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COURT OF APPEAL.

NOVEMBER 4TH, 1911.

*RE CITY OF WEST TORONTO AND TORONTO R.W. CO.

Street Railways—Agreement with Municipality—Construction—Repair and Renewal of Tracks—"Construct"—Dangerous Condition of Tracks—Ontario Railway Act, 1906, *sec.* 164—*Ontario Railway and Municipal Board Amendment Act*, 1910—*Application to Proceedings Pending when Passed—Order of Board—Jurisdiction.*

Appeal by the Toronto Railway Company from an order of the Ontario Railway and Municipal Board of the 8th August, 1910, requiring the appellants forthwith to repair, renew, and restore to a suitable and satisfactory condition the tracks and substructure in use upon that portion of Dundas street between the easterly limit of the former city of West Toronto and the westerly limit of Keele street north of Dundas street, and on Dundas street west of Keele street, over which the appellants were operating their cars.

The appeal was heard by MOSS, C.J.O., GARROW, MACLAREN, MAGEE, JJ.A., and MIDDLETON, J.

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

H. L. Drayton, K.C., for the respondents.

The judgment of the Court was delivered by GARROW, J.A.:—The only question involved is as to the jurisdiction or power of the Board to make the order complained of. We have, of course, nothing to do with the merits. . . .

[Reference to the Ontario Railway and Municipal Board Act, 1906, secs. 63(1), 64; to the agreement between the Corporation of the Town of Toronto Junction and the Toronto Suburban

*To be reported in the Ontario Law Reports.

Street Railway Company, dated the 11th November, 1899, and validated and confirmed by 63 Vict. ch. 103, schedule B; and to the agreement between the Corporation of the Town of Toronto Junction, the Toronto Railway Company, and the Toronto Suburban Railway Company, dated the 8th October, 1899, and validated and confirmed by the same statute, schedule D.]

The track is old and worn and is out of repair and has become unsafe and dangerous. . . . The appellants admit that the track is unsafe, but say that they are under no obligation to repair. . . . .

One of the appellants' main contentions was, that there was no jurisdiction or power to make the order in the absence from the record of the Toronto Suburban Street Railway Company; but, while in some respects it would have been more satisfactory to have had that company also served and represented upon the application, the failure to do so is not, in my opinion, fatal. The appellants, it is reasonably clear from a perusal of the agreement, were intended to be substituted for and to assume the obligations of the Toronto Suburban Street Railway Company in respect of that portion of the latter's line of railway covered by the agreements; indeed, it is only to the appellants that the extended franchise was granted by the corporation, and not to both companies. And if, as between themselves, the appellants are entitled to any relief over against the other company, the right to such relief will not be prejudiced by the order.

The duty to maintain and repair the track or line of railway is unfortunately not clearly expressed in the agreement, although there can be no reasonable doubt, reading the whole, where such duty was intended to lie . . . upon the operating company, and certainly in no sense upon the corporation.

Clause 12 of the first agreement, chiefly relied on by the respondents, is somewhat halting. "Construct" is a proper word to use when a line of railway is to be built; but, once it is built, as this was when the agreement was made, it is not easy to give it at least its primary meaning. And yet it clearly must have been intended to mean something important in furtherance of the purposes of the agreement. And, after much consideration, the only reasonable meaning I can conceive of, as applied to the circumstances, is "construct from time to time," or, in other words, "construct and maintain," which construction, if I am right, is sufficient for the respondents' purposes, and does, I believe, no violence to either the intention or the language which the parties have used. The clause even seems, by its terms, to anticipate not merely original construction, but necessary reconstruction,

for it says, " . . . shall construct . . . according to the best modern practice from time to time in general use," etc. Such language, confined to original construction only, would be, I think, quite inappropriate.

But the matter does not entirely rest upon the obligations contained in the agreements between the parties. The railway is a street railway within sec. 2(21) of the Ontario Railway Act, 1909; and sec. 164, which provides for the case of a railway becoming dangerous from lack of repairs or renewals, expressly applies to street railways. The Board, after the present proceedings began, as appears in the judgment of the Chairman, directed its own engineer to make an inspection and report as required by that section; and upon that, as well as upon the evidence adduced on the subsequent hearing, the order was based. Power to deal with such a situation, that is, of danger to the public using the railway, is not necessarily based upon an agreement between the municipality and the railway company, but is clearly intended to be invoked for the protection of the public, any member of which may be the complainant. And, in addition, it is not, I think, beyond question that the Ontario Railway and Municipal Board Amendment Act, 1910, passed while the proceedings were pending, but before the hearing, under which the powers of the Board were considerably enlarged, does not apply. By sec. 7, secs. 2, 3, 5, and 6 are made applicable to street railways. And by sec. 2 the Board is empowered to act after hearing, either upon a complaint, or upon its own motion. The effect seems to be to modify the general rule that pending proceedings are not to be affected by new legislation unless that intention clearly appears. And, as significant of such an intention, in addition to the new power given to act upon its own motion, sec. 65 of the Ontario and Municipal Board Act, 1906, which declared that the Act should not affect any action or other proceeding pending when the Act came into force, is, by sec. 8, repealed.

Upon the whole, I am clearly of the opinion that the Board had power and jurisdiction to make the order, and that this appeal should be dismissed with costs.

NOVEMBER 4TH, 1911.

*RE MCALLISTER.

Will—Construction—"Trustee of his Heirs"—Heirs of Living Person—Legal Estate for Life—Equitable Estate in Remainder—Contingent Remainder—Rule in Shelley's Case.

Appeal by Harmon McAllister from the order of a Divisional Court, 24 O.L.R. 1, affirming the order of RIDDELL, J., declaring the construction of the will of John James McAllister, deceased.

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

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

I. F. Hellmuth, K.C., for the respondents.

MOSS, C.J.O.:—. . . For the most part the will is couched in language quite sufficiently appropriate and accurate to express in intelligible fashion the testator's intentions and wishes. But, in the concluding sentence of the 4th clause, the draftsman appears to have lapsed into language which, when contrasted with the rest, appears loose and vague. Whatever may have been the testator's intention, in penning it there is a failure to give clear expression to that intention. It almost seems as if it was an afterthought, written by some one, perhaps the testator himself, not skilled in the expression of testamentary desires. The introduction of this sentence has given rise to the whole difficulty. The provisions and directions in the other parts of the will are clear and intelligible. The testator was, it appears, possessed of both real and personal property, and he gave his wife an estate for life in the whole, with certain directions as to the application of some of the funds, and as to sale of the real estate in the discretion of his executors. The remainder expectant upon the termination of his wife's life estate was still to be disposed of, and this was dealt with by the 4th clause, as follows: "Upon the death of my said wife, I give devise and bequeath all my real and personal property whatsoever and wheresoever situate, including the principal money of the proceeds of my real estate (should it be sold) and of the said life insurance or all such stocks, bonds, or securities, should the estate be sold and invested as provided under clause 3 of this will, to my three

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children, Harmon, John, and Sarah Annie Greer, share and share alike . . . ." Up to this point there is no want of certainty, nor is there any difficulty in gathering the meaning of the language. But then comes the following: "Subject nevertheless as to the share therein of my son Harmon, that he shall hold the same as trustee of his heirs and use the income as he may see fit, and that he shall not be accountable for the expenditure of such income, but that it shall be left entirely to his judgment and discretion."

The difficulty is to ascertain the nature and extent of the limitation thus expressed with regard to the interest given to Harmon McAllister in the one-third share of the testator's estate.

As has been frequently said, the first duty of the Court in expounding a will is to ascertain what is the meaning of the words used by the testator, i.e., what is the meaning of that which he has actually written, not forgetting to attribute to technical terms or words of known legal import their proper legal effect, unless something is found to satisfy the mind that they were meant by the testator to be used in some other sense, and to shew what that sense is: Roddy v. Fitzgerald, 6 H.L.C. 823, per Lord Wensleydale, p. 876. By this means the testator's intention is got at, and it then remains to ascertain in what manner effect shall be given to the intention.

The language of the portion of the 4th clause of the will now under consideration is peculiar. It is quite plain that the testator intended to cut down or limit the estate or interest of Harmon which the earlier words of the clause would, if left unqualified, have vested in him. This object is sought to be expressed by declaring that as to the one-third share expressed in the earlier part of the clause to be given to Harmon, "he shall hold the same as trustee of his heirs." According to this, the intention was that he was not to hold the share for himself but for others. But for the subsequent directions as to his enjoyment of the income, this might have deprived him of all beneficial interest, just as a gift or devise to A. to hold as trustee for B., without more, would leave A. without any beneficial interest. It is plain that the testator did not intend to give the estate wholly to Harmon, but to constitute him a trustee of the whole, leaving to him the enjoyment of the income until the interest of the cestuis que trust vested in possession. Does the nomination of Harmon's "heirs" as the cestuis que trust enlarge the beneficial interest intended to be given to Harmon, by operation of the rule in Shelley's case or otherwise?

