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YORK COUNTY COURT.

REX v. ST. CLAIR.

Criminal Law — Circulating Obscene Literature — Criminal Code, sec. 207—8 and 9 Edw. VII. c. 9—Intention Well-meaning—Public Good not Served—Onus on Accused—Excess—Lawful Justification or Excuse—Conviction.

Prosecution for the circulation of certain obscene circulars tending to corrupt morals. The circular purported to report and describe a performance given at a certain theatre and the alleged object of its publication was to awaken public sentiment against the alleged immoral performances at the theatre in question. The pamphlet in question was sent chiefly to clergymen and others interested in moral reform.

DENTON, Co.J., *held*, that even if the description of the performance was an accurate one the pamphlet in question was obscene. *R.* v. *Hicklin*, L. R. 3 Q. B. 371; *Steele* v. *Brennan*, L. R. 7 C. P. 261, and *R.* v. *Carlyle*, 3 B. & A. 167, referred to.

That the onus which was on the accused to shew that the public good had been served by the publication had not been discharged and that in any case there was an excess beyond what the public good required.

Accused convicted under sec. 207 of Criminal Code as amended by 8 and 9 Edw. VII. ch. 9.

Prosecution under sec. 207(1a) of the Criminal Code, as amended by 8 and 9 Edw. VII., ch. 9, for "knowingly and without lawful justification or excuse, selling, distributing or circulating or having in defendant's possession for sale, distribution or circulation, certain obscene circulars tending to corrupt morals."

R. H. Greer for the Crown.

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

HIS HONOUR JUDGE DENTON:—I do not think there is anything to be gained by reserving judgment in this case because I have made up my mind as to what the decision must of necessity be. That the defendant circulated or dis-

tributed obscene printed matter, tending to corrupt public morals within the meaning of sec. 207, sub-sec. 1A. of the Criminal Code, is to me very clear. No one who reads the pamphlet can reasonably hold any other opinion as to its obscenity. Counsel for the defence has admitted it subject to this qualification: He argues that when read with the context and considered in the light of its limited circulation, it may not be regarded as obscene. In other words, that the obscene matter is clothed in a garb that hides its obscenity. I cannot follow that argument. Then as to the circulation, it must be borne in mind that the test of obscenity as laid down by Lord Cockburn in *Reg.* v. *Hicklin,* L. R. 3 Q. B. P. 371 is "whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences and into whose hands a publication of this sort may fall." The pamphlet in question was addressed to the clergymen, but there was no evidence that it was sent to them as a body, if that would have made any difference and in my opinion it would not. There was evidence that by the accused it was placed in the hands of four persons, none of whom were clergymen, and only one of whom was associated with him in his work. Then I am forbidden by the Criminal Code from considering the motives that actuated him in printing and circulating it. And it is no defence in itself to say that it is a correct description of what he saw and heard at this show —*Steele* v. *Brennan,* L. R. 7 C. P. 261, and *Reg.* v. *Carlyle,* 3 B. & A. 167, which decide this, are decisions binding upon this Court and must be followed. And that must be so, apart from authority, for it would be strange indeed that in order to prevent the pollution of the public morals the law should allow pollution to be circulated.

The only defence in my opinion that the accused might have is to be found in sec. 207, sub-sec. 2 of the Code, which reads as follows: "No one shall be convicted of any offence in this section mentioned, if he proves that the public good was served by the acts alleged to have been done, and that there was no excess in the acts alleged beyond what the public good required."

It is, therefore, necessary to consider the meaning of the words "public good was served" and to consider whether the accused (for the burden is placed on him by the statute) has made out a defence under this section.

I can find no similar provision in the English law. It is not unlikely that Parliament intended by this section to provide for the case of scientific, medical, or religious works, which though containing matters obscene should nevertheless be permitted for the public good. But the language used is wide, and should not be unreasonably restricted especially in this case. It is conceivable that the section might be applied to a case where a document is printed and circulated, containing obscene matter, for the very purpose of bringing public opinion to bear upon a condition of things political, moral or religious, which it is for the public good should be made known and remedied. I can conceive that the section might be construed to cover a case of that kind, and it is in that view that evidence has been admitted in this case, which otherwise would have been quite irrelevant—as to the character of the show "Darlings of Paris," which the accused described in his bulletin, and the attitude of the police towards it. Evidence was given by ministers, clergymen, and others connected with moral reform work, who saw the play in question, and if we are to adopt their testimony, one conclusion only can be arrived at. But it is said that the standard set by these witnesses is not the standard by which the show should be judged. Well, that may be; no one person can decide that. We all know that the stern soberness of the Commonwealth was followed by the frivolities of the Restoration; but in this case if it be necessary to come to a decision as to whether that play—"The Darlings of Paris" was obsence, immoral or indecent, it can be done without considering the evidence of these clergymen, however valuable their evidence may be. I find that the report of the play made by the accused was, except in some comparatively unimportant particulars, a fair and accurate description of the obj ctionable things that he heard and saw, and that the inferences and meanings drawn by him were the inferences and meanings that any reasonable person attending that show would have drawn. That being so, it does not require any high standard of morality to denounce the show as indecent or immoral or obscene. It was all these things combined. And it followed from this that the so-called censorship of this play by the police was inefficient. But all this affords no defence to St. Clair unless he goes further and proves that the public good was served, not that the public good was intended to be served, not that the evidence given at this

