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APPELLATE DIVISION.

DECEMBER 21ST, 1914.

*MacMAHON v. TAUGHER.

Solicitor—Agreement with Client Made in Foreign Country—Foreign Law—Lex Loci Contractus — Contingent Fee — Share of Estate—Agreement Made after Relationship of Solicitor and Client Arose—Duty of Solicitor—Absence of Independent Advice—Action to Set aside Agreement—Evidence—Extortionate and Unconscionable Bargain.

APPEAL by the defendant Taugher from the judgment of KELLY, J., ante 9.

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

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

C. A. Moss and O. H. King, for the plaintiff, respondent.

C. S. MacInnes, K.C., for the defendant the National Trust Company, respondent.

MEREDITH, C.J.O.:— . . . It is not necessary, in my view, to decide whether the validity of the agreement in question and the rights of the parties under it are to be determined by the law of Ontario or by that of California, for in either case the nature and terms of the agreement and the circumstances under which it was entered into are such that it must be held to be extortionate and unconscionable so as to be inequitable against the respondent MacMahon and not binding upon her.

As I understand the testimony of the witnesses who gave

*To be reported in the Ontario Law Reports.

evidence as to the law of California, it is lawful there for an attorney to undertake to institute and carry on proceedings for the recovery of property and to stipulate with his client for a contingent fee, as it is called, which may be a part of the property or a part of the value of it; and that, where the business is undertaken after the relationship of attorney and client has been established, the onus rests upon the attorney of proving that the bargain was a fair one; but, if the business is undertaken before that relation is established, the validity of the agreement is to be determined according to the law applicable to contracts between parties who do not stand in that relation to one another, and that the law applicable in the latter case does not differ from the law of England.

It was argued that the validity of the agreement and the rights of the parties under it are to be determined according to the law of Ontario, and that by that law the agreement is champertous and void. It is unnecessary, in the view I take, to decide whether or not this contention is well-founded; for, even if the agreement is not champertous, the respondent MacMahon is entitled to have it set aside, for the reasons I shall afterwards mention.

I may say, however, that I do not share the views expressed by Lord Chancellor Cottenham in Strange v. Brennan (1846), 2 Coop. temp. Cott. 1. . . . I prefer the view expressed by Sir Montague E. Smith in delivering the judgment of the Privy Council in Ram Coomar Coondoo v. Chunder Canto Mookerjee (1876), 2 App. Cas. 186, 209, 210. . . .

The trend of modern opinion is against the view expressed by Lord Cottenham and in accord with that expressed by Sir Montague E. Smith; and in many of the States of the neighbouring Republic an attorney and his client may lawfully agree that the attorney's compensation for services rendered on recovering property for his client shall be a part of the property or a proportion of its value, and that such an agreement is valid and binding upon the client, subject always to the condition that the compensation is not extortionate and unconscionable so as to be inequitable against the client; and, although such agreements are not valid according to the law of Ontario, there are many who think that no harm would be done if a similar latitude were by legislation allowed to solicitors in this Province.

A bare statement of the effect of the agreement in question in this case is enough to shew that it was an extortionate and unconscionable agreement. It is true that the contingent interest

to which the respondent MacMahon was entitled was such that it was possible, and indeed, in view of the state of her health, probable, that she would never become absolutely entitled to anything. What it was in the contemplation of the parties to effect by the employment of the appellant was the making of an agreement with D'Arcy MacMahon, another beneficiary under the will, by which a present division of the estate between him and the respondent MacMahon might be brought about; and it was thought—whether rightly or not, it is unnecessary to consider—that if the two of them were to come to an agreement nothing would stand in the way of that object being accomplished. What the agreement provides for is, that, in the event of an agreement being come to which should result in the respondent MacMahon getting anything out of the estate, the appellant should be entitled to one-half of it for his services and any expenses he might have been put to, and that, if no agreement should be come to, or perhaps if after negotiation had so far progressed that the making of an agreement was in sight, D'Arcy MacMahon should die and the respondent MacMahon should become entitled under the terms of the will to the whole of the estate, the appellant should receive for his services and outlay one-fourth of the estate which should come to her.

It was not the case of the employment of an attorney to recover an estate which would involve his entering upon litigation, perhaps long and expensive, but an employment merely to endeavour to affect an agreement, of the character I have mentioned, with D'Arcy MacMahon, and possibly, if that became necessary, to bring a friendly action to protect the executor and trustee for giving effect to the agreement.

It might well have happened, and in fact did actually happen, that after the writing of a few letters it would be ascertained that no agreement could be come to with D'Arcy MacMahon; and all that, in the event of that happening, the appellant had to do, was to sit down and wait until his client or D'Arcy MacMahon died; when, if his client outlived D'Arcy MacMahon, the appellant would step into the enjoyment of one-fourth of the estate; or, if his client died first, he would get no compensation for his trouble in writing the letters and the small expenditures he might have incurred.

But, even if an agreement had been come to with D'Arcy MacMahon, the compensation for which the appellant stipulated was out of all proportion to any services it was at all likely that he would be called upon to render.

The respondent MacMahon was, no doubt, a bright, intelli-

gent woman and had some knowledge of business, and it appeared that she was alive to the unfairness of having to pay one-half of what she should receive if she became entitled to the estate by its falling into her in consequence of D'Arcy MacMahon predeceasing her; and it is manifest that no lawyer, except one with whom she was making such a bargain, would have advised her to enter into the agreement. In addition to these considerations, she was, as the appellant knew, in dire straits for money, out of employment, and dependent on the generosity of a friend for even the means of subsistence, as well as in bad health, and therefore likely to jump at anything which seemed to promise even the chance of getting money, regardless of the price she was to pay for it.

In bargaining with such a woman, and a woman so circumstanced, every principle of fair dealing demanded that, before exacting such a price for his services as the appellant stipulated, he should have taken care to see that she thoroughly understood not merely the terms but the effect of the agreement she was entering into—and that he did not do; and, even if he had done all this, he cannot escape from the position of having exacted from her an agreement which required her to pay him for his services a compensation which he must have known was grossly in excess of the value of any services he was likely to be called upon to render.

For these reasons, I would affirm the judgment and dismiss the appeal with costs.

MACLAREN, MAGEE, and HODGINS, JJ.A., agreed.

GARROW, J.A., agreed in the result, for reasons stated in writing.

Appeal dismissed with costs.

DECEMBER 21ST, 1914.

NICHOLSON v. GRAND TRUNK R.W. CO.

Water—Flooding of Premises—Obstruction of Drain—Cause of Obstruction—Evidence—Fault of one Defendant—Exoneration of the Other—Costs of Successful Defendant to be Paid by Defendant at Fault.

Appeals by the defendant railway company and by the defendant Scott from the judgment of FALCONBRIDGE, C.J.K.B.,

at the trial, in favour of the plaintiff as against the appellants, but dismissing the action as against the defendant Mills; the plaintiff did not appeal as to Mills.

The plaintiff was the owner of a lumber-yard and several buildings adjoining the Strathroy station of the defendant railway company. The defendant Mills was the owner and the defendant Scott the lessee of a coal-shed in the same neighbourhood; and the action was brought to recover damages for the flooding of the plaintiff's property, arising from obstructions in a drain passing through the parties' respective properties.

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

T. G. Meredith, K.C., for the appellant Scott.

D. L. McCarthy, K.C., for the appellant railway company.

J. M. McEvoy, for the plaintiff, the respondent.

The judgment of the Court was delivered by MACLAREN, J.A.:— . . . The railway track at Strathroy runs east and west. The plaintiff's lands which were flooded adjoin the station grounds on the north. On the railway side of the boundary-line, the defendant company has a drain which conveys the water from the right of way westward to the river. It was constructed with a galvanised iron pipe, 20 inches in diameter, which runs close to the plaintiff's southern boundary, then passes under Frank and Metcalfe streets at their intersection, and 130 feet farther westward runs under the defendant Scott's coal-shed. The top of the pipe is slightly below the surface of the ground. It was originally a continuous tube for the distance above-mentioned, but for some time before the flood in question it had been out of repair—two sections of over 100 feet each adjoining the plaintiff's land having been taken up, leaving an open ditch there about 2 feet deep; a third section, of about 40 feet, east of Scott's shed, being in the same plight. In ordinary high water, the mouth of the pipe or culvert under Frank and Metcalfe streets was often blocked by pieces of lumber, bark, and other refuse, and the railway men from time to time cleaned these out, and drove in stakes to prevent them going into the pipe.

In the latter part of March, 1913, there were two floods, of which the plaintiff complained to the railway agent, and the obstructions then at the mouth of the pipe were removed and missing stakes replaced. On the 3rd April, there was an unusual rainfall. The next morning, the plaintiff's land, buildings, and

lumber were flooded. He complained again to the railway agent, who sent his men to remove the obstruction. East of Frank street, the water was considerably above the pipe and only 2 inches lower than the sidewalk. They found the water at the west end of Scott's shed lower than at the east end, and concluded that the obstruction was under this shed. The coal was removed by the railway men and Scott's men, and it was found that the flooring and stringers had dropped down and had broken the pipe. The coal and the broken flooring were cleared out by 3 o'clock in the afternoon, and the water began to go down. By the next morning, the water had entirely subsided.

The railway men were of opinion that the obstruction under Scott's shed was the cause of the flooding of the plaintiff's premises. . . . They judged that the water west of the shed was about 18 inches lower than on the east side. The removal of the coal proved that they were right in their belief that there was an obstruction under the shed; but they were manifestly mistaken in their idea that this obstruction was the cause of the flooding of the plaintiff's premises. The measurements and levels taken at the time by the witness Manigault, a civil engineer of the town, shewed that at the height of the flood the water on the plaintiff's premises was two and a half feet higher than at the east end of Scott's shed; and there is no evidence to the contrary. All the evidence for all parties is to the effect that the land between Metcalfe street and the shed was not flooded, and that the open ditch east of the shed did not overflow, while east of Metcalfe and Frank streets it was entirely flooded, and rose to within 2 inches of the top of the sidewalk.

. . .

It is proved by the plaintiff and not contradicted that the stakes that the railway company had from time to time placed at the mouth of the pipe east of Frank and Metcalfe streets were not there for a week before the flood. The evidence is not clear as to the exact time of the subsidence of the flood. . . .

The defendants Scott and Ellis produced two civil engineers, who examined the premises and who heard the evidence. They gave expert evidence in corroboration of that of Manigault, that there must have been some obstruction in the pipe or culvert under the street. I do not see that expert evidence was necessary to prove this, if the uncontradicted evidence of Manigault as to the levels is true, unless the law of gravitation was suspended, or unless it is not true that water will, if unobstructed, find its own level. If this pipe or culvert of 20 inches diameter was not obstructed, but the water had a free flow, then it could

not be possible that the water on the west side of the street would be 2½ feet lower than on the east side, and that the open ditch between the street and the coal-shed had not overflowed its banks, and this was proved by Manigault and not contradicted, but corroborated as to the latter statement by the evidence given on behalf of the railway company.

I am, consequently, of opinion, that the appeal of the defendant Scott should be allowed and the action dismissed as to him, and that the appeal of the railway company should be dismissed.

As to costs, those connected with the appeal of the railway company should follow the ordinary rule. As to the costs of the defence and appeal of Scott, the circumstances are entirely exceptional. The railway company gave a third party notice, and claimed indemnity over against him. In the circumstances, I think that it was quite reasonable for the plaintiff to bring a joint action against the two defendants rather than to have proceeded against one of them, and, if he failed, then to proceed against the other. This latter course might possibly result in his failing to recover against either, even if the fact were that one of them, or perhaps both, had caused him the injury. . . .

[Reference to Besterman v. British Motor Cab Co., [1914] 3 K.B. 181, per Vaughan Williams, L.J., at p. 186.]

In the present case, the railway company brought witnesses to prove that the flooding complained of was caused by the obstruction under the defendant Scott's coal-shed; and having, in my opinion, failed to establish this, it ought, in consequence, to pay the costs of its co-defendant both in this Court and in the Court below, to the exoneration of the respondent; the respondent's costs to include all costs incurred by reason of Scott having been joined as a defendant.

DECEMBER 21ST, 1914.

*LITTLE v. SMITH.

Water—Frozen Surface of Bay of Quinté—Public Highway—Right of Travel Paramount to Right of Ice-cutters—Hole Cut in Ice and Insufficiently Guarded—Criminal Code, sec. 287—Runaway Horse Falling into Hole—Liability of Ice-cutters—Findings of Jury — Negligence — Contributory Negligence—Nuisance.

Appeal by the defendants from the judgment of the Senior Judge of the County Court of the County of Hastings in favour

*To be reported in the Ontario Law Reports.

of the plaintiff, upon the verdict of a jury, in an action brought in that Court to recover damages for the loss of the plaintiff's horse, in the circumstances set out below.

The appeal was heard by MEREDITH, C.J.O., MACLAREN and HODGINS, JJ.A., and CLUTE, J.

W. B. Northrup, K.C., for the appellants.

E. G. Porter, K.C., for the plaintiff, respondent.

MEREDITH, C.J.O.:—The female appellant conducts an ice business, which is managed by her son, the other appellant, and for the purpose of the business they cut ice in the Bay of Quinte. There is a conflict of testimony as to the area of the opening made in the process of cutting; but it was at least 150 feet long and 8 or 9 feet wide; and the appellants failed to provide the protection around it required by sec. 287 of the Criminal Code. A horse of the respondent which was being driven by him, attached to a sleigh in which the respondent and a man named McConnell sat, and in which there were a number of empty milk-cans, ran away and in the course of his flight broke through the thin ice which had formed over the hole, and was drowned. The bay when frozen over is used as a means of travelling from Belleville to the county of Prince Edward; and the respondent was driving across the bay for the purpose of getting a supply of milk from farmers in that county. There was a beaten track which was used in crossing the bay, and the respondent was driving on it when his horse ran away and ultimately came to the hole in the ice, which was distant about 150 feet from the travelled way.

The respondent brings his action to recover damages for the loss of his horse, and claims to recover on two grounds: (1) that the hole in the ice, insufficiently guarded as it was, constituted a nuisance in the highway which he was lawfully using, and that the loss of the horse was due to the existence of the nuisance; (2) that the appellants were guilty of a contravention of sec. 287 in not protecting the hole as that section requires, and that the loss of the horse was due to the failure so to protect it.

The contention of the appellants is, that the hole in the ice did not constitute a nuisance, because of its distance from the travelled way; that no action lies for the failure to provide the protection which sec. 287 requires; and that the proximate cause

of the drowning of the horse was his running away and being no longer under the control of his driver or of any one else; and the appellants also contend that the learned County Court Judge misdirected the jury as to the effect of sec. 287, and that the running away of the horse was occasioned by the negligence of the respondent, who, it was contended, was under the influence of liquor and unfit to drive the horse, in driving in that condition a horse which had run away on the previous day.

The question of contributory negligence was fairly left to the jury, and their verdict acquits the respondent of it, and there was evidence which warrants the jury's finding.

The main question is as to the liability of the appellants for injury done to a runaway horse.

That it was the duty of the appellants, both at common law and under the provisions of the Code, to guard the hole that had been made, is, I think, undoubted; and that such a duty exists was decided by a Divisional Court in Pennock v. Mitchell (1908), 12 O.W.R. 767.

It may be that sec. 287 imposes a greater duty as to the nature of the guard than is imposed by the common law; but it is unnecessary, in the view I take, to consider that question.

. . . .

[The learned Chief Justice quoted sec. 287.]

While the purpose of this enactment was the safeguarding of human life, I have no doubt that a hole, opening, aperture, or place, left unguarded, in contravention of it, in a public highway, as the Bay of Quinté is, is a nuisance; and, if it be a nuisance, the respondent, having suffered damage different in kind from that which was suffered by the public at large, is entitled to maintain an action for the recovery of the damages which he has sustained.

There is more difficulty as to the liability of the appellants in the circumstances of the case, the horse having run away, without, as the jury have found, any negligence on the part of the respondent, and in his flight having broken through the thin ice which had formed over the hole cut by the appellants. . . .

[Reference to Elliott on Roads, 3rd ed., pp. 194, 195, para. 793; Toms v. Township of Whitby (1874-5), 35 U.C.R. 195, 37 U.C.R. 100; Price v. Cataraqui Bridge Co. (1874), 35 U.C.R. 314; Sherwood v. City of Hamilton (1875), 37 U.C.R. 410; Steinhoff v. Corporation of Kent (1887), 14 A.R. 12; Foley v.

Township of East Flamborough (1898-9), 29 O.R. 139, 141, 26 A.R. 43, 45; Atkinson v. City of Chatham (1898-9), 29 O.R. 518, 26 A.R. 521; Bell Telephone Co. v. City of Chatham (1900), 31 S.C.R. 61; Thomas v. Township of North Norwich (1905), 9 O.L.R. 666.]