I do not think that such is the effect. It seems to me that

the rule in Shelley's case does not apply, under the circumstances.

Reading the whole devise to Harmon together, the effect is that he is to hold the entire estate as trustee, with the right to use the income without being accountable to any one for its expenditure. The testator's design appears to have been to preserve the estate for such persons as would at Harmon's death be his heirs, preserving to him the enjoyment of the income in the meantime.

If this design could only be accomplished by regarding the word "heirs" as embracing the whole series of heirs in a course of devolution, then, in order to give effect to the intention, it might be necessary that the word "heirs" should be read as a word of limitation, and not of purchase. But the operation of the trust is, I think, sufficient to carry the estate to the intended beneficiaries when the period of their ascertainment arrives without resorting to that construction.

It may be that, in view of the directions following the declaration that Harmon is to hold as trustee of his heirs, the latter word ought to be read as meaning "children"—a reading which would not assist the contention made on Harmon's behalf.

The question is one not wholly free from doubt; but, upon the best consideration I can give it, I am unable to say that the judgment appealed from is wrong.

I, therefore, think that the appeal must be dismissed.

The other members of the Court agreed; MEREDITH and MAGEE, JJ.A., giving reasons in writing.

NOVEMBER 4TH, 1911.

*BIGELOW v. POWERS.

Partnership—Operation of Thresher—Injury to Property of Partner—Contract—Breach—Damages—Negligence—Right of Partner against Partnership and Co-partners—Contribution—Findings of Jury—Unsatisfactory Verdict—New Trial—Costs.

Appeal by the defendants from the judgment of MAGEE, J., 20 O.L.R. 559, upon the findings of a jury, in favour of the

*To be reported in the Ontario Law Reports.

plaintiff, in an action against twenty-six persons, members of the Pioneer Threshing Syndicate of Clark Township, and against the Syndicate as an entity, to recover damages for the burning of the plaintiff's property—the plaintiff being himself a member of the syndicate.

The appeal was heard by Moss, C.J.O., GARROW and MACLAREN, JJ.A.

I. F. Hellmuth, K.C., and Eric N. Armour, for the defendants.

D. B. Simpson, K.C., and A. J. Armstrong, for the plaintiff.

Moss, C.J.O.:—. . . The plaintiff and twenty-six other farmers agreed to become the purchasers and proprietors of . . a threshing machine outfit . . . paying therefor the sum of $2,700. . . . As between themselves, they were the purchasers and owners of the machinery, contributing the purchase-money in equal shares. The object and intention of the purchase was to carry on the business of threshing grain for farmers and others, in their neighbourhood and elsewhere, by whom they might be engaged or employed for the purpose. It may be that some, if not all, had also in their minds the convenience in getting their own threshing done likely to result to themselves from the ownership of the outfit. From the beginning there was the intention of carrying on the business; but each was not to be personally concerned in the actual work to be done.

They agreed upon and adopted certain rules and regulations for the management of the general affairs. They agreed to choose and at their first meeting did choose from amongst themselves a committee or board of management, consisting of a secretary, a treasurer (who was also appointed president), and three directors, who were to be the executive body under whose direction the business was to be carried on. They adopted for use in business the firm name of the Pioneer Threshing Syndicate of Clark Township. From time to time they held meetings at which directions were given with regard to the business. At one of these meetings one Dowson was appointed manager. Some question has been raised as to the manner of his appointment, but for the purposes of this action it must be taken that he became and was an official of the firm, duly recognised and acting as a person authorised to transact the business of the firm, so far as making engagements to thresh, conducting the work thereof, and controlling and supervising the machinery and its workings, were concerned.

It was, of course, contemplated that the other members of the firm, though there was no absolute obligation on their part, would deal with the firm in providing for their own threshings. Accordingly, it was part of the agreement that their threshings must be paid for at the same rates as those charged outside. Thus, while a firm was constituted of which each of the twenty-seven persons was a partner, it was evidently not contemplated that as between themselves each should be endowed with full authority to act for and on behalf of the firm. The principal authority was delegated to the board and the manager acting under and as authorised by it.

The business was proceeded with under the management of Dowson. In October, 1908, the plaintiff arranged with Dowson in the ordinary way for the threshing of his grain. Dowson undertook to do it in the usual course, and the threshing outfit was taken to the plaintiff's place and operated, Dowson being in charge of the engine, and one Gordon, also in the employ of the firm, being in charge of the separator. The plaintiff on this occasion took no part in the management or working of the outfit, and in no respect acted otherwise than as owner of the grain.

While the work of threshing was proceeding, the plaintiff's barn took fire and was consumed together with a large quantity of grain and other produce and some farm implements and stock, the total value of which has been found by the jury to be $3,601.

It was found by the jury that the fire originated from defects in the smoke-stack of the engine, and that their existence was due to Dowson's negligence, and that he was aware of them. . .

It is not questioned that, if the plaintiff was not a member of the firm, or if, instead of a firm of individual partners, it was an incorporated company in which the plaintiff was a shareholder, his remedy would be clear. But this does not appear to advance the inquiry.

The precise point does not seem to have arisen or to be noticed in any reported decision, and the text-books in discussing the rights of partners inter se do not deal with the precise point. . . .

[Reference to Lindley on Partnership, 7th ed., p. 413.]

In the present state of facts, one partner has sustained a direct loss owing to an act of the firm, negligent and wrongful to such an extent that if it occasioned loss to a third person he could recover against the firm or the co-partners. . . . There is no authority for saying that in such a case the loss thus sustained by the one partner must be borne entirely by him, and he is not entitled to contribution in respect thereof from the other part-

ners. In neither case does it follow from the absence of authority one way or the other that no such right of contribution exists.

The right to relief and the manner in which it may be enforced in cases where there is an admitted liability, as upon a promissory note of the firm held by one partner, may be considered as now well settled as the result of decisions or statutory provisions, to which it is unnecessary to make special reference.

But the argument is that, although acts or omissions out of which the claim arises may be said to be the acts or omissions of the firm as a whole while in the ordinary course of the business through its ordinary agents and employees, and although the resultant injury is occasioned to or falls upon one partner in his individual capacity, yet, because he is a partner, he cannot be allowed to separate himself from the firm and hold it responsible for the damage he sustained.

I have referred to the limited rights of management or control possessed by the plaintiff, and all those members not constituting the board of management, over the conduct of the business. And, beyond question, he was not actively taking part as one of the firm in overseeing or directing the operations of the outfit while threshing at his place. Save in so far as against third persons he was bound by the acts of the board of management and the manager, he was not responsible for placing Dowson in a position of control and management of the engine and its appliances, and he was not aware of the defects owing to which it is alleged that the fire occurred. So far as the facts are concerned, it is a fallacy to say that the firm's acts were the plaintiff's acts, and that Dowson's negligence was his negligence, and that Dowson's knowledge was his knowledge.

Is it not equally fallacious in law? Suppose the case of a firm carrying on its business in a building beside or near the dwelling-house of a co-partner, which is owned solely by him in his private capacity and has nothing to do with the partnership or its property. Suppose that, owing to negligence on the part of the firm or its employees, neither participation in nor knowledge of which is imputable to the partner in his individual capacity, an explosion occurs on the firm's premises which wrecks the partner's dwelling. Can it be the law that, under such circumstances, the loss of the dwelling must be borne by the partner alone? . . . There is, of course, the long-existing technical objection that, the firm not being a legal entity, the partner cannot be both plaintiff and defendant, and that if he sues the firm he is suing himself; but that objection has been removed in cases

such as of promissory notes to which I have referred, and there seems no good reason why it should bar an action founded upon a claim such as the present.

The case is not to be likened to the case of a joint covenant in which one of the covenantors is also a covenantee, as in . . . Ellis v. Kerr, [1910] 1 Ch. 529. . . .

Nor, with great respect, do I think the case can be likened to the case of a partner injured through the negligence of a servant of the partnership while actually engaged by the partner to render him a service which it was the servant's duty to render to him, and which he had a right to require the servant to render him at the time. . . . The firm was dealing with the plaintiff in the same way and on the same terms as its other customers. The plaintiff's loss arose in the course of the business, and not in the course of any service that he was individually receiving because he was a member of the firm. And there is no authority for saying that for such a loss he should not be recouped by the firm, just as others would be.

The negligent acts of the firm's servant in such a case ought not to be so attributed to the plaintiff as to preclude him from saying to the firm that the loss resulting to him was the outcome of its servant's negligence, and that it should make good the consequences.

Probably this is only another manner of enforcing contribution; but, if so, there seems to be reasonable objection to it on that ground.