trial has served the public good, but that the circulation of the document itself has served the public good. As I read this section, it means this, that he who publishes an obscene document with the object of serving the public good does so at the peril of being able to shew on his trial that the public good was served by it. Now, there has been no evidence that the document as such has served any public good. No action was taken upon it, the public was not even aroused by the document itself, whatever may be said about the trial that has arisen out of it. But even if it be conceded that the public good was served, there was, in my opinion, excess beyond what the public good required. What can a person do who thinks the laws are not being properly enforced? What can a person do who thinks that another person ought to be prosecuted when he is not prosecuted? The initiation of criminal proceedings is not confined to the officers of the Morality Department. Any person can go before a magistrate and lay an information. He may get a summons, or, if the magistrate thinks it a proper case, he may issue a warrant for the arrest of the person charged. It was the privilege of Mr. St. Clair if he chose, and if he believed these people ought to be prosecuted, it was his privilege and right to go to the magistrate and lay an information. It is said that probably he would have been refused a summons. I cannot believe that our magistrate and the officers of the law would act in such a way as to refuse a summons at least, or, perhaps, a warrant, in a case like this. Not only that: Suppose that he were refused? Or suppose, what is more likely, that St. Clair did not desire to take upon himself the burden of prosecution and no one could blame him for not having the desire, then it seems to me there were other means of bringing about a better condition of things than by publishing this obscene document. He could have interested his fellow-clergymen, and others who were engaged in moral reform work, and could have got up a deputation and gone to the Police Commissioners and laid the facts before them and told them exactly what he had published in his bulletin. He could have urged upon them that they were not properly enforcing the law, and if they failed to be convinced he could still have taken steps to arouse public opinion without publishing what is obscene. Supposing this show was indecent, and I think beyond question that it was, and you want to describe it to other people. You can describe the play in your own way,

denouncing it in the strongest language without going into details and using language so obsecene and filthy as appears in this document. Had St. Clair confined himself to that, had he published his pamphlet denouncing the show in as strong language as he could use, no exception could have been taken to it, so long as it was not obscene, but no person reading this document circulated by St. Clair can come to any other conclusion than that it is not only obscene, and has a tendency to corrupt morals, but it is a positively filthy thing which ought not to be allowed to fall into the hands of anyone. I was surprised to hear one of the ministers (Mr. Moore, if I remember rightly), who gave evidence, say that he would go so far as to put the document in the hands of lady teachers of the city. Well, I am sure that Mr. Moore, if he thinks about it, will recall that statement. In the first place, I do not think his own conscience would allow him to do it, and in the second place, if he did it, it would not be long before he would find himself in prison. For these several reasons I have come to the conclusion that the acts of the accused were far in excess of what the public good required, even assuming that the public good was served, which, in my opinion, it was not.

The result, then, is that I feel myself obliged to find the accused guilty.

YORK COUNTY COURT. JANUARY 17TH, 1913.

HILL v. RICE LEWIS.

Sale of Goods—Action for Breach of Implied Warranty—Defective Cartridge in Box—Box of Well-known Maker Sold Sealed—Guarantee of Maker—No Reliance on Vendor's Skill or Judgment—Review of Authorities—Stay.

Action for damages for breach of implied warranty upon the sale of a box of cartridges. Plaintiff purchased from defendants a box of "38-40 rifle" cartridges sold to him in a sealed box bearing the label and guarantee of well-known makers. One of such cartridges proved not to be a rifle cartridge but a revolver cartridge and when inserted in plaintiff's rifle it exploded, seriously injuring him.

DENTON, CO.J., *held*, that under the facts of the case there was no implied warranty other than that the goods were the goods of the manufacturer in question and that plaintiff did not in any sense rely upon defendants' skill and judgment but upon the reputation and guarantee of the manufacturers.

Judgment for non-suit with costs if demanded. Review of authorities.

J. W. McCullough, for the plaintiff.

J. D. Montgomery, for the defendants.

HIS HONOUR JUDGE DENTON:—Plaintiff is a farmer living near Thornhill in York township, and defendants are hardware merchants in King street, Toronto. In the fall of 1911 plaintiff, in preparation to go hunting went to defendants' store and bought from them a box of cartridges for his Winchester rifle. It is not disputed that (except as to the one single cartridge which caused the trouble), the cartridges sold by defendants to plaintiff were the cartridges which plaintiff desired and which were suitable for his rifle. The plaintiff joined his hunting party and one morning, before daylight, the plaintiff took some cartridges out of his pocket and put them in his rifle. He went out in the course of the morning, saw a deer which he fired at and missed. He then pumped up (to use the huntsman's phrase), another cartridge and fired and missed a second time. He pumped up a third and fired, but there was no discharge. He then pumped up another cartridge and fired, when an explosion took place, powder going into the plaintiff's face, injuring his eyes and causing him very great pain and suffering. The plaintiff was taken by a comrade to the camp and on the same afternoon the rifle was examined. They found in the barrel a revolver cartridge smaller in size than the rifle cartridge. The

plaintiff and his comrades came to the conclusion that the explosion was caused by the presence in the barrel of the rifle of this revolver cartridge and that this was the one which failed to discharge in the third effort. There was evidence given that neither the plaintiff nor any of his comrades used a revolver in the camp or had any revolver cartridges; that the plaintiff used no other cartridges except those that he had got from the defendants.

The defendants offered no evidence, but Mr. Montgomery's cross-examination of the plaintiff was directed to shew first of all that the plaintiff was careless in loading, handling or discharging the gun, and, secondly, that the accident was not caused by the presence of revolver cartridge in the barrel, and thirdly that even if the cause of the accident was as alleged, the revolver cartridge was not in the box bought from the defendants.

At the close of the plaintiff's case, counsel for the defendants moved for a nonsuit on the ground that there could be no liability in any event assuming that the findings were all in the plaintiff's favour.

With a view to avoiding the necessity for a new trial in case a nonsuit should be wrongly granted, I left questions to the jury in order that their findings might be got upon the disputed questions of fact. Judgment on the motion for nonsuit was reserved until after the findings of the jury were obtained. The questions asked the jury and their answers are as follows:—

1. Were the plaintiff's injuries caused by the presence in the barrel of the gun of a cartridge that was too small? A. Yes.