The cases are certainly not satisfactory and are not easily reconcilable, but I am of opinion that the true rule is that laid down in the Sherwood case, and that the Atkinson case does not stand in the way of its being applied in a case against a municipal corporation where the highway is out of repair owing to the corporation's neglect of the statutory duty to keep it in repair; but, if the rule be otherwise, and the corporation is not liable where horses are running away, that would not, in my opinion, help the appellants. The Bay of Quinté—the whole bay—is a highway and open to the public, and upon its waters when frozen any person may travel on foot or driving his horse or other animal. The public have the right to cut the ice, but this right is subordinate to the right of travel, as is clearly shewn by the provision of the Code to which I have referred; and I am unable to find any ground upon which the appellants can escape liability if the hole which they had made in the ice was not guarded as the Code requires, and the absence of the guard was the cause of the respondent's horse being drowned, notwithstanding that the horse had escaped from the control of his driver and was running away when he met his death, if that was not due to the negligence of the respondent.

That the hole was not guarded as the Code requires is clear upon the evidence, and the danger of the horse getting into it was increased owing to the fact that ice had formed over the hole, but not of sufficient strength to support the weight of the horse. It is possible that, if there had been open water where the ice had been cut, the bushes that had been set up would have been sufficient to have prevented the horse from proceeding beyond them; but, as it was, there was nothing to indicate to the horse that what lay beyond the bushes was not ice like that over which he had been travelling.

The charge to the jury is not, I think, open to the objection taken to it by the appellants' counsel. It was left to the jury to say whether or not the hole was reasonably guarded, but it was pointed out to the jury that it was necessary to guard only so as to keep persons from accidentally driving or falling into it, and that, even if there had been a good, solid fence, three feet

high, around the hole, it did not follow that it would have kept the horse from getting into the hole; and, reading the charge as a whole, I do not think that the appellants have any reason to complain that it was too favourable to the respondent.

It was argued for the appellants that the right to cut ice formed in a navigable river is paramount to the right of the public to travel upon the ice, and in support of that contention a decision of the Supreme Judicial Court of Maine, Woodman v. Pitman (1887), 79 Maine 456, and also the opinion of American text-writers, were cited.

Whatever may be the view of American Courts as to the respective rights and duties of the ice-cutter and the public, the policy of our law, as indicated by the provisions of sec. 287 of the Code, is, that the safety of human life and limb is paramount to the right of the ice-cutter, and that, if he chooses to exercise his right, he must do so in such a way as not to endanger that safety, by providing the safeguards which by the section he is required to put around the opening which he has made.

. . .

Upon the whole, I am of opinion that the appeal fails and should be dismissed with costs.

CLUTE, J., agreed.

MACLAREN, J.A., agreed in the result.

HODGINS, J.A., also agreed in the result, for reasons stated in writing. His opinion was that the act of the appellants created a nuisance, and that the verdict and judgment should be supported upon the ground that they were liable to the respondent for his injury thereby caused. He referred to Beven on Negligence, 3rd ed., p. 360; Blithe v. Topham (1608), 1 Vin. Abr. 554, pl. 4; Deane v. Clayton (1817), 7 Taunt. 490, 532; Barnes v. Ward (1850), 9 C.B. 392.

Appeal dismissed with costs.

DECEMBER 21ST, 1914.

*HUNT v. EMERSON.

Principal and Agent—Agent's Commission on Sale of Land—Agreement—Evidence—Failure of Agent's Negotiations—Subsequent Sale by Principal to Purchaser Found by Agent at Lower Price—General Employment—Quantum of Commission or Damages—Arrangement to Divide Commission with Agent of Purchaser—Effect of.

Appeal by the plaintiff from the judgment of FALCONBRIDGE, C.J.K.B., ante 15, dismissing without costs an action by a broker for a commission on the sale of land.

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

G. Lynch-Staunton, K.C., for the appellant.

Sir George Gibbons, K.C., and G. S. Gibbons, for the defendant, respondent.

HODGINS, J.A.:—The written agreement between the parties in this case, coupled with the admitted verbal arrangement to pay commission, resembles that considered in Kelly v. Enderton, [1913] A.C. 191. . . . If the option in this case were the only agreement between the parties, I should be inclined to think that the appellant could not claim an agency to sell except upon the terms mentioned in the option. But both parties admit that there was mention of some variation in price, and it must be determined whether or not that mention, and the actions of the parties throughout, introduced into the bargain a more general agency. . . .

[The learned Judge referred at some length to the evidence.]

The fair result of this, I think, is that, while the option named a price and time for sale, it was understood that, if the appellant could effect a sale at a less price, the respondent might accept it, and if more time were needed he would give it. . . .

[Reference to Toulmin v. Millar (1887), 58 L.T.N.S. 96.]

It seems to me that the appellant . . . had a general authority. Does what happened during the negotiations affect the right of the appellant to get a commission on the sale afterwards made? . . .

*To be reported in the Ontario Law Reports.

[Discussion of the evidence and reference to Nightingale v. Parsons, [1914] 2 K.B. 621; Millar v. Radford (1903), 19 Times L.R. 575.]

The respondent himself made the sale to the Bank of Hamilton for $100,000 on the 12th September, 1913. This was to the purchaser introduced by the appellant; and, applying the cases of Burchell v. Gowrie and Blockhouse Collieries Limited, [1910] A.C. 614, Stratton v. Vachon (1911), 44 S.C.R. 395, McBrayne v. Imperial Loan Co. (1913), 28 O.L.R. 653, and Stewart v. Henderson (1914), 30 O.L.R. 447, I think the appeal should succeed. . . .

The evidence as to the amount of the commission was, that it was originally arranged to be 5 per cent., but that the respondent got the appellant to agree to $5,000. In this case it makes little difference, for 5 per cent. on $100,000 comes to $5,000. It seems to follow that, if the original bargain included a general employment, the agent would be entitled either to the agreed commission or to damages, the measure of which might well be the stated percentage applied to the reduced amount: Burchell v. Gowrie and Blockhouse Collieries Limited, [1910] A.C. at p. 626. The sum of $5,000 was fixed with regard to the contemplated price of $107,350 . . . and, as it was not obtained, the appellant is justified in claiming, on the price actually got, commission at 5 per cent.

Counsel for the respondent contended that, even if the appellant were otherwise entitled to a commission, he had forfeited his right to it by his arrangement to divide his commission with the local agent of the bank. He urged that, if a sale had been made, the bank, on discovering this fact, could repudiate the transaction, and that an agent who so acted as to produce a contract which might, at the option of the purchaser, be voided, could not recover commission. In this contention I would be disposed to agree if the sale had been actually made as a result of the agent's negotiation, of which that arrangement was a part. But recovery here depends on a different cause, i.e., the introduction, before any other act had been done, by the agent of the purchaser with whom the principal, disregarding the agent and intervening himself, made the contract.

It is true that Lord Alverstone in Andrews v. Ramsay, [1903] 2 K.B. 635, uses the expression: "A principal is entitled to have an honest agent, and it is only an honest agent who is entitled to any commission:" but I think that decision is correctly interpreted in Hippisley v. Knee Brothers, [1905] 1 K.B.

1, and in Nitedals Taendstikfabrik v. Bruster, [1906] 2 Ch. 671. . . . I think the distinction may reasonably be made that the intervention of the respondent eliminated from the transaction the negotiation in which the impropriety occurred, and that it is separable from and does not interfere with the right of the appellant depending only upon the introduction prior to the bargain with the agent. The latter disclaims any right, arising from the improper offer, as attaching to the sale actually made, and the respondent insists that his sale had no connection with the appellant. It would be a misapplication of the principle to hold that an act, evidence of which is in no way essentially connected with nor part of the proof upon which success depends, should disentitle an agent to receive his commission.

Having regard to the reason of the rule which prevents an agent from succeeding unless his action is free from the taint of dishonesty—which reason I take to be that he cannot give true service unless he is free from an actual or possible contrary interest—I think the appellant is, under the circumstances in evidence here, entitled to be paid.

The appeal should be allowed, and judgment entered for the appellant, with costs throughout, for the sum of $5,000.

MACLAREN and MAGEE, JJ.A., agreed.

MEREDITH, C.J.O., dissenting, was of opinion, for reasons given in writing, that the judgment of FALCONBRIDGE, C.J.K.B., should be affirmed.

Appeal allowed; MEREDITH, C.J.O., *dissenting.*

DECEMBER 21ST, 1914.

McLEAN v. WOKES.

Conspiracy — Several Defendants — Assessment of Damages against each Separately—Direction to Jury—Acquiescence in—Verdict of Jury—Evidence to Support.

Appeal by the defendant Freeland from the judgment of MIDDLETON, J., upon the verdict of a jury, in favour of the plaintiff, in an action for conspiracy.

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

G. P. Deacon, for the appellant.

J. M. Duff, for the plaintiff, the respondent.

MEREDITH, C.J.O.:—By his statement of claim the respondent alleges that in or about the month of October, 1913, the appellant advised the respondent's wife to leave and abandon him for the defendant Wokes, and that, immediately prior to the 17th of that month, the appellant conspired, confederated, and agreed with Wokes to assist him in procuring the respondent's wife to leave him and cohabit with Wokes (para. 5); that, accordingly, on the 17th October, 1913, the appellant and Wokes procured the respondent's wife to go to a rooming-house in Jarvis street, in Toronto, and there registered her with Wokes as man and wife (para. 6); and that Wokes lived at this rooming-house until the 20th October, 1913, with the respondent's wife and there committed adultery with her (para. 7); and the claim is for $10,000 damages.

As I understand the claim of the respondent, as presented on his pleading, his action is for conspiracy, and the acts alleged to have been done by the defendants are acts done in furtherance of the common design which they are alleged to have conspired to bring about, viz., the procuring of the respondent's wife to leave him and to cohabit with Wokes; although, standing by itself, para. 7 would sufficiently disclose a cause of action against Wokes for criminal conversation.

The jury found a verdict for the respondent, and assessed the damages against Wokes at $6,000 and against the appellant at $2,000; and the learned Judge directed that judgment should be entered in accordance with the verdict.

Two grounds were urged in support of the appeal: (1) that the evidence did not warrant a verdict against the appellant; and (2) that the claim of the respondent is for a single cause of action based on a joint wrong committed by the appellant and Wokes, and that the damages should not have been assessed separately, but at one sum against both of them.

There was, we think, evidence to go to the jury that both defendants were guilty of the wrongs which they are alleged to have committed, and we cannot say that the finding is one that twelve reasonable men might not have made.

The first ground of objection, therefore, fails.

The appellant has no reason to complain of the way in which the damages were assessed; for, if the jury had been directed that the damages should not be assessed separately, and had been told that the injury to the respondent was the aggregate of the injury received from both defendants, and that they were answerable in damages for the injury sustained by their common act, the damages would have been assessed against both defendants at $8,000; and it may be that my brother Middleton might properly have directed that judgment should be entered against both defendants for that sum—a course which was taken in a somewhat similar case, Damiens v. Modern Society Limited (1910), 27 Times L.R. 164.

However that may be, as I understand the learned Judge's charge, he left it to the jury to assess the damages against each defendant separately, and that course appears to have been acquiesced in by counsel for the appellant, and it is not now open to the appellant to object to what was done, especially as, for the reason I have mentioned, she was not prejudiced, but actually benefited, by the course which was taken.

Having come to this conclusion, it is unnecessary for us to determine whether the case falls within the rule established by Greenlands Limited v. Wilmshurst and The London Association for the Protection of Trade, [1913] 3 K.B. 507, that where there is a single cause of action against several defendants arising from a joint wrong, although the defendants sever in their defences, the jury has no power to sever the damages, and judgment cannot be entered against the several defendants for different amounts; or within the exceptions to it mentioned in O'Keeffe v. Walsh, [1903] 2 I.R. 681.

The second objection also fails; and the result is that the appeal must be dismissed with costs.

GARROW and MACLAREN, JJ.A., agreed.

MAGEE and HODGINS, JJ.A., agreed in the result.

Appeal dismissed with costs.

DECEMBER 24TH, 1914.

BECK v. TOWNSHIP OF YORK.

Building Contract — Work Taken over by Municipality — Liability of Municipality for Acts of Engineer—Absence of Justification—Provisions of Contract — Delay — Claim of Contractor for Work Done — Forfeiture — Acquiescence — Quantum Meruit — Moneys Expended by Municipality in Completing Contract—Findings of Trial Judge—Appeal.

Appeal by the defendant township corporation from the judgment of LENNOX, J., 5 O.W.N. 836.

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

J. R. L. Starr, K.C., and L. C. Outerbridge, for the appellant corporation.

H. D. Gamble, K.C., and A. C. Macnaughton, for the plaintiff, the respondent.

The judgment of the Court was delivered by SUTHERLAND, J. (after setting out the facts):—The defendant corporation is bound by what its engineer did; and, if the taking over of the contract was improperly done, it must bear the consequences: Lodder v. Slowey, [1904] A.C. 442; Roberts v. Bury Improvement Commissioners (1870), L.R. 5 C.P. 310; Holme v. Guppy (1838), 3 M. & W. 387; and that too even though, as the plaintiff alleges in this action, what the engineer did was prompted by a desire to gain personal advantage and resulted in that: Lloyd v. Grace Smith & Co., [1912] A.C. 716.

If the defendant corporation, through its engineer, improperly took over the contract, then the plaintiff was released from the performance thereof.

The plaintiff claimed in the action $2,000 "damages for breach of contract and wrongful dismissal, or in the alternative on a quantum meruit the sum of $1,568.51," with some further sums for plant of the plaintiff alleged to have been taken by the defendant and not returned, and lumber supplied by the plaintiff upon the works and not returned, and for the use of part of the plaintiff's plant which was returned, for damage to a gas engine, and for installing a winter camp, amounting to between $600 and $700.

The defendant corporation counterclaimed for the sum of $1,500 . . . as the sum it says it was obliged to expend to complete the work, in excess of what would have been payable to the plaintiff under the contract.

In his preliminary findings, the trial Judge has expressed a favourable view of the plaintiff's evidence as against that of the engineer. He has given the plaintiff judgment in alternative ways. . . . He has come to the conclusion that the amount claimed by the defendant corporation is altogether in excess of any sum which could have been properly expended, and makes an estimate of what should reasonably be allowed for such completion, at $4,760.69, even giving the defendant corporation a fairly free hand, in the circumstances, in doing the work.

He also makes an estimate of the work which the plaintiff had already contributed up to the time when the contract was taken away from him, at $1,348.51. On the basis of the contract being completed by the plaintiff, he has figured that there would have been payable to the plaintiff the sum of $5,234.01. Deducting from this the difference between the $4,760.69 and the $1,348.51 as the amount which could be properly said to be expended by the defendant corporation, namely, $3,412.18, he arrived at a balance owing to the plaintiff of $1,821.23.

After a careful perusal of the evidence, I am unable to say that he was not justified in such a disposition of this case.

But he has alternatively found that the defendant corporation was not justified in taking the work out of the plaintiff's hand, and consequently had no right to avail itself of the provision for dismissal. I think it clear that the course pursued, or attempted to be pursued, by the engineer and the defendant corporation, in taking over the contract under clause 38, was one not authorised thereunder. The engineer gave no certificate in writing, as required by that clause, and no action by the defendant corporation was taken on any certificate or report from him. I do not think, either, that it was at all within the contemplation of that section that if the contractor were properly put off the work, and the corporation legally employed other persons to complete it, the engineer could be considered one of such persons.

If it was the fact, as the trial Judge has found, that the defendant corporation itself, by its failure to supply materials, rendered it difficult, if not impossible, for the plaintiff to prosecute the work as he would otherwise have been able to do, the delay was really the corporation's, and not the plaintiff's. Yet, in these circumstances, the engineer assumed to act under clause 38,

but in doing so did not proceed regularly thereunder. . . . The trial Judge . . . came to the conclusion that a fraud had been practised upon the plaintiff by the engineer in taking over the work; that "there never was any bonâ fide action under" clause 38; and that the plaintiff was deceived into any acquiescence which he gave to the proposal of the engineer to take over and complete the work.

It may be questioned if the 10 per cent. added to the cost of piling should be allowed; but, in view of the opinion of the trial Judge that the plaintiff is entitled to a larger sum than $1,821.80, it may well be left undisturbed.

Having regard to these findings, I am of the opinion that it is impossible to disturb the judgment.

Appeal dismissed with costs.

DECEMBER 24TH, 1914.

*WEIR v. HAMILTON STREET R.W. CO.

Highway—Obstruction—Trolley Pole in Travelled Part of City Street—Injury to Travellers by Vehicle Striking Pole—Absence of Guard or Light—Statutory Authority—Municipal By-law—Negligence—Contributory Negligence — Findings of Jury—Nuisance.