Why should the fact that the loss is the loss of the plaintiff's own property place him in any different or worse position? He is out of pocket to the same extent as if he had paid it or made it good to a third person. His position ought not to be any worse than if that was what he had been obliged to do.

If, therefore, the case were to be determined upon the findings of the jury as they now stand, I would, with respect, be of the opinion that the judgment ought not to be disturbed.

But, having regard to the evidence in support of the allegation that the fire arose from or was caused by the engine, and the more than hesitation expressed by the jury in regard to their finding in the affirmative upon the second question, and to what then took place with regard to it, I would be in favour of a new trial.

The second question was the crucial question upon which, as the learned trial Judge told the jury, the whole case turned—if they answered it in the negative, they need not proceed further. It was as follows: "Were the barn and goods of the plaintiff

burned by fire caused by sparks from the engine owned by the members of the syndicate?'' Their first answer to this was: ''We could not say definitely by the evidence produced, but we believe they were.'' After some discussion between the Judge, counsel, and jury, the latter retired and after some time returned, having amended their answer so as to make it state, ''We believe they were.'' . . .

[The Chief Justice then set out a further discussion between the Judge and jury, from which it appeared that the jurors did not agree as to the inference to be drawn from the facts, and that no ten were agreed upon a definite finding.]

The jury again retired and after some time returned with the answer ''yes'' to the question.

An affirmative answer rendered under such circumstances cannot be said to be satisfactory.

Looking at the evidence itself and the opinions expressed by the foreman and others of the jury, and noting their very evident hesitation and reluctance to accept it as justifying them in returning an affirmative answer, I think the defendants are entitled to the opinion of another jury upon this most material part of the case; and, looking also at the nature of some of the other questions and answers, there should, I think, be a new trial generally if the defendants desire it. In the event of the defendants desiring a new trial, the costs of the former trial and the appeal should be costs in the action. In the event of the defendants not seeking a new trial, the appeal should be dismissed; but, under all the circumstances, the parties should bear their own costs of the appeal.

MACLAREN, J.A., concurred.

GARROW, J.A., dissented, being of opinion, for reasons stated in writing, that the plaintiff could not sue his co-partners for his loss, and also that there was no reasonable warrant in the evidence to justify a finding that the plaintiff's damage was due to any negligence on the part of Dowson. He was in favour of allowing the appeal without costs and dismissing the action without costs.

HIGH COURT OF JUSTICE.

BOYD, C. NOVEMBER 3RD, 1911.

*McALLISTER v. McMILLAN.

Costs—Action to Set aside Will—Undue Influence—Want of Testamentary Capacity—Failure to Establish Grounds of Attack—Incidence of Costs.

An action to set aside a will on the grounds of undue influence and want of testamentary capacity. The action was dismissed at the trial; but the question of costs was reserved.

W. H. Wright, for the plaintiff.
W. S. Middlebro, K.C., for the defendants.

BOYD, C.:— . . . The will was attacked on two grounds —of undue influence and testamentary incapacity. The former was abandoned at the opening, and at the close of the hearing the latter failed on the facts.

The testatrix was a childless widow, aged 70, who lived at Owen Sound with her niece, the chief beneficiary, and her sister, also a beneficiary. The chief cause of her death was pneumonia, which developed rapidly from the first appearance about midnight (Friday or Saturday), ending in her death at 5 p.m., on the next day, Sunday. She was minded to make a will on Friday night, and spoke of going to her lawyer on Monday for that purpose. But the progress of the disease led to the calling in of a solicitor early on Sunday morning. He asked her how she wished to deal with her property, and she told him. . . . He returned in about an hour. . . . The will was read over clause by clause, and her assent given, and she affixed her signature with a firm hand . . . about ten o'clock in the morning. Just before this . . . another doctor had been called in to diagnose the case, by the attending physician, who had been the family doctor for seventeen years, and was an intimate friend of the testatrix. The other was not asked to examine with a view to testing the state of the patient's capacity for the disposal of her affairs, but confined himself to her physical condition. He does not agree with Dr. Brown, who was in charge, as to the character of the pneumonia; he found her in a state of unconsciousness, if not of stupor, and, while she was able to respond to suggestions, she was not, in his opinion, capable of

*To be reported in the Ontario Law Reports.

initiative as to the disposal of her property. I thought it unfortunate that his attention had not been called to the testamentary operation then in course of completion, and his judgment obtained as to what had occurred that morning. Doubtless, the condition in which the patient was found, between giving the instructions and the execution of the will, was due to some exhaustion occasioned by the effort to make known her wishes, which she had thought out before; but she was quite able to rouse herself or be roused to attend to the final act of signature after the consulting doctor had departed.

The facts that the beneficiaries had not in any manner intervened to shape the provisions of the will, and that the family physician was fully satisfied that the testatrix knew what she was doing, and intended to do as she did with her property, may serve to explain why the opinion of the other medical man was not sought as to her capacity to make a will.

There was no justification for imputing undue influence in the obtaining of this will; there was some justification for alleging insufficient capacity, in view of the opinion of the doctor called in contemporaneously with the completion of the will. But, upon the evidence taken, I had and have no doubt that the will is in every respect a valid instrument.

The whole amount of the estate is under $6,000. So far as the costs arose from alleging undue influence, the plaintiff should pay them. As to the rest of the costs, the question is, should the plaintiff be relieved from their payment? For I cannot agree that these costs of litigation should be borne by the estate. The common law rule is, that the loser is to pay the costs; the equity rule is, that the costs are in the inherent power of the Court to deal with . . . Corporation of Burford v. Lenthall, 2 Atk. 551, 552.

In testamentary and other causes, these rules may be blended, with this result, that costs may properly be ordered to follow the result unless good reason appears to disturb this direction. . . . Was the plaintiff justified in claiming judicial investigation into the making of the will? . . .

The plaintiff had no expectation of any benefit from the deceased; he relied apparently upon the opinion of the occasional physician, upon what that physician himself recognises as a far from thorough examination; he charges undue influence rashly, and makes but a futile attempt to prove a lack of sufficient capacity, by the examination of experts whose conclusions fail to take into account the well-proved and the real facts of the transaction. . . .

Now, it is a well-known practice in probate matters that the next of kin can always call for proof of a will *per testes* and cross-examine the witnesses called in support of that will, without being subject to the payment of costs. Here, however, probate was granted without opposition, and thereafter this action is launched to vacate the probate and nullify the will, on insufficient evidence and without any proper inquiry.

I see no reason to relieve the plaintiff from the payment of all the costs of the defendants, who actively defended, and such will be the judgment of the Court—dismissing the action with costs. . . .

[Reference to Spiers v. English, [1907] P. 122; Ponder v. Burmeister, [1909] S. Australian L.R. 62, 99; Robertson v. McOuet, 17 O.W.R. 852.]

DIVISIONAL COURT. NOVEMBER 3RD, 1911.

RE SOLICITORS.

Solicitors—Taxation of Costs against Clients—Quantum of Fees and Charges—Discretion of Taxing Officer—Appeal—Bills of Costs—Entries in Solicitors' Books—Estoppel—Services of Solicitors in Selling Company's Stock and Bonds—Services as Directors and Officers—Remuneration—Commission.

Appeal by the clients and cross-appeal by the solicitors from the order of BRITTON, J., 2 O.W.N. 1421, affirming the taxation by the Senior Taxing Officer of the solicitors' bill of costs, charges, and disbursements in respect of services rendered to the clients.

The appeal was heard by FALCONBRIDGE, C.J.K.B., RIDDELL and LATCHFORD, JJ.

R. A. Pringle, K.C., for the clients.

F. E. Hodgins, K.C., for the solicitors.

RIDDELL, J.:—Messrs. Beach Bros. were lessees from the Crown of a water power at Hound Chutes, and had entered into an arrangement with the firm of Baillie & Co., looking to the development of this water power.

The Cobalt Electric Power Company Limited had been chartered to carry out this arrangement, Beach Bros. being the

owners of the stock in fact, and the incorporation of the company being for technical reasons. On the 18th February, 1909, the solicitors were retained by B. C. Beach, for Beach Bros., and they subsequently, at the request of their clients, became directors of the company.

The arrangement with Baillie & Co. fell through, and the bonds of the company, to the amount of $180,000, were sold to Mr. D. F.

The clients, Beach Bros., procured an order on the 26th October, 1910, for the delivery of bill of costs, charges, and disbursements, and bills were rendered accordingly against Beach Bros. and the company separately. An order was obtained for taxation on the 17th November, 1910, and the taxation proceeded before Mr. J. H. Thom, Taxing Officer, on the 6th December, 1910. The result was:—

Against Beach Bros., rendered at.....		$15,907.07
Taxed off		9,234.12
Allowed at		$ 6,673.95
Against the company, rendered at.....		$ 9,193.67
Taxed off		3,126.70
Allowed at		$ 6,066.97

Upon the taxation it was agreed that the whole be dealt with as a bill against Beach Bros., as the amount would come out of their pocket in any case.

