be no order as to costs.

RIDDELL, J. DECEMBER 24TH, 1908.

TRIAL.

WILLIAMS MANUFACTURING CO. v. MICHENER.

Master and Servant — Contract of Hiring—Construction—Payment by Commission — Weekly "Cash Advance"—Liability of Servant to Account for, where Commissions Less than Weekly Sum—Mistake—Parties not ad Idem —Liability of Sureties—Misrepresentation — Assent of Master's Agent—Estoppel—Relief of Sureties.

Action against an agent of the plaintiffs and his sureties to recover moneys advanced by the plaintiffs, etc.

A. C. Kingstone, St. Catharines, for plaintiffs.

H. W. Macoomb, Welland, for defendants.

RIDDELL, J.:—The defendant Michener was employed in Welland at a salary of $9 per week; the plaintiffs, through their agent, Swift, were desirous of obtaining his services as agent in the sale of sewing machines. Swift saw Michener about the matter; and another agent of the plaintiffs did so also. In the absence of Swift, this agent, X., was informed by Michener that he would not accept the employment unless he were assured of a minimum amount. X. said he had no authority to make such an agreement himself, but that he would mention the matter to Swift. He did speak to Swift, but I am not able to find that he made it clear to Swift that Michener insisted that he must have some fixed sum paid him in any event. Shortly thereafter, Michener and his wife met Swift and asked him if the terms which Michener had mentioned to X. were satisfactory, to which Swift replied in the affirmative. A few days afterwards Michener was in Swift's office, and a contract was prepared, and then it was signed by Michener. This contract provides (amongst other things) that Michener is to act as salesman and collector for the plaintiffs; to report weekly; to furnish a horse and waggon; and to return to the plaintiffs on request all goods, &c., of the plaintiffs in his possession. The document proceeds: "Second, the company agrees to pay to the employed in full for all his services the following compensation, with the limitations hereinafter expressed"—then follows a scale of commissions for sales and collections. All the above, with the exception of the percentage, is in type. In the margin we find in handwriting the following: "Cash advance of $12 per week, said advance to be deducted from commissions and premiums set forth in this contract."

It was not, I find as a fact, explained to Michener that this meant that the sum of $12 was to be deducted from the amount of his earnings in any event; but he believed, and reasonably believed, that he was to have this advance in any case, and that (each week standing by itself) the sum would be deducted only in case that the earnings were more than $12. This was not the intention of Swift; he intended to consider this weekly sum as simply an advance on account of the earnings of Michener, to be accounted for by him in any event. I cannot find fraud or improper dealing by Swift in the transaction; I think it was just one of those in-

stances so common in which the parties have failed to understand one another, the one meaning one thing and the other another.

Michener went on with the employment, made some sales apparently, and it seems was satisfactory. However that may be, the plaintiffs required him to furnish a bond, and the other defendants executed it. The present action is against Michener and his bondsmen, based upon the theory that the "advance" is to be returned, being considered as a mere payment on account by the plaintiffs.

This is (as against Michener) a case of mistake—a want of consensus ad idem: but, there being no fraud, it will be impossible to grant him relief in the case of this contract.

It is not the case of an attempt to have a contract specifically performed, but the case of two parties selecting a certain form of words to represent their meaning, and of this contract then being proceeded with. There is no rule of law or equity which would justify the Court in deviating from the meaning which the words actually bear.

While the word "advance" does not, of necessity, mean that the sum in question must be considered as paid in advance on salary or otherwise, i.e., the word has no fixed meaning in law (as to which the case of London Financial Association v. Kelk, 26 Ch. D. 107, at p. 136, may be looked at), I am of opinion that the provisions in the body of the document are too precise and definite to be got over. The provision is that the stated sums are to be "in full for all" the "services." This clearly excludes any other sum as payable under any circumstances. The "advance," then, must be considered as an "advance" on account of the sums to be earned by the employee. There must be judgment for the plaintiffs for the amount claimed. And I see no reason why this recovery should not be with costs.

As to the other defendants, other considerations are to be had in mind. When the bondsmen were being asked by the defendant Michener to execute the bond, they were, in the presence of Swift and to his knowledge, told by Michener that he was receiving a salary of $12 per week; Swift, though he knew differently, did not contradict this statement, as was his duty, but assented to it. I think that he thereby precluded his company from claiming as against these bondsmen any sum based upon the calculation that the weekly advance was to be deducted from earnings of Michener, as is now claimed.

Accepting as I do the evidence of the other witnesses as against the evidence of Swift in respect of what took place at the time of the execution of the bond, I am of opinion that, as against the defendants Austin and Burgar, the action must be dismissed. This dismissal will also be with costs.

It would appear that I have the power to order a set-off of these costs (Holmested and Langton's Judicature Act, pp. 1383, 1384), but it is not a case for the exercise of this power.

MACMAHON, J. DECEMBER 24TH, 1908.

TRIAL.

WOODS v. CANADIAN PACIFIC R. W. CO.

Railway—Right of Way through Farm — Construction of Drain — Injury by Flooding to Lands Adjoining Right of Way—Evidence—Railway Act, R. S. C. 1906 ch. 37, sec. 250—Right to Apply to Board of Railway Commissioners—Right to Damages—Assessment of Damages.

Action for damages for injury to land.

The plaintiff in his statement of claim alleged that he was the owner of lot 19 in the 1st concession of the township of Montague, in the county of Lanark, and that the Ontario and Quebec Railway Company, in 1886, acquired a right of way across said land from west to east thereof; that for many years previous to and up to the time the said railway was constructed there were suitable drains along and across the lot upon which the railway was constructed, sufficient to drain the said land; that the defendants had, contrary to the provisions of the Railway Act, neglected and refused and still neglected and refused to maintain suitable ditches and drains along each side of and across and under the railway to connect with ditches and drains upon said lands existing at the time said railway was constructed, so as to afford sufficient outlets to draw off and carry off the water, and so that the existing drainage of said lands should not be obstructed or impeded by said railway, but, on the contrary, also ob-

structed said existing drains and allowed them to fall into decay, so that a large quantity of water from year to year since 24th January, 1901, flowed out and over the plaintiff's land, thereby greatly damaging the same, and rendering about 10 acres of it unfit for any use whatever to the plaintiff.

C. J. Foy, Perth, and W. McCue, Smith's Falls, for plaintiff.

W. L. Scott, Ottawa, for defendants.

MacMahon, J.:—The plaintiff 35 years ago became the owner of the whole of lot 19, but prior to 1886 had conveyed the north-east quarter to his son David Woods.

On 25th June, 1886, the plaintiff, in consideration of $158.75, conveyed to the Ontario and Quebec Railway Company part of the north-west quarter of the lot, 99 feet in width, 56½ feet of which is to the north and 42½ feet to the south of the centre line of the railway. On the same day, David Woods made a conveyance of 99 feet in width across the south-east quarter to the same company. So the Ontario and Quebec Railway Company owned 99 feet in width across, as the plaintiff said, the middle of the lot, which was used as their railway line.

James Brennan, a witness called by the plaintiff, who 40 years ago became the owner of lot 17, said that 25 years ago there was a creek on the south side of the plaintiff's farm, and the railway ran through the bed of the stream. There is no doubt that subterranean springs existed on that part of the plaintiff's farm, the waters from which found their way south by means of a ditch on the plaintiff's farm, and across a corner of the farm of Robert Caudie, being the east half of lot 20, and through the farm of John Clark, being the west half of lot 20, down to Shields's creek on the farm of Henry Shields, on lot 21, as shewn on exhibit 3. I regard Brennan as being an accurate witness; and I find that the subterranean springs formed a stream under the knoll hereafter referred to, on the part of the plaintiff's farm which was afterwards owned by the railway company, and with the exception of the said knoll was low land.

The defendants became the lessees of the Ontario and Quebec Railway Company.

The plaintiff said that 23 years ago the railway company put a box drain on their right of way, 160 feet long, be-

tween stations 1600 and 1700, where the knoll referred to hereafter is. See plan exhibit 1. The drain, plaintiff said, during recent years did not answer the purpose intended of carrying off the water, and it backed up on his land, and he had not been able to crop some 4 or 5 acres on the north side of the railway track for the past 15 years. He accounted for the backing up of the water by the end of the box drain opposite Condie's land being low, while the other, or east end, was raised too high, and prevented the water flowing westward, as it should.

The alleged backing up of the water at this point and drowning out the 4 or 5 acres is the principal ground for seeking damages by the plaintiff. The plaintiff admitted that there were springs under the clay knoll, and in consequence thereof the bank of the knoll frequently caved in and filled up the mouth of the box drain.

Mr. Ramsay, the engineer of the defendants over the section of the railway, said that, with the exception of the knoll, all the surrounding lands alleged to have been injured by the railway are low, wet lands. He says that the major portion of the 4 or 5 acres is 3 feet above the bottom of the railway drain, and the drain is filled up constantly by the caving in of the clay from the knoll. He also said that he could take a testing rod and with one hand push it down 10 or 15 feet through the soft ground at this place.

I find that the submerging of plaintiff's land at this point was caused partly by reason of the box drain being too high at one end, and partly because a retaining wall had not been built at the knoll to keep the earth from falling from the knoll. This piece, according to the plaintiff's surveyor, Mr. Code, contains 155,000 square feet, or 3 3-10 acres.

There is one-half an acre of the plaintiff's land adjoining Condie's farm north of the railway track which he complained could not be cultivated by reason of the water of the railway drain being backed up on it. George McGrath said he worked it 25 years ago and raised a good crop of turnips on it, but that the land is now grown up with wild grass.

Samuel Code, the plaintiff's surveyor, said that there is a wooden culvert, 4 feet wide, which crosses the railway track at this point and runs into a drain running west two feet in width. And the under sill of the larger culvert is 6 inches above the bottom of the drain on the north side,

causing this piece of land to be flooded. It was not stated when the wider drain was built or who built it.

Mr. Code represents this piece of land as containing 18,349 square feet, being less than one-half an acre.

On the south side of the railway, the plaintiff says, two acres of his farm have been submerged, and in consequence he has been unable to cultivate it.

I find that the submerging of this land was caused by the culvert at No. 1 crossing to the plaintiff's farm by reason of the non-repair into which it has fallen, and, as a consequence, the flow of the water was impeded; another reason is that the ditch was not cleaned out by the railway company and has been obstructed by cat-heads, bulrushes, weeds and grass, thus almost stopping the flow of the water.

Mr. Code made a calculation of the area of this piece of land, which he found to contain 61,400 square feet, or about one and one-half acres.

The area of the 3 pieces he places at 5 4-10 acres.

The plaintiff, having sold the right of way across his farm to the railway company, would be precluded on the authority of Knapp v. Great Western R. W. Co., 6 C. P. 187, Lesperance v. Great Western R. W. Co., 14 U. C. R. 173, and Wallace v. Grand Trunk R. W. Co., 16 U. C. R. 551, from recovering against the defendants for the damage from the defects in the drain causing the flooding of his lands, but for the provisions of the Railway Act, assented to on 24th October, 1903. That Act is consolidated in the Railway Act, R. S. C. 1906 ch. 37. By sec. 250, the railway company are "obliged to make and maintain suitable ditches and drains along each side of and across and under the railway to connect with ditches and drains upon the lands through which the railway runs, so as to afford sufficient outlet to drain and carry off the water, and so that the then natural, artificial, or existing drainage of the said lands shall not be obstructed or impeded by the railway." Immediately after the passing of the Act the plaintiff might, under sec. 250, sub-sec. 2 (b), have applied to the Railway Commission for an order requiring the railway company to provide such drainage, or to lay pipes for the carrying off the water that was doing the damage to his lands.

The plaintiff's claim is for damages resulting from the flooding of his lands since 24th January, 1901. My opinion is that, although sec. 250, sub-sec. 2 (b), gave him the right to apply to the Railway Commission, it does not deprive him

of his right of action to recover damages for the injury to his land sustained by its being flooded from causes attributable to the railway company, but such damage must be measured for the injuries sustained since October, 1903.

Mr. Ramsay said his cross-section of the land shewed that the land on each side of the railway track alleged to have been injured by the flooding was—with the exception of the knoll spoken of—low land, and I accept Robert Condie's valuation, who said that $10 an acre would be a good profit for a farm. There being 5 4-10 acres in the submerged land, that would be $54 a year since October, 1903, to October, 1908—5 years—which would make $270, at which I assess the damages.

There will be judgment for the plaintiff for that sum with costs.

RIDDELL, J. DECEMBER 24TH, 1908.

EXCHEQUER COURT OF CANADA.

BERLINER GRAMOPHONE CO. v. COLUMBIA PHONOGRAPH CO.

Trial—Preliminary Question of Law—Application for Separate Hearing before Trial—Rule 66, Exchequer Court.

Application by the plaintiffs for an order for the trial of a certain question of law arising on the pleadings, under the provisions of Rule 66 of 8th October, 1906.

The motion was heard by RIDDELL, J., as a Judge ad hoc of the Exchequer Court.

R. C. H. Cassels, for plaintiffs.

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

RIDDELL, J.:—The Rule reads: "No demurrer, as a separate pleading, shall be allowed, but any party shall be entitled to raise by his pleadings any point of law; and any point so raised shall be disposed of by the Court or a Judge at or after the trial; provided that by the consent of the parties, or by order of the Court or a Judge on the applica-

tion of either party, the same may be set down for hearing and disposed of at any time before the trial."

This Rule is taken from the English O. XXV., R. 1, (1883).

The action in the present case is to restrain the defendants from infringing certain letters patent of the plaintiffs and for similar relief. The statement of defence disputes the patent, and sets up an adjudication by the Circuit Court of the United States in favour of the defendants; the reply denies this, and "submits that said paragraph . . . discloses no answer in law to the plaintiffs' claim, and craves the same benefit on this ground as if it had demurred to said statement of defence."