Appeal by the defendants from the judgment of LATCHFORD, J., upon the findings of a jury, in favour of two of the plaintiffs, viz., Robert Weir and Gladys Weir, in an action for damages for personal injuries sustained by the plaintiffs by reason of a motor car in which they were driving running against an upright pole planted by the defendant railway company in a street in the city of Hamilton.

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

D. L. McCarthy, K.C., for the appellants.

H. Howitt, for the plaintiffs Robert Weir and Gladys Weir, respondents.

SUTHERLAND, J.:—The action arose out of a motor car accident in the city of Hamilton on the night of 23rd May, 1913. In

*To be reported in the Ontario Law Reports.

the car at the time were the plaintiff Robert Weir, the owner thereof, and the other plaintiffs, namely, his daughter Gladys and James Cowan Kent and Caroline Kent.

The car collided on King street with an upright pole of the defendant company, and was damaged and its occupants injured. The plaintiffs alleged that the pole "had been negligently placed, maintained, and left unguarded and unlighted in the travelled portion of King street by the defendants so as to constitute a dangerous trap for passers-by."

The defendant company pleaded that they were not responsible in law for any injuries sustained or damages suffered by the plaintiffs; that the pole had been placed in its position by the order, under the supervision, and to the satisfaction of the Municipal Corporation of the City of Hamilton; and that the plaintiffs could have avoided the accident by the exercise of ordinary care.

The defendant company delivered a third party notice to the Municipal Corporation of the City of Hamilton. . . . The municipal corporation delivered a defence setting forth that they would rely upon the defence of the defendant company, and denying all negligence on their own part.

At the trial the action was dismissed without costs as regards the plaintiffs Kent.

The jury, in answer to questions, found the defendants guilty of negligence in that "the trolley poles should have been placed in a uniform position along the entire thoroughfare;" that the plaintiffs could not, by the exercise of reasonable care, have avoided the accident; and they assessed the damages at $375 and $300 respectively for the plaintiffs Robert and Gladys Weir.

The poles of the defendant company, at the point where the accident occurred, were erected upon King street, one of the streets of the municipality. The plaintiff Robert Weir, who was driving the car, was not familiar with the locality, and the night was rainy and misty. The car had been driven along James street, and at the corner of King street turned easterly along that street, proceeding along the south side thereof, which, in ordinary circumstances, would be the proper side for the driver to take. On the south side of King street the two tracks of the defendant company were, on account of the gore or park in the street, located much nearer to the south than to the north side, and between them there was the usual devil's strip of about 5 feet in width. The car was being driven so that the wheels on

the north side ran along the devil's strip and those on the south side between the rails of the south track, and it was travelling at about 12 or 13 miles an hour, when suddenly it collided, at a point about 75 feet east of the intersection of Hughson street, the next street east of James street, and King street, with a trolley pole which had been placed there on the devil's strip, and was the first of a series of poles along that strip in front of the gore.

It appears that along King street, up to the point where the car came in contact with the pole, the travelled portion of the street was not obstructed by trolley poles, as they were erected at the side of the street. It appears also that to any one well acquainted with the condition of the street at that point there was ample space on the north side of the tracks for motor cars and other vehicles to pass one another without difficulty. . . .

After a careful perusal of the evidence, I am unable to see that the finding of the jury that there was no contributory negligence on the part of the plaintiff Robert Weir can be considered perverse or should be disturbed or the case on this ground sent back for a new trial.

I think, in the light of the evidence, that the finding of the jury as to the defendants' negligence amounts to this, that it was negligence on their part, instead of continuing their trolley poles in a uniform position at the side of the street along the highway, to shift or change them, in front of the gore or park, to the devil's strip, and so in the way of vehicular traffic that the result was to create a trap.

In my opinion, to leave a pole erected in such a place unlighted at night was to create a dangerous nuisance.

I think the placing of a pole in the position and condition in which this was, might well be considered by the jury to be an obstruction to the highway and an act of negligence, and that the trial Judge could not have taken the case away from the jury. . . .

[Reference to the defendant company's Act of incorporation, 33 Vict. (O.) ch. 100, secs. 7, 15.]

By sec. 16, the city corporation were authorised to pass by-laws for the purpose of carrying into effect agreements between the city corporation and the company. The company applied to the municipality for leave to locate and construct their lines in the city, and an agreement was entered into and a by-law passed to give effect thereto.

At the time of the accident, by-law No. 624, passed on the

26th March, 1892, was in force. It recites that previous by-laws had been passed in the years 1873, 1882, and 1888, conferring certain rights and privileges on the defendant company, subject to the conditions therein contained. It also recites that the previous by-laws provided that the cars of the railway company should be drawn by horses and mules only, and that the company were desirous of constructing an electric railway, and it had been agreed that the previous by-laws should be repealed and the previous agreements terminated. Clause 1 gave authority to the defendant company to construct an electric street railway "and to erect all necessary poles and wires," etc. Clause 2 mentioned the streets to which the permission and authority should extend, King street being one of those named; and also provided that all poles should be "placed on the side of the street, except on King street between Hughson and Mary streets, where they shall be placed between the tracks"—no doubt on account of the gore—"and all the poles of the company shall be placed in such manner as to obstruct as little as possible the use of the streets for other purposes." Clause 31 provided that "all works of construction and repair . . . shall be placed under the supervision and to the satisfaction of the city engineer."

The poles were put up by the defendant company after being "located" by the city engineer.

Reference was made during the argument to the Street Railway and Municipal Acts in force at the time of the incorporation of the company and subsequent amending or repealing Acts. But in none of them have I been able to find any express or explicit authority to a municipality to erect or authorise any other corporation or person to erect a pole in the nature of an obstruction on the travelled portion of a highway; nor do I find any such authority in the defendant company's Act of incorporation. At common law there was no such right. . . .

[Reference to Halsbury's Laws of England, vol. 16, pp. 151, 152, 153, 154; Regina v. United Kingdom Electric Telegraph Co. (1862), 31 L.J.M.C. 166, 9 Cox C.C. 137, 174.]

The municipality is by statute required to keep its highways in repair, and can in a civil action be made to answer in damages for an injury sustained in consequence of its failure to do so.

When the defendant company have placed on the travelled portion of a highway a pole in such a position that a jury has found it to be an act of negligence, it is incumbent on the company, I think, to shew some express statutory warrant for its

maintenance in that position. I am of opinion that they have failed to do so, and that the judgment appealed from must stand.

But, even if such warrant can be considered to be given or properly inferred from any of the acts referred to, it cannot, I think, be deemed to extend further than this, that poles can be erected in such a position only when all needed precautions are taken to safeguard the public, as, for example, by lighting them at night. Here the evidence before us is, that no red or other light was upon the pole. See Geddis v. Proprietors of Bann Reservoir (1878), 3 App. Cas. 430, 455, 456; Metropolitan Asylum District Managers v. Hill (1881), 6 App. Cas. 193, 208.

. . .

[Reference to Bonn v. Bell Telephone Co. (1899), 30 O.R. 696; Atkinson v. City of Chatham (1899), 26 A.R. 521, 522, 524, 528; Bell Telephone Co. v. City of Chatham (1900), 31 S.C.R. 61; Toronto Corporation v. Bell Telephone Co. of Canada, [1905] A.C. 52; Senhenn v. City of Evansville (1894), 140 Ind. 675; Attorney-General v. Barker (1900), 16 Times L.R. 502, 504.]

The power of a provincial legislature and of a municipal corporation to interfere with a public highway is a limited one. It does not go the length of authorising something to be done which will endanger the safety of the travelling public and create a common nuisance. As erected and maintained, this obstruction was dangerous to those lawfully using the highway as the plaintiff was doing when the accident occurred. It was, therefore, a common nuisance and a violation of the criminal law. No statutory enactment of a provincial legislature or by-law of a municipal corporation could, in these circumstances, give it legal sanction.

I think the appeal fails on all grounds and must be dismissed with costs.

MULOCK, C.J.Ex., concurred.

LEITCH, J., being ill, took no part in the judgment.

HODGINS, J.A., was of opinion, for reasons stated in writing, that the judgment at the trial should be set aside, and that there should be a new trial.

Appeal dismissed; HODGINS, J.A., *dissenting.*

DECEMBER 24TH, 1914.

*CARRIQUE v. CATTS AND HILL.

Fraud and Misrepresentation—Purchase of Interest in Invention — Contract — Rescission—Conduct—Election—Evidence — Finding of Trial Judge—Appeal—Estoppel.

Appeals by both defendants from the judgment of LENNOX, J., 5 O.W.N. 785, 886.

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

H. D. Gamble, K.C., for the appellant Catts.

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

The plaintiff, respondent, in person.

CLUTE, J.:—The action is brought by the plaintiff to set aside a contract of the 5th January, 1912, as having been obtained by fraud, and for the return of $5,000 paid thereunder. An amendment was allowed permitting the plaintiff to claim $1,000 for loss of time, expenses, etc.

The judgment set aside the contract as fraudulent and void, and damage was assessed to the plaintiff at $6,000.

There is evidence to support the finding that the contract was obtained by misrepresentation and fraud. The trial Judge did not accept the evidence of the defendants. He saw the witnesses, and it was for him to say what weight he would attach to their evidence.

The real difficulty in the case from the plaintiff's standpoint is, that upon his own evidence it is quite clear that he did not repudiate the contract after he had become fully aware of the misrepresentations made to him; but on the contrary, treated it as still existing for some months, and in his correspondence and interviews with the defendants allowed them to believe that he regarded the contract as valid. This view of the case does not seem to have been taken, or, if taken, pressed, at the trial. . .

Having regard to the view taken of the evidence by the learned trial Judge, I see no ground to interfere with his finding so far as it relates to the manner in which the contract was obtained.

The question of the plaintiff's conduct after he became aware of the fraud presents some difficulty. . . . It was strongly

*To be reported in the Ontario Law Reports.

urged on behalf of the defendants that the plaintiff is not entitled to set aside the agreement entered into between him and them, because, after the time when, as he states, he had his suspicions and knew it was a fraud, he treated the contract as still subsisting, kept in touch with Hill from time to time, and solicited four persons to take stock in the enterprise. He says that he did this not intending to permit these persons . . . to join the company, but in order that he might get further information in respect of the company through the intercourse of these persons with Hill and Catts. He insists that he never intended to affirm the contract, but, on the contrary, that he intended to disaffirm it, and that he delayed the matter only that he might get more evidence. . . .

The evidence establishes the fact, if the trial Judge believed it, as he did, that the plaintiff did not elect to affirm the contract, although he withheld notice from the defendants of his intentions, and acted for some time as if he did intend to affirm.

Whether or not there was an election in fact, depends upon the view the trial Judge took of the evidence; and he in fact finds there was not. . . .

[Reference to Morrison v. Universal Marine Insurance Co. (1873), L.R. 8 Ex. 197; Halsbury's Laws of England, vol. 20, pp. 738, 749, 750; Campbell v. Fleming (1834), 1 A. & E. 40.]

Having regard to the facts in the last-mentioned case, I do not think it applicable to the present. There, there was an unequivocal act after knowledge by dealing with the shares in a manner wholly inconsistent with the invalidity of the contract, and clearly shewing the plaintiff's intention to affirm the same.

In the present case, having regard to the facts as found by the trial Judge, and the credit which he gave to the plaintiff's evidence, I am unable to say that the plaintiff elected to affirm the contract. Fraud having been established, he was entitled to have it rescinded.

The appeal should be dismissed with costs.

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

RIDDELL, J., was of opinion, for reasons stated in writing, that the plaintiff was not entitled, by reason of his conduct, to repudiate the contract, and that the judgment for the plaintiff should be set aside and the action dismissed without costs to any party of the action or of the appeal.

Appeal dismissed; RIDDELL, J., *dissenting.*

DECEMBER 24TH, 1914.

*CITY OF LONDON v. GRAND TRUNK R.W. CO.

*SUMMERS v. GRAND TRUNK R.W. CO.

Railway — Level Highway Crossing—Destruction of Vehicle by Train—Injury to Person in Vehicle—Negligence—Contributory Negligence—Findings of Jury — Evidence — Rule Passed after Accident—Inadmissibility — No Substantial Wrong or Miscarriage—Judicature Act, sec. 28—Doctrine of "Imminent Danger."

Appeal by the plaintiff in the first action from the judgment of KELLY, J., 6 O.W.N. 494, dismissing the action with costs; and appeal by the defendants in the second action from the judgment of KELLY, J., ib., in favour of the plaintiff.

The first action was for damages for the destruction of a motor fire engine and truck struck by a train of the defendants at a level crossing; and the second action was for damages for personal injuries sustained by the plaintiff, a fireman, who was on the truck when it was struck by the train.

The actions were tried together by KELLY, J., and a jury.

The appeals were heard by MULOCK, C.J.Ex., CLUTE, RIDDELL, and SUTHERLAND, JJ.

T. G. Meredith, K.C., for the appellants the Corporation of the City of London.

D. L. McCarthy, K.C., for the Grand Trunk Railway Company, respondents in the first case and appellants in the second.

Sir George Gibbons, K.C., and G. S. Gibbons, for the plaintiff Summers, respondent in the second case.

SUTHERLAND, J. (after setting out the facts):—Exception was taken at the trial, at the time of its reception and after the charge to the jury, to the admissibility of evidence on the part of the defendant company brought out on the examination by its counsel from witnesses of the plaintiff corporation, to the effect that after the accident a rule of the plaintiff corporation was passed and put into effect requiring the driver of their motor truck, when proceeding to a fire, to stop before crossing the railway track. Counsel for the defendant company was persistent

*To be reported in the Ontario Law Reports.

in getting this evidence on the record, and contended that it was admissible as shewing what the plaintiff corporation considered good practice. It was argued before us that, in consequence, the finding of contributory negligence as against the plaintiff corporation's employees should not be allowed to stand, and that there should at least be a new trial. I am of opinion that the evidence was not admissible on the ground contended for; but the trial Judge seems to have so minimised any effect it could otherwise have had in the . . . statements (he made to the jury) . . . and the language used by the jury would seem so to indicate that the evidence did not affect them in coming to the conclusion arrived at, that I do not think the finding should be disturbed. I think the provisions of sec. 28 of the Judicature Act may well be applied. I am of opinion that the finding as it stands is abundantly justified by the evidence.

On the question of contributory negligence, in so far as the plaintiff Summers is concerned, as he was not the driver of the truck, and there was no evidence that personally he was guilty of any negligence, he is entitled to maintain his action notwithstanding the negligence of which the jury has found the plaintiff corporation guilty through its servants in charge of the truck: Millar v. Armstrong (1888), 13 App. Cas. 1. . . .

The jury has negatived all allegations of negligence on the part of the defendant company set out specifically in the pleadings or otherwise suggested in the evidence with the exception of that contained in the answer to question 3—"We firmly believe that the switchman and employees at Maitland, who saw the fire truck pass Maitland street, should have used what power they had at their disposal, to have cleared William street, believing the fire truck might go down that street, employees knowing that the fire was on the south side of the track, also knowing that '93,' a special, was coming from the east." The main question, in my view, in the appeals, is, whether this finding can stand. It is attacked by the defendant company. The trial Judge seems to have thought that it was open to the plaintiffs, on their statements of claim as framed, to adduce evidence in support of this finding. With respect, I have great doubt as to this. . . . However, I prefer to deal with it as though the evidence were properly admitted.

It is, I think, clear from the evidence that, at the time the semaphore was operated from Maitland street and the train let in at Adelaide street, there was no danger apparent or imminent. But the contention of the plaintiffs is that, when the rail-

way men at Maitland street saw the truck drive rapidly past that street on King street, a situation of danger, of impending and imminent danger, arose. The jury seems to have accepted this view, and, in consequence, made the finding in answer to question 3. . . .

[Reference to Shearman & Redfield on Negligence, 6th ed. (1913), p. 1245, discussing the doctrine of imminent danger.]

The man at Maitland street saw the engine and train beyond William street approaching that street with head-light shining and bell ringing. The train was in fact also running at the slow rate of 5 or 6 miles an hour. They saw a fire truck, which, they had a right to assume, was equipped, as according to the evidence it in fact was, with proper appliances to stop it within a few feet, if driven at a reasonable rate and without negligence, and they had a right to assume also, as the fact was, that it was in charge of a competent and experienced driver, who knew the locality and the dangerous character of the railway crossing on William street. After the truck went by Maitland street on King street, they knew it would have to travel three blocks at least before it could arrive at the railway crossing at William street. They could not meantime see it for the intervening buildings. Unless they were to assume, which, I am of opinion, they were not called upon to do, that the truck, thus manned, would be driven negligently and carelessly on to the track in front of the approaching engine, there was no reason to apprehend that a collision was at all imminent or even likely. So far as they were concerned, an accident became evident and imminent only when the truck appeared on William street near the railway track. It was then apparently too late for them to do anything to avert the accident. I am of opinion that the finding of the jury in answer to question 3 is unwarranted by the evidence and should not be allowed to stand. . . .