An appeal and cross-appeal were dismissed by my brother Britton.

Both parties now appeal to this Court, the clients having failed to obtain an order allowing an appeal direct to the Court of Appeal (2 O.W.N. 1495), although the solicitors did not object to such order.

The appeal, as argued before us, covers six points:—

(1) A charge is made of $2,000 for the preparation of a trust mortgage, etc., to secure bonds to the amount of $300,000 and the mortgage bonds; this is allowed by Mr. Thom at $1,500, but the clients contend that $700 to $750 is ample.

(2) A similar charge of $4,000 in respect of $600,000 and afterwards $800,000 bonds; allowed at $2,000; the clients contend that $1,250 is ample.

(3) Items 1 to 27, charged at $500, allowed at $350; the clients are willing to allow only $235.25.

(4) Items 28 to 62 charged at $9,000; allowed at $2,700; the clients would allow $965.

This is also to be considered as No. 7, being the first point of the cross-appeal.

(5) A charge of $600, which the clients say should be only $338.12.

(6) A charge of $5,000, allowed at $2,549.98, which the clients do not admit.

Nos. 3, 5, and 6 are really pressed because the dockets of the solicitors are said to contain entries with amounts to the sum to which the clients desire the costs should be reduced; but this is not exactly the case, and many entries are not full. I can find nothing in the way of an estoppel, even if the contention of the clients as to the dockets were well founded—the solicitors are entitled to a reasonable sum for their services, no matter what their dockets do or do not shew.

As to Nos. 1, 2, and 4, while the Taxing Officer might have been justified in reducing the amounts allowed, I can see nothing in which he has erred in principle.

It cannot be necessary to elaborate authorities for the rule to be followed on an appeal from the Taxing Officer. I adhere to the opinion expressed in Re Solicitor, 12 O.W.R. 1074: "The Court must necessarily possess a general jurisdiction over the taxing officer in all matters to prevent any positive wrong to parties or suitors;" but we can give "no countenance to the proposition that, where the taxing officer has not made any mistake in principle, and the sum awarded is not so grossly large or small (as the case may be) as to be beyond all question improper, the Court can interfere with the discretion of the taxing officer." It is much such a case as when a motion is made to the Court against a finding at the trial—the Court, no doubt, has the power to set aside the finding, but it will not do so unless the finding is "beyond all question improper."

I may add that I can see no excess in the amounts allowed on any of the items—they should, as to Nos. 1, 2, and 4, be increased, if anything. It cannot be known to any one that the value of money has decreased and is decreasing—the same amount of money cannot command the same amount of services or of goods as formerly.

The appeal should be dismissed.

In the cross-appeal are two matters for consideration:—

(7) The solicitors were instructed to sell $180,000 worth of

bonds, which they did; they claim 5 per cent., *i.e.*, $9,000, and have been allowed $2,700. The argument is substantially that they were employed by Beach Bros. as brokers, and should be paid the same amount as brokers would charge as brokerage or commission. Now, it is undoubtedly true that a person who happens to be a solicitor may be employed as a broker, just as he may be employed as an auctioneer or a gardener; but it is equally true that what these solicitors were employed to do is what is done by solicitors every day for their clients. The present case on the facts comes within Lord Langdale's test in Allen v. Aldridge, In re Ward, 5 Beav. 401, and the business was "business in which the . . . solicitor was employed because he was a . . . solicitor, in which he would not have been employed if . . . the relation of . . . solicitor and client had not subsisted between him and his employer:" see p. 405.

In re Baker Lees & Co., [1903] 1 K.B. 189, is a late instance of the application of this principle, that in such cases the fees to be paid are solicitors' fees and so are taxable.

The solicitors in the present case are not to be paid as brokers, but as solicitors.

There is no hard and fast rule as to the remuneration to be allowed for such services—it may be on a percentage basis, as was the case in Re Richardson, 3 Ch. Ch. R. 144, or a lump sum, as in Re Solicitor, 12 O.W.R. 1074. I adhere to the view expressed in the latter case, that "in proceedings taken by persons who indeed are solicitors, but who do not act differently or with any different right from those not solicitors, I cannot see why they should not be paid the same as any other person." But all that is for the taxing officer; so long as he does not err in principle, speaking generally, the Court on appeal will not interfere. It cannot be said that there is any error in the principles upon which the Taxing Officer proceeded in regard to this item; he is an officer of very great and varied experience, and we should not interfere. This the more that the learned Judge appealed from has affirmed the Taxing Officer.

(8) The solicitors, at the instance and in the interests of Beach & Co., became and acted as directors, &c., of the company. There is and can be no pretence that there was any impropriety in this, or that there was any conflict of duty to client and company—the client "owned" the company, which, indeed, as has been said, was formed for technical reasons.

This was work done for the clients; and, while there would be

difficulty in the solicitors compelling the company to pay them, I can see none in the way of charging the clients, Beach Bros. The Taxing Officer thus reports: "The said solicitors claimed an allowance for services performed by them and members of their office staff in acting as directors and officers of Cobalt Power Company Limited at the request of and in the interests of said Beach Bros., but that I did not consider said claim, and made no allowance therefor." In this I think he was wrong. I am unable to follow my brother Britton when he says: "If such services should be paid for at all, payment should be made by the company." The services, while they were in form rendered for the company, were in fact rendered for Beach Bros., and as part of the whole work carried on for Beach Bros. The appeal should be allowed on this ground.

If both parties agree, we may fix a reasonable sum to allow; but, if they cannot agree (say within ten days), the matter should be referred back upon this point—costs of the new reference to be in the discretion of the Taxing Officer. The costs of this appeal should substantially follow the event—the clients should pay three-fourths of the costs before us; and we should not interfere with the costs before Mr. Justice Britton.

FALCONBRIDGE, C.J., agreed.

LATCHFORD, J., agreed in the result.

DIVISIONAL COURT. NOVEMBER 3RD, 1911.

POULIN v. EBERLE.

Ejectment—Title of Plaintiff—Failure to Prove Legal Title—Possession—Right as against all but True Owner—New Trial—Amendment—Statute of Limitations—Entry of Defendants under Plaintiff's Tenants—Costs.

An appeal by the plaintiff from the judgment of the Judge of the County Court of the County of Kent dismissing an action of ejectment.

The appeal was heard by FALCONBRIDGE, C.J.K.B., RIDDELL and LATCHFORD, JJ.

J. M. Ferguson, for the plaintiff.

L. J. Reycraft, for the defendants.

RIDDELL, J.:—The land in question was patented in 1848 to Ralph Hackney, and in the grant the land is described as running to the water's edge; it was then, in 1861, conveyed to W. J. Palmer, and in 1863 conveyed by him to William Wilson. The will of William Wilson was registered in 1877, bequeathing and devising all his estate, real and personal, to trustees named, to be by them sold and converted into money to be divided amongst the testator's children as the trustees should think fit and proper, with power to the trustees to sell by private contract or by auction. The testator died in 1877; and the trustees named are his son-in-law, J. M. Fraser, the testator's wife, and his brother, Robert Wilson.

In 1886, one Cunningham was in possession of the property, having a grain warehouse for collecting and storing the grain he bought in his business of grain buyer and an old dock for shipping the same—the warehouse being right down on the beach between the bottom of a hill and the water.

The plaintiff bought the property from Cunningham, but, searching the registry office, found that it belonged to William Wilson's estate. He then went to see Mr. M. Wilson, K.C., brother of William Wilson, who advised him to write to Dr. Wilson, son of William Wilson. He did so, and, after seeing Mr. M. Wilson again, went to see Cunningham and with him went to Nathaniel Mills, then a practisising solicitor in Ridgetown, and had "a quit-claim deed, or whatever it was, drawn up" by Mills "for the property." The plaintiff then paid Cunningham $220, and "it was left then with Mills to get the title straightened out on the register and to get the Wilson heirs to sign off." "All the deeds and papers were left with Mills." At the trial, His Honour said: "I want to have the record shewing that the evidence you propose to give is justified by the facts. Evidence was given of such search for the "quit-claim deed, or whatever it was," as would justify parol evidence being given of the contents of the document; but no such evidence of the contents was offered or given at the trial as is at all definite—the nearest being, on cross-examination, that it was "an agreement or counterclaim . . . a bargain to sell anyway."

The plaintiff went into possession of the property, tore down the warehouse, and took it away, even to the foundation; but left the dock standing—he sold timber, lumber, and stones of the building.