2. If so, was such small cartridge contained in the box of 38-40 rifle cartridges purchased by the plaintiff from the defendants? A. Yes.

3. Or were the plaintiff's injuries caused by any negligence on the part of the plaintiff in loading, handling or discharging the gun? A. No.

4. At what sum do you assess the damages? A. $500.

There is no dispute as to what took place when the plaintiff purchased the cartridges in question, and therefore no finding of the jury was required on that point. The following questions and answers taken from the plaintiff's examination and cross-examination shew what took place.

The Court: "You went to Rice Lewis and got this box just before you went north? A. Just a few days before I went north.

Q. What did you say when you went in the store? A. I asked them for a box of 38-40 shells, and that is the shells I got.

Q. A box just like that, Exhibit 47? A. Yes."

Then in cross-examination by Mr. Montgomery:—

"This is the kind of cartridge that you asked for, is it not, when received (shews a box of 38-40 rifle cartridges)? A. Yes, that is the kind of cartridges.

Q. In a sealed box like this? A. Yes.

Q. Trade mark U. M. C. on it? A. Yes.

Q. 38 Winchester centre-fire cartridges? A. This is the same as yours.

Q. That is the same style of box? A. As near as I know.

Q. And this is the sort of package you asked for? A. I asked for 38-40 rifle shells.

Q. And you got it? A. Yes.

Q. And you took this home with you? A. Took it home.

Q. You said before that you asked for 38; it is the same thing? A. It is the same thing; I got the same anyhow.

Q. This is what you asked for, is it not? A. Yes, that is what I asked for.

Q. Union Metallic Company's 38 Winchester? A. Yes.

Q. They are guaranteed? A. Yes.

Q. "We hereby guarantee these cartridges ——"? A. Yes.

Q. Guaranteed by the factory? A. Yes, sir.

Q. You accepted that and took it with you? A. Yes."

The plaintiff does not base his claim on any negligence of the defendants. Indeed, negligence could not even be suggested, as the defendants sold to the plaintiff a sealed package, got by them in the ordinary way from the manufacturers, the Union Metallic Cartridge Company, who are well-known makers. But the plaintiff puts his case on the ground first of all, that apart from any question of warranty there was here a condition attaching to the sale, the condition being that the goods sold to the plaintiff were to be 38 or 38-40 Winchester rifle cartridges, whereas, they were not all rifle cartridges and that as the damages were caused by the fact that they were not all rifle cartridges he is entitled to succeed on the ground of breach of condition, whether or not

there was any warranty implied or otherwise accompanying the sale. In *Wallis* v. *Pratt,* 1910, 2 K. B., at page 1003, Fletcher Moulton, L.J., in a judgment which met with the unanimous approval of the House of Lords, 1911, A. C. 394, points out in very clear language the difference between a condition and a warranty. This is the *Sanfoin Seed Case* and it was there decided that even where the contract provides that there is no warranty given as to the thing sold, yet if the thing sold be something different from what was agreed to be purchased and there has been a substantial failure to perform the contract at all, the purchaser who suffers damage has a right of action for breach of condition separate and distinct from a breach of warranty. A condition and a warranty are alike obligations under a contract, a breach of which entitles the other contracting party to damages, but in the case of a breach of a condition he has the option of another and higher remedy, viz., that of treating the contract as repudiated.

But where the buyer has accepted the goods or where the contract is for specific goods, the property in which has passed to the buyer, the purchaser will be deemed as a matter of law to elect to content himself with his right to damages. Whether a stipulation in a contract of sale is a condition, the breach of which may give rise to a right to treat the contract as repudiated or a warranty, a breach of which may give rise to a claim for damages, but not to a right to reject the goods and treat the contract as repudiated, depends in each case on the construction of the contract.

So that if the defendants in this case had sold the plaintiff a box containing all revolver cartridges instead of rifle cartridges, the article sold would have been something entirely different and the case cited would have been authority for holding the plaintiff entitled to damages even if no warranty implied or expressed accompanied the sale. But it seems to me this is an entirely different case. This is a case where one single revolver cartridge got mixed in a box containing a great many rifle cartridges. The plaintiff in this case was never in a position to repudiate the purchase on the ground that there was a substantial failure to perform the contract, There was not in this case, as there was in the one cited, that kind of condition for a breach of which an action lies independently of warranty. The plaintiff, then, is driven to rely on an implied warranty.

He contends that in every case where the buyer expressly or by implication makes known to the seller the particular purpose for which the goods are required, so as to shew that the buyer relies on the seller's skill or judgment and the goods are of a description which it is in the course of the seller's business to supply, there is an implied warranty that the goods shall be reasonably fit for such purpose. This, no doubt, is the common law of England as now contained in section 14 of the Sales of Goods Act.

Applying then the facts of this case to this law it seems to me that it must be held that the plaintiff did by implication when he bought the cartridges in question make known to the defendants the purpose for which the goods were required. It was not necessary that the purchaser should say to the defendants that he intended to shoot with the cartridges. The cartridges could have been used for no other purpose. On the other hand, I do not see how it can be said that the buyer relied in any way on the seller's skill or judgment. The purchaser knew that what he was buying were goods not made by the defendants, but manufactured by the Union Metallic Cartridge Company, well-known makers of repute, and sold by the defendants in a sealed package as it had come from the makers. The goods were of that description which it was in the course of the sellers' business to supply, so that all that is lacking in this case to create the implied warranty is the fact that the plaintiff did not rely upon the sellers' skill or judgment. But it seems to me that the case comes under the proviso of section 14 (1) of the Sales of Goods Act, "that in case of a contract for the sale of a specified article under its patent or other trade name there is no implied condition as to its fitness for any particular purpose."