To say that men in the position of the railway employees at Maitland street were to assume the responsibility of stopping a train approaching William street, in the circumstances disclosed in the evidence, merely because they saw a fire truck passing rapidly along King street, three blocks away, and because they failed to do so the defendant company is to be made liable, is, I think, carrying the doctrine of liability of a railway company for negligence altogether too far. I should be disposed to think, from the evidence, that in any event it was most unlikely that the said employees could have done anything after the truck had passed Maitland street on King street to avert the accident.

. . .

I am of opinion that the appeal of the plaintiff corporation should be dismissed with costs, and the appeal of the defendant company as against the plaintiff Summers be allowed with costs, if asked.

At the conclusion of his argument, Sir George Gibbons, in view of the fact that the judgment for Summers was only for $600, and that he would, in consequence, have no further right of appeal, asked that, in the event of the present appeal of the plaintiff corporation being dismissed, and that corporation making a further appeal and being successful, the right of the plaintiff Summers be preserved to share in such ultimate success.

In these circumstances, it may well be that no judgment on this appeal should be issued as against the plaintiff Summers dismissing his action, until the further appeal, if any, of the plaintiff corporation is finally determined.

MULOCK, C.J.Ex., for reasons briefly stated in writing, agreed with the disposition of the appeals made by SUTHERLAND, J.

RIDDELL, J., arrived at the same result, for reasons stated at length in writing.

CLUTE, J., for reasons stated in writing, agreed that the appeal of the city corporation should be dismissed, and was of opinion that the appeal of the defendant company against the plaintiff Summers should also be dismissed.

In the first action, appeal dismissed: in the second action appeal allowed; CLUTE J., *dissenting.*

DECEMBER 24TH, 1914.

*REX v. TITCHMARSH.

Criminal Law—Conviction—Motion to Quash—Practice—Certiorari—Rules of Supreme Court of Ontario Made in 1908 *—Authority to Make—Criminal Code, sec.* 576*—Power to Regulate Practice in Certiorari—Power to Abolish Writ.*

Appeal by the defendant from the judgment of MEREDITH, C.J.C.P., 6 O.W.N. 317, refusing to order the issue of a writ of certiorari.

*To be reported in the Ontario Law Reports.

The appeal was heard by MULOCK, C.J.Ex., MACLAREN, J.A., CLUTE, RIDDELL, and SUTHERLAND, JJ.

J. B. Mackenzie, for the appellant.

Edward Bayly, K.C., for the Attorney-General for Ontario.

The judgment of the Court was delivered by RIDDELL, J.:—The defendant was convicted of cruelty to animals, under sec. 576 of the Criminal Code. Instead of proceeding in the manner prescribed by the Rules of 1908, the defendant chose to apply for a writ of certiorari. This was refused by the learned Chief Justice of the Common Pleas; and the defendant now appeals.

A reasonable case is made out on the merits for the matter being brought into the Supreme Court, and this the Crown admits. Accordingly, if the practice still exists, and the Rules of 1908 are invalid, the writ should go.

The learned Chief Justice must have decided that the practice prescribed by the Rules of 1908 was to be followed. Notwithstanding that he has expressed great difficulty in coming to the conclusion he does, his decision is not doubtful.

It seems to me, with much respect, that the doubt arises from confusing "certiorari" and the "writ of certiorari."

The word "certiorari" is simply the present passive infinitive of certioro (certiorem facio, and from certus, certior) used only in juridicial Latin, meaning "I inform, apprise, shew;" and it is taken from the original form of the writ.

The theory is, that the Sovereign has been appealed to by some one of his subjects, who complains of an injustice done him in an inferior Court; whereupon the Sovereign, saying that he wishes to be informed—certiorari—of the matter, orders that the record, etc., be transferred into a Court where he is sitting. This order is put in the form of a writ, which is the only and the conclusive evidence of such order. The form of the writ (when proceedings were in Latin) can be seen in any old edition of Fitz-Herbert's Natura Brevium. . . .

The whole proceeding of removal into a Court where the King may be "certified" is the certiorari; the means by which his order is made known is the writ. So long as by some means the record, etc., are got before the King, the means is unimportant, the effect the same. If the King were (effectively) to change his method of procedure and cause the record, etc., to come into his Court by some other process than signifying his pleasure by a writ, surely that could not be called an abolition of certiorari, although the writ might be abolished.

It is most true that innumerable instances may be adduced in which the word "certiorari" is used judicially and in text-books and legal dictionaries as synonymous with "writ of certiorari;" but that is in the same way as we constantly speak of "injunction," meaning now an "order of injunction," but formerly "a writ of injunction"—"prohibition," meaning "an order of prohibition," but till the other day "a writ of prohibition." It could not, I venture to think, be said that injunction, prohibition, etc., were abolished or interfered with when the writ went by the board; nor can it be said that (civil) certiorari is abolished since our Rule (now Rule 263) abolished the writ.

In the same way I quite fail to understand how the abolition of the writ of certiorari in criminal matters has any greater effect. The remedy exists; the manner of obtaining it is different—that is all.

The King now says, "I desire to be certified of the matters, etc., and I am to be so informed by the record, etc., being produced in obedience to a notice by the complainant," instead of a formal writ under seal.

I think the judgment right, and that the motion should be dismissed.

DECEMBER 24TH, 1914.

RE RISPIN.

Will—Legacies—Insufficiency of Estate to Pay in Full—Abatement—Legacy to Creditor in Satisfaction of Debt—Claim to Priority—Payment of Legacy in Full by Executors—Disallowance—Appeal—Costs.

Appeal by W. J. Tisdall, a legatee under the will of Luke Rispin, deceased, from the judgment of MIDDLETON, J., 6 O.W.N. 669, upon an appeal from the decision of the Judge of the Surrogate Court of the County of Middlesex, upon passing the accounts of the executors, and upon a motion, by way of originating notice, for a determination of a question arising upon the will, determining that the appellant was not entitled to payment of his legacy in full in priority to the other legatees, upon a deficiency of assets.

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

U. A. Buchner, for the appellant.

T. G. Meredith, K.C., for Charles Roe and others.

J. Macpherson, for the executors.

The judgment of the Court was delivered by RIDDELL, J.:—The late Luke Rispin by his will bequeathed his property among a number of beneficiaries. One clause of his will reads: "To my physician W. J. Tisdall the sum of $1,500 in full settlement for his services during the past five years."

There is a deficiency of assets to pay all the legacies. Dr. Tisdall's bill is only $300. The Surrogate Court Judge held that this legacy did not abate; Mr. Justice Middleton held the reverse; and this is an appeal from the decision of Mr. Justice Middleton.

A careful perusal of all the cases cited in the judgments and in the arguments convinces me that the only case, of authority in our Courts, which is a decision on the point, is In re Wedmore, [1907] 2 Ch. 277. There are many dicta and text-writers' statements, but no other decision; and I think it should be followed.

It was suggested that possibly the right decision would be to allow the appellant the amount of his bill in full and let him share pro rata for the balance; but that course is negatived in the case cited.

The appeal should be dismissed; but, in view of the difference of judicial opinion, of the long line of dicta, and of the difficulty having been occasioned by the testator himself, I would give costs of all parties out of the estate.

DECEMBER 24TH, 1914.

*MITCHELL AND DRESCH v. SANDWICH WINDSOR AND AMHERSTBURG R.W. CO.

Street Railway—Laying Rails on Streets under Authority of By-law not Submitted to Electors—Statutory Requirement—Action by Persons Affected to Restrain Laying of Rails and to Compel Removal—Locus Standi—Special and Particular Injury—Parties—Municipal Corporation—Jurisdiction—Ontario Railway and Municipal Board.

Appeal by the defendants from the judgment of LENNOX, J., 6 O.W.N. 659.

*To be reported in the Ontario Law Reports.

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

I. F. Hellmuth, K.C., and G. A. Urquhart, for the appellants.

J. H. Rodd, for the plaintiffs, respondents.

The judgment of the Court was delivered by CLUTE, J.:—The plaintiffs sue on behalf of themselves and all other ratepayers of the city of Windsor, and charge that the defendants have commenced to construct a line of railway from their tracks on South Windsor street, in the city of Windsor, south along Ferry street to Chatham street, thence west to Victoria street, and thence south to London street, and in so doing have torn up the pavement on portions of the said streets; that the work was done without authority and has made the streets impassable.

The plaintiff Dresch is the owner of lot 14 on the west side of Ferry street, and is erecting a four-storey building thereon, and, by reason of the conditions caused by the defendants, he has been obstructed and delayed and hindered in his work, and further charges that the value of his property has been depreciated by the construction of the line, as Ferry street is too narrow to accommodate an electric railway; and the plaintiffs ask for an injunction to restrain the defendants from proceeding with their work and for a mandatory order requiring them to restore the streets to their original condition, and for damages and costs.

The defendants, besides denying the allegations of the plaintiffs' statement of claim, plead that they are authorised by special Acts of the Legislative Assembly of the Province of Ontario and by by-laws of the Corporation of the City of Windsor to construct the works aforesaid. They also state that the plaintiffs have no status to bring this action, and that the Corporation of the City of Windsor is a necessary party. They further plead that the Ontario Railway and Municipal Board has exclusive jurisdiction to interpret the various franchises granted by the city. The writ was issued on the 8th April, 1914.

It was held by the learned trial Judge that the by-law of the 27th April, 1914, of the Municipality of the City of Windsor, purporting to authorise and empower the defendants to construct the line of railway in question, not having been submitted to the people as required by law, has no legal effect, and he granted the injunction and mandatory order, with a reference to the Master to assess the damages, and held that the Corporation of the City of Windsor was not a necessary party.

Upon the argument it was urged by counsel for the appellants

that, under their charter and the various agreements with the Corporation of the City of Windsor, they had a franchise and authority to do the work complained of, and that the statute 2 Geo. V. ch. 42 has no application to their charter and does not affect their rights.

It will be necessary, therefore, to examine somewhat closely the acts, agreements, and by-laws under which the defendants claim the right to construct the lines complained of. . . .

[Reference to 35 Vict. ch. 64, secs. 4, 13, 14 (O.); 50 Vict. ch. 80 (O.); an agreement of the 17th April, 1893, between the Corporation of the City of Windsor, the defendants, and the Windsor Electric Street Railway Company; by-law 783 of the Corporation of the City of Windsor, passed on the 17th April, 1893; 56 Vict. ch. 97 (O.); a by-law of the Corporation of the City of Windsor, passed on the 19th June, 1893; an agreement of the 29th July, 1902, between the Corporation of the City of Windsor, the defendants, and the City Railway Company of Windsor, validated by 3 Edw. VII. ch. 112 (O.), and a by-law of the same date; the report of a committee of the Council of the City of Windsor, adopted on the 2nd February, 1914; a by-law passed by the council on the 27th April, 1914; sec. 569 of the Municipal Act, 1903; 10 Edw. VII. ch. 81, sec. 4 (O.); the Municipal Franchises Act, 2 Geo. V. ch. 42 (O.), now R.S.O. 1914 ch. 197; R.S.O. 1897 ch. 223, sec. 569, sub-sec. 1; 10 Edw. VII. ch. 81, secs. 3, 4; 3 & 4 Geo. V. ch. 36, sec. 250.]

The defendants being subject to the provisions of the Ontario Railway Act, the building of the proposed extension is within the meaning of sec. 250, sub-sec. 2, and requires the sanction of the Board, and this notwithstanding the terms of the agreement between the Corporation of the City of Windsor and the defendants. The new sub-sec. 3 of sec. 250 came into force on the 1st July, 1913 (see sec. 304), and the acts complained of occurred in April, 1914; so that it appears that, while the assent of the council was proper and within the agreements between the city corporation and the defendants, the authorisation of the board was a further condition precedent imposed by the Legislature to entitle the defendants to begin the construction of their line on the streets in question.

It will be seen, upon reading secs. 232 and 250 of the Ontario Railway Act, that the first gives authority to the corporation of a city or town to equip and operate a railway along and over the highways of the city, subject to the approval of the Board, but that such power is not applicable where a previous

agreement exists; and, if there is a dispute as to whether such right exists, the Board is to decide. Section 232, therefore, does not apply to this case, as was contended at bar. This is not a contest between the claim of the city and the defendants to construct and operate a street railway, nor does the city dispute the existence of the agreements under which the defendants claim the right to build the railway; on the contrary, the Corporation of the City of Windsor has expressed its acquiescence by resolution and by-law as to the proposed acts of the defendants. The result is, that sec. 250 applies, and it was admitted that the defendants had not obtained the consent of the Board authorising the work to be done.

The Municipal Franchises Act, 2 Geo. V. ch. 42 (R.S.O. 1914 ch. 197), sec. 3 (1), provides that a franchise shall not be granted by the council of a municipality to use a street or highway without the assent of the electors. Section 4 (1) applies this provision to an extension of works already constructed; but sec. 4 (2) declares that sub-sec. 1 shall not apply to any franchise granted by general or special Act before the 16th March, 1909, but no such franchise or right shall be renewed nor the term thereof extended by a municipal corporation except by by-law with the assent of the electors, as provided by sec. 3. I am of opinion that this last clause as to renewal is not retroactive. The defendants' right to use the streets in question for their railway rests upon the agreements of the 17th April, 1893, and the 4th July, 1893, as modified by the agreement of the 28th July, 1902, as validated by 3 Edw. VII. ch. 112, which being a special Act prior to the 16th March, 1909, the last clause (2) of sec. 4 excludes the application of the section to the defendants' franchise. It is not, therefore, in my opinion, under the peculiar circumstances of this case, compulsory upon the city corporation to submit the by-law authorising the construction of the railway on the streets in question for the approval of the electors; but the sanction of the Board is necessary. The latter not having been obtained, the acts of the defendants were without authority and illegal, and created a nuisance on the streets in question.

It also appears from the evidence that the plaintiff Dresch suffered peculiar damage by reason of the acts of the defendants upon the said streets upon which his premises front. It rendered access to his house and lot difficult, if not impossible, and increased the cost of getting material there for his building operations.

I am also of opinion that the Corporation of the City of

Windsor is not a necessary party to this action. The by-law was properly passed authorising the railway to be built, but the sanction of the Board was necessary, and was not obtained. That was wholly a matter for the defendants. It is not a case where damages alone is a proper remedy.

The appeal should be dismissed with costs.

DECEMBER 24TH, 1914.

*RAYNOR v. TORONTO POWER CO.

Master and Servant—Injury to Servant—Negligence—Electric Current—Escape of Dangerous Element—Evidence—Onus—Findings of Fact of Trial Judge—Appeal.

Appeal by the defendants from the judgment of FALCONBRIDGE, C.J.K.B., 6 O.W.N. 604, after trial without a jury, in favour of the plaintiff for the recovery of $1,200 and costs.

The appeal was heard by MULOCK, C.J.Ex., CLUTE, RIDDELL, and LENNOX, JJ.

D. L. McCarthy, K.C., for the appellants.

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

CLUTE, J.:—The plaintiff was employed by the defendant company, under the direction of its officers, to paint certain of its towers, to which were attached wires conveying electricity; and he alleges that he was informed by his foreman and the defendant company's officers that the current of electricity had been shut off from the said wires, and he was directed to climb amongst the frame-works of one of the towers and paint that part near to the wires; that he did as directed; and, after he had proceeded with some painting, the defendant company suddenly and without warning to the plaintiff negligently caused the electric current to flow over the said wires, with which the plaintiff was obliged to be in contact to do the said painting, and thereby caused a heavy current of electricity to flow through the body of the plaintiff, and caused him to fall to a plank-walk or platform, 7 or 8 feet below where he was working, whereby certain parts of his body were burned by the electricity, and he was seriously injured. He further charges negligence on the part of the defend-

*To be reported in the Ontario Law Reports.

ant company in not providing a reasonably safe structure or works for the plaintiff lawfully engaged in his work, and that it negligently failed to provide any proper system of appliances for controlling the electric current in order to prevent unforeseen and extraordinary risks to the plaintiff while engaged in the said work. . . .

The case resolves itself largely into a question of fact as to whether there is evidence to support the findings in the judgment of the trial Judge. . . .

Upon the whole, I think that the evidence of the four witnesses (the plaintiff himself, Robert Hamilton, Walter Maudsley, and George Bull) was quite sufficient to justify the finding that the plaintiff was injured from a current from what is called unit A (wire 3), a wire supposed to be dead. I think I should have reached the same conclusion .

That being so, there was evidence of negligence on the part of the defendant in sending the plaintiff to a dangerous place; and the onus was upon the defence, in my opinion, at this stage of the case, to satisfy the trial Judge that the defendant company was guilty of no negligence. This it failed to do.

It was said by Lord Macnaghten in McArthur v. Dominion Cartridge Co., [1905] A.C. 72, 75, that it is not the province of the Court to retry the question. . . . "The verdict must stand if it is one which the jury, as reasonable men having regard to the evidence before them, might have found, even though a different result would have been more satisfactory in the opinion of the trial Judge and the Court of Appeal."