In 1888, the property was about to be sold for taxes in arrear for 1885, 1886, and 1887, and the plaintiff paid the back

taxes and redeemed the land: it was thereafter assessed against the plaintiff, and he paid the taxes. In 1901, he rented it to one Lee by a verbal arrangement, Lee to cut ice for the plaintiff, give him what fish he wanted to use, and fix the road built by the plaintiff in 1886 or 1887, to get the stone and timbers from the beach. Lee rented the property from the plaintiff for three seasons, and went out in 1904, when Koehler bought him out, i.e., as I understand it, bought out Lee's fishing apparatus. Thereupon the plaintiff made an agreement with one O'Brien that he should have the property on the same terms as Lee; and O'Brien and Koehler (who seem to have been in partnership) occupied in this way till 1907. Then James O'Brien rented for the fishing season for $50. The agreement was verbal, but a lease was to be drawn up. O'Brien refused to execute the lease, and the plaintiff took proceedings under the Overholding Tenants Act to put him and Koehler off. O'Brien swore that he had not rented the property, and the application failed.

Then the plaintiff, about May, 1907, procured a deed from four out of the six heirs and heiresses at law of William Wilson, that is, those living in London, the others living elsewhere not being asked.

The defendants came upon the property during last fall or the present year; Eberle buying out Koehler's right to fishing privileges; Frank Rose O'Brien, the other defendant, joining them; but none under any right from the plaintiff. They erected one ice-house of cement near and to the west of the site of the old warehouse, and apparently a little fish house, though this may have been built by O'Brien and Koehler or Lee.

Lee had been a fisherman under license, so were O'Brien and Koehler, as are the defendants; Cunningham was not.

In the statement of claim the plaintiff alleges that from 1886 he has been the owner in fee simple of the land, and that the defendants entered upon his possession.

The learned County Court Judge, at the conclusion of the plaintiff's evidence, dismissed the action with costs, saying: "I rule on the ground that there has been no sufficient evidence put in of any deed whatever or any title whatever in the plaintiff as against these defendants for the land which they are in possession of." But this must be taken in connection with what is said immediately before, on motion made for a nonsuit: "It is utterly impossible for me to hold there ever was a transfer to Poulin. There is an alleged deed, and the very man that is said to have executed it or that drew it, is not here."

Assuming, however, that the transfer to Poulin by Cunningham is not proved, this by no means disposes of the case. In the absence of a deed, the plaintiff takes peaceable possession of the property and occupies it by his tenants for years—he, being in such possession, is the owner as against all but one having a better right, and is entitled to eject him: Allen v. Rivington, 2 Saund. 111 (in Williams's edition many cases are cited in the note to this leading case); Asher v. Whitlock, L.R. 1 Q.B. 1. In the Privy Council in Mussammatt Sundar v. Mussammatt Parbati, L.R. 16 Ind. App. 186, at p. 193, this is cited with approval as deciding "that a person in possession of land, without active title, has a devisable interest, and that the heir of his devisee can maintain ejectment against any person who has entered upon the land and cannot connect himself with some one having title or possession prior to the testator." And, of course, the rule will be, if anything, a fortiori in the case of the possessor having such devisable interest.

And he does not lose this right by setting up a title which he fails to establish in proof. In Davison v. Gent, 1 H. & N. 744, at p. 750, Pollock, C.B., says: "A plaintiff in ejectment is not deprived of the right to rely on his prior possession . . . because he has brought forward documents . . . which on account of some defect in proof do not establish his title to the property in question." See also per Bramwell, B., at p. 751; Watson B. at p. 752.

The kind of possession, actual or constructive, required is well known; and I do no more than refer to 15 Cyc. 30 (4). This does not seem to have been present to the mind of the learned County Court Judge, for there is no finding as to the possession of the plaintiff—evidence which, if believed, would justify a finding in favour of the plaintiff has been given—but it may be met or discredited. I think there is enough to call upon the defendants for their defence; and there should be a new trial.

The plaintiff may be advised also, by amending his pleading, to claim in the alternative (1) by the Statute of Limitations and (2) upon the ground that the defendants came in under his tenants O'Brien and (or) Koehler.

Leave should be reserved to the plaintiff to amend as he may be advised, and also to the defendants.

Costs of this motion and of the last trial should be to the plaintiff only in the cause, so that if, in the end, he succeeds, he should get them, but, if he fails, he should not have to pay them.

As to the evidence rejected at the trial, it was rejected in the view that it was only the title of the plaintiff derived from the previous owners which was in question. Of course, when the possession of the plaintiff is in controversy, evidence may be given of conversation between him and any person constituting a contract of letting of the land, if it appear that this other went into possession. This will help to establish that the possession of that other is really the possession of the plaintiff.

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

TEETZEL, J. NOVEMBER 4TH, 1911.

*RE GRAHAM.

Surrogate Courts—Jurisdiction—Claim against Estate of Deceased Person—Donatio Mortis Causâ—Surrogate Courts Act, sec. 69(1) — Amount Involved—Appeal—Forum—Judge in Weekly Court—Consent to Jurisdiction—Judge Acting as Arbitrator—Appeal as from Award—Dismissal of Claim—Evidence—Refusal to Interfere.

An appeal by Ida May Sewell from the order or judgment of the Judge of the Surrogate Court of the County of York dismissing the claim of the appellant to a portion of the estate of John Graham, deceased.

W. N. Ferguson, K.C., for the appellant.

H. T. Kelly, K.C., for the administrator of the estate of the deceased.

TEETZEL, J.:—The question is, whether the claimant is entitled to hold a certain savings bank pass-book and the money represented by it, which in his lifetime belonged to the intestate, as a *donatio mortis causâ*.

When the claim was set up, the administrator assumed that the matter came within the provisions of the Surrogate Courts Act, 10 Edw. VII. ch. 31, sec. 69, sub-sec. 1 of which provides: "Where a claim or demand is made against the estate of a deceased person which, in the opinion of his personal representa-

*To be reported in the Ontario Law Reports.

tive, is unjust, in whole or in part, such personal representative may, at any time before payment, serve the claimant with a notice in writing that he contests the same in whole or in part, and, if in part, stating what part and also referring to this section."

The administrator accordingly gave the notice of contestation as provided by sub-sec. 1.

The amount involved in the claim was $1,161.94; and, upon the learned Judge being applied to by the claimant for an appointment to adjudicate, he pointed out that, as the amount exceeded $500, he could not dispose of the question in dispute, under sec. 69, unless all parties agreed.

Since the argument, counsel have put in . . . a letter from the claimant's solicitor to the solicitors for the administrator . . . asking whether they wished to have the matter disposed of by the Judge or to have it tried in a High Court action; to which the solicitors for the administrators replied that they were willing to have the matter disposed of by the learned Judge—"provided, of course, that all rights of appeal by either party are preserved."

These terms were accepted, and the learned Judge proceeded to hear the evidence of both parties, and gave judgment in favour of the administrator, whereupon an order was issued in the Surrogate Court disallowing the claim and ordering the claimant to pay costs.

Upon the argument Mr. Kelly objected that the appeal should have been to a Divisional Court, under sec. 34, sub-sec. 1, of the Surrogate Courts Act; but I held that, assuming that the proceedings were properly before the learned Judge under sec. 69, the right of appeal is governed by sub-sec. 6 of sec. 69, as reconstructed by 1 Geo. V. ch. 18, sec. 3, which was in force when the judgment was given, and that the appeal would be to a Judge in the Weekly Court; but, until furnished with the terms of the consent upon which the Judge proceeded, I doubted whether the appeal was competent. The argument, however, proceeded upon the assumption that the learned Judge was authorised by the consent to dispose of the matter either as a Judge of the Surrogate Court or as a quasi-arbitrator between the parties. . . .

I am of opinion that sec. 69 does not confer power on the Judge of the Surrogate Court to adjudicate upon a claim of the character of the one in dispute. The "claim or demand" referred to in sub-sec. 1, when that sub-section is read in the light of sub-secs. 4 and 5, is clearly a claim or demand against the estate by a creditor for payment of a money demand. . . .

[Reference to Williams on Executors, 9th ed., pp. 687, 688,

as to the nature of the claim of a person seeking to establish a *donatio mortis causâ*.]

Even if it should be held that the Surrogate Court has jurisdiction under sec. 69 to adjudicate upon claims of this nature, that jurisdiction was limited to $500 when the proceedings began, and is now limited to $800 by 1 Geo. V. ch. 18; and, in the absence of express statutory provision, consent of the parties would not confer jurisdiction upon the Judge to adjudicate upon the matter as a Judge of the Surrogate Court; and, if he did so adjudicate, his decision should be regarded not as a judgment of the Court, but as that of a private tribunal constituted by the parties—in other words, as that of a quasi-arbitrator—and would be appealable only as an award, where the right of appeal was reserved by the consent under which he acted, as provided in sec. 17 of the Arbitration Act, 9 Edw. VII. ch. 35.

[Reference to Canadian Pacific R.W. Co. v. Fleming, 22 S.C.R. 33, 36; Attorney-General for Nova Scotia v. Gregory, 11 App. Cas. 229; Burgess v. Morton, [1896] A.C. 136.]