Mr. McCullough contends that this proviso is not a declaration of the common law and therefore not in force in this province. (It is to be hoped that some day we may have a Sales of Goods Act enacted in this Province so that such questions will not be raised). But *Chanter* v. *Hopkins*, 4 M. & W. 399, and *Olivant* v. *Bayley*, 5 Q. B. 288, are authorities against this contention and in favour of the view that the proviso is part of the common law and therefore in force in this province.

The plaintiff here bought a specified article under the trade name U. M. C., or the Union Metallic Cartridge Com-

pany, with the guarantee of the manufacturers stamped upon it. And if that be so there is no implied condition or warranty as to its fitness for any particular purpose.

Then, failing upon other points, Mr. McCullough argues that this was a contract for the sale of goods by description and that in every such case there is an implied condition that the goods shall correspond with the description.

This case cannot, I think, be fairly said to come under a contract for the sale of goods by description.

In *Wren* v. *Holt*, [1903] 1 K. B., at page 615, Vaughan, Williams, L.J., says: "Speaking candidly I do not think, taking the generally accepted view of lawyers as to the meaning to be attached to the words by description as applied to a sale, that a sale of goods over a counter, where the seller deals in the description of goods sold, is a sale of goods by description within this sub-section."

In *Varley* v. *Whipp*, [1900] 1 Q. B. 513, Channell, J., says that a sale of goods by description must apply to cases where the purchaser has not seen the goods but relies upon the description.

In this case the plaintiff saw the goods and while it would not occur to him as being necessary to open and inspect them, he had the opportunity of doing so, and if he had done so the examination would, I think, have revealed the mistake.

Counsel have referred to many authorities, but none of them are quite like the present case. The case is somewhat similar to that of a person buying from a grocer canned fruit or vegetables or fish, and there is a case in Scotland, *Gordon* v. *McHardy*, 6 Frazer 210, in which Lord Justice Clerk Macdonell gave his opinion that a grocer who gets a quantity of tins of preserved food and sells them to the public as he got them cannot be liable for the condition of the contents of the tins if he buys from a dealer of repute. In Scotland, however, the Sales of Goods Act is not in force, and Mr. Beven, in his work on Negligence, Canadian Edition, page 53, points out that had the grocer been sued in England under the Sales of Goods Act, section 14, sub-section 1, the result might have been different. But at page 54 of the same book Mr. Beven gives his reasons for thinking that in a case like this there is no liability.

The plaintiff in this case must, I think, be nonsuited. First: Because the article sold was a specific article sold under its patent or other trade name and no condition can be

implied by law from the sale of such an article as to its fitness for any particular purpose. Secondly: On the ground that assuming that it was not sold under its patent or other trade name, the purchaser did not rely on the sellers' skill or judgment, but relied upon the name and reputation of the makers and their guarantee stamped upon the box. Thirdly: If there be no warranty implied by law then the only warranty that can be implied in fact, in my opinion, is that the goods sold by the defendants to the plaintiff were the goods manufactured by the Union Metallic Cartridge Company, and sold by them to the defendants as 38 Winchester rifle cartridges.

The following additional cases have been consulted, but while they all have a bearing upon the general subject they are not authorities upon which a decision in this case can be founded.

Brown v. *Edgington*, 2 M. & G. 279; *Wallis* v. *Russell*, [1902] 2 Ir. L. R. 585; *Emmerton* v. *Mathews*, 7 H. & N. 586; *Bristol* v. *Tramways*, [1910] 2 K. B. 831; *Bostock* v. *Nicols*, [1904] 1 K. B. 725; *Wren* v. *Holt*, [1903] 1 K. B. 610; *George* v. *Skivington*, L. R. 5 Ex. 1; *Blood Balm Co.* v *Cooper*, 20 Am. St. R. 324; *Chapronnier* v. *Mason*, 21 T. L. R. 633; *Frost* v. *Aylesbury*, [1905] 1 K. B. 608; *Cramb* v. *Caledonia Railway Co.*, 19 Rettie 1054.

While the plaintiff is nonsuited it does not follow that he is without a remedy. He may not be able to sue the Union Metallic Cartridge Company in this province (see *Anderson* v. *Nobells*, 12 O. L. R. 644), but he probably has a right of action against them in the States. *Thomas* v. *Winchester*, 6 N. Y. 397 (a decision generally followed in the States—see Pollock on Torts, 8th Ed., p. 505). *Blood Balm Company* v. *Cooper*, 20 Amer. State Reports 324; *Dixon* v. *Bell*, 5 M. & S. 198; *Kerry* v. *England*, [1898] A. C. 742, all incline in that direction. Although the point would not be clear if the defendants were sued here (see *Winterbottom* v. *Wright*, 10 M. & W. 109; *Earl* v. *Lubbock*, [1905] 1 K. B. 253.

I hope the defendants will not ask for costs. There will be a stay for 60 days to allow an appeal to be taken.

APPELLATE DIVISION. MARCH 19TH, 1913.

GRAHAM CO., LIMITED v. CANADA BROKERAGE LIMITED.

4 O. W. N. 957.

Sale of Goods—Damages for Non-Acceptance — Sample Rejected—Tender of Other Sample—Refusal to Accept—Sample Sent Not in Accordance with Contract—Variation of Contract.

Action by vendors of certain apples against purchasers for damages for their refusal to accept the same. The contract provided that it should be contingent upon the approval by defendants of 5 boxes to be sent as a sample. Plaintiffs sent one box as a sample which defendants claimed was not of the required quality and immediately after receiving notice of defendants' dissatisfaction therewith sent a sample lot of five boxes which defendants refused to accept, claiming the contract was at an end.