I think that applies with equal force to a case tried by a Judge. . . .

[Reference to Lodge Holes Colliery Co. v. Mayor, etc., of Wednesbury, [1908] A.C. 323, 326.]

It never was intended that the plaintiff should undertake the risk of working near live wires; and if from any cause the wire became alive without default on the part of the plaintiff, that was not a risk which he assumed.

It is the duty of the master to keep the plant in a condition in which, from the terms of the contract or the nature of the employment, the servant has the right to expect it will be kept: Clarke v. Holmes (1862), 7 H. & N. 937 (Ex. Chamb.); Halsbury's Laws of England, vol. 20, para. 255; and the extent of the master's duty varies according to the degree of danger involved in the work, and also according to the skill and experience possessed by the servant: ib., para. 256.

For some reason, which the defendant company did not give, it did not provide the plaintiff with a safe and proper place to do his work, as it should have done; and, having shewn that his injuries were caused by a dangerous element under the control of the defendant company, at a time when and a place where such element ought not to have been, with its destructive power, the plaintiff is, in my opinion, entitled to recover. In other words, he made out a primâ facie case of negligence, which the defendant company has not answered: Ainslie Mining and R.W. Co. v. McDougall (1909), 42 S.C.R. 420. The system adopted by the defendant company did not, in fact, afford a safe and proper place for the plaintiff to do his work, and the defendant is not relieved from responsibility by the fact that the operations were superintended by a competent foreman: Brooks Scanlon O'Brien Co. v. Fakkema (1911), 44 S.C.R. 412.

It was urged on behalf of the plaintiff that, electricity being in its nature a highly dangerous element when not under efficient control, a very high degree of care and precaution was necessary on the part of those who were responsible for its creation and use, and that the principle of Rylands v. Fletcher (1868), L.R. 3 H.L. 330, applied. . . .

In National Telephone Co. v. Baker, [1893] 2 Ch. 186, Kekewich, J., after full argument by eminent counsel, held that the principle of Rylands v. Fletcher applied to an electric current. . . .

[Reference also to Eastern and South African Telegraph Co. v. Capetown Tramways Companies Limited, [1902] A.C. 381, 391; Young v. Town of Gravenhurst (1910-11), 22 O.L.R. 291, 302, 24 O.L.R. 467; Cairns v. Canada Refining and Smelting Co. (1914), 6 O.W.N. 652; Royal Electric Co. v. Hévé (1902), 32 S.C.R. 462; Citizens' Light and Power Co. v. Lepitre (1898), 29 S.C.R. 1.]

Having regard to the dangerous nature of the electric current, and the fact that the plaintiff was ordered to go to a place where, if he were not protected by the current being turned off from the wires about which he was to work, there was the greatest possible danger, it appears to me that the responsibility of the defendant company is not less in its duty towards the plaintiff than it would be toward a person upon whose land the defendant had permitted the electric current to flow, and injury was caused thereby.

In my opinion, the appeal should be dismissed with costs.

MULOCK, C.J.Ex., and LENNOX, J., agreed with the opinion of CLUTE, J.

RIDDELL, J., dissenting, was of opinion, for reasons stated in writing, that negligence was not shewn, and that no liability could attach without negligence.

Appeal dismissed; RIDDELL, J., *dissenting.*

DECEMBER 24TH, 1914.

SIMCOE CONSTRUCTION CO. v. McMURTRY.

Principal and Agent—Authority of Agent—Husband and Wife —Action against both—Election to Take Judgment against Wife only—Amendment.

Appeal by the defendants in a Supreme Court action, tried by consent in the County Court of the County of Simcoe, from the judgment of the Senior Judge of that Court, in favour of the plaintiff, for the recovery of $1,952 upon a contract for the erection of stores and houses for the defendants.

The appeal was heard by CLUTE, RIDDELL, SUTHERLAND, and KELLY, JJ.

A. E. H. Creswicke, K.C., for the appellants.

F. W. Grant, for the plaintiffs, respondents.

The judgment of the Court was delivered by CLUTE, J.:—The only question reserved was the liability of the female defendant for the amount found due by the Court below.

A perusal of the evidence satisfies us that Alwilda McMurtry, the wife of the defendant Samuel Francis McMurtry, authorised him as her agent to do whatever he thought right in the matter of building upon her lands, and is responsible for the debt contracted by him.

The plaintiffs having elected to take judgment against the female defendant only, the record will be amended accordingly, and in other respects the appeal dismissed with costs.

HIGH COURT DIVISION.

BRITTON, J. DECEMBER 21ST, 1914.

LINKE v. CANADIAN ORDER OF FORESTERS.

Life Insurance — Presumption of Death of Insured — Seven Years' Absence without being Heard from—Evidence — Proofs of Death—Waiver—Right of Beneficiary to Recover upon Policy.

Action to recover the amount of an insurance upon the life of Carl Linke.

The action was tried without a jury at Berlin.

E. P. Clement, K.C., for the plaintiff.

G. H. Watson, K.C., for the defendants.

BRITTON, J.:—The plaintiff was the wife of one Carl Linke, and she alleges that her husband must be presumed to be dead. She brings this action to recover from the defendants $1,000 upon the certificate or policy of insurance No. 96838 issued by the defendants on the 18th November, 1905, by which certificate the said sum of $1,000 was made payable to the plaintiff within 30 days after proof of the death of the said Carl Linke and of the manner of the occurrence, together with such information pertaining to the cause of death and circumstances connected therewith as might be required.

Carl Linke and the plaintiff were married to each other in 1904. On or about the 8th or 9th July, 1907, the said Carl Linke left the plaintiff, and she has never seen him or heard from him since.

During the years intervening since the 9th July, 1907, the plaintiff has paid all the fees, dues, and assessments upon the said certificate to keep it alive and current. After the expiration of 7 years from the 9th July, 1907, the plaintiff made application to the defendants for payment of the insurance moneys due upon the certificate mentioned, and payment was refused.

The defendants rest their defence upon two grounds: first, no formal proof of death, giving the time, occasion, and place of death and the circumstances connected with it; second, no sufficient proof, upon this trial, of the death of the husband of the plaintiff.

The plaintiff's claim is that after the 9th July, 1914, because of the absence of her husband for over 7 years without having been heard from, the presumption had arisen that on the last-mentioned day he was dead—and that was made known to the defendants, but they continued in their refusal to recognise the plaintiff's claim. The plaintiff then placed the matter in the hands of Clement & Clement, her solicitors. Correspondence followed—but the only letters that I deem material are the following:—

"31st August, 1914.

"The Secretary, High Court,
Canadian Order of Foresters,
Brantford, Ont.

"Dear Sir:—Re your certificate No. 96838 issued to Carl Linke, formerly a member of Court Berlin No. 72.

"We have been consulted by Mrs. Annie Linke, the wife of the insured and the beneficiary under your certificate, with reference to this certificate.

"We understand that you have been communicated with, but that you decline to recognise the claim made by Mrs. Linke. What she says is that she has not heard from her husband since the 7th June, 1907, and that he has not been heard from by any one so far as she knows from that time. What became of him at that time she is utterly unable to say; but, as you are aware, after seven years' absence, unheard of, he is presumed to be dead, and we must ask you, therefore, to forward us the usual and necessary papers for making a claim under the certificate.

"The members of your local court must be very well aware of all the circumstances connected with this case, and it appears to us that if you would ask them to make a report to you of the facts, you might save your Order the costs of proceedings to establish the claim.

"Yours truly
"CLEMENT & CLEMENT."

The defendants, after delay in getting the person with full authority, replied:—

"Perth, Ont., Sept. 17th, 1914.

"Messrs. Clement & Clement, Barristers, etc., Berlin, Ont.

"Dear Sirs:—With further reference to your letter of the 31st August with reference to the insurance certificate of Carl Linke.

"We have had so many disappearance claims that have proved fraudulent that, as a matter of general policy, we ex-

pect the death to be established to the satisfaction of a court of competent jurisdiction. We do not obligate ourselves to pay insurance after seven years' absence. If the courts decide this brother is dead, we will have no alternative but to pay, but in the meantime we cannot send you any claim papers.

"Yours truly

"J. A. STEWART."

The defendants emphatically denied the plaintiff's right to recover, and put forward, as the only issue, that of the death of Carl Linke, the insured.

This is a case in which the defendants might, if in any case, waive the formal proofs of the occasion, time, and place of death. The plaintiff could not nor could any one on her behalf give them. Such formal proofs are inconsistent with the claim which is founded upon the presumption of the death of the insured.

I find that the defendants have waived the requirement of formal proof ordinarily required before action in cases arising when death is witnessed or can be proved by a person or persons having knowledge of it.

The plaintiff's case, as I have said, is based upon the presumption of the death of her husband.

The rule is, as laid down by Lawson in his work on "The Law of Presumptive Evidence," p. 256: "An absentee shewn not to have been heard of for seven years by persons who naturally would have heard of him, is presumed to have been alive until the expiry of such seven years, and to have died at the end of that term."

No two cases are exactly alike in the case of disappearance and absence—on which a presumption is founded. The facts in no other case that I have read prevent me from coming to a different conclusion from the one arrived at in another case.

The facts in this case, shortly and in part, are as follows. Linke and the present plaintiff were married at Berlin, Ontario, in 1904. Two children, a boy and a girl, were born to them in marriage, and are living. Husband and wife lived together as boarders in the house of the mother of the plaintiff at Berlin until the 8th or 9th July, 1907, when the husband stated his intention to go to Preston—a town only a short distance from Berlin. He left, and from that time has not been seen or heard from by the plaintiff or by any person known to her, or from whom she could get information. Linke was well-known in Berlin, to his brother members of the Foresters' Lodge, as well as to his

relations by marriage. The brother-in-law caused an advertisement to be inserted in the "Shoe-Workers' Journal," a paper published in Boston in the interest of that class of workmen, of which class the deceased was one. Linke's likeness was also published. No information or response was received.

The plaintiff, by her brother-in-law, inquired by letter. Counsel for the defendants objected to the replies received, but the evidence was that no word came from any one in reference to having seen or heard from Linke during the period named. The plaintiff's father died about 13 years ago. Her mother is living. The plaintiff's children are with her.

There was no ill-feeling between Linke and his wife, or his wife's family, and if word had come to any one in Berlin or Preston about Linke, the plaintiff would be likely to hear. She did not hear.

In this matter the defendants could have taken proceedings under R.S.O. 1914 ch. 183, sec. 165, sub-secs. 4, 5, but they did not do so.

I find upon the facts that there exists the presumption that Carl Linke was dead on the 9th July, 1914.

There should be judgment for the plaintiff for $1,000, with interest from the 22nd September, 1914, at 5 per cent. per annum, with costs.

MIDDLETON, J. DECEMBER 21ST, 1914.

GILMOUR v. CHARPENTIER.

Vendor and Purchaser—Agreement for Exchange of Lands—Mistake as to Incumbrance—Impossibility of Carrying out Agreement—Covenant—Refusal of Specific Performance.

Action for specific performance of a contract for the exchange of lands.

The action was tried without a jury at Ottawa.

T. A. Beament, for the plaintiff.

C. A. Seguin, for the defendant.

MIDDLETON, J.:—On the 12th December, 1913, R. P. Gilmour, the father of the plaintiff, agreed to purchase certain property for $11,000, assuming a mortgage now existing of $5,300 at 6

per cent.—Charpentier accepting certain lands in part payment, at the price of $7,000, subject to two mortgages of $2,000 each, at 6 and 7 per cent., one of these mortgages having a year and the other two years to run. This contract is in writing and under seal. Underwritten is the following: "I, R. P. Gilmour, in consideration of the said Alderick Charpentier signing the present agreement, hereby covenant to have the one-year mortgage renewed for another year."

It now turns out that there was a mistake. The one year mortgage is not a mortgage at all; it is a balance of purchase-money due under an agreement. The extension cannot be obtained.

The contention is, that, nevertheless, the exchange must be carried out, and that Charpentier must rely upon the independent covenant of Gilmour contained in the memorandum.

I do not think that this is sound. The title is not as stipulated. The difference between a mortgage, which can only be enforced by foreclosure with reasonable time for redemption, and an agreement, which may be and is subject to more or less drastic provisions as to forfeiture, is fundamental. The agreement made between the parties cannot be carried out; and, therefore, I think that specific performance cannot be awarded.

There are other difficulties, which need not be discussed.

The action fails, and must be dismissed with costs.

MIDDLETON, J. DECEMBER 21ST, 1914.

GRILLS v. CITY OF OTTAWA.

Highway—Snow and Ice on Sidewalk Opposite Church Property Used as Rink—Escape of Water from Rink Causing Dangerous Condition — Personal Injury to Passer-by — Claim against City Corporation—Failure to Give Notice in Time—Claim against Trustees of Church—Nuisance—Failure to Protect Passers-by—Responsibility of Trustees for Action of Subordinate Church Organisation—License.

Action against the Corporation of the City of Ottawa and the trustees of a Baptist Church in Ottawa to recover damages for injury sustained by the plaintiff by a fall upon an ice-

covered sidewalk upon a city street, at a place on which property of the church fronted.

The action was tried without a jury at Ottawa.

G. D. Kelley, for the plaintiff.

F. B. Proctor, for the defendant corporation.

George McLaurin, for the defendants the trustees.

MIDDLETON, J.:—At the hearing I determined that the action could not be maintained against the municipality, as due notice had not been given within the time limited. The action as to the city corporation is, therefore, dismissed without costs.

The trustees of the Baptist Church authorised the Young People's Society to flood a vacant piece of land adjoining the church, and owned by the congregation. On the day in question, the 25th January, 1914, water had been run into the rink by the city officials, at the request of the executive officers of the society. This water had escaped and had run over the sidewalk in great volume, forming a mass of ice and slush. During the afternoon every endeavour had been made to get rid of this condition, both by the city officials and by a member of the Young People's Society, and well on in the afternoon this young man left the place, giving instructions to the city officials to see that the sidewalk was adequately sanded. The sidewalk was sanded, but on the following morning (Sunday) the plaintiff, while on the way to church, fell and was seriously injured. I think the proper inference from the evidence is, that, although the sand was placed upon the sidewalk on Saturday afternoon, further water came down from the rink and formed ice, for the sidewalk was in a dangerous condition on the Sunday. The church resists liability upon the ground that it is not responsible for the action of the subordinate organisation, and upon the ground that the flooding which was authorised by the association was a flooding to the depth of 5 inches only, which would probably have been innocuous.

Upon the first ground, I cannot recognise the situation created as in any way freeing the church from its responsibility. What took place with this Young People's Society amounted at most to a license to these members of the congregation to place a rink upon the church property. The license contemplated and authorised the bringing of water into the rink, and for the consequences of the attempt to store water upon the church property the church must be responsible. Nor do I think that the re-

sponsibility ceases by reason of the city corporation having placed an excessive quantity of water upon the property.

I am inclined to think, however, that this is not the true ground of liability. The water brought upon the church property and suffered to escape upon the sidewalk constituted a nuisance, and I think that the church is responsible for allowing this nuisance to be created, and also because, when it was found that a dangerous condition was being created by the escaping water, adequate provisions were not taken to protect passers-by. There does not appear to have been any inspection of the situation on Sunday morning, and it would have been very easy to remove the ice which had then formed, and, if necessary, to have stationed some one to warn pedestrians.

The plaintiff had just concluded an agreement for employment at $25 per week. She has not yet recovered from the injuries sustained. Her out of pocket expenses are said to amount to about $350. This is probably subject to some slight abatement; but, in addition to that, there has been much pain and suffering, and probably there will be some permanent weakness, although there is now every indication of a pretty fair recovery.

In view of all the circumstances, I assess the damages at $2,250.

MIDDLETON, J. DECEMBER 21ST, 1914.

ARGUE v. BEACH.

Vendor and Purchaser—Agreement for Sale of Land—Absence of Title in Vendor—Vendor not in Position to Call for Conveyance at Time of Agreement—Refusal of Specific Performance.

Action for specific performance of a contract, tried by MIDDLETON, J., without a jury, at Ottawa.

A. E. Fripp, K.C., for the plaintiff.
J. R. Osborne, for the defendant.

MIDDLETON, J.:—The action is by the vendor for specific performance of an agreement dated the 15th April, 1913, for the exchange of a piano-player for certain lands in the Province

of Saskatchewan, "subject to a mortgage or payments of $1,-542," which $1,542 the purchaser was to assume and pay. The agreement recites that the piano-player was supposed to be worth $150 more than the interest in the lands, and this sum the plaintiff agreed to pay upon the execution of the conveyance. The piano-player has been delivered, the lands have not been conveyed, the $150 has not been paid. What is now sought is to compel the defendant to pay the mortgage which was to be assumed.