The application is by the plaintiffs that the question of law thus raised may be disposed of separately, and not at the trial of the other parts of the case. The ground alleged is the saving of time and of expense, as well as convenience.

It appears that both parties are of substance, and it is not suggested that the defendants, if they should fail in the matter, are not quite good for any extra costs that may be incurred by any method of proceeding.

Again, it is to be observed that the fact of the alleged adjudication is not admitted—it may well be that the defendants would fail to establish the fact, and thus the Court is in the position of being asked to determine the law in what may turn out to be a merely hypothetical state of facts—a course always to be deprecated.

Moreover, if the application were acceded to, it might and probably would be the case that an appellate Court would be called upon to deal with one branch of the case, while another part would be in the course of being dealt with elsewhere—a uselessly costly and inconvenient practice.

The authorities in England upon the corresponding Rule there are to be found in Snow's Annual Practice; a number of these are very different from the present case, and I do not find any very like the present. No authority has been cited, and I can find none, which indicates that the order sought should be granted.

The motion will be refused, and the costs will be paid by the plaintiffs, in any event, unless the trial Judge should otherwise order.

CARMAN, Co. C.J. DECEMBER 26TH, 1908.

ASSESSMENT APPEAL.

RE CONIAGAS MINES LIMITED.

Assessment and Taxes — Business Assessment — Offices of Mining and Industrial Companies—Assessment Act, sec. 10 (h).

Appeal by the Coniagas Mines Limited, the Clifton Sand Gravel and Construction Company Limited, and the Coniagas Reduction Company Limited, from a decision of the Court of Revision for the city of St. Catharines, confirming a business assessment of the appellants on their offices in the city of St. Catharines.

H. H. Collier, K.C., for appellants.

C. H. Connor, St. Catharines, for the city corporation.

CARMAN, Co.C.J.:—These companies carry on their works, one at or near Cobalt, one at Thorold, and one at or near Clifton.

In their offices their several officers do their planning, scheming, reading, and smoking, so far as I know, as no evidence was given as to what purpose or purposes the offices are used for. They do not mine there, they do not dig sand there, and they do not reduce ore there, I am credibly informed on inquiry, yet they are assessed for a business tax. The Act says "every person occupying or using land for the purpose of any business mentioned or described in this section." The persons so occupying or using, &c., &c., are divided or classified, not on a basis of relationship or similarity, but on the basis of the percentage of assessed values chargeable, and the actual business of the appellants is not mentioned or decribed, nor is it cognate to any business mentioned or described in any of the clauses set out and following sec. 10. It is, therefore, sought to make the appellants liable for a business assessment under clause (h) by the words "or any business not before in this section or in clause (i) specially mentioned." These words constitute the only attempt, in sec. 10 of the Act, to generalize, and, if these words are to be held sufficient to charge the appellants, then they would

be held sufficient to charge every business not named, mentioned, or described, and every thing, act, or deed done in connection with every such business, as sufficient to subject them to such tax.

If this business be chargeable at all under these general words, it must be subject to such assessment where the actual business is carried on. The Coniagas Reduction Co. cannot possibly do their business in this office, that is, as is contemplated by the Act, and do not do it there, and just so with the other companies. If the appellants are charged here, and also in municipalities where their business or work is actually done, they would be doubly assessed, which is not permissible.

The appeal must therefore be allowed, and with costs.

CARTWRIGHT, MASTER. DECEMBER 26TH, 1908.

CHAMBERS.

ROBERTSON v. BULLEN.

Mechanics' Liens—Proceeding to Enforce Lien—Motion for Summary Judgment against Defendants Personally Liable—Practice—Scheme of Mechanics' Lien Act.

Motion by plaintiff in a proceeding under the Mechanics' Lien Act for summary judgment against the defendants other than the registered owner, on the ground that one of them had not put in any defence, and that the others had no real defence, and because one had also frequently admitted the claim to the plaintiff, and promised to pay it.

H. H. Shaver, for plaintiff.

A. J. Keeler and A. R. Clute, for defendants.

THE MASTER:—The motion is apparently made under Rule 603. But this, I think, cannot be done. When proceedings are taken under the Mechanics' Lien Act, they must be confined to the remedies which it gives. The object in these cases is primarily to have recourse to the percentage required to be retained by the owner, and in default to have execution against the land, and then, if there is any deficiency, to have personal judgments as provided by secs. 47 and 48. Until the time for this has come, there can be no per-

sonal judgment against any one. The present is an attempt to combine a proceeding under the Mechanics' Lien Act with that given by the ordinary action for goods sold and delivered to a contractor. There is no authority for such a joinder of actions. Certainly no judgment can be given under any circumstances until the trial has been entered on.

This experiment, like some others, has failed, in my opinion, and the motion must be dismissed with costs to the defendants, to be adjusted when the case has been tried, or else disposed of by the Referee at the trial.

All interlocutory motions in Chambers under this Act are to be discouraged, as being foreign to its spirit, as evidenced by sec. 43.

CARTWRIGHT, MASTER. DECEMBER 26TH, 1908.

CHAMBERS.

RE SOLICITORS.

Solicitor — Bill of Costs—Order for Taxation—Amendment of Bill.

Motion by solicitors for leave to amend a bill of costs rendered to clients, and, upon the application of the clients, ordered to be taxed.

Grayson Smith, for solicitors.

J. R. Code, for clients.

THE MASTER:—The solicitors rendered to their clients a bill amounting in all to $291.49, and allowing credits for $100, shewing a balance of $191.49, for which they were willing to accept $186.

They have since discovered that two items of $25 and $23.50 have erroneously been put at $15, and now ask to be allowed to amend.

The solicitors state that when the bill was rendered, they never anticipated taxation. They only desire the amendment as a matter of precaution and undertake to ask no more than $186, whatever may be the result of the taxation.

This matter was under consideration by the late Mr. Dalton in Re B. & S., Attorneys, 6 P. R. 18.

It seems proper to make an order such as was made there.

It does not seem a case for costs.

RIDDELL, J. DECEMBER 26TH, 1908.

TRIAL.

see page 862

DELAMATTER v. BROWN.

Fences—Boundary Line between Farm Lots—Evidence as to Position of Former Fence—Statute of Limitations—Proceedings of Fence-viewers—Line Laid by Surveyor—Appeal to County Court Judge from Award of Fence-viewers—Order on—Effect of—Jurisdiction—Determination of True Boundary — R. S. O. 1897 ch. 284—History of Legislation — Injunction—Counterclaim—Declaration of Title—Costs.

Action to restrain the defendants from interfering with a fence erected by plaintiff upon or near the line between her land and that of defendants. Counterclaim for a declaration of title in accordance with the position of a former fence.

W. M. German, K.C., for plaintiff.

E. D. Armour, K.C., for defendants.

RIDDELL, J.:—The plaintiff is the owner of lots 8 and 9 in the 7th concession of the township of Pelham; the defendants are the owners of the adjoining lot 7, to the east of lot 8. For some time the defendants were the tenants of the plaintiff of these lots 8 and 9, and occupied the land. Towards the close of this tenancy, a dispute arose as to the true line between lots 7 and 8, the fence which had for very many years divided these two lots having for a great part of its length been taken down by the defendants. Both parties seem to have called in the fence-viewers, and the fence-viewers made an award. The plaintiff, not being satisfied, appealed to the Judge of the County Court of Welland; he decided that it was advisable to have a surveyor go on the premises and lay out the line. Mr. Gardiner, O.L.S., was selected; and, under authority of both parties, he went on the land and laid out a line. The County Court Judge thereupon heard evidence on both sides, and finally decided that the Gardiner line was not the true line, the line found by the fence-viewers was not the true line, and himself found a line some distance to the east, which he held to be the true line.

The learned Judge allowed the appeal with costs, and amended the award of the fence-viwers accordingly.

Th amending order is dated 2nd June, 1906; and nothing seems to have been done in the way of putting up a fence or otherwise acting on the order till about October, 1908. Then the plaintiff proceeded to put up a fence at a place certainly not east of the County Court Judge's line; the defendants interfered; the County Court Judge (as local Judge of the High Court) granted an injunction against such interference; the plaintiff completed her fence and proceeded with the action.

The plaintiff sets up the award as modified by the County Court Judge, and that alone, and asks that the injunction may be made perpetual.

The defendants allege that the County Court Judge had no jurisdiction to vary the award by changing the locality—the locus—of the line as found by the surveyor; they assert that, in fact, the true line was a snake fence which had been between the lots for many years; and, if that snake fence was not the true line, the Statute of Limitations had operated to give the parties title to the lands on either side. The pleading proceeds to allege the last-mentioned contention by way of counterclaim, and to claim a declaration that the true line is the line of the old snake-fence (which, it is alleged, was marked at the south by a stone monument and the meeting of a hedge planted by the defendants, and the fence at the south of the plaintiff.)

The plaintiff replies by again setting up the award or order of the County Court Judge, which, she insists, is binding; the pleading goes on to admit that the true line was the line of the old snake-fence, and asserts that the plaintiff was building her fence upon this line, and that the County Court Judge had determined the true position in his order.

At the trial before me at the St. Catharines non-jury sittings, both parties went into evidence at length as to the position of the old snake-fence, and both continued to insist upon the binding effect of what had been done by the fence-viewers and surveyor, on the one hand, and by the County Court Judge, on the other.

The first matter to be determined, in my view of the case, is the position of the old snake-fence. It seems quite clear, and indeed is admitted and asserted by both parties, that whatever may have been the original line as laid out by the Crown surveyor, this fence had been in situ as a

boundary line for a period too long for the parties to set any other.

Upon this the evidence is very conflicting; but I, from that part of the evidence which recommended itself to me as to be accepted, have no hesitation in finding that the line as set up by the defendants cannot be accepted, but that the line set up by the plaintiff is not further east than the line of the old snake-fence. The evidence of Ira Delamatter is wholly to be accepted in that regard. . . . I am satisfied, from what I saw of the witnesses in the box, that the witnesses for the plaintiff are to be believed and their account accepted.

I find as a fact that the stone found by Mr. Gardiner at the south was not a boundary stone; it did not truly mark the corner of the lots, and was not an ancient monument in any sense—it was placed in the position in which it was found by Mr. Gardiner within a few years of its being found by the surveyor.

I further find as a fact that the maple tree at the north was not a corner tree, and did not mark the boundary of the lots. The account of Ira Delamatter is to be accepted in respect of this also, as it is in respect of the position of the various trees mentioned by him in relation to the old snake-fence.

I find as a fact that the wire-fence which the defendants admittedly interfered with the plaintiff in building was wholly on the land of the plaintiff.

It is not wholly without significance (though I have not taken the fact at all into consideration in forming my conclusion) that this determination will give to the plaintiff a quantity of land more near to the quantity called for by the original patent.

It remains to consider the effect of the proceedings of the fence-viewers, the surveyor, and the County Court Judge.

The legislation in respect of fence-viewers is to be found in the R. S. O. 1897 ch. 284; and the sections relied upon are secs. 4, 6, 7 (1), (2), (3), (4), 11, especially 11 (5). This has come down without change from R. S. O. 1887 ch. 219; that from R. S. O. 1877 ch. 198; and that from 37 Vict. ch. 25 (O.) Before the last-mentioned Act the matter of line fences was dealt with in the same statutes as water-courses; these two matters attracted the attention of the legislative body from an early period of the history of the province.

In 1793 the Act 33 Geo. III. ch. 2 provided, by sec. 5, for the selection of "not less than 2 or more than 6 persons . . . to serve . . . the office of overseers of highways . . . which said overseers shall also serve the office of fence-viewers, and are hereby authorized and required, upon receiving proper notice, to view and determine upon the heighth (sic) and sufficiency of any fence or fences within their respective parish, township, reputed township, or place, conformably to any resolution that may be agreed upon by the said inhabitants at such meeting to be holden. . . ."

In a very interesting appendix to the report of the Ontario Bureau of Industries, printed by order of the Legislative Assembly of Ontario, in 1899, will be found an account of the town meetings of Adolphustown, beginning 1792, at the first of which meetings, holden 6th March, 1792, were elected certain officers, and on 5th March, 1793, at the second meeting, were elected "Overseers of the Highway." At this meeting it was also passed—"Water voted no fence. . . . Fences 4 feet 8 inches high." Similar proceedings took place at subsequent meetings, i.e., persons elected as "Overseers of the Highway" and regulations made as to what should be a fence. There is no provision in the Act that the overseers shall have the power to determine the line; and no direction to exercise any such power is found in the course of the town meetings in the township already mentioned, in the records which are printed from 1792 to 1849.

The next Act seems to be (1834) 4 Wm. IV. ch. 12. This repeals so much of 33 Geo. III. ch. 2 as relates to fence-viewers, and provides, sec. 1, for the election at town meetings of not less than 3 and not more than 18 "fit and discreet persons to serve the office of fence-viewers, and who shall perform the duties hereinafter prescribed to fence-viewers," etc. The Act goes on, sec. 2, to provide "that each of the parties occupying adjoining tracts of land shall keep and repair a fair and just proportion of the division or line fence between their several tracts of land; and that where there shall be a dispute between the parties as to the commencement or extent of the part of the said division fence which either party may claim or refuse to make or repair, it shall and may be lawful for either party to submit the same to the determination and award of 3 fence-viewers." No further power is given to the fence-viewers in the premises. The Act also provides for drains or ditches and

watercourses, and gives the fence-viewers certain powers in respect of these.

Then came the legislation of 1845—a prolific year in important legislation. The statute 8 Vict. ch. 20 repealed 4 Wm. IV. ch. 12 (it is called ch. 13 in the marginal note); but the new provisions are substantially the same as the former, the Act now prescribing, in addition, that the "line fence shall be made on the line dividing such tracts of land and equally on either side thereof." The provisions as to ditches and watercourses also appear in this Act.