I think, under the terms of the consent here, the parties have a right of appeal from the judgment as from an award to a Judge in the Weekly Court, under the Arbitration Act.

Now, upon the merits, while I might have come to a different conclusion from that arrived at by the learned Judge, had I heard and seen the witnesses, I cannot say that his finding is wrong. . . .

[Reference to Coghlan v. Cumberland, [1898] 1 Ch. 704, 705.]

As it does not appear from the judgment or from the evidence that the learned Judge has misapprehended the effect of the evidence or failed to consider a material part of it, this case cannot be brought within such cases as Beal v. Michigan Central R.R. Co., 19 O.L.R. 502.

The appeal must, therefore, be dismissed with costs.

DIVISIONAL COURT. NOVEMBER 4TH, 1911.

LYON v. BORLAND.

Nuisance—Lease of Part of Building—Agreement by Landlord with Tenant not to Allow Machinery in Building—Failure to Prove Agreement—Co-tenant Using Machinery in Building—Noise and Vibration—Locality of Premises—Manufacturing District—Necessity for Consideration—New Trial.

Appeal by the defendants from the judgment of the County

Court of the County of York in favour of the plaintiff in an action for a nuisance.

The appeal was heard by FALCONBRIDGE, C.J.K.B., BRITTON and RIDDELL, JJ.

D. W. Saunders, K.C., for the defendant Borland.

R. B. Henderson, for the defendant Weighart.

J. T. White, for the plaintiff.

The judgment of the Court was delivered by RIDDELL, J.:— The plaintiff sues Weighart, his landlord, and Borland, a tenant of Weighart's, for a nuisance committed by the latter—noise, vibration, etc. The learned County Court Judge has given judgment against both defendants, and they now appeal.

As against the landlord it is alleged that he made an agreement, at the time of the plaintiff's lease, with the plaintiff, that no machinery should be allowed in the front part of the building, in part to be occupied by the plaintiff; but that afterwards he leased such part of the building to his co-defendant, and the co-defendant placed heavy and noisy machinery in such part of the building, to the prejudice of the plaintiff.

All the evidence upon this alleged agreement was gone over more than once during the argument, and I have again read all the proceedings at the trial; and I am of opinion that no such agreement has been made out. The lease to the plaintiff contained a covenant for quiet enjoyment, but it is admitted that such a covenant does not cover the practice complained of. Jenkins v. Jackson, 40 Ch.D. 74, may be looked at upon this point. And it naturally follows that this is not a derogation from the landlord's grant. Nor can the plaintiff claim as against the defendant Weighart independently of the lease and the relation of landlord and tenant.

"In the case of landlords who have given up to the tenant control of the premises . . . out of which the damage arises, the Court has never gone further than to hold them liable when the use from which the damage or nuisance necessarily arises was plainly contemplated by the lease:" Earl v. Reid, 23 O.L.R. 453, at p. 466.

Nothing of that kind is found in the present instance.

The appeal of Weighart should be allowed with costs, and the action against him dismissed with costs. As against the other defendant, there is ample evidence upon which the learned County Court Judge could find a nuisance; and we should not interfere, if it were clear that he had not omitted to take into consideration some of the elements.

But His Honour (p. 98), upon certain evidence being given, says: "What has all this to do with this case?"

Thereupon Mr. Henderson, counsel for the defendant Weighart, said: "One of the questions, I submit, your Honour, is, whether this is a manufacturing district?"

The Court: "It does not make any difference whether it is a manufacturing district or not."

We find nothing in the case indicating that the learned Judge withdrew from this position; and it would appear that he considered the question whether or not there was a nuisance independently of the locus. It is not denied by the plaintiff—and, in view of the law, it could not be successfully denied—that the same facts would in some localities constitute a nuisance which in other localities would not. All the circumstances of the property must be taken into consideration—amongst them the notorious fact that manufactures cannot be carried on without noise and vibration, and that one in a manufacturing district cannot expect to have the same freedom from annoyance of that kind which he would have a right to look for in a residential quarter. As all parties agree on the law, it is unnecessary to cite authorities. St. Helens Smelting Co. v. Tipping, 11 H.L.C. 642, 35 L.J. Q.B. 66, Wood on Nuisances, sec. 17, may be looked at for the principles.

Upon the evidence, I am unable to say that the County Court Judge must needs find a nuisance in view of the nature of the locality—and I think that all the facts should be developed fully, and the learned Judge, taking all circumstances of locality, etc., into consideration, should then find nuisance or no nuisance.

I think there should be a new trial as against the co-tenant. Costs of the last trial and of this appeal should be in the discretion of the trial Judge upon the new trial.

DIVISIONAL COURT. NOVEMBER 9TH, 1911.

MEIKLE v. McRAE.

Principal and Agent—Agent's Commission on Sale of Land—"Securing a Customer" within Limited Time—Option Given but not Accepted within Time—Letter from Agent to Principal—Inference of Acquiescence from Silence.

Appeal by the defendant from the judgment of the Junior Judge of the District Court of the District of Thunder Bay in

favour of the plaintiff for the recovery of $127.50 damages, in an action for a commission upon a sale of land by the plaintiff, a land agent, for the defendant.

The appeal was heard by MEREDITH, C.J.C.P., TEETZEL and RIDDELL, JJ.

Casey Wood, for the defendant.

Featherston Aylesworth, for the plaintiff.

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

. . . The defendant owned a piece of land in Port Arthur. The plaintiff, a real estate agent in that city, learning that the Government of Canada wanted an armoury-site, secured a number of options upon properties suitable for that purpose. Calling upon the defendant, he procured a document signed by him in these words: "Port Arthur, Aug. 13th, 1910. Russell Meikle, Esq., City. Dear Sir: Replying to your inquiry of today re price of lots 8 and 9 Second St., I will except thirty-eight hundred 00/100 dollars net. This price is to be good for thirty days, subject to previous sale by myself. John L. McRae."

The plaintiff says that upon that occasion, on the 13th August, "he (i.e., the defendant) said it was a very desirable site for the armoury. I did not say whether I was acting for the Government or not. Provided that a customer was likely and secured within thirty days, he would give me authority." Although the document mentioned does not expressly so state, it seems clear that the learned trial Judge is right in his finding that "on the 13th day of August, 1910, the defendant authorised the plaintiff, a real estate agent, to sell his property . . . at and for the price of $3,800 net, the price to be god for thirty days . . . and it was agreed that any sum over and above the $3,800 which the plaintiff could get for the property would belong to the plaintiff, and be his commission for making the said sale."

The next day the plaintiff saw Mr. Hunter, the agent of the Government, about this land; Hunter said the option must be given direct to the Government, and the plaintiff took him to see the defendant, told the defendant that he was quoting the land to Hunter at $4,100. Hunter dictated an option to the Government for $4,100, which was signed by the defendant, which set no time for acceptance, and which contained the following provision: "All buildings and erections on the property are to be retained and removed by me on or before the 1st of

December next. I am to have free use of the land until that date. I am in a position to make a good title to the property."

It is argued that this provision is a modification and extension of the time for "securing" the customer; but I cannot follow the argument—a binding contract for sale might well be signed in August or September, containing such a provision.

The option was not accepted by the Government till long after the expiration of the thirty days; and efforts made by the plaintiff to have it accepted after the expiration of the thirty days are not shewn to have been made to the knowledge of the defendant. But the Government did take up the option ultimately, about the 14th November—the defendant having on the 22nd September written the plaintiff that the "deal is off as far as agreement with you and myself, as I have not heard anything since." To this the plaintiff replied: "May say on receipt of your price at which we were allowed one month to secure a customer, we at once secured one in the Government, to whom you willingly gave another option for us. We may say we have done our part so far as possible up to the present; and, although the transfer has not yet been made, we are doing our part in endeavouring to have same attended to at a nearly date. But, as such matters have to pass through so many hands, it has necessitated a slight delay, but hope to have the matter settled soon. We are writing again in an endeavour to have the matter attended to at once." To this no answer was made by the defendant; and, as has been said, it was not till about the 14th November that the matter was closed out.