Although the agreement recites that the plaintiff is the owner in fee of these lands, it now appears that he has no title thereto other than that derived under the assignment of certain agreements for the purchase of the land, which have not been produced; and I think his action fails upon the ground that he neither has title nor the right to call for title.

The lands are registered under the Land Titles Act. Two certificates are produced: the first shewing that Rembler Paul acquired title on the 20th March, 1913; the second shewing that three men, Darke, Cross, and Rossie, acquired title on the 26th May, 1914. The last certificate is dated in November, 1914, and shews ownership then in these three.

There is supposed to have been some agreement by which Paul, the original owner of the lands, agreed to sell, it is not clear to whom. On the 1st December, 1912, Grant, Lownsborough, Campbell, and Sloan agreed to sell these lands and other lands to one Hanna for $7,000. This agreement contains no provision for subdivision or distribution of the purchase-money, and contains stipulations against assignment without the consent of the vendor. Hanna, in violation of the terms of this agreement, on the 5th March, 1913, agreed to sell the lands in question to the plaintiff, and assigned the last-mentioned contract, subject to the payment of the balance due. This agreement was never assented to by Grant et al.

The plaintiff desires that I should now pronounce a judgment for specific performance, leaving him to make title in the Master's office. I am told that the lands are now regarded as being of little value.

It is clear to me that the law does not authorise the position taken by the plaintiff. If he shewed that he was in truth the legal or equitable owner of the land and entitled to call for a conveyance, he might be entitled to specific performance; but where, so far as appears, he had no right to call for a conveyance of the land at the time he agreed to sell, I do not think I

could decree specific performance and afford him the opportunity of now acquiring title and turning it over to the defendant.

The action fails, and I can see no reason why it should not be dismissed with costs.

MIDDLETON, J. DECEMBER 21ST, 1914.

JOHNSON v. HANNA.

Contract — Exchange of Properties — Specific Performance — Misrepresentation—Warranty—Damages.

Action for specific performance of a contract or for damages, tried without a jury at Ottawa.

R. A. Pringle, K.C., for the plaintiff.
J. R. Osborne, for the defendant.

MIDDLETON, J.:—On the 23rd May, 1914, the plaintiff, the owner of a store and stock of goods at Pendleton, agreed with the defendant to exchange this property for certain other property. This latter property the defendant assumed to control, although in fact he was not the owner of it; the owner having undertaken with him to bring it into the transaction. Specific performance cannot now be awarded, as this property cannot be conveyed by the defendant; so the action resolves itself into a claim for damages.

The defendant seeks to avoid liability upon the written agreement by alleging that the stock in question was misrepresented. I do not think that the defence is made out upon the evidence. The contract was carefully and deliberately prepared, and it contains no stipulation for an adjustment of the account if the stock should fall below any stipulated figure. Unless the defendant was content to accept the stock as it was, taking his chances as to its value, some such provision would have been found in the contract. This, of course, would not excuse the plaintiff if in fact there was any misrepresentation; but I do not think that there was any misrepresentation, nor do I think that there was intended to be any warranty as to the precise quantity of stuff in the store. It is apparently a case in which each party

desired to be free from the burden of his own property; and the equity of redemption in the realty had probably in it as much of an element of uncertainty as to value as could possibly be found in the stock of goods in the store.

I have had much trouble as to damages. The plaintiff had an entirely erroneous conception as to what his right was. The defendant unwittingly lent him much assistance, as, in attempting to emphasise his grievance as to the supposed misrepresentation, he stated that the property he gave was worth more than $1,000 more than the property he received. In this I think he was exaggerating, and I think it might not be fair to hold him bound. I have concluded that $600 would be a fair estimate of the plaintiff's loss.

Judgment will be for this sum and costs.

BRITTON, J. DECEMBER 21ST, 1914.

RE SHORT.

Will—Construction—Gift of Income to Wife for Life, Subject to Certain Charges—Legacies—Annuities—Gifts to Missionary Society—Charitable Bequests—Cy Pres Doctrine—Uncertainty—Perpetuity—Dower—Election—Lapsed Legacies.

Motion by the executors of the will of the Reverend William Short, of the city of Kingston, who died on the 6th May, 1911, for an order determining certain questions arising upon the terms of the will and codicils.

The motion was heard at the Kingston autumn sittings.

W. F. Nickle, K.C., and J. M. Farrell, for the executors.

G. M. Macdonnell, K.C., for some of the persons and corporations interested under the will.

BRITTON, J.:—The testator was a retired Minister of the Methodist Church of Canada. He made a will dated the 12th August, 1886, appointing his wife, Johanna M. Short, and John Short Larke executrix and executor. He made a codicil on the 17th April, 1896, and a second codicil on the 20th February, 1911. The will is as follows:—

"I give to my beloved wife the use of all interest accruing from investments in the Ontario Loan and Savings Society and the Napanee debentures; also from mortgages and notes—amounting at this time to more than $14,000; with the exception that she pays annually the following sums—to my sister Mary Ann Harding during her natural life £5 sterling; to my brother Richard (if he should need it) £10 sterling; and to the oldest and poorest of the poor of the parish of Woolfardisworthy, near Bideford, Devon, England, £5 sterling. This last amount to be continued for 90 years, to be paid from interest accruing from $500 which shall be invested in the Methodist Book and Guardian Office of Toronto by Mrs. Short during her life, which $500, at the expiration of the 90 years, shall be given to the Methodist Missionary Society. The Book Steward of the Methodist Book and Guardian Office shall send annually the £5 sterling, after Mrs. Short's death, to the office of the poor fund of the above parish for proper distribution.

"After Mrs. Short's death I will to my nephews and nieces $1,000 each, with the exception of my sister Mary Ann Harding's two daughters, to whom I will $2,000 each. I will to David Forward and his wife of Bath, my frame house in Bath, and after their death to their daughters who shall then be living.

"I will to the Methodist Superannuated Fund of Canada $1,000 to be paid after Mrs. Short's death. None of the principal shall be spent by Mrs. Short. I appoint Mrs. Short my executrix and John Short Larke of Oshawa my executor."

The first codicil is as follows: "I give to my dear wife all the furniture. I give to my sister M. A. Harding $60 a year, instead of the amount mentioned in my will, during her life. I make Charles Larke of Colborne, Ontario, my executor, in the place of John S. Larke of Oshawa, as mentioned in my will. My sister Mary Ann Harding having died since the inside was written, I give the $60 a year willed to her, to her two daughters Elizabeth and Lydia Harding in addition to the amount foremention ed. My brother Richard having married since the above was written and having born to him two children, I will him nothing, but to the two children $1,000 each. To the Woolsey poor I will $50 yearly instead of $25 as stated above. Should any of my nephews or nieces be dead before this will is executed their portion to be equally divided among those that are living."

The second codicil was as follows: "In the death of John Short Larke, I will to his four children $400 each—Eva, William, Frederick, and Percy. In the death of David Forward, I will

my house in Bath to the four daughters—Elizabeth, Weatta, Agnes, and Claria; I also will each of them $100. I will to my nephew Reuben Harding my gold watch and chain and gun and between $1,500 and $1,850."

Probate was granted to the widow, Johanna Short, and to Charles Larke on the 21st November, 1911.

The following questions are submitted upon which the opinion of the Court is asked:—

(a) Is the annuity of $60 a year to Elizabeth Harding and Lydia Harding in equal shares for their lives, and the whole amount for life to the survivor? If so, provision is only made in this paragraph for payment of the sum by Mrs. Short out of the income left her for life. How is the annuity to be secured? Will the executors have to set apart a fund to meet this in the event of Mrs. Short predeceasing the annuitants?

(b) Will the annual payment of the charge of $50 to the officer of the poor fund of the parish of Woolfardisworthy be a satisfactory discharge to Mrs. Short of the annual payment to be made by her during her life?

(c) Is the annual payment of this sum of $50 made a charge on Mrs. Short's income?

(d) Is the $500 she is directed to invest to come out of her income or out of the corpus of the estate?

(e) Is the Methodist Missionary Society, to whom there is a gift over of $500, the Methodist Missionary Society of the Methodist Church of Canada, or is the gift over void for uncertainty?

(f) Are the executors to set apart an additional $500 to meet the increase in the annual payment made by the codicil from $25 to $50, and, if so, has it to be invested in the Methodist Book and Guardian Office?

(g) In ascertaining the amount for distribution, are nephews and nieces dying before the execution of the will to be counted in fixing the amount or only nephews and nieces dying between the execution of the will and the execution of the codicil?

(h) When do these legacies vest in the legatees? At the death of the testator or at the death of Mrs. Short?

(i) Do the children of John Short Larke take the legacies mentioned in paragraph 3 of the codicil in addition to the legacies to which they are entitled in paragraph 2 of the will?

(j) Is the legacy given by the codicil, paragraph 4, to Reuben Harding, in addition to the legacy which he is entitled to under paragraph 2 of the will?

(k) Is the testator's widow entitled to dower out of his lands, in addition to the provision made for her by the will?

(l) In the event of a legatee dying after the death of the testator and before the period of distribution arrives, does his legacy lapse? . . .

Answers:—

(a) The annuity of $60 a year to Elizabeth Harding and Lydia Harding is payable only during the life of the widow of the testator.

During the life of the widow and during the joint lives of Elizabeth and Lydia Harding the legacy is payable to them in equal shares. If either should die during the life of the widow, the whole of the annuity will be payable to the survivor until her death or the death of the widow.

The intention of the testator evidently was to provide for present needs of these nieces; and, upon the death of the widow, they will get, if living, $2,000 each.

(b), (c), (d), (e), (f). In endeavouring to construe this very extraordinary will, my first impression was that the gift of £5 sterling—afterwards raised to $50 a year—to the oldest and poorest of the poor of the parish of Woolfardisworthy, and the gift of $500 to the Methodist Missionary Society, were void for uncertainty. Further consideration leads me somewhat hesitatingly to the conclusion that, as they are charitable bequests, they will be carried out cy pres by the Court. See Jarman on Wills, 5th ed., p. 204.

(b) Payment by Mrs. Short may be made to the officer of the poor fund of the parish mentioned, for distribution. Such payment will be a proper release to Mrs. Short and to the executors. If there is no such officer, or if such officer refuses to accept, an application may be made to the Court for further direction upon the facts as they may appear.

(c) The annual charge of £5 sterling is upon the $500. Mrs. Short is to pay the £5 over together with the further sum, making in all $50 a year. The sum of $50 a year is specifically bequeathed to the poor as mentioned, but no fund is designated out of which that sum is to be paid—beyond the $500. During Mrs. Short's life, she must pay the $50 a year. The interest on the $500 will be part of that sum of $50, and the balance must come from the residuary estate.

(d) The $500 will come out of the corpus of the estate, and not out of the widow's income.

(e) The missionary society named is the Missionary Society

of the Methodist Church of Canada. The testator was a minister of that Church. He had knowledge of that society, as one of the departments of the Church of which he was a minister in full standing, and there is nothing to indicate that he had knowledge of any other Methodist missionary society. The gift is not void for uncertainty, nor is the gift void as violating the rule against perpetuities.

(f) The executors are not required to set apart a second sum of $500. That sum, and that sum only, is given to the Methodist Missionary Society. The interest on that sum only will, after Mrs. Short's death, go to the poor as named; and after the expiration of ninety years the $500 will be paid to that society. The gift vests; payment is deferred. The direction by the testator is that his widow shall pay the $50, but only as interest upon the $500. That cannot be done by the interest on only that sum. That direction is only until Mrs. Short's death. During her life, the executors have no right to use the principal sum of $500 or any part of it to make up the $50 a year. After Mrs. Short's death the poor named will get only the interest on $500, whatever that may amount to, invested by those as the will directs. Again I mention that it may be necessary, owing to change of persons and offices, during the long term, if the fund can be kept intact and invested, to ask the Court for direction—unless the Crown intervenes.

(g) The first codicil provides that, should any of the nephews or nieces be dead before the will was executed, their shares, that is, the portion each would have taken if living, shall be divided among the nephews and nieces living at the time of the execution of that codicil. I am of opinion that the meaning of the testator was, that, if any nephew or niece supposed to be living at the time of execution of the will was dead, his or her share would be divided among those nephews and nieces living at the time of the execution of the codicil. Then to entitle these latter to share they must be alive at the time of the death of Mrs. Short.

(h) At the death of the widow, Mrs. Short.

(i) The children of John Short Larke take the legacy in paragraph 3 of the second codicil, in addition to that in paragraph 2 of the will.

(j) The nephew Reuben Harding takes the legacy mentioned in codicil 2, in addition to the legacy given by the will.

(k) The widow is entitled to dower out of the lands of the testator, in addition to the provision made for her by the will. She is not put to her election.

(l) Subject to what I have said in answer to (g), my answer is, that, as to any legatee dying before the period of distribution arrives, his or her legacy will lapse.

In argument several other questions were suggested; but I am of opinion that the executors will, without further difficulty, be able to administer the estate satisfactorily to all parties. There is nothing complicated or difficult beyond the questions submitted, and I decline to give further directions at present.

Costs of all parties out of the estate.

LATCHFORD, J. DECEMBER 22ND, 1914.

GAGNON v. DOMINION STAMPING CO.

Nuisance—Factory — Noise and Vibration from Use of Steam-hammers — Interference with Enjoyment of Neighbouring Dwelling-houses—Injunction—Restriction—Stay of Operation to Permit of Abatement of Nuisance—Damages—Fourteen Separate Actions—Rule 66*—Costs.*

Action for an injunction and damages in respect of an alleged nuisance.

The action and thirteen other actions against the same defendants were tried without a jury at Sandwich.

J. H. Rodd, for the plaintiff.

M. K. Cowan, K.C., and A. R. Bartlet, for the defendants.

LATCHFORD, J.:—This is one of 14 actions brought by landowners in Ford City, in the county of Essex, for an injunction restraining the defendants from maintaining a nuisance and for damages.

The same counsel represent the parties in all the cases, and they consented that, while but one case should be tried, the other cases should be regarded as determined by the result of this.

All the 14 actions have been brought by the same firm of solicitors.

Mrs. Gagnon is the owner of lots 32 and 33 on the west side of St. Luke's road in Ford City, and has two houses erected thereon. A street lies between her property and the main line of the Grand Trunk Railway on the north. East of St. Luke's

road is the factory of the defendants. Their main building occupies the entire north front of the block extending east to Albert road, across which they have another building. From this, however, no serious inconvenience to the plaintiff arises. Immediately south of the defendants' works the district is wholly residential, and was of that character when their works were erected. The lots are for the most part of 40 feet frontage, and upon nearly every lot is a dwelling costing from $1,000 to $2,000.

North across from the Grand Trunk Railway, and west towards Walkerville, there are many factories. None of these, however, appears to constitute a nuisance to the plaintiff. The locality has, however, long been subject to noise and vibration, dust, smoke, and steam, from passing trains. Mrs. Gagnon has in these respects been more incommoded than any of the plaintiffs in the other actions, as her property is much nearer to the railway than any of theirs.

The defendants' works are on a large scale and represent an investment of nearly half a million. They employ at times as many as 400 men, and their weekly pay-roll is from $2,500 to $4,000. Heavy forgings are made by powerful steam-hammers, weighing from 2,500 to 5,000 pounds. In the installation and operation of the machinery all the means that the best engineering practice could suggest have been employed to prevent or lessen noise and vibration. But, notwithstanding the defendants' efforts, the operation of the three largest hammers is attended with noises and vibrations which are heard and felt—of course with diminishing intensity—within an area extending many hundreds of feet from the point of origin. The hammers have sometimes been used late into the night. Steam and smoke escape from the defendants' works, and the streets in the vicinity are occasionally obstructed by vehicles transporting materials for or from the main factory.

It is, however, the noise and vibration that form the main factor of the nuisance objected to. The other elements are not, in my opinion, so injurious to the plaintiff—having reference to conditions not attributable to the defendants—as to give her any cause of action.

The hammers do not operate continuously. Each works for about 5 minutes at intervals of about 15 minutes. The resulting noises and vibrations are much more disturbing than if they were continuous.

I find that the use of the larger hammers, especially the use of the 5,000-pound hammer, installed about September, 1912,

constitutes a substantial and not merely a slight addition to the noises and vibrations previously existing. I reach this conclusion after a consideration of all the circumstances of the locality, especially the disturbances which occurred there prior to the installation by the defendants of the large steam-hammers.

I find also that the working of the machines in question seriously interferes with the comfort physically of the plaintiff, and depreciates the value of her property. The standard of comfort which she is entitled to enjoy, and which the defendants prevent her from enjoying, is that which is recognised as proper by reasonable persons of her condition, in the circumstances.