Then came the C. S. U. C. 1859 ch. 57; this is a mere transcript of the Act of 1845. It was under this Act that In re Cameron and Kerr, 25 U. C. R. 533, was decided. This case was cited by counsel as of importance upon the present inquiry, but I am unable to see its relevancy. The only point decided was that an "award" by fence-viewers under the C. S. U. C. was not an award such as the Court could set aside; and I do not find any dicta which could be helpful as shewing the view of the Judges of that time as to the subject matter of the jurisdiction of the fence-viewers.

In 1869 the Act was amended so far as it relates to watercourses, but not otherwise; and an appeal to the County Court Judge was provided in certain cases.

Then came the Act of 1874, 37 Vict. ch. 25, which repealed (so far as they related to line fences) the C. S. U. C. and 32 Vict. ch. 46. This statute separates the legislation regarding line fences from that regarding watercourses, and the provisions are practically those which still obtain, the legislature being careful to insert in that Act the clause now found in sec. 7 (3), "but such location shall not in any way affect the title to the land."

The present Act is, as has been said, practically the Act of 1874, the trifling amendment of 1884 not being of any importance upon this inquiry.

No case has been cited as to the power of fence-viewers to determine the true boundary between two adjoining lots; and the question must be decided upon the words of the Act and upon principle.

It is not doubtful, in my judgment, that the legislature of the province has the power to say that any question respecting property or civil rights shall be decided in any way the legislature shall see fit. The King is an integral part of the legislature, and that legislature has supreme power, within the limits of their authority . . . to pass such

legislation as may seem expedient, and such legislation must be given effect to by this and every other Court. . . . And if the legislature has in fact said that the true boundary between 2 adjoining lots is to be determined by 3 farmers, or by a land surveyor, it is my duty loyally to obey the order of the legislature and stay my hand; the legislature has the legal power—and that is all I may concern myself about—to say that His Majesty's Court shall not determine the property rights of His Majesty's subjects in respect to the extent of their land, but that such is to be ascertained by some other tribunal or by some person named.

But, before arriving at the conclusion that the rights of the subject are to be dealt with in this way, the language must be at least reasonably clear that the interference of the Court is to be ousted.

In the Act I can find nothing to indicate that the fence-viewers were intended to have the extensive powers contended for. Section 3 provides that "owners of occupied adjoining lands shall make, keep up, and repair a just proportion of the fence which marks the boundary between them . . . ;" and sec. 4 provides for what shall be done "in case of dispute between owners respecting such proportions." All the proceedings under the Act are based upon a "dispute between owners respecting" the "proportion of the fence which marks the boundary between them," or, if there is no fence, "the . . proportion which is to mark such boundary." The latter rather curious and elliptical terminology occurs in the leading Act of 1874; I think it can only mean "proportion of a fence which is to be put up marking the boundary."

No power is, I think, given to the fence-viewers to determine the boundary itself; their powers are limited to a determination in respect of the fence which is to be put up—the kind, description, and cost of the fence, etc. An argument is based upon the word "locality" in sec. 7, the fence-viewers being required to specify the "locality" of the fence. This word was introduced by the leading Act of 1874—the language previously being, "may decide all disputes between the owners or occupants of adjoining lands . . . in respect to their respective rights and liability under this Act. . . . ." No power was given to place any part of the fence on any other than the true line. When the legislature decided that the fence-viewers should be given power to

direct that under certain circumstances the fence should be either wholly or in part on the land of one or other of the disputants, it seemed necessary to introduce this word "locality."

Section 5 of the Act of 1874 provides that "where from the formation of the ground, by reason of streams or other causes, it is found impossible to locate the fence upon the line between the parties, it shall be lawful for the fence-viewers to locate the said fence either wholly or partly on the land of either of the said parties, where to them it may seem to be most convenient; "but," the Act proceeds, "such location shall not in any way affect the title to the land." Then the Act proceeds: "If necessary, the fence-viewers may employ a provincial land surveyor and have the locality described by metes and bounds."

I think it is not doubtful that the land surveyor is to be employed to describe by metes and bounds "the locality" in cases in which the fence-viewers determine that the fence is not to be built upon the true line, and in such cases only. And it is apparent, I think, that this "locality" is the "locality" mentioned in the previous part of sec. 5. The present legislation divides the sections differently, but the substance is the same. The "locality" mentioned in sec. 7 (1) is, of course, the "locality" mentioned in the early part of sec. 5 of the previous Act—while the "locality" in sec. 7 (3) is the "locality" in the later part of sec. 5 of the former Act.

I do not find here any power given the fence-viewers, in case of a dispute as to the true position on the ground, either themselves to determine the line or to have it determined by a surveyor. What they are to do is to take the line; if there is no dispute, and the position of the line is known, determine whether the fence is to be built on the line, or, if there are special circumstances, off it; if the latter, a land surveyor may be employed by them to describe by metes and bounds the locality which they have described or laid out or determined on the ground. But, if there is a dispute as to the position of the line, they cannot determine the line; it may be that it is plain that, no matter where the line may be, the fence should not be built upon it by reason of the special circumstances mentioned in sec. 7 (3), and then the fence-viewers may perhaps proceed to locate the proper line for the fence, and have that described by metes and bounds by a surveyor. Even in cases in which a surveyor is em-

ployed, it is to be noticed that the true line is not determined at all, and the title is kept intact.

The fence-viewers described the fence as to be made between lots 7 and 8, but went on to give the location of the line in respect to certain trees and stumps. The line so described is not the true boundary line between these two parties, as I have found. The fence-viewers directed the fence to be built and maintained on a line which is not "the line between the parties," there being no special circumstances such as required by the statute, sec. 7 (3); this, I think, was beyond their power. And no aid is given to this award by the employment of the surveyor; even were he employed by the fence-newers, as he was not.

And I think the order of the learned County Court Judge was equally without jurisdiction. It may be admitted that, if the statute does give jurisdiction to the fence-viewers, the jurisdiction of the County Court Judge also attaches; but it seems to me quite clear, as has been said, that the fence-viewers have no jurisdiction. And I do not think the power of the Judge is more extensive than that of the tribunal upon an appeal from which he was sitting.

The award of the fence-viewers, then, does not operate as a bar to the plaintiff obtaining her land; nor does the order of the County Court Judge operate to give her land to which she is not entitled. So far as either decision purported to determine the rights of either party in any land or to determine the true boundary, it is a mere nullity. I am at liberty to determine the rights of the parties without reference to what has been done.

Were it necessary for me to determine the true boundary, I should find it further east for the greater part of its extent than the line found by the County Court Judge; it is not necessary that I should do so, the plaintiff being content with the line she has been given by the County Court Judge. It is sufficient to dispose of this case that I should find, as I do, that the land upon which the plaintiff built her fence was west of the boundary line between lots 7 and 8, and wholly her own land. The defendants' interference was wholly wrongful; the injunction was properly granted, and should be made perpetual; and the counterclaim should be dismissed.

As to costs, the counterclaim was wholly unfounded, and the defendants should pay the costs of it. As to the claim,

the statement of claim does not set up any legal ground for relief; the reply is indefinite. I think there should be no costs of these two pleadings. The plaintiff may amend as advised, and the defendants will pay the costs of the action other than as just mentioned.

ANGLIN, J. DECEMBER 28TH, 1908.

TRIAL.

SMITH v. CITY OF HAMILTON AND HAMILTON CATARACT POWER, LIGHT, AND TRACTION CO.

Municipal Corporations — By-law — Contract with Electric Power Company — Supply of Electrical Energy — Construction of Contract — Previous By-laws Authorizing Contract with Hydro-Electric Power Commission—Repugnancy — Necessity for Submitting By-law to Electors —Municipal Act, sec. 389, sec. 566, sub-sec. 4, cl. A 6, sec. 569, sub-sec. 5 — Commencement of Term—Uncertainty — Funds for Construction of Works and Purchase of Plant — Previous Application for Mandamus—Res Judicata—Period for which Contract Binding—Obligation for one Year—Appropriations in Future Years.

Action for a declaration that by-law No. 775 of the defendant municipal corporation was void, and for a judgment quashing the same and restraining both defendants from acting upon the by-law, and the agreement executed in pursuance thereof. The validity of the by-law was impugned upon several grounds.

W. E. Middleton, K.C., and D'Arcy Martin, K.C., for plaintiff.

G. Lynch-Staunton, K.C., and G. H. Levy, Hamilton, for the defendant company

H. E. Rose, K.C., and F. R. Waddell, Hamilton, for the defendant city corporation.

ANGLIN, J.:—The plaintiff alleges that under two previous by-laws of the municipal corporation, numbered 625 and 727, the corporation was committed to a contract with the

Hydro-Electric Power Commission of Ontario for the supply of electrical power and energy for the uses of the corporation, and the inhabitants of the city of Hamilton; that the power or energy to be supplied under the agreement with the Hamilton Cataract Power, Light, and Traction Company, authorized by by-law No. 775, will suffice for all the uses and requirements of the defendant municipal corporation, and that, if this by-law is upheld and the contract which it authorizes is carried out, the municipal corporation will be unable to take or utilize the power which it is contemplated should be taken from the Hydro-Electric Power Commission of Ontario under the by-laws numbered 625 and 727.

The plaintiff further contends that by-law No. 775 is invalid, because it was not submitted to the electors of the municipality before being finally passed, as provided for by sec. 338 and the following sections of the Municipal Act. The plaintiff contends that such submission is necessary to the validity of the by-law, if it is a by-law under sec. 556, sub-sec. 4, clause A6, because of the requirements of sub-sec. 5 of sec. 569 of the Municipal Act, and whether it is or is not a by-law within clause A6 of sub-sec. 4 of sec. 566, because it falls within the provisions of sec. 389 of the Municipal Act, both by reason of the capital expenditure which it entails, and also by reason of its involving an expenditure by the municipality out of its revenues for future years.

The plaintiff also maintains that the by-law is invalid because the commencement of the term for which it provides is future and contingent, no certain date being fixed therefor by the by-law.

The plaintiff further alleges that the funds requisite for the carrying out of the works which it is necessary to construct, and the purchase of such plant as is required to enable the municipal corporation to utilize the power or energy for which it has contracted with its co-defendant, have not been supplied, either out of the revenues for the current year by estimates passed by the municipal council therefor, or by the submission to the electorate and the approval by them of by-laws for the raising of money by the issue of debentures or otherwise.

By-law No. 775 was passed by the council of the city of Hamilton on 18th July, 1908. The mayor of the city refused to sign the by-law, and also refused to execute the contracts to which it refers. An application was made on 6th August last to the Chief Justice of the King's Bench for an order of

mandamus requiring the mayor to sign and execute the by-law. The mayor opposed this application, on the ground that the by-laws numbered 625 and 727 bound the city to take power from the Hydro-Electric Power Commission, and that, after the passage of these by-laws, which had been submitted to and sanctioned by the electorate, the municipal council had no right or discretion to decline to enter into the contract with the Hydro-Electric Power Commission which by-law No. 625 authorizes. By-law No. 727 provides for the issue of debentures for the cost of a plant to distribute electric power to be supplied by the Hydro-Electric Power Commission under the contract authorized by by-law No. 625. No contract with the Hydro-Electric Power Commission had then or has yet in fact been executed. The mayor also intended to oppose the motion for mandamus, as appears by the material filed, on the ground that by-law No. 775 is invalid because it was not submitted to the electorate for approval before it was finally passed. The order of mandamus was granted, and, in obedience to it, the mayor signed and executed by-law No. 775, and the contracts with the Hamilton Cataract Company which it authorizes. Although the present plaintiff was not a party to the application before the learned Chief Justice, and therefore, as to him, the validity of by-law No. 775 may not be res judicata, the decision requiring the mayor to execute the by-law is binding upon me as authority. It involves a finding in favour of the validity of the by-law as against such objections as were then urged, and were, in the opinion of the Chief Justice, ineffectual or untenable.

The application for mandamus was made in vacation, and was argued by the respondent in person. I learn from the learned Chief Justice that, although the existence and alleged effect of the by-laws numbered 625 and 727 was pointedly brought to his attention, the objection to the validity of by-law No. 775, on the ground that it had not been submitted to the electorate, was not urged before him. All that the learned Chief Justice intended to decide was that, notwithstanding by-laws numbered 627 and 727, the municipal corporation had a discretion to make or to decline to make with the Hydro-Electric Power Commission of Ontario the contract authorized by by-law No. 625; in other words, that these by-laws were enabling and permissive, but not mandatory upon the council, and therefore that neither the execution of the contract authorized by by-law No. 775 nor of that

by-law was improper or illegal by reason of the existence of by-laws numbered 627 and 727, and, further, that the mayor had no discretion to decline to place his signature, as the head of the corporation, to a valid by-law of the corporation, duly passed by the council. Although the validity of by-law No. 775 was in question before the learned Chief Justice, his disposition of the motion did not involve the determination of the question whether or not it was essential to the validity of this by-law that it should have been submitted to the electorate. But upon the first point taken by Mr. Middleton before me, the decision on the motion for mandamus is conclusive against him. I merely desire to say, with great respect, that while the Hydro-Electric legislation requires that municipalities should obtain the approval of the electorate before entering into contracts with the Commission—Re Scott and Patterson, 12 O. W. R. 637—I entirely concur in the view that the passage by the council and the approval by the electorate of the by-laws numbered 625 and 727, did not oblige the council to enter into the contract, authorized by by-law No. 625, with the Hydro-Electric Power Commission, and that the existence of these by-laws, therefore, presented no obstacle to the passage of by-law No. 775 or to the making of the contract which it purports to authorize.