With some doubt, I am of the opinion that, in the circumstances of this case, the plaintiff is entitled to recover. No doubt, from all the evidence, he was to "secure" a customer within thirty days. But the word "secure" is not always used in its strict or etymological sense: and procuring within thirty days a customer who ultimately and within a reasonable time purchases may well be called "securing" such purchaser. All the circumstances of the case seem to bear out this conclusion. The defendant knew that it was the Government which was expected to be the purchaser; he gave an "open option" without limit of time to the Government; when the thirty days had elapsed, he did not cancel the option—thinking, no doubt, that the matter would soon be completed by a formal acceptance. He contented himself with endeavouring to deprive the plaintiff of any profit from the transaction which he had brought about. And finally, when the plaintiff wrote, on the 24th September, setting out that he had "secured" a customer in the Govern-

ment, the defendant keeps silence. "Silence is sometimes conduct," says Bramwell, B., in Keen v. Priest, 1 F. & F. 314, at p. 315; and where, from the relations of the parties, a reply might naturally and ordinarily be expected, silence is strong evidence of acquiescence. See Richards v. Gellatly, L.R. 7 C.P. 127, 161; Wiedeman v. Walpole, [1891] 2 Q.B. 534, esp. 539, 541 (C.A.) The "fair way of stating the rule of law is, that in every case you must look at all the circumstances under which the letter is written, and you must determine for yourself whether the circumstances are such that the refusal to reply alone amounts to an admission." See the cases collected in Wigmore, sec. 1073, and notes.

Under the circumstances of this case, I think the natural thing to expect, if the defendant really disputed the plaintiff's claim that he had "secured" a customer, would be an explicit denial by the defendant of that construction of the contract. I am of opinion that what the plaintiff did was what both parties contemplated as a securing of a customer within thirty days—and that the plaintiff is entitled to recover.

There being no cross-appeal as to the amount, the appeal should simply be dismissed with costs.

DIVISIONAL COURT. NOVEMBER 9TH, 1911.

*CONNORS v. REID.

Malicious Prosecution—Reasonable and Probable Cause—Belief of Defendant in Truth of Charge Laid—Question for Jury—New Trial.

Appeal by the defendant from the judgment of the County Court of the County of Ontario in favour of the plaintiff, after a trial with a jury, for the recovery of $175 damages, in an action for malicious prosecution.

The appeal was heard by MEREDITH, C.J.C.P., TEETZEL and RIDDELL, JJ.

H. E. Rose, K.C., for the defendant.

J. M. Ferguson, for the plaintiff.

RIDDELL, J.:—The action is for malicious prosecution, the defendant having charged the plaintiff, who was in his employ,

*To be reported in the Ontario Law Reports.

with stealing milk from him. His story is that Mrs. Connors, the plaintiff, had been milking for him night and morning; that one Smith had told him that the plaintiff was stealing milk from him, and that he had seen her do this many times. He also says that one White told him that he (White) had seen her stripping the cows after she had got through milking them and taking the pail away, although he (White) could not say what she had done with it—"he (White) said something about her having a bottle under her coat which he used to see her fill near the feed-box.

The defendant says that he consulted a solicitor and told him what he had been informed by Smith and White; and was advised that it was a case for a summons. The solicitor, when called, corroborates the interview and advice.

Were there no more in the case, it would be plain that there was no absence of reasonable and probable cause. But it also appears that the solicitor was consulted as early as November, as on the 25th November, 1910, he wrote the solicitor for the plaintiff's husband (who was making a claim for her wages against the defendant): "Milk was taken almost daily by Mrs. Connors, and which she has never paid for: now this may be put down to stealing, or it may be that she intends to pay for it —if the latter, would be very glad to hear of it; and if the former, we would be very sorry for her; but there is one thing sure, that we have absolute proof of what I am saying. If your client is satisfied, without prejudice, to accept $5, my client is ready to pay it, and he does not hope to have anything more to do with Mrs. Connors." On the 2nd December, 1910, the same solicitor writes the plaintiff and her husband offering $5 in full of all claims, and adds: "All I can say is that Mr. Reid has two witnesses who will swear that they say you take milk, not once but many times; and, if there is any more trouble or Mr. Reid is annoyed any more, he will see what he can do, and will have these witnesses summoned to Court, as well as Mrs. Connors." Again on the 12th, the same solicitor writes the solicitor for the plaintiff and her husband: "I note what you say in your letter about accepting the $5 we have offered it (sic) to your clients in settlement of the account. We will defend any action that you bring. I might just add that, if Mr. Reid has any more trouble, then other proceedings will be taken, but he is not looking for trouble unless he is forced to do it. I might just add that I have two witnesses who will prove the contention that I raised in a former letter. There is no doubt in my mind of the fact that Mrs. Connors took milk that she was not entitled to,

and, if she wants the matter tested, then all she has to do is to proceed." The $5 was not accepted, and the plaintiff sued in a Divisional Court or proceeded before a magistrate for her wages, and recovered the full amount she was claiming. The trial was had on the 18th January, and in the meantime, on the 16th January, the defendant laid an information before a magistrate charging the plaintiff with stealing a quantity of milk from him in August. A summons was served upon the plaintiff after the termination of the wages proceedings in her favour. She was acquitted.

The only explanation the defendant gives of his delay in laying an information is, "I couldn't make out any account for to tell what amount of milk she stole or anything of this kind," which, of course, is no explanation at all.

Much complaint is made that the learned County Court Judge characterised the letters already referred to as "blackmail." If they were not intended to indicate that the defendant did not believe that the plaintiff had stolen the milk, but had taken it away intending to pay for it and without animus furandi, then they were an offer to compound a crime.

And the whole conduct of the defendant in delaying to lay an information and in omitting to make any inquiry, etc., is indicative of his disbelief in the truth of the charge he laid.

All this is by no means conclusive against him—notwithstanding the circumstances already detailed and others, the defendant may have honestly believed that the plaintiff had stolen from him. The belief of the informant in the truth of the charge contained in the information is a most material fact to be considered upon the question of reasonable and probable cause—if the informant does not believe in the truth of the charge he is making, there is no reasonable and probable cause for him.

So far as I am concerned, I should not have thought it necessary to reserve the motion, had it not appeared that two recent judgments in our Courts had been misunderstood—and it seems to have been thought that, if there be no contradiction in the evidence—in the sense that one witness is not called to contradict another—if was wholly for the trial Judge to draw the inferences of fact upon which he based his finding as to reasonable and probable cause. Such is, I think, not the law.

The cases referred to are Longdon v. Bilsky, 22 O.L.R. 4, the judgment of Mr. Justice Middleton, pp. 8 sqq.; and Ford v. Canadian Express Co., 21 O.L.R. 585; and in the Court of Appeal, 3 O.W.N. 9. . . .

[Reference to and explanation of these cases.]

If no jury could reasonably draw any but one conclusion of fact from the facts admitted or proved, the Judge may and should draw that conclusion himself; but where more than one conclusion of fact may reasonably be drawn from such facts, it is for the jury to say which is the proper conclusion.

It is needless to multiply authorities: the law is clear that the belief of the defendant in the truth of the charge he was laying is a most material fact to be considered—that the state of his mind is as much a fact as the state of his digestion; and that where the evidence, be it of one or more witnesses, including the defendant himself or otherwise, may lead to different conclusions as to his belief, it is not for the Judge, but for the jury, to say what the fact is. We may regret that the law is so —I for my part do regret it—but that this is the law is, I think, plain.

I find it impossible from the notes before us to make out whether the trial Judge himself decided against the defendant upon the question of his belief—but in any case it was not left to the jury, as it should have been.

There should be a new trial; costs of the last trial and of the appeal to be in the cause.

MEREDITH, C.J., gave reasons in writing for the same conclusion.

TEETZEL, J., also concurred.

LAMOUREAUX v. SIMPSON—BRITTON, J.—NOV. 3.

Contract—Transfer of Company Share—Undertaking to Retransfer—Sale or Loan of Share—Findings of Jury.]—The plaintiffs, as trustees of the estate of George Tuckett, deceased, were the holders of one share of the capital stock of the Hamilton Jockey Club Limited. The par value was $100 per share, but $40 only had been paid thereon. On the 17th May, 1906, the plaintiffs transferred this share to the defendant, taking from him an undertaking in writing and under seal to re-assign and transfer the share to the plaintiffs on demand. The plaintiffs on the 8th July, 1910, wrote to the defendant asking for a retransfer of the share; the defendant paid no attention to the letter. On the 16th September, 1910, the Jockey Club declared

a dividend of 10 per cent. and a bonus of $700 on each share, and $710 was accordingly paid to the defendant. This action was brought to compel a retransfer of the share and payment to the plaintiffs of $710. The plaintiffs asserted that the transfer was made at the request of the defendant, without payment of money, merely for the convenience of the defendant. The defendant asserted that he paid the plaintiffs $40, which was the value of the share at the time of the transfer, and that the transaction was a completed sale. He stated that he signed the undertaking to retransfer upon the representation of Witton, one of the plaintiffs, that the undertaking was a mere form. The question was, whether the transaction was a sale by the plaintiffs and a purchase by the defendant of one share, or whether it was a loan of the share to be returned on demand. The action was tried by BRITTON, J., and a jury, at Hamilton. The jury found, in answer to questions submitted to them, that the transaction was as stated by the plaintiffs and that the sum of $40 was not paid by the defendant. BRITTON, J., said that, upon the answers of the jury, and upon the whole case, judgment should be entered for the plaintiffs, directing the defendant to transfer the share to the plaintiffs as trustees and to pay $710 to the plaintiffs, with costs. I. F. Hellmuth, K.C., and E. H. Ambrose, for the plaintiffs. G. T. Blackstock, K.C., and J. A. Soule, for the defendant.