The words of Cozens-Hardy, L.J., in the leading case on the matters in question here—Rushmer v. Polsue, [1906] 1 Ch. 234, at p. 250—are singularly in point: "Whatever the standard of comfort in a particular district may be, I think the addition of a fresh noise caused by the defendant's works may be so substantial as to create a legal nuisance. It does not follow that because I live, say, in the manufacturing part of Sheffield, I cannot complain if a steam-hammer is introduced next door, and so worked as to render sleep at night almost impossible, although previously to its introduction my house was a reasonably comfortable abode, having regard to the local standard; and it would be no answer to say that the steam-hammer is of the most modern approved pattern and is reasonably worked. In short, if a substantial addition is found as a fact in any particular case, it is no answer to say that the neighbourhood is noisy, and that the defendant's machinery is of first-class character." This case is reported in appeal to the House of Lords in [1907] A.C. 121.

The interference with the plaintiff's comfort is greatest when the defendants' heavy hammers are operated at night; but their operation even by day, because causing a serious and substantial interference with the reasonable comfort of the plaintiff, also constitutes a legal nuisance to her; and she is by the law, as I understand it, entitled to redress.

The position of the defendants is to be taken into consideration. They erred in establishing costly works near so many private residences, but they cannot readily move and establish themselves in another location. To cause them to suspend at once, except as I propose, during the night, the operation of the heavier hammers, would probably result in the discharge of not a few workmen, who might, at the present juncture, be unable to obtain employment elsewhere.

In granting the redress to which the plaintiff is entitled, I purpose to extend to the defendants a reasonable indulgence.

There will be judgment declaring the defendants restrained from using the three large steam-hammers; but as to the use of such hammers during the hours between 7 a.m. and 7 p.m. for a period of six months from this date, the operation of the injunction is to be suspended. Should the defendants, acting diligently and in good faith, be unable to remove their works within that time, they may apply for an extension.

The damages sustained by Mrs. Gagnon are greater than those sustained by any plaintiff in the other actions. To avoid, if possible, further costs, I estimate the damages in her case at $200. If she or the defendants desire a reference, she or they may have it at peril as to costs. The plaintiff is also to have the costs of the action and trial.

Each of the other plaintiffs is to have judgment for an injunction in the terms stated. The damages vary. In some cases —particularly Miners and Meloche's, whose lots appear by the plan to be north of Edna street—they are merely nominal. In the others I estimate them as best I can on the evidence given at the trial, conceding to each plaintiff, as to the defendants, the same right to a reference as in this case.

On the question of the costs in the other actions something remains to be said. I cannot but deprecate the bringing—unnecessarily—of so many separate suits.

Under Rule 66 all persons may be joined in an action as plaintiffs in whom any right to relief, arising out of the same occurrence, is alleged to exist, whether jointly, severally, or in the alternative, where, if such persons brought separate actions, any common question of law or fact would arise.

The plaintiff in all the actions could, under this Rule, have been joined in one action. I intend to mark my disapproval of the course pursued by restricting the costs in each of the cases other than Mrs. Gagnon's to $25. Upon an appeal, the cases should, I think, be consolidated.

BOYD, C. DECEMBER 23RD, 1914.

DONOHUE v. McCALLUM.

Vendor and Purchaser—Agreement for Sale of Land—Uncertainty as to Land Intended to be Sold—Description—Boundaries—Evidence of Identity—Small Element of Uncertainty—Disregard by Court.

Action for specific performance of an agreement for the sale and purchase of land.

The action was tried without a jury at Sarnia.

D. S. McMillan, for the plaintiff.

J. M. McEvoy, for the defendant.

BOYD, C.:—Leave was given to adduce further evidence in order to make plain the identity of the lot in question. The location of the front end was uncertain, and I suggested that evidence of actual measurement on the ground between the defendant's house and the Markle lot might suffice; and also if that kind of evidence shewed the depth of the lot to be marked by visible boundaries.

On the further trial, evidence was given by the plaintiff (on whom the onus lay). The defendant was examined and said that lot 30 owned by her was or was supposed to be 100 feet front on the London Road, and that she intended to sell the westerly 50 feet. That 50 feet would be the part claimed by the plaintiff, lying between the defendant's house, called St. Margaret's Hospital, and the next lot to the west, No. 29, belonging to Markle. By exact measurement, it is said, from the westerly wall of the defendant's house to the Markle lot is 53 feet; but, allowing for the overlapping of the cornice, it would be 16 inches less. There is thus arrived at a sufficiently fixed boundary on one side of the 50 feet sold, by lot 29 belonging to Markle; and, if that distance is laid off, it will leave the plaintiff's house with a little over 50 feet as its share of the lot. Assuming that the lot was of the width of 100 feet, the defendant was intending to sell half the lot, containing 50 feet.

There is a boundary at the rear, marked on the plan produced as a lane, and it is said in the evidence that there is a fence in the rear of the lot.

I think that this further evidence has cleared up sufficiently

any ambiguity that clouded the case at an earlier stage—and that no circumstance of discrepancy or uncertainty now appears to stay the action of the Court in granting specific performance.

In the most critical view of all the evidence as to identity, there is introduced such a very small element of uncertainty (per Kekewich, J., in Wylson v. Dun (1887), 34 Ch. D. 569, 573) that the Court may reasonably disregard it.

Judgment for the plaintiff with costs; reference as to title, if desired, and the Master will deal with the costs of the reference.

MIDDLETON, J. DECEMBER 23RD, 1914.

BAIRD v. CLARK.

Contract—Sale of Animals for Breeding Purposes—Undertaking —Construction—Breach.

Action for damages for breach of a contract, tried without a jury at Ottawa.

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

J. A. Ritchie, for the defendant.

MIDDLETON, J.:—The plaintiff purchased a pair of black foxes from the defendant, on the terms of a contract evidenced in writing. The plaintiff William Baird, acting on behalf of himself and his co-plaintiffs, wrote on the 3rd October, 1913, to the defendant, agreeing to purchase the foxes for $6,000, "on the understanding agreed upon, i.e., should we fail to get a good black male from either pair mated, as we said, your male with our old bitch, and our young male with your female, then you agree to exchange the male you are sending for a good silver black male next year." The terms of this letter being expressly accepted by the defendant, the foxes were shipped and paid for. This action is brought upon the theory that there has been a breach of the undertaking above quoted.

In order that the situation may be understood, it is necessary to state that the plaintiffs were the owners of a pair of foxes, and, for the purpose of avoiding undue inbreeding, desired to purchase this other pair from the defendant.

Foxes mate only in the month of February, and in order that

mating may be successfully accomplished it is necessary that the mates should become acquainted for some considerable time previously.

Upon the receipt of these foxes, the plaintiffs attempted to mate in the manner contemplated, and mating was successfully accomplished so far as one pair was concerned, and in due course the female whelped.

At the time of the birth of their young, foxes are very nervous, and the female is apt to make away with her young if she is in any way disturbed. The young do not leave the kennel for a month after birth. I do not think that there can be any doubt, upon the evidence, that live foxes were born, but this litter was never seen, and no doubt was destroyed by the mother.

The other pair was not successfully mated, as the female died early in December.

I am inclined to think that death took place from natural causes, but this does not appear to be material. There was a suggestion that the plaintiffs were negligent in their treatment of these foxes, but there is no foundation for this suggestion. The one thing certain is that mating never took place.

Two entirely opposite theories are put forward as to the true construction of the document in question . The plaintiffs contend that the intention was that, upon the purchase of these foxes from the defendant, they should in the result secure a good black male. The foxes purchased were not pure black, but cross foxes. What the plaintiffs desired was a good male for breeding purposes, and they contend that this contract was to ensure this. The defendant, on the other hand, contends that all he was undertaking by the contract was to guarantee the quality of the foxes to be such that, as the result of breeding in the manner indicated, one good black male would be found among the progeny.

The case has given me a good deal of anxiety, and I find it by no means easy to determine the issue thus raised; but in the result I have come to adopt the view of the defendant. I do not think that the contract can be construed as an undertaking on his part to insure the lives of these foxes. Had both foxes been destroyed by inevitable accident immediately after delivery, the position would be the same. I think it reasonably clear that the plaintiffs could not then have demanded the delivery of the silver black fox.

As there was no mating in the case of the one pair, and as it is unknown what the result of the mating was in the case of the other pair, the plaintiffs have, I think, failed to prove their case.

The case is free from any suggestion that the contract was a tricky one, for the defendant simply accepted the drafting of the plaintiffs, and I fear that what the plaintiffs now ask is that I should make a better and more favourable bargain for them, placing all the risk in the event of failure to mate upon the defendant. The answer to the action is, shortly, that "it is not so written in the bond."

I trust that the defendant may be willing to forgo costs. I can see no reason for refusing to award them, if asked.

MIDDLETON, J. DECEMBER 23RD, 1914.

OTTAWA FREE PRESS LIMITED v. WELSH.

Contract—Advertising — Provision as to Rate of Payment in Case of Insolvency of Advertiser—Construction—Penalty or Liquidated Damages—Amount for which Creditor Entitled to Rank on Estate of Insolvent.

Action by a newspaper company against the assignee for the benefit of creditors of J. P. & S. W. Esmonde, insolvents, to establish a claim against the estate of the insolvents in the hands of the defendant.

The action was tried without a jury at Ottawa.

G. D. Kelley, for the plaintiff company.

E. J. Daly, for the defendant.

MIDDLETON, J.:—By a contract bearing date the 19th May, 1913, the insolvents contracted to advertise to the extent of 150 lines 3 times a week, for $450, extra space 2¼ cents a line. The contract is upon printed terms endorsed. The clause now of importance is as follows: "If the advertiser shall make an assignment for the benefit of creditors or become bankrupt or insolvent, or make default in paying any of the sums agreed at any of the times provided in the contract, Ottawa Free Press Limited shall have the option to put an end to the contract, and in such case the advertiser and his estate shall be liable to pay the single transient insertion rate of 10 cents a line for all space used during the term of this contract, less such amounts as shall have been previously paid on account, and such liability to pay 10 cents a line shall be as binding as if inserted in the contract originally, instead of the reduced rate."

The assignment was made on the 8th January, 1914. The claim filed is based upon the terms of this contract, for $2,297, being for the space used up to the date of the assignment, at the rate of 10 cents a line. Upon this, credit is given for payments made on account before the assignment.

It is obvious that the clause in question is highly penal in its nature, and its operation is most prejudicial to the creditors. If, for example, an assignment was made just before the expiry of the year, and all advertising that had then taken place had been paid for, the assignee would be entitled to recover for many hundred times the balance due to him. In this particular case the contract had, roughly speaking, run two-thirds of its time, and for the advertising that had then taken place approximately $300 had been earned; $140 had been paid on account of this; $150 had yet to be earned; yet the plaintiff company ranks for over $2,000. The nearer the contract reached its completion the greater the sum for which the plaintiff company would rank, although, obviously, the less it was damnified by the failure of the advertiser.

I think this brings the case well within the authorities which point out the principle which guides the Court in determining whether a provision is penal in its nature or a genuine pre-estimate of the damages sustained by the breach of the contract.

For example, it is said in Law v. Local Board of Redditch, [1892] 1 Q.B. 127: "Where a sum is made payable on the happening of any of several different events of varying importance, such sum, even though expressed to be payable as liquidated damages, is a penalty." *A fortiori,* when, by the terms of the contract, the sum payable increases as the real damage sustained decreases. The true principle is that indicated in Public Works Commissioner v. Hills, [1906] A.C. 368: "Can the sum named be regarded as a genuine pre-estimate of the creditor's probable or possible interest in the due performance of the principal obligation?"

In this case there is nothing to indicate that the creditor will not be fully compensated by allowing it to rank for the full amount of the contract price less any sums paid on account, any extra space being charged for at the rate stipulated for in the contract, 2½ cents per line. This cannot be unfair to the creditor, because it will then be able to utilise the unused advertising space as it sees fit. The assignee has not shewn that any abatement should be made by reason of this.

I think there should be no costs. The exact amount can be adjusted between the parties.

MIDDLETON, J. DECEMBER 23RD, 1914.

RE DUNCAN.

Distribution of Estates—Absentee Next of Kin—Application for Declaration of Death without Leaving Issue — Evidence—Insufficiency.

Motion, upon the return of an originating notice under Rule 600, for an order determining the question whether Margaret Anne Duncan or her representatives, if any, had any interest in the estate of William Henry Duncan, deceased.

C. W. Plaxton, for the applicant, the administrator of the estate, relied on Re Stanford, an unreported case decided in September, 1905, and Re Ashman (1907), 15 O.L.R. 42.

F. W. Harcourt, K.C., Official Guardian, for the infants interested.

MIDDLETON, J.:—William Henry Duncan died intestate on the 29th May, 1914, leaving an estate of $3,106. Letters of administration have been taken out by Mary Duncan, his sister. Mary Duncan now claims to be the sole surviving next of kin of the deceased, and she now makes an application in Chambers for an order so declaring. Margaret Anne Duncan, sister of the intestate and of the applicant, it is said, lived here some 21 years ago, and has not since been heard of.

This application is in effect for an order declaring that Margaret Anne Duncan predeceased the intestate.

Where an executor or administrator finds himself confronted with difficulty in ascertaining the next of kin, he rightly resorts to the Court for assistance; but where the applicant is the sole person beneficially interested, what is sought is not the sanctioning of payment over of money, but the retaining of it by the applicant, and the Court ought to be very chary in the making of any order, and the material ought to be of the clearest and most satisfactory description. No order would protect the applicant against any claim that might be hereafter made.

The material here is very unsatisfactory. The applicant confines herself to the naked statement that she is the sole surviving next of kin "except possibly my sister Margaret Anne Duncan or her lawful issue, if any." She then says that the sister left home 21 years ago for the city of Lowell, Mass., and she has not heard or received any letter or word from her since then,

except one letter about two months after the arrival of her sister in the city of Lowell. This affidavit does not state any of the circumstances surrounding the sister's departure. It is not even said that she was unmarried, or that she did not leave for the purpose of being married. The nature of the letter received is not disclosed, nor is it shewn whether the relationship between the sisters was such as to render it likely that there would be any correspondence.

This affidavit is supplemented by the affidavit of one Thomas Corner, a notary public, acting for the applicant, who states that his client has told him that she never received any word or communication from her sister, thus contradicting the lady herself, who admits the receipt of one letter, but in no way fortifying her evidence.

There is an affidavit from one James Graham, who is a first cousin of the applicant and her sister. He swears that the sister left his residence in the city of Toronto for Lowell in 1893, and that he has not heard from her since. He does not state for what purpose she left nor whether she intended to stay in Lowell permanently or for one day. This is fortified by a notice published in the *Cannington Gleaner*, calling for the next of kin of the intestate to file claim, and a singularly inconspicuous notice printed in small type, published in a newspaper at Lowell. If the sister was, as is probable, illiterate, she would be most unlikely to see the advertisement. This advertisement gives the only clue to the age of Margaret Anne Duncan, but there is no evidence that this statement in the advertisement is true.

The motion is dismissed, without prejudice to any proper application that may be made upon adequate material, and without any encouragement being given to the granting of any relief upon any such motion. There is nothing to suggest that Margaret Anne Duncan, if dead, died without issue.

MIDDLETON, J., IN CHAMBERS. DECEMBER 23RD, 1914.

RE DINGWALL AND CEDAR RAPIDS R.W. CO.

Costs—Arbitration under Dominion Railway Act—Taxation by Judge — Counsel Fee — Quantum — Arbitrators' Fees — Charges for Time Spent in Conference.

The railway company's costs of an arbitration under the Dominion Railway Act to determine the amount to be paid to

Dingwall as compensation for land taken for the railway, came before MIDDLETON, J., for taxation, pursuant to the statute; and the learned Judge requested the Senior Taxing Officer at Toronto to tax the bill of costs presented by the company. The Taxing Officer's report then came before the Judge for adoption.

Featherston Aylesworth, for the railway company.
Grayson Smith, for Dingwall.

MIDDLETON, J.:—Two items are complained of—the allowance for counsel fee and one matter in respect to the arbitrators' fees.

The Taxing Officer has allowed a fee of $500 to cover the whole arbitration proceedings. I am unable to say that this is too much. The proceedings lasted for more than 12 days. It is true that the costs taxed and allowed exceed the amount awarded to Mr. Dingwall for his land; but it is to be borne in mind that what is taxed to the railway company is the costs of resisting a very large claim made by Mr. Dingwall. No machinery has yet been devised by which the cost of expropriation proceedings can be kept within reasonable bounds; and, although in this case the proceedings appear to have occupied altogether too much time, the land-owner seems to be as much responsible for this as the company.

The other question is as to an allowance for time taken by the arbitrators in considering and discussing the making of their award. It is not the practice to allow a sole arbitrator for the time occupied in making up his mind; but where an arbitration is before a board of arbitrators some time must be spent in conference, and a reasonable time should be allowed for.

I think the taxation of the Senior Taxing Officer, to whom I am very much indebted for the time spent, should be confirmed.