The following appear to be the provisions of the power contract authorized by by-law No. 775 which it is material to have in mind when considering the objection taken to the by-law upon the ground that it has not received the approval of the electorate:—

"1. Subject as hereinafter set forth, the company will at all times during the period of 5 years, commencing on the day when power is first taken under this contract, develop and supply to the city electrical energy ready for use at approximately 2,200 volts, and at approximately 62½ cycles per second frequency, and in such quantities as the city may require, not exceeding in all 1,200 horse power. Until the city's Beach pumping station is ready to operate, the city will take as a minimum 60 per centum of the capacity of the motors installed by the city and connected up for operation, and when the said Beach pumping station is ready for operation, the minimum to be taken shall be 60 per centum of the said 1,200 horse power, that is to say, 720 horse power.

"2. After the expiration of 3 months' written notice, which may be given by the city from time to time during the

said period of 5 years, or during any renewal period, the company will supply additional power in such amounts as may be ordered until the total amount supplied shall amount to 3,000 horse power. Any such additional amounts shall be added to the 1,200 horse power, and 60 per centum of the sum shall thereafter constitute the minimum amount to be paid for.

"3. The current to be supplied by the company shall be available for use at all hours every day of the year. The city shall, subject as hereinafter provided, pay for the current used at the rate of $16 per horse power per annum, the payment to be in 12 monthly payments, bills to be rendered by the company on or before the 7th day of each month for the calendar month immediately preceding, and to be paid at the company's office on or before the 14th day of the month in which they are rendered. When the greatest amount of power taken for 20 consecutive minutes in any calendar month shall exceed 60 per centum of the amount during such 20 minutes supplied and held in resrve by the company pursuant to notice from the city, the amount to be paid for that month shall be such greatest amount. Provided, however, that such 20-minute maximum demand for said current shall not include or be based upon any emergent or abnormal demand caused by purely exceptional circumstances or conditions, and not arising from the ordinary use of power by the city for the purposes hereinafter mentioned. Any such exceptional demand which shall occur twice in any one month shall not be considered abnormal for that month.

"4. The city may, to the extent and in the manner described in this clause, countermand notices for additional power given pursuant to paragraph 2 of this agreement. That is to say, the city may at any time, without previous notice, decrease the amount of its order for additional power, so long as the decrease shall not equal 10 per centum of the maximum amount of power ordered by the city for the 12 months immediately preceding such decrease. If the city shall desire to decrease such consumption of power taken pursuant to any notice or notices given under paragraph 2 aforesaid, by an amount as much as 10 per centum of the maximum amount of power ordered and held in reserve by the city during the 12 months immediately preceding, the city may give 6 months' written notice to the company of its said desire. And, after the expiration of 6 months from the giving of the said notice, the city's demand for power, given

pursuant to paragraph 2 aforesaid, shall be and shall be deemed to be decreased to the extent specified in the said notice, provided, however, that the city shall not in any one calendar year decrease its demand for power by more than 10 per centum of the maximum amount of the power ordered by and held in reserve for the city during the preceding calendar year.

"5. The city, within 12 months from the day on which power is first taken by the city under this agreement, shall begin to use the minimum amount of 720 horse power provided for by paragraph 1 of this agreement. . . .

"10. The power herein provided for is to be used exclusively for operating motors and electric lights, and nothing else, and only for the purposes of the city's own business. The motors and lights shall be suitable to the system in use by the company, and shall be subject to the company's approval before being connected, which approval shall not be unreasonably or capriciously withheld. The city shall not disturb, rent, sell, or make use of said power except for the class of apparatus mentioned. . . .

"15. This agreement shall continue in force for the period of 5 years from the day on which the city first uses electricity pursuant to this agreement. The city may, not less than 6 months before the expiration of 5 years from the said day on which it first uses electricity, give notice in writing to the company that it elects to continue this agreement in force for a second period of 5 years, and, said notice being given, this agreement shall continue in force for such second period. In the event of such notice being given, and this agreement continuing for the second period of 5 years, the city may, not less than 6 months before the expiration of the said second period of 5 years, give notice to the company that it elects to continue this agreement in force for a third period of 5 years, and, said notice being given, this agreement shall continue in force for such third period of 5 years. In the event of this agreement being so continued for such third period of 5 years, the city may, not less than 6 months before the expiration of such last-mentioned period, give notice to the company that it elects to continue this agreement for a fourth period of 5 years, and, such last-mentioned notice being given, this agreement shall continue in force for such last-mentioned period of 5 years. . . .

"20. The price to be paid by the city may, at the option of the city, be readjusted from time to time, at intervals of not less than two years, in the manner following, that is to say: At any time more than two years after the city has begun to take power under this agreement, and at any time more than two years after an investigation has been held, or a readjustment of prices has been made under this clause, and so on at intervals of not less than two years during the continuance of this agreement or of any renewal or renewals thereof, the city may, in writing signed by the city clerk or other officer, notify the company that the city is of opinion that 90 per cent. of the price (as hereinafter defined) that is at the time of such notice being charged by the Hydro-Electric Power Commission of Ontario to some city, town, or municipal corporation west of Hamilton, or to the city of Toronto, is less than the price at the said time being charged by the company to the city under this agreement, and unless the company shall, within 30 days after receipt of the said notice, notify the city in writing that it agrees to reduce the price thereafter to be charged by it, and unless within a period of 30 days after receipt by the city of the company's notice, the city and the company shall agree upon a readjustment of the price to be charged by the company, the city may apply to the Ontario Railway and Municipal Board, or to such body as shall at the time exercise the powers now exercised by the said Board, for an appointment to ascertain the price which was at the time of the said notice by the city being charged to such city, town, or municipal corporation west of Hamilton, or to the city of Toronto, as the case may be. If the said Board or other body will give an appointment pursuant to the said application, the city and the company shall, with such counsel and witnesses as the said Board or other body may direct or allow, appear before the said Board or other body, which shall proceed to ascertain the said price. If the said Board or other body shall not give an appointment upon the city's application, the city may give notice to the company that the city desires an arbitration to ascertain the said price, and thereupon the matter shall stand and be referred to a board of three arbitrators, one to be chosen by the city, one by the company, and the third by the two first chosen, or, in the event of their failure to agree, in the manner provided by the Arbitrations Act, and the said board of arbitrators shall proceed to ascertain the said price. When the said price has been ascertained, in

either of the ways hereinbefore mentioned, the city may, at its option, notify the company that as from the day on which the notice first in this clause mentioned was given by the city it will pay for power supplied by the company and taken by the city 90 per centum of such price, and this agreement shall thereafter, until the price is again re-adjusted, be read and construed as if the said 90 per centum were written in this agreement instead of $16. And the company shall account to the city for and shall pay to the city any sums in excess of the readjusted price which the city may have paid to the company for power supplied after the day on which the notice first in this paragraph provided for was given by the city to the company. For the purposes of this agreement, the price charged by the said Hydro-Electric Power Commission of Ontario to any municipality shall be taken to include all payments demanded by the said Commission from the municipality in question, except such municipality's contribution to the sinking fund established pursuant to the agreement between the said Commission and the said municipality, and due and proper allowance shall be made for the difference between the cost of transmission from Niagara Falls to Hamilton, and the cost of transmission from Niagara Falls to the municipality in question. . .

"31. Notwithstanding anything herein contained, it is hereby understood and declared to be the intention of this agreement that the city corporation shall not be bound to incur any debt or obligation by reason hereof, or to expend any money not included within the ordinary expenditure already provided for, and such expenditures as may be hereafter authorized within the respective municipal years during the term of this contract, together with the expenditure for any of the purposes herein mentioned, which are already provided for by the issue or authorized issue of debentures."

For the plaintiff it is contended that this contract is binding upon the city of Hamilton for a term of at least 5 years, to commence at a date which was future and contingent when the contract was executed.

After the most careful consideration of the contract of which I am capable, I find myself unable to agree with this contention. Had there been no such provisions as are contained in clause 31, the plaintiff's contention would, no doubt, have been correct; but clause 31 cannot, in my opinion, be so read or construed that, notwithstanding its presence, the contract remains an agreement binding on the

city for the term of at least 5 years; and I have not been convinced that this clause should, therefore, be rejected as utterly inconsistent with the whole tenor of the contract.

Clause 31 is introduced by the comprehensive and significant words, "notwithstanding anything herein contained." These words imply that every other provision of the contract, however absolute in form, is to be read as subject to the provisions of clause 31. It follows that the obligation of the city to take and pay for power under the contract and to provide the plant or apparatus requisite to enable it to take or utilize such power, is subject to the conditions that "the city shall not be bound

(a) to incur any debt or obligation, or

(b) to expend any money not included within

(1) the ordinary expenditure already provided for, and

(2) such expenditures as may be hereafter authorized within the respective municipal years during the term of this contract, together with

(3) the expenditure (sic) for any of the purposes herein mentioned which are already provided for by the issue or authorized issue of debentures."

The provision that "the city shall not be bound to incur any debt or obligation," necessarily implies that, unless and except in so far as the city has money on hand to pay for energy or power to be supplied under this contract, or for plant or apparatus required to utilize such power, it shall not be compellable to take such power or energy, or to provide such apparatus or plant, and failure on its part for this reason to take power or energy, or to supply plant or apparatus, shall not subject it to any liability to its co-defendant. The provision that "the city shall not be bound . . . to expend any money," &c., necessarily implies that, except so far as money has been already provided by the estimates for the current year, or shall be provided by appropriations to be made by the municipal councils of subsequent years for the respective years in which they hold office, or has been furnished by the issue or the authorized issue of debentures, the city corporation shall not be compellable to take or pay for electric energy under this contract, or to provide any plant or apparatus requisite for the taking or utilization of such electric energy. That this is the proper construction of clause 31 I entertain no doubt, and I see nothing to prevent the contract being construed as the parties manifestly intended, that is, subject, as to all its provisions, to the

conditions contained in clause 31. The result, in my opinion, is, that the city has not by this contract bound itself to take from its co-defendants electric energy for any year after the year 1908, unless the municipal council for each subsequent year during the term of the contract shall provide in its estimates for the expenditure necessary to pay for electric energy to be supplied in that year. Neither has it bound itself to provide plant or apparatus except in so far as expenditure therefor has been already provided for by the issue or authorized issue of debentures. Although the contract by its terms binds the company to furnish power for a period of 5 years, if the city shall require it to do so, and at the option of the city for 3 further periods of 5 years, the obligation of the city to take and pay for such power depends entirely, as to each year, upon the action which may be taken by the council for that year.

Perhaps the best way to test the question whether this contract creates an obligation enforceable against the municipal corporation by the Cataract Power Company, beyond the current municipal year, is to inquire what would be the position and the liability of the municipal corporation should its council, in any succeeding year during the life of the contract, decline to provide moneys to pay for electrical energy to be furnished under it. Unless the municipal corporation would, in that event, be liable to its co-defendant in damages for breach of contract—that is, for refusal to take and pay for electric energy—it cannot be successfully contended that the contract is binding upon the municipal corporation beyond the current year. Clause 31 expressly provides that the municipal corporation shall not be bound to expend any money not included (a) "within the ordinary expenditure already provided for," that is, not covered by the estimates for the ordinary current expenditure of the present municipal year; (b) "such expenditures as may be hereafter authorized within the respective municipal years during the term of this contract," that is, moneys which may be provided by the municipal councils of future years for ordinary current expenditure during their respective years of office, together with (c) "expenditure for any of the purposes herein mentioned which are already provided for by the issue or authorized issue of debentures"—that is, money which the council has by by-laws, duly sanctioned by the electorate, obtained authority to raise, and which have already been raised or may be so raised in the future. If

the municipal council of the year 1909 should refuse to vote money out of the revenues of that year to pay for electric energy under this contract, then, having regard to clause 31, I am unable to see what obligation there could be on the part of the municipal corporation to take or to pay for such electrical energy; and, unless there is that obligation, there could be no liability in damages for failure so to take and pay for it. The contract expressly provides that the corporation "shall not be bound to incur any debt or obligation" for its purposes. If, therefore, it is only bound to take electric energy when funds for that purpose are provided, either out of moneys already voted as ordinary expenditure for the current year, or to be voted by the municipal councils of subsequent years for their respective years, or out of moneys already provided by the issue or authorized issue of debentures, should one or other of such funds not be available, there can be no liability on the part of the city to its co-defendant under this contract.

In my opinion, therefore, clause 31 of the contract, upon its proper construction, so modifies the effect of the contract that the by-law authorizing it cannot be regarded as a by-law "for raising upon the credit of the municipality any money not required for its ordinary expenditure and not payable within the municipal year."

It is undoubtedly true that, if clause 31 had been omitted, the contract between the defendants (subject, of course, to the questions raised as to its validity) would have been binding upon both parties to it at least for the term of 5 years. But it does not follow, as urged by Mr. Middleton, that this clause should, therefore, be rejected as contrary to the general tenor of the contract. It is quite usual that a whole series of sections in a statute—indeed sometimes an entire Act of Parliament—quite as absolute in form as is this contract, is qualified and controlled by a proviso introduced at the end. Neither is it uncommon to find contracts so drawn that agreements and obligations absolute and unqualified in the clauses which create them, are modified and limited in their effect, or are made conditional or contingent in their operation, by some subsequent paragraph so framed that it is manifest that it was designed to control the whole instrument. Unless it is made clear that the controlling paragraph found its way into the contract by fraud or mistake, it may not be rejected or disregarded. Here there is no suggestion of fraud or mistake, and the introductory words of clause 31 indicate

that the draftsman and the parties fully recognized that its provisions produce material qualifications and modifications of the terms of the contract contained in the preceding paragraphs. I see no ground upon which I should reject clause 31, and no reason why its provisions should not be given the full effect which it was apparently intended that they should have.

But, if the contract, notwithstanding the terms of clause 31, should be deemed a contract for a term of 5 years, I doubt whether it would be subject to the requirement that it should have the approval of the electorate.