DEROCHE, Co.C.J., found in favour of plaintiffs for $300 and costs.

APPELLATE DIVISION *held*, that the sending of the first sample and the correspondence relative thereto did not introduce a new term into the contract or vary the former terms so that plaintiffs were still bound to send and defendants to accept 5 boxes as a sample.

That an appropriation and tender of goods, not in accordance with the contract and in consequence rejected by the purchaser is revocable, and the seller may afterwards within the contract time, appropriate and tender other goods which are in accordance with the contract.

Borrowman v. *Free*, 4 Q. B. D. 500 followed.

Appeal dismissed with costs.

Appeal by defendants from a judgment of His Honour Judge Deroche, Senior Judge of the County Court of Hastings, in favour of the plaintiffs for $300 and costs, in an action for breach of contract, tried at Belleville on the 18th January, 1913, without a jury.

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

Shirley Denison, K.C., for defendants.

M. Wright, and W. D. M. Shorey, for plaintiffs.

HON. MR. JUSTICE CLUTE:—The plaintiffs, through their commission agents, Messrs. Anderson, Powis & Co., on the 31st August, 1911, sold to the defendants "600 50-lb. boxes good primes, at 10c. per lb., f.o.b. Ontario shipping point; subject to approval of 5 boxes when ready for shipment;

Belleville freight to apply; ship first half of October; terms sight draft, documents attached."

On the 5th of October, 1911, the plaintiffs wrote to the defendants as follows: "Referring to the order which we have on our books for 600 cases evaporated apples for you, sold through Wallace Anderson, Toronto, we are sending you by express to-day sample case of evaporated apples which we think will be a fair representation of the 600 cases we can ship you. Please advise immediately by return mail if these goods are satisfactory."

The defendants replied on October 7th, 1911, in part, as follows: "We are in receipt of your favour of the 5th inst., also invoice for sample box of evaporated apples representing 600 boxes, which we were to take subject to our approval of sample. We have opened this box and must say that out of seven samples that we have here it is the worst of the lot. I immediately called up Mr. Williams, of Wallace Anderson, and he is writing you to-day and will confirm what I say. We cannot accept the car."

In reply to this letter, on the 9th October, the plaintiffs wrote: "We have telephoned our Frankford branch to send you five cases by express to-day. . . . Please wire us report on them to-morrow without fail, as if not satisfactory we will try and submit some goods from some other branch. We want to deliver exactly what we have sold."

To this the defendants replied on the 10th of October as follows: "We are in receipt of your favour of the 9th inst., and are rather surprised that you are sending forward another lot of samples of *Evaporated Apples* as samples had already been submitted and *refused*, which close the transaction as far as we are concerned. We therefore have no interest in any further samples."

On the 13th October, the plaintiffs again wrote: "We are sending you by express to-day another five cases evaporated apples from Belleville, representing 600 cases which we can load here to-morrow subject to immediate reply by wire at our expense. We consider these choice goods, away above the grade we sold you, and so sure are we that the quality is right we are quite willing to ship them on any 'good prime' contract you may have anywhere in Canada and stand behind the goods at their destination. Please reply by wire your decision early to-morrow morning regarding this order and oblige."

The defendants replied on the 18th October: "We acknowledge receipt of your favour of the 13th inst., but we did not wire reply, as we have already advised you that we are not interested in further samples. Should we, however, be in the market late for evaporated apples, we would be glad to give you every opportunity, in fact, would give you the preference. We return herein debit note for 10 boxes shipped, which are lying here to your order."

The defendants refused to examine either of the lots of 5 boxes each, sent by the plaintiffs, standing by their rejection of the first box, and insisting, as the correspondence shews, that the contract was off. The plaintiffs thereupon sold the lot, realizing $300 less than contract price.

It was argued before us that the damages in the claim were unreasonable if the defendants were wrong in refusing to inspect either of the samples of the 5 boxes.

The first question is whether the contract was varied between the parties, submitting one case for five. During the argument, I was rather impressed with the view that this was the effect of the correspondence between the parties, but upon a closer examination of the letters of the 5th and 7th of October, between the parties, I do not think they have this effect. The plaintiffs merely said: "We are sending by express to-day sample case of evaporated apples which we think will be a fair representation of the 600 cases we can ship you."

No doubt, if inspection had proved satisfactory, this sample might have taken the place of the 5 boxes, but the plaintiffs do not expressly ask that this should be done, nor do the defendants, in their reply, accept it as such; for all that is contained in this letter, they clearly had the right to ask for the five boxes.

The letters, in short, are not sufficiently definite to introduce a new term in place of the old, and substitute one box in lieu of the five. The fact that the defendants inspected the sample box sent, does not necessarily imply that they thereby intended to treat that in lieu of the five boxes. They did, in fact, subsequently do so, but I mean their mere act of inspection would not necessarily imply that that was their intention. They might very well say the meaning of the plaintiffs' letter is that if they feel satisfied with this single box sample, they will fill the contract with goods of that class. But in the letters neither of the parties distinctly take this ground,

and the fair construction of the letters and what was done by way of inspection, is that the plaintiffs intended to reserve to themselves, the right of formally sending the five boxes, in case the one box did not prove satisfactory.

If this be so, as I think it is, then the defendants have wrongfully refused inspection under the contract, and upon the plaintiffs proving, as they did to the satisfaction of the trial Judge, the loss incurred by them for such wrongful refusal, they are entitled to recover in damages. This view is sufficient for the disposition of this case.

But I also think that the view of the trial Judge on the authorities is correct, even assuming that the five first boxes sent must be treated as a second sample, sent for inspection under the contract. Benjamin on Sale, 5th Ed., p. 358, says: "But an appropriation and tender of goods, not in accordance with the contract, and in consequence rejected by the purchaser, is revocable, and the seller may afterwards, within the contract time, appropriate and tender other goods which are in accordance with the contract."