MIDDLETON, J. DECEMBER 24TH, 1914.

LOOMIS v. CITY OF OTTAWA.

Contract—Work and Labour Undertaken for City Corporation —Change in Extent and Character of Work—Certificate of City Engineer—Dispensing with, as Condition Precedent to Payment—Extra Work — Absence of Written Order—Acceptance—Removing Obstruction — Contract Work—Salvage—Interest on Security Deposit—Interest on Amounts Claimed—Counterclaim — Unskilfulness in Performance of Work—Penalty for Delay.

Action by contractors to recover from the Corporation of the City of Ottawa a sum alleged to be due in connection with a contract for the repairing of an intake pipe forming part of the waterworks system of the city. The amount claimed was $21,265.93. The defendant corporation denied liability, and also alleged that the work was performed unskilfully, and claimed $25,000 damages and $9,200 as a penalty for delay.

The action was tried without a jury at Ottawa.

G. F. Henderson, K.C., and A. Greene, for the plaintiffs.

F. B. Proctor, for the defendant corporation.

MIDDLETON, J.:—The contract is dated the 18th August, 1913, and provides for the lifting of the old intake pipe over the distance from the pump to the mouth of the pipe at Lemieux Island, the scraping, testing, and recoating of this pipe, cutting off old joints, putting on and rivetting new joints, and relaying the pipe in the bed of the Ottawa river; all this to be done for $40,000.

At the time of the making of this contract, the situation was urgent; and, as is demonstrated from the engineer's report outlining the work, attached to and forming part of the contract, the engineering detailed had not been considered or worked out. When the work came to be undertaken, the engineer in charge determined to construct saddle cribs, to rest upon the pipe.

. . .

Other difficulties developed. The gate-house at the end of the aqueduct was found to be in such bad repair that it had to be entirely reconstructed. The extent and magnitude of the additional work may be judged when it is stated that the work ac-

tually performed cost in all between three and four times the amount of the contract-price.

In the contract there are the usual provisions calling for the engineer's certificate as a condition precedent to the right to demand payment. The contract contains this interpretation clause: "'City engineer' shall mean Mr. Archibald Currie or other engineer duly appointed by the corporation to superintend the execution of the said works."

The works were carried out under the supervision of Mr. Currie and his assistants, particularly under the control of Mr. Beer. About the time of the completion of the work, unfortunately, Mr. Currie's health gave way, and for a considerable time he was entirely disabled. When the time came to demand a final certificate, Mr. Currie had partly recovered his strength, but was still far from well. An arrangement was made by which he granted a certificate for a certain amount, making the total amount certified, so far as these contractors were concerned, $140,151.86—the claims by the contractors for a further sum and for their right in respect to a final certificate being held in abeyance until he should have opportunity and strength to consider the questions involved.

Shortly after this arrangement, and apparently without preliminary warning, Mr. Currie's resignation was asked, and he resigned. He properly takes the position that after this he should not certify or deal in any way with the matters in issue; and he may be treated as having declined to give a final certificate.

No other engineer has been appointed to supervise this work, nor do I think that it would be competent for the defendant corporation, now that the work has been completed, to appoint any engineer to undertake the function vested by the contract in Mr. Currie.

The circumstances disclosed warrant me, I think, in holding that the action of the defendant corporation in discharging Mr. Currie, and his refusal to certify, dispense with the necessity of any certificate from him as a condition precedent to the right of action.

In addition to the amount certified by Mr. Currie, five items are claimed by the plaintiffs.

Under the agreement, when the pipes were brought to the surface, any new pipe necessary was to be furnished by the defendant corporation. Some of the pipe was found to be injured, and the engineer instructed the contractors to repair this. It is true that there were no written orders, but the work was done,

and has been accepted by the defendant corporation; and it was, I think, outside of the contract entirely. The defendant corporation, I think, should pay for this. The sum involved is $1,190.

The second item is a sum of $1,380. The location of the line was changed from that shewn in the engineer's report. This involved the laying of 230 feet of additional pipe. That sum, I think, is properly allowable.

The third item is called "labour removing obstruction." Owing to the delay in the construction of the work caused by the construction and placing of saddle-cribs and other extra work, the work ran on into winter; ice formed, and had to be removed. The extra work necessitated the cutting of a trench 25 feet wide. Had the pipe alone to be laid, a trench 5 or 6 feet wide would have sufficed. The engineer has allowed two-thirds of the cost of this work. I do not think that the contractors are entitled to recover the remaining one-third. That is not in any sense an extra. It is cost not contemplated in doing the work. This must be borne by the contractors.

An item is claimed for salvage from the waste portions of the old pipe not used. The property in this pipe was in the defendant corporation, and it was entitled to the salvage; so this claim fails.

The last item is $140, interest on $4,000 deposit. This is claimed at 3½ per cent., the amount earned by the money while in the defendant corporation's possession, and it ought to be paid. . . .

The amount due on the certificates should, I think, bear interest from the date of the last certificate, and the other claims should bear interest from the date of the writ.

No case has been made out by the defendants shewing unskilfulness in the doing of the work. . . .

The claim for a penalty, I think, also fails. The character of the work to be done was so radically changed that the penal clauses, upon well-known principles, ceased to apply. Had the work been confined to the original work contemplated, it would probably have been completed in time. The other work seems to have been prosecuted with reasonable diligence, save for one short interval. . . .

The judgment will, therefore, be for the plaintiffs as indicated, with costs throughout; the exact amount to be ascertained by the Registrar upon the entry of judgment, if the parties disagree; or, if necessary, I may be spoken to.

MIDDLETON, J. DECEMBER 24TH, 1914.

*MARTIN v. SHAPIRO.

Chattel Mortgage—Affidavit of Execution—Non-fulfilment of Imperative Statutory Requirement—Bills of Sale and Chattel Mortgage Act—Date of Execution not Filled in—Invalidity of Instrument.

Stated case, heard by MIDDLETON, J., in the Weekly Court.

A. C. McMaster, for the plaintiff.
W. J. McWhinney, K.C., for the defendant.

MIDDLETON, J.:—The sole question is the validity of a chattel mortgage dated the 18th May, 1914, made by one Edward Herman to the defendant. The plaintiff, as the assignee for the benefit of Herman's creditors, contends that the mortgage is invalid, as the date of execution of the mortgage is not stated in the affidavit of the attesting witness. The mortgage purports to bear date the 18th May, 1914, and the affidavit of execution is sworn on the 19th May, 1914. The day of the month has not been filled in in the printed form, although the month itself is stated.

The precise point is determined adversely to the mortgage by my brother Kelly in the case of Cole v. Racine (1913), 4 O.W.N. 1327. There the day of the week and the day of the month were duly stated but the year was left blank. My learned brother said (p. 1329): "This requirement of the statute is imperative, and it must be construed strictly. Failure to mention the year in which it was executed is, in my opinion, a fatal omission, and such a non-compliance with the requirements of the Act as renders the mortgage void."

The principle applicable to cases of this kind is indicated in Parsons v. Brand (1890), 25 Q.B.D. 110. . . .

The clause introduced into the statute requiring the date of the execution of the mortgage to be given was introduced of fixed purpose, to insure the registration of a chattel mortgage within five days from the date on which it was actually executed, and so to prevent the holding of chattel mortgages undated so that the date might be filled in and registration completed at any time the mortgagee thought it necessary for his protection. A mortgage so registered was of course invalid, but those interested

*To be reported in the Ontario Law Reports.

were compelled to ascertain that the facts were not as they appeared, and to attack the transaction at their peril. The Courts cannot dispense with that which the Legislature has prescribed.

None of the English cases cited are in any way in conflict with this. The English statute in some respects differs from ours; and in all the cases in which the mortgage has been upheld the Court has been able to find that there was a substantial compliance with the statutory requirements. No tendency can be found in any of our own decisions to indicate that this rule should be relaxed. See Re Andrews (1877), 2 A.R. 24; Nisbet v. Cock (1879), 4 A.R. 200; and Archibald v. Hubley (1890), 18 S.C.R. 116.

I, therefore, find in favour of the plaintiff upon the stated case; and there is no reason why costs should not follow the event.

HALLIDAY v. ROY—MIDDLETON, J.—DEC. 21.

Contract—Exchange of Properties—Specific Performance—Statute of Frauds — Untrue Representation.] — The parties agreed to exchange an automobile for an equity of redemption of some property. The plaintiff, the owner of the automobile, brought this action for specific performance. The action was tried without a jury at Ottawa. MIDDLETON, J., said that the Statute of Frauds probably afforded a defence; but, apart from that, he was of opinion that the action failed. By a contemporaneous written memorandum, which really formed part of the same transaction, the plaintiff undertook that the automobile was in good repair and running order. It was not; and, although this representation may have been made honestly, it was untrue in fact; so that, in substance, as well as for technical reasons, the action failed, and must be dismissed with costs. C. L. Bray, for the plaintiff. J. P. Labelle, for the defendant.

GRILLS v. CANADIAN SECURITIES CORPORATION LIMITED—LENNOX, J.—DEC. 22.

Principal and Agent—Agent's Commission on Sales of Land — Payments — Deductions — Account — Reference — Indulgence—Costs.]—Action against the above-named corporation and other companies to recover commissions alleged to be due to

the plaintiff upon sales of land made for the defendants; for an account, an injunction, and other relief. The action came on for trial before LATCHFORD, J., without a jury. The plaintiff desired to have a reference as to the whole of the questions involved in the action; but the learned Judge was of opinion that there were issues of law and fact which should be disposed of by him. The issues he found mainly in favour of the defendants. The total amount claimed by the plaintiff was $9,747.52. The learned Judge, taking this sum as a basis, finds that payments made by the defendants, together with overcharges and improper charges, unfounded claims, etc., amount to $10,060.87, leaving a balance in favour of the defendants the Canadian Securities Corporation Limited of $313.35, for which sum, with costs of defence, these defendants should have judgment, unless the plaintiff elects within 10 days to take a reference as an indulgence. If he so elects, the onus will be upon him to shew that the sums allowed are incorrect; and further directions and costs will be reserved. In the event of the plaintiff electing not to take a reference, the judgment will direct that, upon payment of the sum of $313.35 and interest and costs of defence and subsequent costs (if any), within 6 months before actual sale of the property, the plaintiff shall be entitled to a conveyance of certain Lindsay lots, and that, upon sale of the lots, the net proceeds thereof, after deducting the amount owing to the defendants the Canadian Securities Corporations Limited, shall be paid to the plaintiff. As against the other defendants, action dismissed with costs. F. Arnoldi, K.C., and D. D. Grierson, for the plaintiff. I. F. Hellmuth, K.C., and F. S. Mearns, for the defendants the Canadian Securities Corporation Limited. W. K. Fraser, for the other defendants.

CHISHOLM v. GOLDFIELDS LIMITED—LENNOX, J., IN CHAMBERS—DEC. 22.

Judgment—Default in Payment of Costs — Motion to Set aside Judgment—Extension of Time for Moving—Leave to Defend—Rule 176—*Terms—Costs—Security.*]—Motion by the defendants to set aside a judgment entered against them for default of compliance with an order for postponement of the trial; and for an extension of the time for moving, and for leave to defend. LENNOX, J., said that the application was not governed by Strati v. Toronto Construction Co. (1910), 22 O.L.R. 211, 2 O.W.N. 172, nor by Crown Corundum and Mica Co. v. Logan

(1902), 3 O.L.R. 434, nor by any of the cases dealing with the power of the Court where the order provides for the dismissal of the action. There is power, under Rule 176, to grant the relief asked. The defendants should be let in to defend, but it must be on terms fair to the plaintiff. If the defendants pay to the plaintiff's solicitors the taxed costs, amounting to $70.50, and the costs of entering judgment and of this application, fixed at $25, a total of $95,50, on or before the 29th December instant, and if the defendants pay into Court to the credit of this action, as security, the sum of $1,000, or file a bond for that amount, on or before the 15th January next, the judgment will be set aside, and the action will come on for trial as provided by an order made on the 10th November, 1914. If the defendants fail to comply with these terms, the application will be dismissed with costs. W. J. McWhinney, K.C., for the defendants. H. S. White, for the plaintiff.

TIGHE v. TOWNSHIP OF TYENDINAGA—MIDDLETON, J.—DEC. 23.

Master and Servant—Injury to Servant—Cause of Injury—Evidence—Fault of Fellow-servant—Notice under Workmen's Compensation for Injuries Act not Given in Time—No Liability at Common Law—Costs.]—The plaintiff, a young man of seventeen, sued for damages for injuries said to have been sustained while in the employ of the defendant corporation, drawing gravel for use upon the township roads from a pit owned by one Horrigan. The action was tried without a jury at Belleville. The accident took place on the 13th March, 1914. The suggestion was that, owing to the thawing then going on, some gravel fell, striking the plaintiff upon the back of his head, as he was helping to lift the hind runner of a sleigh which was being backed on to some skids placed upon the ground. This blow, it was said, drove the head of the plaintiff forward and downward, so that his forehead was struck upon the sleigh, a nasty wound being in that way inflicted. That the plaintiff came in contact with the sleigh and so received the wound complained of, says the learned Judge, there can be no doubt. Whether he slipped and fell or whether the gravel struck him, however, was a matter of very much doubt. The plaintiff did not know what happened to him. He said that he became instantly unconscious for a moment or so. He asserted that there was a lump on his head where he was struck by the gravel, and that he found some gravel inside of his short collar. The doctor who attended him

did not find the lump on his head. The evidence of all the other witnesses was consistent with either theory; and the plaintiff's story might be viewed with a good deal of suspicion. It was not necessary to deal with the case upon this ground, as the necessary notice was not given within the time limited by the Workmen's Compensation for Injuries Act. The action failed at common law, as the utmost that could be said was, that there was negligence of a fellow-workman. The learned Judge was rather inclined to think that the negligence was that of the plaintiff himself, in failing to see that the face of the wall of the pit was kept in a proper condition. The plaintiff was to be congratulated on having made an excellent recovery. He lost two months' work, and had now a scar upon his forehead. In no possible aspect of the case could he have been expected to recover very heavy damages, and the action ought not to have been brought in the Supreme Court of Ontario. The action failed, but, under all the surrounding circumstances, it should be dismissed without costs. E. G. Porter, K.C., for the plaintiff. Stewart Masson, K.C., for the defendant corporation.

BAGWELL v. TORONTO GENERAL TRUSTS CORPORATION—LENNOX, J., IN CHAMBERS—DEC. 23.

Jury Notice—Application to Strike out—Adjournment to be Heard by Trial Judge.]—Motion by the defendants, the executors of a deceased person, for an order setting aside a jury notice filed and served by the plaintiff. The action was brought to recover compensation for services alleged to have been rendered by the plaintiff to the deceased. LENNOX, J., said that he felt no difficulty in deciding how the action should be tried, but he was also convinced that the Judge before whom the case should come for trial would be in a still better position to decide as to the best mode of trial. Where it can be done without inconvenience, it is better to leave the question of the mode of trial to the trial Judge. Application adjourned before the trial Judge, who will also dispose of the costs. G. M. Willoughby, for the defendants. H. Arrell, for the plaintiff.

MEREDITH v. ROMAN CATHOLIC EPISCOPAL CORPORATION OF OTTAWA—MIDDLETON, J.—DEC. 24.

Architect—Fees for Services in Erection of Building—Breach of Duty—Attempt to Remedy Defect in Construction — Bona Fides — Recovery of Fees — Deduction of Expense Caused by Abortive Attempt—Costs.]—Action by an architect to recover fees for services in connection with the erection of a parish house in the city of Ottawa. The defence was, that the plaintiff had disentitled himself to recover, and had rendered himself liable to heavy damages by reason of negligence and lack of skill in the construction of the roof of the building. The roof was constructed according to a system, but was not properly constructed. This, the learned Judge finds, was the fault of the contractors, not of the plaintiff; but, when it was ascertained that the roof was a failure, the learned Judge says, it was the duty of the plaintiff to place the whole situation before the defendant. Instead of doing this, the plaintiff improperly assumed to attempt to doctor up the roof, ignoring the defendant's right to insist upon getting what he had contracted for. Without the defendant's consent, he had no right to substitute a botched job for what was called for by the contract. The plaintiff acted in good faith and not without skill, but he involved the defendant in an unjustifiable expenditure. The defendant's agent took the matter into his own hands, removed the roof, and erected another to his own satisfaction. The plaintiff was entitled to his commission, $1,305.60; but he must pay or indemnify the defendant from the expense of the abortive attempt to patch up the roof. Judgment for the plaintiff for the amount sued for, less $619.27, unless the plaintiff indemnifies the defendant from liability in respect thereof. As the plaintiff was in one way at fault, and as the defendant made an unsuccessful attack upon the plaintiff, there should be no costs. G. F. Henderson, K.C., for the plaintiff. M. J. Gorman, K.C., for the defendant.