Clause A6 of sub-sec. 4 of sec. 566 of the Municipal Act reads as follows: "In case there is any gas or electric light company supplying gas, electric energy or light, or water company supplying water in any municipality, the council may, by by-law, fix a price and terms to offer for the supply by contract by such gas or electric light company of gas or electric energy or light for street lighting and other public uses, or for the supply by contract by such water company of water for street hydrants and other public uses for a term of not less than 5 years and not more than 10 years, and after 30 days have elapsed after notice of such price and terms have been communicated to the company without the company's having accepted the same, the council may, under the provisions of this Act as to arbitrations, name and give notice of an arbitrator to determine the price and terms of the contract for such supply of gas or electric light as aforesaid, and, in case the company and the municipality do not agree, the said price and terms shall be determined by arbitration under this Act."

Sub-section 5 of sec. 569 of the same Act reads as follows: "No by-law under clause 4 of section 566 or under sub-section 1 of this section shall be passed—

"Firstly: Until estimates of the intended expenditure have been published for one month, with notice of the time appointed for holding a poll of the electors on the proposed by-law, and until a copy of the proposed by-law at length, as the same is to be ultimately passed, and a notice of the day appointed for finally considering the same in council, have been published for one month in some newspaper in the municipality, or (if no newspaper is published therein, then) in some newspaper in the county in which the municipality is situate: nor,

"Secondly: Until, at a poll held in the same manner and at the same places and continued for the same time as at elections for councillors, a majority of the electors, voting at the poll, vote in favour of the by-law; nor

"Thirdly: Unless the by-law is passed within three months after holding the said poll."

This sub-section was, however, repealed by 6 Edw. VII. ch. 34, sec. 21, and there was then substituted for it the following: "In the case of a by-law under paragraph number 4 of section 569, or under sub-section 1 of this section, in addition to the publication required in the case of a by-law authorizing the issue of debentures which requires the assent of the electors of a municipality before the final passing thereof, there shall be published along with a copy of such by-law, and for the same period, the estimates of the intended expenditure."

Whatever may have been the proper construction of sub-sec. 5 of sec. 569 as it stood in the Consolidated Municipal Act of 1903—whether it applied to clause A 6, found in sec. 566, as part of sub-sec. or clause 4 of that section, it is notable that the legislature, in the new provision of 1906, substituted the words "paragraph number 4" for the words "clause 4" found in the provision of 1903. "Clause 4" or "sub-sec. 4" of sec. 566 might very well have been taken to include paragraph A6, which is found under clause 4. But A6 is a separate paragraph, and I read the words, "paragraph number 4" found in the substituted provision of 1906, as referring only to the particular paragraph of sec. 566 in the Consolidated Act, which bears the number "4." Moreover, it should be noted that the new sub-sec. 5 of sec. 569 does not itself impose any obligation to submit by-laws to which it relates to the electors of the municipality, as the repealed section did. The question whether the by-law is one which requires submission to the electorate is, under the new sub-sec. 5, left to be determined under the general provisions of the Municipal Act. I therefore reach the conclusions that sub-sec. 5 of sec. 569, as enacted by 6 Edw. VII. ch. 34, sec. 21, does not apply to clause A6 of sec. 566, whether clause A6 is or is not to be regarded as a sub-clause of sub-sec. number 4, and that, if applicable, it would not of itself impose any obligation to obtain the assent of the electors to by-laws authorized by clause A6.

Upon examination, it will be seen that clause A6 merely authorizes a municipal council, where there is a gas or elec-

tric light company already supplying gas, electric energy, or light, "by by-law to fix a price and terms to offer for the supply by contract by such gas or electric light company of gas or electric energy or light for street lighting and other public uses . . for a term of not less than 5 years, and not more than 10 years." If clause 31 should be eliminated entirely from the power contract between the present defendants, it would remain a contract binding upon both parties for a period of 5 years, and binding upon the power company for 3 further periods of 5 years, at the option of the municipal corporation, but not binding upon that corporation beyond 5 years, unless at its own election. This contract I would deem a contract "for a term of not less than 5 years and not more than 10 years, within the meaning of clause A6 of the statute." This clause purports to authorize the municipal council "to fix a price and terms to offer for the supply by contract . . of electric energy" by an existing electric light company. The defendants the power company were, in this case, "an existing electric light company," which was "supplying electric energy or light" in the municipality. Whether the proposition embodied in the present contract came first from the company to the municipality or from the municipality to the company, is not very material. The municipality is authorized by the section "by by-law to fix a price and terms to offer for the supply by contract," etc. This must mean that it is authorized, if its offer is accepted, to make a contract at a price and upon terms which it has offered under the authority of the statute. Must such a by-law, fixing merely the price and terms of an offer to be made to an existing electric light company, be submitted for the approval of the electorate? If so, why this special statutory provision? A contract of this kind might have been authorized by by-law submitted to the people without such legislation as is found in clause A6. The only purpose of this legislation, the only necessity for it, would seem to be to empower the council to pass such a by-law and to enter into such a contract without submitting them to the electorate. Having regard to the history of the legislation, to the general provisions of the Municipal Act, to the alterations made in sub-sec. 5 of sec. 569, I incline strongly to the view that submission to the electorate before final passing is not a pre-requisite to the validity of a by-law within clause A6 of sec. 566. If the contract authorized by by-law No. 775 of the defendant municipal corporation should

be regarded as a contract within clause A6, as contended by counsel for the plaintiff—if clause 31 either should receive the construction suggested by him or should be entirely eliminated as inconsistent with the whole tenor of the contract—in my opinion, the by-law authorizing this contract, regarding it as the equivalent of a by-law fixing a price and terms to offer for the supply by contract of electric energy for street lighting and other public uses by an existing electric light company, would be valid and effectual when passed by the council without submission to the electorate.

I find nothing in the decision in Ottawa Electric Light Co. v. City of Ottawa, 12 O. L. R. 290, 8 O. W. R. 204, so much relied upon by Mr. Middleton, which is inconsistent with this view. There the by-law of the municipal corporation was held invalid because it provided for the purchase of electric energy, whereas the special Act under which it was passed authorized the production and manufacture, but not the purchase, of this commodity. The contract which the by-law purported to authorize was binding upon the municipality for a term of 18 years. The expressions of opinion by the learned Chief Justice of Ontario that "the by-law is also bad as creating a debt not payable within the municipal year" (12 O. L. R. p. 298) and by Mr. Justice Garrow that "it created an obligation which required submission to the ratepayers, as contended by the plaintiffs" (p. 299), could not, therefore, have been intended to apply to a by-law passed under clause A6 of sec. 566 of the Municipal Act.

In Re Olver and City of Ottawa, 20 A. R. 529, the Court dealt with a contract for the building of a bridge, payment for which was to be made partly in the current financial year and partly in the succeeding financial year. The bridge was not to be paid for out of the ordinary rates of the current financial year, and there had been no by-law authorizing the expenditure assented to by the electors. The Court held the contract ultra vires. In this case there was no statutory provision applicable at all similar to clause A6 of sec. 566. The case was one in which, without statutory authority, the municipal corporation had undertaken to create a debt payable in, and out of funds to be provided by the municipal council of, a subsequent year. This was clearly in contravention of the provisions now found in sec. 389 of the Consolidated Municipal Act, and also of the provisions now found in secs. 402 and 404 of the same statute.

In re Carpenter and Township of Barton, 15 O. R. 55, also cited by Mr. Middleton, was a case in which the municipal corporation of Hamilton passed a by-law to grant the sum of $5,000 towards the construction of a free road, upon certain conditions stated in the by-law which rendered the liability future and contingent. No appropriation was made in the estimates of the current year for the payment of the $5,000. The liability of the city corporation to pay the $5,000 was not dependent upon the money being provided by the municipal council of any subsequent year out of current revenue, or upon money being raised by the issue of debentures or otherwise with the sanction of the electorate. Apart altogether from the future and contingent character of the liability, therefore, the by-law offended against the provisions of the Municipal Act to which I have referred in dealing with the Ottawa case. This case is clearly distinguishable from that now under consideration, on these grounds, and also because of the absence of any statutory provision applicable to it at all corresponding with clause A6 of sec. 566 of the Municipal Act.

In County of Grey v. Village of Markdale, 6 O. W. R. 978, the Court dealt with a by-law which created a liability or debt on the village for 10 years from the installation or first supplying of electric current. In that case there were no facts shewn which would bring it within clause A6 of sec. 566 of the Municipal Act. It was simply the case of a municipality, without statutory authority, absolutely binding itself to take and pay for electric current for a term of 10 years—a clear contravention of sec. 389 of the statute.

In none of these cases was the construction of clause A6 of sec. 566 considered; in none of them was that clause thought to be applicable to the by-law or contract under consideration. It follows that there is in none of these cases anything approaching authority directly bearing upon a contract within this clause of the Municipal Act, and it is almost unnecessary to add that there is nothing in any of these cases which has any bearing whatever upon a contract which creates no debt or liability on the part of the corporation, except in so far as funds have been already provided to meet such debt by debentures duly authorized, issued or to be issued, and does not bind the municipality to take and pay for electric energy beyond the current year.

But, in the view which I take of the effect of clause 31, this contract is not within clause A6 of sec. 566, because it is not a contract for "a term of not less than 5 years." So far as the municipal corporation is concerned, its obligation beyond one year depends upon the councils of ensuing years making certain appropriations.

It is further contended that the contract involves a capital expenditure on the part of the municipality for the construction and purchase of plant and apparatus necessary to enable it to utilize the electric energy to be furnished. It is undoubtedly the case that, without the expenditure of a very considerable amount of money in the construction of plant and purchase of electrical machinery, the municipality cannot make use of the electric energy which it proposes to obtain under this contract. But the contract imposes no obligation upon the municipality to incur such expenditure beyond the amount of funds already provided for those purposes. Clause 31 expressly excludes any construction of the contract which would import such an obligation. Except so far as it can be used by motors belonging to the city presently installed, that is, which were installed at the time the contract was entered into, the city is not obliged to take any electric energy under this contract within one year from its date. "Until the city's Beach pumping station is ready to operate, the city will take as a minimum 60 per centum of the capacity of the motors installed by the city and connected up for operation, and when the Beach pumping station is ready for operation, the minimum to be taken shall be 60 per centum of 1,200 horse-power, that is to say, 720 horse-power" (clause 1). "The city, within 12 months from the date on which power is first taken by the city under this agreement, shall begin to use the minimum of 720 horse-power provided for by paragraph 1 of this agreement" (clause 5). It is quite clear, therefore, that for the present year the obligation of the city is only to take power up to 60 per cent. of the capacity of motors already installed when the contract was made, and that it cannot be compelled to taken any further power until 12 months from the date on which it first used electric energy under the contract. But this time will necessarily be beyond the current year, and the obligation of the city then to take power will be subject to the provisions of clause 31, that there shall not be any such obligation except to the extent of "such expenditure as may be hereafter authorized within the respective municipal years

during the term of this contract." It follows, therefore, that the city has not by the contract bound itself to complete the Beach pumping station, because, should it fail to have this station ready for operation, by not providing next year for the expenditure necessary to pay for electrical energy, it would escape all liability.

The electors, however, had already provided by by-law No. 728 the sum of $50,000 for the installation of electric pumps at the Beach pumping house. Tenders have been received from the Canadian Westinghouse Company, and accepted by the municipal corporation, for the construction of the pumps and electrical apparatus required at the Beach pumping house for the utilization of electric energy to be furnished under the contract of the city with the Cataract Power Company. The carrying out of the Westinghouse contract is suspended pending this litigation. The evidence before me warrants the conclusion that the Beach pumping station can be completed and made ready for use without the expenditure of any further moneys than are provided for by by-law No. 728. The evidence, further, is, that the two electric pumps to be installed at the Beach pumping house will each use upwards of 573 horse-power of electric energy, and that upon certain occasion, and at certain times of the day, it will be necessary to use both pumps simultaneously, involving the use of upwards of 1,100 horse-power of electric energy. It is part of the scheme of the city of Hamilton to utilize electric energy to be supplied by its co-defendant under the contract, in connction with its sewage disposal plant; and "for the construction of sewers establishing works and basins for the interception and purification of sewage, and the purchase of lands therefor in the eastern annex district," the sum of $120,000 was provided by by-law No. 621 of the city of Hamilton, passed on 14th January, 1907. Of this sum upwards of $109,000 has been already expended, and the evidence before me is that it will require about $40,000 more to complete this sewage disposal system, including the purchase of such electrical motors and apparatus as are required in connection therewith. The Westinghouse Company already has a contract from the city for the construction of pumping outfits for this purpose at the price of $3,614. There is to be submitted to the electors at the coming municipal election a by-law to provide for a further sum of $65,000, of which $38,500 is to be applied towards the completion of the east-end annex sewage system.

This latter sum, together with the sum of about $10,000 remaining on hand from the funds provided under by-law No. 621, should enable the city to complete this sewage system. But here again the obligation of the city under its contract with its co-defendant is entirely dependent upon funds being provided as stipulated in clause 31 of the contract.

Moreover, the Beach pumping station, when in operation, will use the whole amount of electric energy which the council, if bound beyond the present year, could be obliged to take under the terms of the contract. To provide power for the sewage disposal plant it will probably be necessary for the city to give notice under clause 2 of the contract, in order that it may have the right to demand the supply of additional power beyond the 1,200 horse-power which the company binds itself to furnish under clause 1.

But, whatever the amount of power which the city may under the contract have the right to require that the company shall from time to time furnish, its obligation to take and pay for power is always limited by the funds provided for that purpose. Except to the extent of such funds, it cannot be compelled to take or pay for power, and it is, therefore, immaterial for the purposes of the present action, to determine whether sufficient money has been provided to enable the city to procure the plant and apparatus requisite to utilize the power which the Cataract Company has undertaken to furnish. If it were the case that the city is obliged under the contract to take for 5 years a minimum of 720 horse-power, the by-law providing funds for the completion of the Breach pumping station probably provides for the installation of a plant sufficient to utilize that amount of electric energy.