Borrowman v. *Freo*, 4 Q. B. D. 500: In that case, after the refusal of a tender of a cargo of maize, which the defendants refused to accept because the shipping documents were not tendered with it, and an arbitrator to which the matter was referred having decided that the tender was invalid, the plaintiffs, within the time limited, tendered a cargo of another shipment, which the defendants refused to accept upon the ground that they were not bound to accept any cargo in substitution for that of the first cargo. It was held that the defendants were bound to accept the tender of the second cargo and might be sued by the plaintiffs for any loss which the latter might have sustained through the refusal to accept it.

Without expressing any opinion as to the decision of the arbitrator, Bramwell, L.J., said: "The case may be shortly stated as follows: If the 'Charles Platt' was a proper ship, the plaintiffs were entitled to tender her cargo; if she was not they were entitled to withdraw the tender, and instead of the cargo of the 'Charles Platt' to offer that of the 'Maria D.'"

Cotton, L.J., pointed out that "if there had been an election within the terms of the contract, it would have been binding upon the defendants. . . . The offer of the cargo of the 'Charles Platt' was withdrawn, and the plaintiffs,

as they were at liberty to do, offered another. It was said that if after the cargo had been objected to, another had been immediately offered, the rule to be applied might have been different. I do not think so. . . . A contract had been arrived at, which was acceptable to both parties, and it could not be altered without the assent of both parties."

In the present case there was no selection within the time of the contract of any particular lot. The contract was satisfied if within the time the plaintiffs tendered required sample which the defendants approved. I do not think the question of election arises in this case. The plaintiffs were ready to comply with the terms of their contract and the defendants refused inspection.

The plaintiffs were, therefore, entitled to recover damages for such refusal, and the appeal should be dismissed with costs.

HON. SIR WM. MULOCK, C.J.EX., HON. MR. JUSTICE RIDDELL, HON. MR. JUSTICE SUTHERLAND, and HON. MR. JUSTICE LEITCH agreed.

HON. MR. JUSTICE LENNOX. MARCH 14TH, 1913.

MACDONALD v. TORONTO Rw. CO.

4 O. W. N. 947.

Negligence—Collision with Street Car — Injury to Automobile—Depreciation—Personal Injury—Quantum.

LENNOX, J., gave judgment for plaintiff for $900 in an action for damages for injuries sustained by reason of a collision between plaintiff's automobile and defendants' street car through the alleged negligence of defendants.

Action by plaintiff, a Toronto physician, for $2,696, being the value of plaintiff's automobile, which was run into by a car of defendants, and various expenses arising from the collision, or for $1,400, the difference in value between the automobile before the collision, and the same automobile as and when properly repaired. Tried at Toronto Non-jury Assizes.

C. A. Masten, K.C., for the plaintiff.

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

HON. MR. JUSTICE LENNOX:—The defendants' witness Alfred Torges says he made final examination of the car, on 20th October, and that nothing has been done to it since. He modified this a little on cross-examination. The evidence of another of their witnesses, Terry, would also go to shew that repairs were completed by this date. The disbursements for transportation down to this date were at least $470, and with some other small items included, would perhaps bring them in the neighbourhood of $500. As to the condition of the car, however, I accept the statements of Mr. Visick, as by far the most reliable evidence in the case, and upon his evidence, I am satisfied that it was not in good running condition, even on the 4th of March, instant. It can be made right, however, at a trifling expense. Counting to the present time plaintiff's disbursements are $644. As I intimated at the close of the case, the plaintiff must take the car now, and of these disbursements, I have determined to allow him $600. The evidence satisfies me that, let the repairs be what they may, there is a general depreciation in the efficiency, and value of the car—of at least $300. This is not in any way interfered with by the agreement, and I allow the plaintiff this sum under this heading. The plaintiff claims for loss of professional earnings for five months, about $500 or $600. I think this is a *bona fide* claim, and that the plaintiff has probably suffered loss in the way he says, but as he voluntarily suffered a similar loss before the 12th of October, when both parties recognized the agreement, and for other reasons I do not consider this a recoverable item of damages. The $250 recently paid into Court, will be paid out to the plaintiff, and applied upon the judgment. There will be judgment for the plaintiff for $900 with costs, according to the tariff of this Court.

HON. MR. JUSTICE BRITTON. MARCH 19TH, 1913.

HOWSE v. SHAW.

4 O. W. N. 971.

Solicitor—Negligence—Failure to Issue Writ Against Municipality in Time—Evidence—Lack of Instructions—Damages—Mistaken Opinion of Solicitor as to Law.

BRITTON, J., dismissed with costs an action against a solicitor for negligence in not issuing a writ against a municipality for damages for non-repair of a highway within three months, holding that defendant had received no instructions to proceed from plaintiff who from his municipal experience was as well aware of the statutory limitation as was defendant.

Action against a solicitor for negligence, tried at St. Thomas, without a jury.

Gordon Waldron, and G. G. Martin, for plaintiff.

Colin St. C. Leitch, for defendant.

HON. MR. JUSTICE BRITTON:—On the 27th June, 1911, the plaintiff while driving upon a highway in the township of Southwold was thrown from his "rig" and quite severely injured. The plaintiff attributed his accident to a defective roadway. He was well versed in municipal law, having, as he stated, been for 7 years a member of a township council, and also for 2 other years a member of a county council. He knew that it was necessary, if he intended to hold the township liable for his injury if occasioned by non-repair or highway, to give the township notice, within 30 days of the time of the happening of the accident and to bring his action within 3 months.