POLSON IRON WORKS LIMITED v. LAURIE—LAURIE v. POLSON IRON WORKS LIMITED—DIVISIONAL COURT—NOV. 3.

Bailment—Contract—Work and Labour Expended on Boat—Loss of Boat—Negligence—Evidence Insufficient for Determination of Questions Raised—New Trial.]—Appeal by Laurie from the judgment of MEREDITH, C.J.C.P., 2 O.W.N. 1187, in favour of the Polson company for the recovery of $500 upon their claim for work done by them upon the Knapp roller boat, and dismissing Laurie's action and Laurie's counterclaim in the Polson company's action for damages for the loss of the boat. A Divisional Court (FALCONBRIDGE, C.J.K.B., RIDDELL and LATCHFORD, JJ.), ordered a new trial; the costs of the former trial and of the appeal to abide the event of the new trial. RIDDELL, J., who gave written reasons for judgment, said that there was no doubt about the law—the Polson company, having the custody of the boat, were bound to use reasonable care for its safety and to prove that they had used such care: Pratt v.

Waddington, 23 O.L.R. 178. The evidence given at the trial did not enable the Court to determine whether such care was in fact used; and, on this point he thought that there should be a new trial, upon which all the facts could be fully developed. The new trial should be general. The other members of the Court agreed in the result. R. McKay, K.C., for Laurie. C. A. Moss, for the Polson Iron Works Limited.

PRATT v. PIPE—MASTER IN CHAMBERS—NOV. 6.

Discovery—Examination of Parties—Exclusion of Stranger from Examiner's Chambers—Discretion.]—Motion by the plaintiff for a direction to the Local Registrar at Berlin to allow the father of the assignor of the plaintiff to be present at the examination of the defendant for discovery. His presence was objected to by the counsel for the defendant, and he was thereupon directed to retire. Against the motion were cited the following cases: Re Western of Canada Oil Lands Co., 6 Ch. D. 109; Hands v. Upper Canada Furniture Co., 12 P.R. 292; Merchants Bank v. Ketchum, 16 P.R. 366. The Master said that these cases shewed, as was admitted by counsel for the motion, that the examiner in such cases has a discretion, which is, no doubt, subject to review; and in the first case he was directed to give effect to an objection similar to that made in the present instance. No case can be found where a discretion to exclude has been overruled. So far as the material shews, it would seem that the discretion was rightly exercised; and the motion must be dismissed with costs to the defendant in any event. A. R. Lewis, K.C., for the plaintiff. D. C. Ross, for the defendant.

NORTHERN SULPHITE MILLS v. CRAIG—MEREDITH, C.J.C.P.—NOV. 6.

Principal and Agent—Purchase of Bonds by Agent—Dispute as to Ownership—Evidence—Purchase for Principal—Agent's Lien for Part of Purchase-money Paid.]—An action by the Northern Sulphite Mills, an incorporated company, and E. R. C. Clarkson, receiver for the company, for the delivery to the plaintiff Clarkson of 52 first mortgage bonds of the Imperial Land Company on deposit in Court. The bonds were acquired by the

defendants the Occidental Syndicate, as the plaintiffs contended, with the money of the plaintiff company; while the syndicate contended that they were acquired for the syndicate and belonged to it. The Chief Justice said that his conclusion upon the evidence was, that the contention of the plaintiffs was entitled to prevail. What was done afforded cogent evidence that the real transaction was a purchase of the bonds by the defendant syndicate as the agent of the plaintiffs. One of the 52 bonds had been paid off; and, as to the remaining 51, there should be a declaration that the plaintiff company were entitled to them, subject to a lien on them for the sum by which that paid for the bonds exceeded the amount which was withdrawn from the coffers of the plaintiff company, and an order that they be delivered out of Court to the plaintiff Clarkson, on payment to the defendants of that sum; and, if there should be any question as to the amount of the excess, a reference to the Master in Ordinary to ascertain it. The defendants to pay the costs of the action; the plaintiffs to be at liberty to deduct these costs from the amount to be paid to the defendants. I. F. Hellmuth, K.C., and J. H. Moss, K.C., for the plaintiffs. E. D. Armour, K.C., and H. W. Mickle, for the defendants.

NEVILLE v. EATON—SUTHERLAND, J.—NOV. 7.

Promissory Note—Interest—Rate of—Contract—Bonus—Collateral Security.]—Action upon a promissory note, dated the 5th July, 1909, for $3,000, payable 60 days after date, of which the defendants Charles A. Eaton and Cyrus S. Eaton were the joint makers, and the defendants the International Heating and Lighting Company were the indorsers. The note was the last of a series of renewals of a note for the same amount, signed by one Coutts and the defendant Eaton, and indorsed by the defendant company. As collateral to the notes, the plaintiff held fifty-five shares of the stock of the defendant company. The dispute was as to the rate of interest to be paid and in regard to the shares. Upon the security of the original note and the shares the plaintiff advanced $3,000 for the purposes of the defendant company. The shares were of the par value of $5,500, and, according to the account of the agent who negotiated the loan, interest at the rate of six per cent. per annum was to be paid, not on $3,000, but on $5,500, and, in addition, a bonus of three shares of the defendant company's stock was to be given to the plaintiff for making the loan. SUTHERLAND, J., after reviewing the evidence, said that

the defendant company must, upon the evidence, and in view of the fact that they paid the interest from time to time, on the basis above stated, on the notes as they matured and were renewed, be held to have understood and agreed to pay interest at the rate aforesaid on the sum of $5,500; that the defendant Charles A. Eaton, the president of the company at the time the agreement was made, must, upon the evidence, be taken to have known of the terms of the loan as agreed upon, under which he signed the original note and subsequent renewals; and that the defendant Cyrus S. Eaton was present when the terms were arranged, and signed the note sued on, well knowing that the agreement was that interest at six per cent. was to be paid on $5,500. The learned Judge found also that the plaintiff was entitled to the ownership of three shares as bargained for, and was entitled to retain the fifty-five shares as collateral security, in the usual way and subject to the usual rights, to the loan of $3,000 as represented by the note sued on, together with interest on $5,500 at the rate aforesaid, until paid. Judgment for the plaintiff against all the defendants for $3,000, the amount of the note, and $60, the interest thereon up to the 7th September, 1909, and $2.09, notarial fees, and interest on $3,002.09 at six per cent. from the 7th September, 1909, and costs of suit. J. A. Paterson, K.C., for the plaintiff. R. C. H. Cassels, for the defendants other than Charles A. Eaton. The defendant Charles A. Eaton was not represented.

TOWN OF STURGEON FALLS v. IMPERIAL LAND CO.—MASTER IN CHAMBERS—NOV. 9.

Particulars—Statement of Defence—Lien for Taxes—Validity of Assessments.]—The nature of this action appears in a note of a former decision of the Master, 2 O.W.N. 1433. The 4th paragraph of the statement of defence of the defendants the Trusts and Guarantee Company was as follows: "The pretended assessments for the various years in which the plaintiffs claim a lien for taxes alleged to be due on the lands of the Imperial Land Company, mortgaged to these defendants, were not valid, nor have the imperative requirements of the statute 4 Edw. VII. ch. 23 and amending Acts and the Municipal Act in respect of assessment and collection of taxes, been complied with." The other defendants pleaded to the same effect. The plaintiffs moved for particulars shewing in what respects the statutory requirements had not been complied with. The Master said that in the

analogous case of Hamilton v. Hodge, 8 O.W.R. 351—an action to set aside a tax sale—the plaintiff alleged 22 distinct irregularities in the proceedings of the officials. But it was contended that here the onus was on the plaintiffs to shew that all necessary conditions had been complied with. With this the Master is unable to agree. If the plaintiffs produce enough evidence to make out a primâ facie case, the application of the presumption of regularity will throw the onus on the other side; and it, therefore, seems that the motion should be granted, in view of the language of the paragraph in question. Not that this is the only or the main ground. For, even if the defendants had put in a bare denial of the plaintiffs' claim, they could have been required to disclose on examination for discovery (if not earlier) what their real grounds of defence were. Here is no question of pleading a statute. What the defendants allege and must prove is the failure of the plaintiffs to comply with the statutory requirements in certain essentials, and these are facts on which they intend to rely, and which, therefore, under the Rule, must be stated in the pleading—or, if not, particulars should be given. Costs of the motion to the plaintiffs in any event.

CORRECTION.

In Re Broom, ante 102, the Divisional Court was composed of MEREDITH, C.J.C.P., TEETZEL and RIDDELL, JJ.