It is further argued that, although the contract, by virtue of clause 31, purports to leave it entirely optional with the municipal councils of succeeding years to take or to decline to take electric energy from the Cataract Power Company, they can only decline to take this power at the cost of sacrificing the amount of money invested in electric motors installed to utilize Cataract power. The evidence is that these motors could not be used with power furnished by the Hydro-Electric Power Commission of Ontario, because such power is of 25 cycles, whereas the Cataract power is of 66 cycles. The evidence further is that the motors and electrical apparatus would require to be entirely reconstructed to make them avilable for Hydro-Electric power, and that a

new plant and apparatus would practically be required for that purpose. I do not think that this circumstance can affect the proper construction of the contract. It is purely adventitious. If the city of Hamilton already had motors installed capable of using the quantity of power to be furnished by the Cataract Company under their contract, it could not be successfully argued that the fact that, if other power were to be taken in the future, for instance, from the Hydro-Electric Power Commission, it would be necessary to install other apparatus, would be a reason for holding that the present contract binds the municipal corporation to continue in future years to take power from the Cataract Company. The municipal corporation is, in fact, not so bound. It is free to take or to refuse, and, if this argument were to prevail, it would prevent the corporation making a contract even for a single year for the purchase of electric energy. Moreover, the ratepayers have approved of the expenditure necessary for the purchase of the requisite electrical plant, and it should not be assumed that they were not aware of the risk that such plant might not be available for future use should the municipal council of any subsequent year determine to discontinue taking power from the Cataract Power Company, and prefer to take power from the Hydro-Electric Power Commission.

The fact that the liability of the municipal corporation is future and contingent would be a serious objection to this contract, if the event upon which such liability is to arise were controlled, not by the municipal corporation itself, but by some other body. Such was the case in In re Carpenter and Township of Barton, 15 O. R. 55, where it was held that a by-law which created a future, indefinite, and contingent liability, was invalid. Here there is no liability created by the by-law itself, except to the extent of moneys already provided by the estimates of the current year, and to be expended within the current year, or of moneys already available as the proceeds of debentures issued or to be issued, and which were duly authorized by the vote of the electorate.

Upon all the grounds upon which it has been attacked, the by-law, in my opinion, is unexceptionable. It follows that the plaintiff's action fails and must be dismissed, and I see no reason why costs should not follow the event.

DECEMBER 28TH, 1908.

DIVISIONAL COURT.

REX v. LEACH.

REX v. FOGARTY.

Costs—Motion to Quash Conviction under Provincial Act and to Discharge Prisoner—Dismissal of Motion—Power of Court to Award Costs to Crown—Costs of Motion to Vary Minutes of Order Dismissing Original Motion.

Motion by defendant to vary the minutes of the orders made in these two cases, 12 O. W. R. 1016, 1026, by omitting the direction as to costs—that is, that the motions by the defendants to quash the convictions and for the discharge of the defendants should be dismissed with costs.

The motion was heard by FALCONBRIDGE, C.J., BRITTON, J., RIDDELL, J.

J. B. Mackenzie, for defendant.

J. R. Cartwright, K.C., for the Crown.

BRITTON, J.:—The question raised by Mr. Mackenzie as to the jurisdiction of the Court to award costs to the Crown in cases of this kind is an important one, and he was quite right in calling the attention of the Court to the matter and to the cases cited by him. After a careful reading of these cases and others, I do not think they warrant the conclusion that an application for the discharge of a prisoner convicted under an Ontario statute, even if the prisoner is brought up on habeas corpus, is a criminal matter, within the meaning of sec. 191 of the Judicature Act, so as to exclude jurisdiction of the High Court of Justice to award costs.

It was conceded by Mr. Mackenzie that in habeas corpus proceedings for bringing up the body of an infant there is power to award costs—that costs are in the discretion of a Court or Judge. The case of Re Weatherall, 1 O. L. R. 542, so decides. Where there is not clear legislative prohibition as to the power of the Court to award costs, there is "inher-

ent jurisdiction to order him to pay the costs of wrongly putting the Court in motion:" Pringle v. Secretary of State, 40 Ch. D. 288. Where the conviction is for a penalty imposed by or for an offence created by provincial legislation, there is power in the High Court to give costs: Rex v. Bennett, 4 O. L. R. 205, 1 O. W. R. 360; Regina v. Justices of County of London, [1894] 1 Q. B. 453. . .

This motion to vary should be dismissed.

Speaking for myself, I do not feel at liberty to blame a person in custody for an attempt by an application to the Court to get his liberty—even if his application is made on what may be called technical grounds, and even if unsuccessful.

No one should be imprisoned or detained in prison, either awaiting trial or under sentence, unless upon proper evidence and where due form of law has been complied with.

The argument now made as to the power of the Court to award costs should have been presented with and as part of the argument on the main motion for discharge of prisoner, but, although not presented then, the prisoner should not, in my opinion, be made to pay the further penalty of costs of application to vary minutes.

The motion should be dismissed without costs.

FALCONBRIDGE, C.J.:—I agree in dismissing this motion without costs.

RIDDELL, J., for reasons stated in writing, agreed that the motion should be dismissed, and was of opinion that it should be dismissed with costs.

DECEMBER 26TH, 1908.

DIVISIONAL COURT.

RE WALTON.

Will—Construction—Vested Estates Subject to be Divested—Period of Ascertainment of Class—Unborn Children—Persons Interested—Representation—Parties.

Appeal by applicants from an order of ANGLIN, J., in the Weekly Court (31st October, 1908), upon an originating

notice under Rule 938, declaring that, upon the true construction of the will of John Walton, the interests of the children of Thompson Walton in the estate were vested, subject to be divested as to each child in the event of his death without issue prior to the period fixed for conveyance to such child, which is when the widow dies or marries or when he attains majority, whichever event last happens.

W. A. Skeans, for the appellants.

M. C. Cameron, for the official guardian.

The judgment of the Court (BOYD, C., MAGEE, J., LATCHFORD, J.), was delivered by

BOYD, C.:—It is not right to attempt to dispose of the matters argued upon this will without having other interests represented, e.g., the wife of Thompson, the possible future children of the existing marriage of Thompson and wife, and the possible claimants in case of the death of any of the Thompson children without children.

As the matter now stands, we think that, whatever may be the estate of the possible widow of Thompson, whether terminable when the youngest child attains majority or not—though, as at present advised, we think that her interest would then terminate—and whatever may be the proper view to take as to when Thompson's children as a class are to be ascertained—whether now, or when the first child attained majority, or at the death of Thompson, i.e., whether after-born children are to be included or not—it is not possible to declare that each child who attains 21 is seised of vested estate; he has an estate, but subject to be divested in case he dies without children before the period fixed for the absolute conveyance—which is when the youngest attains majority. There is no completely vested estate contemplated or provided for till that time, when one conveyance is to be made to all entitled as "tenants in common."

The order of Mr. Justice Anglin should be varied to conform with this judgment, if the parties desire to take out any order. The infants should get costs out of the estate, but not the others.

DECEMBER 29TH, 1908.

DIVISIONAL COURT.

ELLIOTT v. CITY OF ST. CATHARINES..

Municipal Corporations—Local Improvement By-law—Construction of Sewer—Two-thirds Vote in City Council—Property Interest of Alderman—Interest as Ratepayer—Disqualification—Injunction.

Appeal by the defendants from the judgment of ANGLIN, J., 12 O. W. R. 653, by which it was declared that a certain by-law for the construction of a sewer was not validly or legally passed by the council of the corporation, and the defendants were perpetually restrained from constructing the sewer under the authority of the by-law.

C. H. Connor, St. Catharines, for defendants.

M. Brennan, St. Catharines, for plaintiff.

The judgment of the Court (MEREDITH, C.J., MACMAHON, J., TEETZEL, J.), was delivered by

MEREDITH, C.J.:—The by-law is a local improvement one and is attacked by the plaintiff, suing as a ratepayer on behalf of himself and all other ratepayers, on the ground that it was promoted by one McBride, a member of the council who was a property owner to be benefited by the sewer; that it was finally passed at a meeting of the council, 7 members voting for its adoption, of whom McBride was one; and that, by reason of his interest, he was disqualified from voting; and that it was therefore not validly passed, a two-thirds vote of the members of the council, which was composed of 10 members, being required to pass it.

My brother Anglin was of opinion that McBride, by reason of the circumstances I have mentioned, was disqualified from voting on the motion to adopt the by-law, and that the by-law was therefore not duly passed.

My learned brother, in reaching this conclusion, followed, as he said, L'Abbe v. Corporation of Blind River, 7 O. L. R. 230, 3 O. W. R. 162, which he treated as conclusive in the plaintiff's favour, and he also referred to Re Baird and Corporation of Almonte, 41 U. C. R. 415, and Re Vashon and Corporation of East Hawkesbury, 30 C. P. 194.

Re McLean and Township of Ops, 45 U. C. R. 325, is not referred to, and it was said upon the argument before us was not cited on the argument before my brother Anglin. In that case the motion was to quash a drainage by-law, and one of the objections to it was similar to that raised in the case at bar. There the allegation of the applicant was that the by-law was carried by the vote and influence of one Fitzpatrick, a member of the council, and affidavits were filed shewing that he had been for years an active supporter and promoter of the proposed drainage, that he and his brother owned some of the land proposed to be drained, and that he had a large pecuniary interest in the proposed drainage, and that he and his brother would have to pay from one-fourteenth to one-sixth of the assessment imposed by the by-law. The Vashon and Baird cases were both cited, but the Court refused to quash the by-law, holding that no interest can disqualify a councillor or a member of a Court of Revision from performing his duties as such that spring solely from his being a ratepayer in the municipality, and that Fitzpatrick had no other interest but such as sprang from being a ratepayer in the municipality to be benefited and in the locality to be drained.

The principle of that decision is clearly applicable to the case at bar, and the judgment appealed from cannot be supported without overruling that decision.

In the Vashon case, the by-law was one for closing a road, and the only persons interested in the maintenance or closing of it were the applicant and the member of the council who was instrumental in having it passed, and by whose vote it was carried in council. In delivering the judgment of the Court, Osler, J., said that the case "was quite distinguishable from one where the motives merely of the member of the council are in question, or where, though he is personally interested, his interest is not different from that of the community in general, e.g., the imposition of a tax rate:" p. 203. The by-law was held to be objectionable on the further ground "that it was passed to serve private interests, and not bona fide in the interest of the public."

In the Baird case the question was as to the validity of a by-law to grant a bonus to a manufacturing company proposed by a council consisting of 5 members, of whom 4 were shareholders in the company. The by-law was quashed because of the provisions of sec. 75 of the Municipal Act (36 Vict. ch. 48), which prohibit a shareholder from voting on

any question affecting his company. Section 75 deals not with by-laws, but with contracts with or on behalf of a corporation, and it was held that the granting of a bonus came within it.

In the L'Abbe case, the distinction pointed out in the Vashon case, to which I have referred, was recognized (p. 237). The by-law was one for reducing the number of licenses in the municipality, and it was quashed on the ground that the reeve, by whose casting vote the by-law was adopted, was mortgagee of one of the properties likely to be affected by it, and therefore disqualified from voting.

The result of these cases is that there is a consensus of opinion that where the personal or pecuniary interest of the member is that of a ratepayer in common with other ratepayers, or, as put by Osler, J., "where, though he is personally interested, his interest is not different from that of the community in general," the member is not disqualified.

The community of interest spoken of, I understand to be a community in the kind, not in the degree, of the interest.

It remains to be considered whether this rule is applicable, as was held in the McLean case, where the community of interest is not between all the ratepayers but between all the ratepayers to be affected by the by-law, as is the case where the by-law is a drainage by-law, or where, as in the case at bar, it is a local improvement by-law.

I see no reason for differing from the view taken in the McLean case. As I view it, the principle upon which the rule is founded is the same whether the by-law is one affecting all the ratepayers of the municipality or only those within a section of it.

The principle would be clearly applicable if the by-law in question provided for the work being done and the cost of it provided out of the general funds of the municipality, as it would be in the case of a by-law for undertaking any other work the cost of which is to be provided out of the general funds; and I am unable to see any reason why the principle should not be applied where the same work is being done under the local improvement provisions of the Municipal Act, or under the Drainage Act, where part of the cost is borne by the owners of the property benefited by the work and part by the municipality at large; and it was so applied in Steckert v. East Saginaw, 22 Mich. 104, referred to by Osler, J., in the Vashon case, where the question arose as to a local improvement, and the action of the common council

was attacked on the ground that two of the aldermen were petitioners for the work and owners of property liable to assessment therefor, and the judgment of the Court was delivered by a distinguished jurist (Cooley, J.)

In Buffington v. Burnham, 60 Iowa 493, the Supreme Court of Iowa held that a member of a city council, a rule of which forbade members to vote upon questions in which they were directly interested, was disqualified from voting in favour of an ordinance authorizing a number of firms to build a side-track from a railway, and distinguished the case of voting upon an ordinance relating to the building of streets and constructing sewers, Beck, J., in delivering the judgment of the Court, saying: "But the cases supposed by counsel are very different from the one before us. In constructing streets and sewers, in the usual manner, all the people of the city, or, at least, all in the vicinity of the work, are interested alike. They are never built, or should never be built for the profit of an individual, with incidental benefits to the public:" p. 496.

In City of Topeka v. Huntoon, 46 Kansas 634, Steckert v. East Saginaw was cited with approval, and it was said that the pecuniary interest to disqualify in the case of a member of a council must be adverse to the municipality.

Steckert v. East Saginaw was also approved by the Supreme Court of New York, in Goff v. Nolan, 62 How. P. R. (N.Y.) 323.

The rule is thus stated in the Cyclopædia of Law and Procedure, vol. 28, p. 337: "There is a general rule of law that no member of a governing body shall vote on any question involving . . . his pecuniary interest, if that be immediate, particular, and distinct from the public interest."