On the 25th July, 1911, Wm. Bole, of West Lorne, at the request and on behalf of the plaintiff wrote out, signed, and delivered to the plaintiff to be mailed, a notice in the words and figures following:—

"West Lorne, Ont.,
"July 25th, 1911.

"To the Reeve of the Township of Southwold:

Dear Sir:—Take notice that on June 27th I was severely injured by being thrown from my rig owing to defective highway just east of Shedden, and as a result of such injuries, I claim damages to the amount of five hundred dollars. If so I can, I will wait on your council, when next you meet, if

you will let me know the date, as having been a member of the township council here seven terms, and of the county council two terms, I would like to talk matters over with you, before further procedure.

"Yours truly,

"BARNUM HOWSE,

"Per W. H. B."

The plaintiff says he mailed that notice and registered it—and got the usual certificate, but the certificate had been mislaid and was not produced. This notice was received by the reeve of Southwold, but the exact date of such receipt or indeed of the mailing was not shewn. Nothing turns upon that, in view of what happened. The claim was rejected by the township council. The plaintiff apparently had hopes of getting a settlement even up to and after the 16th of August, that being the day when he consulted the defendant, and the day when, as he contends, he retained the defendant to bring an action against the township. The defendant's account of the interview and alleged retainer on the 16th August is that the plaintiff spoke hopefully of a settlement and gave reasons for his hope, and he wanted a strong letter—a "bluffing" letter—written to the reeve, as he, the plaintiff, thought such a letter would assist in bringing the settlement about.

There is a direct contradiction between the plaintiff and defendant as to what took place at that interview. The plaintiff says that he told the defendant to commence the action if no settlement followed the letter and to commence it in time. The plaintiff further says that at other times and later on, he told the defendant to issue the writ, and that the time within which the writ must issue was discussed between him and the defendant. The defendant says that the negotiation was still on between the plaintiff and the council, and he, the defendant, was not instructed to isuse the writ, but, on the contrary, he was to wait until further instructed, and he was not, within the three months from time of accident, instructed so to do. The defendant says he was not instructed to commence the action until in October, 1911. A letter such as defendant describes, was written on 16th August, 1911.

The plaintiff says that up to within 3 or 4 days of the expiry of the time for bringing his action, he knew that the writ had not been issued, and he told defendant's clerk of the delay and complained of it.

The plaintiff is not corroborated in this—and defendant denies it, so far as having the matter brought to his notice by either plaintiff or by the stenographer or anyone in defendant's office. As to what took place in October—plaintiff says he knew he was late—and when defendant suggested issuing a writ, the plaintiff said, "no use," that the defendant looked up the law, and came to the conclusion that the 3 months' limitation did not apply, and that then, plaintiff said, "if you go on you do so at your own risk, I will not be responsible."

The defendant's account of it is that when plaintiff wanted the writ issued he raised the question of expiration of time—or that it might have been suggested by plaintiff—that he did look up the law and he came to the conclusion that it was a case of misfeasance—and so the action was not barred; that he told plaintiff so, and plaintiff then directed the issue of the writ, and it was done. A special case was agreed upon, which was heard by Mr. Justice Middleton, and the action was dismissed. See 22 O. W. R. 212.

This was affirmed by a Divisional Court. See 22 O. W. R. 797.

In May, 1912, the plaintiff determined to look for damages from defendant by reason of defendant's negligence in not commencing the action in time. The plaintiff employed Mr. Martin as his solicitor in this action. Correspondence followed, and the position taken by defendant is shewn in his letter of 4th June, 1912, to the plaintiff.

The writ issued herein on the 24th August, 1912. Since the issue of the writ the costs of the action, including the appeal, were taxed against the plaintiff at $148.66, and on the 10th October, 1912, the plaintiff paid to the sheriff in full of amount of execution for these costs, and for the sheriff's fees, in all, the sum of $170.

The plaintiff's alleged causes of action are: (1) That the defendant neglected to commence the action against the township until the plaintiff's right of action had become barred by the provision of the Municipal Act, and (2), that the defendant without consulting with the plaintiff and without any instructions from the plaintiff entered an appeal to a Divisional Court from the decision of the trial Judge.

I am of opinion, and so find, that the plaintiff is mistaken in saying that the defendant was actually retained and instructed on the 16th August, 1911, to issue the writ without further instructions from plaintiff.

I find that the plaintiff did not give further instructions to the defendant until after three months from time of accident. No doubt the plaintiff knew, as did the defendant, of the time limit, but the plaintiff waited until some further opportunity to get a settlement. That was plaintiff's desire and he gave defendant to understand that influence was being used on his behalf with the council, so time went by. The plaintiff and defendant were both busy men, and the defendant was exceptionally busy during September, but not likely to forget to have a writ issued had he been instructed to have that done.

The plaintiff took his chances of the defendant being right in his contention that the limitation clause of the statute did not apply—in case that clause should be pleaded in bar of plaintiff's claim.

It was, in my opinion, a case of oversight or forgetfulness on the part of plaintiff not to see that the defendant, or some other solicitor, was specifically instructed, and in time.

No doubt had the defendant not been so much engaged in other matters, and had he been more in his office from 16th August to the 27th September, he perhaps would have, directly or indirectly, reminded the plaintiff, and in that case would have received specific instructions or the plaintiff would have gone elsewhere. The entry by defendant in his docket on the 16th August, 1911, is routine—upon the assumption that there would be no settlement—but it is not conclusive against the defendant. The probability seems to me greater that the plaintiff forgot than that the defendant forgot to have the writ issued in time.

Upon the question of damages the defendant objects on two grounds: (1) That the notice of action, which the plaintiff himself gave, was insufficient, and (2), that the plaintiff had not a good cause of action against the township of Southwold, so that the plaintiff could not have succeeded had the action been fought out on its merits.