In my opinion, the McLean case was rightly decided, and it follows that the judgment appealed from should be reversed and judgment entered dismissing the action.

The plaintiff should pay the costs of the appeal and of the action, including the costs of the injunction motion.

DECEMBER 29TH, 1908.

DIVISIONAL COURT.

MORGAN v. McFEE.

Contract—Release of Liability as Member of Syndicate—Consideration — Withdrawal of Charge of Obtaining Money by False Pretences—Illegal Consideration—Public Crime—Public Policy.

Appeal by plaintiff from judgment of MACMAHON, J., at the trial, dismissing an action brought to obtain a declaration that the plaintiff had ceased to be a member of a certain syndicate, and that defendants were bound to indemnify him against the liabilities of the syndicate.

The appeal was heard by FALCONBRIDGE, C.J., BRITTON, J., RIDDELL, J.

W. N. Tilley, for plaintiff.

A. Weir, Sarnia, for defendant Telford.

J. H. Spence, for the other defendants.

RIDDELL, J.:—The statement of claim alleges that one Oliver was engaged in organizing a syndicate with the intention of ultimately forming a company to acquire certain patents of invention; that Oliver and the defendant Gates induced the plaintiff to sign an agreement to pay $50 for a share in this syndicate, and to pay $10 on account thereof; that the plaintiff laid an information before the police magistrate for the town of Sarnia charging Oliver with obtaining from the plaintiff the said sum of $10 by false pretences and with intent to defraud; that the case came on for hearing before the police magistrate, and, pending the giving of evidence, Oliver asked for an adjournment, which was granted by the police magistrate; that during the adjournment the plaintiff and the defendants entered into an agreement that the plaintiff should drop out of the syndicate and forfeit the $10 he had paid, and the defendants would, in consideration thereof, indemnify the plaintiff against all the liabilities of the syndicate; that the county Crown attorney at the conclusion of the adjournment stated to the police magistrate that the parties had agreed as above, and thereupon the proceedings before the police magistrate were, by

the direction of the police magistrate, dropped; that one Richardson commenced an action against "the above named defendant" in respect of a liability of the syndicate, and the defendants procured the plaintiff in this action to be added as a defendant in that; and plaintiff claims a declaration that he has ceased to be a member of the syndicate, and that the defendants are bound to indemnify him against the liabilities of the syndicate.

At the trial before my brother MacMahon, the plaintiff gave this account of what took place before, at, and after the adjournment:—

"Q. Now, as that trial proceeded, was there any settlement of the matters as between anybody and yourself? A. Yes, sir; the case was adjourned for a few minutes so that we might talk the matter over.

"Q. Who was there? A. The secretary and treasurer, that is, Mr. Gates and Mr. Giffin.

"Q. Was there anybody else? A. That is all I remember just now, but I will swear those were there, and there were others there that I don't remember.

"Q. Now, what was done between you and these defendants who were there? A. The police magistrate adjourned the case so that we might consult; there was Mr. Gates and Mr. Giffin and myself, and we retired to the chief of police's room and discussed the matter there.

"Q. Who else was there? A. Mr. Buck, the county Crown attorney; and Mr. Price.

"Q. What took place? A. They wanted to know what I would take and to be released.

"Q. What was done then? A. They wanted to know what I would do and release the defendant Oliver altogether, drop the case, withdraw the charge against him. I wanted that they should pay me back the $20 of stock that I had paid in, and that I would release or withdraw the charge, and they give me a release. They demurred at that. I wanted them to give me a release from all liability in the company. At last they gave me an offer that if I would step out of the company as I stood, they would give me a clear release, and they would have no claim on me for anything at all, that they would release me from all obligation in the matter, and Mr. Price was to draw up a release, and I was to call in the next day, or whenever it was convenient, and he would hand it to me. I called in several times for the release, but failed to get it.

"His Lordship: Q. Did the police court proceedings stop? A. Yes, sir, they were withdrawn."

The learned trial Judge, at the close of the plaintiff's case, held that the agreement was that the charge should be withdrawn, on condition that the defendants should pay the liabilities of the syndicate, and proceeded: "That was compounding a felony. It is, of course, against public policy in all cases where a charge is made involving the public interest, that the prosecution should be dropped by the parties entering into such an agreement, and any contract founded on such an agreement is an absolute nullity. I therefore find that the action fails and must be dismissed."

The plaintiff now appeals.

With the learned Judge's finding of fact the plaintiff, at least, cannot quarrel, and, in the view I take of the case, I do not think the error, if there be an error, in finding that the defendants agreed, without distinguishing the defendants present at the conference from those who were absent, need be considered.

But the plaintiff says the decision is wrong, as the offence charged was not a felony, and, being at worst a misdemeanour, it could be compromised or "dropped" as it was.

The statement that this was compounding a felony is, of course, the merest inadvertence. Obtaining money by false pretences never was a felony in our law, or in the law of England, from which our law is taken: R. S. C. 1886 ch. 164, sec. 77; Russell on Crimes, vol. 2, p. 524. And the like common law offences were also misdemeanours, not felonies: Russell, vol. 2, bk. iv., ch. 32, pp. 511 et seq. But the leading case of Keir v. Leeman, 6 Q. B. 308, 9 Q. B. 371, does not draw a line of demarcation between cases of felony and cases of misdemeanour, and say that the latter may be compromised. The Court says, 9 Q. B. at pp. 392, 393: "It seems clear from the various authorities brought before us on the argument that some misdemeanours are of such a nature that a contract to withdraw a prosecution in respect of them, and to consent to give no evidence against the parties accused, is founded on an illegal consideration.' "

In Whitmore v. Farley, 14 Cox C. C. 617, James, L.J., at p. 621, says: "Whether it was a felony or misdemeanour does not matter so far as this case is concerned." Baggallay, L.J., at p. 622: "I am clear that upon the authorities it is immaterial whether the charge attempted to be compromised was a felony or only a misdemeanour. Any

agreement to compound a criminal prosecution for such a public offence (a bailee had disposed of certain securities intrusted to him) is illegal, and it is wholly immaterial that such agreement has received the sanction in Court of the magistrate before whom the charge was brought. The sanction of the magistrate cannot render valid a transaction which would otherwise be illegal." Lush, L.J., says, p. 623: "It is a well established doctrine that an agreement to forego public rights is an illegal agreement. Whether the felony could have been proved here or not, there is no doubt that a criminal charge was laid, and the prosecutrix could not legally withdraw it. The fact that the presiding magistrate consented to the withdrawal of the charge does not make it legal."

Unless the obtaining of money by false pretences is less a public matter—one in which the public is concerned—than that of making away with securities intrusted to one's care, this appeal must fail, and I think to ask the question is to answer it.

But express authority is not wanting. In the well known case of Jones v. Merionethshire, &c., Society, [1891] 1 Ch. 173, at p. 184, Bowen, L.J., says: "It is not possible to deny that embezzlement, like false pretences, is a crime committed against the public as well as against the individual, and in deciding what steps should be taken to punish it, the person who has to deal with the case must, if he is to discharge his moral duty, conscientiously consider the public as well as himself." These golden words should be borne in mind as well by magistrates and Crown attorneys as by private prosecutors who claim that they have been defrauded. I agree with the Lord Justice in the statement that the obtaining of money by false pretences is a crime committed against the public, and, that being so, there was no power to compromise, and the agreement (if any) on the part of the defendants was based upon a consideration in part illegal. The agreement then is against public policy.

The appeal should be dismissed with costs.

FALCONBRIDGE, C.J.: — The learned trial Judge was clearly right in dismissing the action, and the appeal must be dismissed with costs.

BRITTON, J., gave reasons in writing for the same conclusion.

DECEMBER 30TH, 1908.

DIVISIONAL COURT.

BASSETT v. CLARK STANDARD MINING CO.

Mines and Minerals — Award of Mining Commissioner—Jurisdiction—Mines Act, 1906, secs. 119, 132—Licensee—Transferee — Damages — Owner of Surface Rights—Compensation—Demand—Costs—Leave to Appeal.

Appeal by plaintiff from judgment of TEETZEL, J., 12 O. W. R. 584.

The appeal was heard by FALCONBRIDGE, C.J., BRITTON, J., RIDDELL, J.

R. McKay, for plaintiff.

H. D. Gamble, K.C., for defendants.

RIDDELL, J.:—The plaintiff is the owner of the surface rights in certain lands in the township of Bucke. On 4th May, 1905, one Adam J. Clark is said to have discovered valuable mineral upon the said lands, and on 24th May, 1905, he staked out a claim thereon. No negotiations took place between Clark and the plaintiff in respect of compensation under sec. 119 of the Mines Act, nor was there at any time any demand or request made on Clark for compensation. He sold to the defendants—or, at least, the defendants, not being the licensee who staked out the claim, have acquired the rights by Clark by transfer of 14th December, 1906.

On 9th May, 1907, the Mining Commissioner, acting under sec. 119 of the Act, gave an appointment for the purpose of fixing and determining the amount of compensation and the time and manner in which it should be paid or secured; and gave a direction that the appointment should be served upon the defendant company by delivering a copy to their solicitor or secretary.

Upon the return of the appointment counsel appeared for the company, consented to the plaintiff putting in his evidence, and said that two witnesses whom he had expected

had not turned up, but that the defendants could put in evidence afterwards if reasonable time were given. The matter was proceeded with, the plaintiff's witnesses examined and cross-examined by the defendants' counsel, and it was then arranged, as the defendants' witnesses had not turned up, that the matter should be adjourned for two days. At the adjourned appointment the plaintiff appeared, but no one attended for the defendants, and the Commissioner thereupon made his decision: "I have ascertained and determined and I hereby fix and award the compensation which shall be paid by the said the Clark Standard Mining and Developing Company Limited, under sec. 119 of the Mines Act, 1906, for injury and damages which are or may be caused to the surface rights of all and singular (setting out the property) at the sum of $705, which sum I direct to be paid as follows, namely, $305, within 15 days from the date hereof, and the balance before the issue of a patent for the said mining claim. Dated this 30th day of May, 1907."

The patent, we are informed, has not yet issued.

The money not being paid, the plaintiff began this action to recover $305 and interest. A motion for summary judgment was refused by the Master in Chambers (10 O. W. R. 752), and at the trial my brother Teetzel dismissed the action without costs (12 O. W. R. 584.)

The plaintiff now appeals.

The first point to be determined is whether there is any personal liability upon the defendants to pay at all. Mr. Justice Teetzel considered that the statute laid the obligation to pay upon the licensee who staked out the claim, and upon no transferee from him. A perusal and consideration of the statutes have led me to the conclusion that my learned brother is right in this interpretation.

Section 119 it is which imposes the obligation to pay, and that section alone. That section is explicit—"The licensee so staking out shall compensate the owner," etc. At the time of staking out a claim, the licensee so staking becomes liable to pay to the owner of surface rights compensation, to be arrived at in one way or another. This is a personal obligation, and, unless the obligation is removed in some way, by statute or otherwise, it must continue until discharged. I do not think sec. 132, either in the form in which it existed at the time the defendants acquired their rights or as amended, has any effect upon the original obligation, or in attaching to the transferee an obligation

under sec. 119. There is, as I read the Act, no transfer of the obligation now under consideration to the transferee of the rights of the original staking licensee. The closing words of sec. 132 do not refer to the licensee called "another licensee," but to him who is called "a licensee."

Of course, this leads to the conclusion that it would be open for a wealthy licensee to take over discoveries made and staked by an impecunious person in his own name, and, by taking a transfer in this way, be in a better position than if he had been the original discoverer and staking licensee. But, on the other hand, this would prevent a wealthy staking licensee, after doing great damage to the owner of the surface rights, and having perhaps exhausted the mineral, from getting rid of his liability to pay the surface owner by a transfer to a man of straw. I do not find in the Acts anything to indicate that the mere transfer of the rights of the staking licensee operates as a transfer also of the liabilities. And the plaintiff is not in any way assisted by the provisions of sub-sec. 3 of sec. 119, introduced by 7 Edw. VII. ch. 13, sec. 33, which simply gives a lien for the compensation awarded upon any mining rights, at the time of the injury done or begun, of any rights subsequently acquired by, the person against whom the award is made. Before this Act there was no lien; after it, a lien only on the rights of him who was liable. I do not consider whether this Act applies at all—the whole effect is to give a lien, not to affix a personal liability; and a lien does not transfer a personal liability: Quart v. Eager, 12 O. W. R. 735.

Nor is any assistance to be derived from a suggestion that there may be a statutory liability upon one licensee for a part and upon another, his transferee, for another part. Mr. McKay repudiated this proposition, and I think he was right. It would seem that there must be a determination of this compensation once for all: Power v. Griffin, 33 S. C. R. 39. And, in any event, there is the express wording of the statute, impossible to get over.

I am unable to agree with the argument against the jurisdiction of the Court—and, had the defendants otherwise been liable, I do not think that, on the facts of this case, the Commissioner had not jurisdiction.

But the appeal must be dismissed, upon the one ground—and with costs.

The case involves a question of the utmost importance to a large class of property-owners, and this question should,

I think, he decided by our highest provincial Court. The plaintiff should have leave to appeal, if so advised, under 4 Edw. VII. ch. 11, sec. 2.

FALCONBRIDGE, C.J.:—I am of the opinion (although not entirely without doubt) that my brother Teetzel's judgment is right, and ought to be affirmed.

The appeal will be dismissed with costs. Plaintiff to have leave to appeal, if so advised.

BRITTON, J., for reasons stated in writing, agreed that the appeal should be dismissed, but was of opinion that there should be no costs.

FALCONBRIDGE, C.J. DECEMBER 31ST, 1908.

TRIAL.

MARTIN v. HOPKINS.

Mortgage—Power of Sale—Exercise of, by Reason of Interest Overdue—Payment of Interest—Application of Payment—Question of Fact—Action to Restrain Proceedings—Costs.

Action to restrain the defendant from proceeding to exercise the power of sale contained in a mortgage deed.

R. J. McLaughlin, K.C., and F. A. McDiarmid, Lindsay, for plaintiffs.

T. Stewart, Lindsay, and L. V. O'Connor, Lindsay, for defendant.

FALCONBRIDGE, C.J.:—Defendant is the holder of a first mortgage made by one Corscadden on certain real estate in Lindsay. The plaintiff Begg is the holder of a second mortgage on said lands. The plaintiff Martin is, subject to said mortgages, the owner of said lands in the capacity of assignee for the benefit of creditors of the said mortgagor.

At the time that the said second mortgage was made to Begg, there was overdue on defendant's mortgage the sum of $67.50 for interest, and Begg claims to have paid through his solicitors that sum to the defendant. The defendant denies that such sum was paid to him, and claims the right to proceed to exercise the power of sale under his mortgage. The solicitor for Begg (Knight) swears that he obtained

from Miss Woods, stenographer and bookkeeper in defendant's office, particulars of the claim, and that there was the sum of $67.50 due on defendant's mortgage for interest from 1st March. This was about 14th March. He also swears that he told the defendant, in his, defendant's, office, that Begg was making the loan, and would not advance the money until defendant's interest was paid, and that he, Knight, was going to send defendant the cheque for the interest, which he did within an hour. Defendant swears positively that no such conversation took place. I may say here that I should have great difficulty as regards this and other matters where there is conflict of testimony. I should experience much doubt and hesitation in deciding which of these two men is telling the truth. They are both members of the legal profession, and, so far as I know, of equal standing in the community; and I cannot report that the demeanour of either one in the box was better than that of the other. I think, however, that the case can be disposed of on other grounds.

What happened then was that Knight at his office wrote two cheques as follows:—

"No. 2607

"Lindsay, Ont., Mar. 16, 1908.

"To the Bank of Montreal,

"Pay to Mr. G. H. Hopkins or order

"Sixty-seven 50-100

"re Corscadden & Mullen.

"$67.50

"Weldon & Knight,
in trust.

"By L. R. Knight."

"No. 2608.

"Lindsay, Ont., Mar. 16th, 1908.

"To the Bank of Montreal,

"Pay to Messrs. Corscadden & Mullen or order

"Two hundred and eighteen 85-100

"re Begg.

"$218.85.

"Weldon & Knight,
in trust.

"By L. R. Knight."

The difference between the sum total of these two cheques and the $300 advanced represented the solicitors' and other charges for making the loan. Knight intrusted these two cheques to Corscadden on 16th March, telling him that the cheque for $67.50 was to be given to defendant to pay the interest. Corscadden went over to defendant's office, accompanied by his partner, one Mullen, who swears that Corscadden handed the cheques to defendant and told him the $67.50 was for the interest on the mortgage, and the other cheque was to be applied on Corran's note (a note on which Corscadden was liable, and which was held by defendant for collection for the Bank of Montreal.) Defendant denies that any question was raised about the mortgage; says he was busy and hurried, and he gave them a receipt for the two cheques on account of the Bank of Montreal's claim, credited it and paid it to the Bank of Montreal.

When he was examined for discovery, he said: "Q. 65. Mr. Corscadden said, 'Here's a cheque for the interest on your mortgage?' A. I won't say Mr. Corscadden said 'here's' anything. Q. 66. You swear that he didn't say that? A. Well, I won't say that he did or he didn't. Q. 67. Did you inquire then why they should have a cheque from Weldon & Knight made payable to you particularly? A. No, I didn't. Q. 68. Didn't it strike you as being strange? A. Not particularly. Q. 69. Why? A. Because oftentimes you get cheques from people that way on account of claims, and I give them myself. Q. 70. Well, their coming to see you with two cheques? A. Well, there was nothing to occasion me to inquire. Q. 71. Will you swear positively that Mr. Corscadden didn't say that the cheque for $67.50 was on account of this interest? A. I will swear that I didn't understand so. I only know what I say—I didn't understand so."

Begg's instructions to Knight and Knight's instructions to Corscadden were that defendant's interest should be paid. Corscadden was out of the country, and was not called as a witness.

The position then is, that Corscadden, the mortgagor, was intrusted with a cheque payable to defendant's own order, for a specific purpose. Mr. McLaughlin endeavoured to apply the principle of the purchase of a chattel (not in market overt), which is subject as a general rule to what may turn out to be infirmities in the title: Cundy v. Bevington, 3 App. Cas. 459. This principle has no applica-

tion to the case of money; but still it is to be borne in mind that neither is this the case of dealing with bank notes, which pass by mere delivery. I think there was a duty cast upon the defendant at least to make inquiry as to the reason for Knight issuing two cheques instead of one, and for making that cheque payable to him personally. He knew or must be taken to have known all about his own mortgage, and that the interest thereon was some days overdue. He admitted in his evidence before me that he knew the mortgagor was getting the money from Knight's firm on a loan, and that he did not know any other real estate owned by Corscadden or his partner. I am of the opinion, therefore, that, under these circumstances, the payment must be deemed to have been made for that overdue interest, and it should have been so applied.

The contention was presented in the pleadings and before me in argument that a few cents would be due by way of compound interest between 1st and 16th March. I do not consider this a case of strict tender, because if defendant had applied the cheque for $67.50 as an inquiry on his part would have shewn him he should have done, the few cents, if demanded, for compound interest, would have been promptly forthcoming.

I think, therefore, that plaintiffs are entitled to succeed. It is a most lamentable litigation, in which there is apparently great personal feeling between Knight and Hopkins. The former considers himself bound to protect his clients, and the suit is in fact his. I think that Knight should have accepted Hopkins's reasonable offer to let the sale go on, and, if any loss should ensue, to settle the matter in the Division Court. Knight was guilty of great laxity of practice in intrusting the cheque to the mortgagor to deliver without at least underwriting it more specifically. And I, therefore, while I give judgment for plaintiffs with costs, direct those costs to be limited to the plaintiffs' actual disbursements out of pocket only.

DECEMBER 31ST, 1908.

DIVISIONAL COURT.

UTTERSON LUMBER CO. v. H. W. PETRIE LIMITED.

Sale of Goods — Conditional Sale—Default in Payment of Price—Repossession by Vendor—Contract of Sale—Construction—Judgment Recovered against Vendee—Merger —Election to Treat Contract as Absolute Sale—Laches—Conditional Sales Act—Conversion.

Appeal by plaintiffs from judgment of Judge of District Court of Muskoka dismissing an action for conversion of a shingle machine.

W. E. Raney, K.C., for plaintiffs.

H. E. Rose, K.C., for defendants.

The judgment of the Court (MULOCK, C.J., ANGLIN, J., CLUTE, J.), was delivered by

MULOCK, C.J.:—One H. W. Petrie (whose rights are now vested in the defendant company) supplied to one Bird certain mill machinery, on the terms contained in a written order given by Bird to Petrie, bearing date 16th September, 1905, the material provisions of which are in the following words:—

"Toronto, September 16th, 1905.

"H. W. Petrie, Toronto.

"Please ship to my address . . . one Drake shingle mill, terms $200, $20 cash, $30 in 30 days, balance 3, 6, and 9 months, with 6 per cent. interest, and I hereby agree that if the above machinery . . . shall not be settled for by cash and notes according to said terms within 20 days after date of shipment, or, if default shall be made in any cash payment or note, then the whole amount shall become due, and I, for value received, promise to pay the same on demand.

"And I further agree not to countermand this order, and until payment in full of the purchase money the said machinery and goods shall be at my own risk, and I will insure in your favour for amount sufficient at all times to

cover your interest therein, and upon demand will assign and deliver to you the policy of insurance, and, should I fail to do so within 10 days after receipt of goods, you are at liberty and are hereby instructed to insure them as per this agreement, and the charges and costs for so insuring them shall become part of this indebtedness and be added to the first cash payment, and the title in the said machinery and goods . . . shall not pass from you until all the dues, terms, and conditions of this order . . . shall have been duly complied with by me, and until all moneys payable and notes given under this order . . . have been fully paid and satisfied, and I will not sell or remove any of the said machinery or goods from my premises without your consent in writing so to do, and in case of default of the payments or provisions of this order . . . and without affecting my liability for purchase money . . . you are at liberty with or without process of law to enter upon my premises and take down and remove the said machinery and goods . . . and I hereby agree to deliver the said machinery and goods to you in like condition as received, subject to wear and tear . . . and you after such removal may without notice to me sell said machinery and goods at such prices as, in your judgment, are advisable, and credit me with same . . . and I agree to pay to you forthwith the deficiency, if any, arising after such sale. . . .

"And I hereby declare . . . that any note or notes or other security given by me to you for any indebtedness under this" (order), "or any part thereof, shall be collateral thereto, and that all payments made by me to you shall be applied as you desire. . . .

"J. M. Bird."

On the terms contained in this order Petrie shipped the machinery in question to Bird, who installed it in his lumber mill, and on 10th October, 1906, sold the mill, including machinery, to Messrs. Martin, who, on 19th March, 1907, sold the same to plaintiffs.

On 18th February, 1908, the defendants removed the machinery in question from the mill of the plaintiffs, whereupon the latter brought this action for damages because of wrongful removal.

In justification of their action, the defendants say that, at the time of their taking possession of the machinery, there was overdue and unpaid for purchase money the sum of

$174, whereby, and by reason of the terms of the order, they were entitled to resume possession.

Before taking possession, the defendants recovered judgment against Bird, and on the appeal before us counsel made the following admissions: (1) that the judgment recovered by Petrie against Bird was for the amount due by Bird under the contract; and (2) that, at the time of the seizure of the machine, money was due to the vendor under the contract, and was still due.

Plaintiffs' counsel attacked the judgment in this action on the following grounds: (1) that the action of the defendants in recovering judgment before seizure worked a merger whereby the original indebtedness of Bird ceased to exist, and, consequently, the defendants lost their right to resume possession of the machine, and the property in it thus passed to the plaintiffs; (2) that in suing for and obtaining judgment for the purchase money the defendants had elected to treat the transaction as an absolute sale; and (3) that the defendants had been guilty of such laches in resuming possession as to disentitle them as against the plaintiffs to seize the machine.

As to the question of merger, the transaction was one creating an indebtedness by Bird to Petrie, for collaterally securing which the latter retained the property in certain goods, to which he was, in certain contingencies, entitled to resort. Recovery of judgment is not payment of the indebtedness. Its simple contract character has disappeared, and it has become a debt of record. To that extent only has there been a merger, but the original indebtedness still exists, and until payment the defendant is entitled to retain his collateral security: Houlditch v. Desonges, 2 Stark. 339; Scrivener v. Great Northern R. W. Co., 19 W. R. 388. I therefore am unable to give effect to Mr. Raney's first objection.

As to the second, that the defendants in recovering judgment for the whole unpaid purchase money had elected to treat the case as one of actual sale, thus waiving his collateral security, McIntyre v. Crossley, [1895] A. C. 457, is relied upon, particularly the observations of Lord Herschell, L.C., at p. 464: "If the instalments are not paid as provided for, or if the hirer or intended purchaser, or whatever he may be called, becomes bankrupt, then there is a provision in the agreement as to what shall happen. Messrs. Crossley may in that case elect to sue for the remainder of

the instalments, to treat all of them as at once payable, and sue for them: No doubt, if they take that course, they elect to have the purchase then completed. They could not sue for the purchase money and insist that the property in the goods, the price of which they were suing for, had not passed. But that is merely one of certain alternative courses which are open to Messrs. Crossley."

These observations are not to be construed as laying down the unqualified proposition that in all cases of conditional sales of chattels, where it is a term "that the property shall not pass until payment, nevertheless it shall pass if the vendors elect to sue for the purchase money—but are merely a judicial interpretation of the terms of the special agreement entered into by the parties to that action, one of which was, not that the vendors might sue for the purchase money and at the same time recover possession of the chattel, but that they might do one of two things, at their election, namely, call in and sue for the whole of the unpaid purchase money, or "instead of seeking to recover such balance, may, if they think fit, seize and resume absolute possession," etc.

Here the terms of the agreement between the parties are different, and in case of Bird's default the defendant is not, by the terms of the contract, put to his election, but is left in the full enjoyment of the right to demand payment of the purchase money, and until payment to resume possession. If the general proposition contended for by Mr. Raney were the law, then, were a vendor to resume possession and thereafter sue for the whole purchase money, the right to possession would at once be lost, and the property in the chattel would at once pass to the purchaser. But this result would be contrary to the express agreement of the parties, which provides that "the title . . . shall not pass . . . until all moneys payable . . . have been fully paid . . . and in case of default of any of the payments . . . and without affecting my liability for purchase money . . . you are at liberty . . . to remove the said machinery," etc.

Thus it is expressly agreed between the parties that the defendants might resume possession without affecting Bird's liability for the purchase money, that is, the vendor was to be entitled to possession until payment of the purchase money. For these reasons, McIntyre v. Crossley has, in my opinion, no application, and the second objection fails.

As to the question of laches, it appears that, in respect of the machine in question, Petrie complied with the provisions of sec. 1 of R. S. O. 1897 ch. 149, "An Act respecting Conditional Sales of Chattels," by having affixed to the machine a stamp bearing his name and address. This was notice to the world of his title to the chattel, and, so long as it remained so affixed, nothing more happening, it was a continuous assertion of title in Petrie, and preserved his rights.

There is no evidence of conduct on the part of Petrie or of the defendant company doing away with the effect given by the statute to compliance with its provisions. What is laches being a question of fact, and here there being no evidence whatever of laches, but, on the contrary, evidence wholly disproving laches, the third ground of appeal fails.

Appeal dismissed with costs.