I think the plaintiff's notice of the accident and action was sufficient in form and apparently the township of Southwold took no objection to that, but promptly disputed plaintiff's right to recover upon the facts of the accident in addition to their objection that action was not brought in time.

As to the second objection, I must say that upon the facts so far as presented to me, I have grave doubts as to plaintiff's right to hold the township liable and if this case does not

end with my decision, and if necessary, this objection may remain to be pressed by defendant.

Mr. Waldron contended that if retainer and instructions proved the plaintiff was in any event entitled to nominal damages. *McLeod* v. *Boulton*, 3 U. C. 84, supports that view.

As the matter stands, the plaintiff has not satisfied the onus which was upon him of establishing his cause of action. The plaintiff affirms—and the defendant as strongly denies. The account the defendant gives of his part in the matter, as I have stated above is a reasonable one, and that the plaintiff should have allowed the time to go by, is not improbable.

The plaintiff, in my opinion, acquiesced in the case being carried to appeal in the ordinary way without any undertaking on the part of defendant to do so at his own cost. That the defendant should have come to the conclusion that the township of Southwold, if liable at all, would be liable for misfeasance, is not actionable negligence.

If an attorney or counsel can be held to warrant the correctness of his opinion, honestly formed and honestly given on a question of law, Judges may fear lest an attack be made upon them for difference of opinion.

The action must be dismissed, and with costs.

Thirty days' stay.

MASTER IN CHAMBERS. MARCH 25TH, 1913.

CLARKE & MONDS, LIMITED v. PROVINCIAL STEEL CO., LIMITED.

4 O. W. N. 991.

Discovery—"Servant" of Corporation — Meaning of—Sales Agent Examinable.

MASTER-IN-CHAMBERS *held* that a Toronto selling agent of a Cobourg company paid a commission on sales while not an officer of the defendant company was a "servant" thereof and could therefore be examined for discovery.

Motion for an order compelling one H. B. Holloway to attend and be examined for discovery as an officer or servant of the defendant corporation.

J. Grayson Smith, for plaintiff.

O. H. King, for defendant company.

CARTWRIGHT, K.C., MASTER:—The question raised on the present motion is, whether one H. B. Holloway is examinable for discovery as an officer or servant of the defendant company.

It is admitted that Holloway is not an officer of the company though it is evident from the correspondence and the affidavits filed on the motion, that Holloway was the selling agent in Toronto for the company, which has its head office at Cobourg. He assumed the right to sign the letters leading up to the matter in issue, in the name of the company on 23rd and 31st October. And on 5th November, a letter was sent from the Cobourg office to plaintiffs' solicitors in which Holloway is spoken of as "our representative, Mr. Holloway." He was paid by a commission on sales made through him. The real questions between the parties seem to be as to the authority of Holloway to bind the company, as the Statute of Frauds was stated to be the main defence, and whether there was any completed contract.

As all the negotiations were between the plaintiff company on the one hand, and Holloway on the other, it is clear that he is the one who can give all information as to what took place. This might allow the application of the judgment in *Smith* v. *Clarke*, 12 P. R. 217. See, too, *Leitch* v. *G. T. R.*, 13 P. R., at p. 382. However that may be, it seems that Holloway comes within the definition of servant. In 35 Cyc. 1430, it is said the word servant means "especially in law one employed to render service or assistance in some trade or vocation, but without authority to act as agent in place of the employer." See quotation in *Ginter* v. *Shelton*, 102 Virginia 185, 188, where five different grades or classes of servants are suggested.

Here Holloway certainly rendered service or assistance to the defendant company, whose chief, if not its only market, is in the cities and larger towns. The business could not be successfully carried on without agents or (to use their own word), "representatives" in such places.

The order will go requiring Holloway to attend again at his own expense.

As the exact point is novel the costs of the motion will be in the cause.

MASTER IN CHAMBERS. MARCH 19TH, 1913.

GRILLS v. CANADIAN GENERAL SECURITIES CO.

4 O. W. N. 982.

Discovery—Further Affidavit on Production—Action by Agent for Commissions on the Sale of Land—Sub-Agents—Issue as to—Books of Company—Partial Inspection Granted.

MASTER-IN-CHAMBERS in an action by an agent for commissions alleged due, where one of the main issues was as to whether certain persons were or were not plaintiffs' sub-agents gave plaintiff partial discovery of defendant's books of account in order that he might be assisted in proving his contention as to this issue.

Evans v. *Jaffray*, 3 O. L. R. 327 and other cases distinguished.

Motion by plaintiff for a further and better affidavit on production by defendant.

F. Arnoldi, K.C., for plaintiff.

C. Evans-Lewis, for defendant.

CARTWRIGHT, K.C., MASTER:—This action is in respect of certain sales made of lands for the defendant company by plaintiff and others who acted as his sub-agents. The defendant company only admits that some of those said by plaintiff to have been his sub-agents were so and as to some of these only in part. It has furnished a list of all those who acted for the company in the matters in question—about 80 in all.

The plaintiff now moves for a further affidavit by the company on production so as to enable him to examine the books and see if his contention as to this is borne out by the entries to be found there.

The decision in *Evans* v. *Jaffray*, 3 O. L. R. 327, shews that a plaintiff is not entitled in an action of this kind to the disclosure of facts which would become material *only* when his right to recover damages has been established. To the same effect are the other cases cited. On the argument of *Graham* v. *Temperance*, 16 P. R. 536, as well as that of *Dickerson* v. *Radcliffe*, 17 P. R. 586.

On the other hand, *Stow* v. *Currie*, 14 O. W. R. 62, 154, 248, shews that the Courts lean "very decidedly against separating issues."

Without further discovery plaintiff cannot satisfy the demand for particulars of paragraphs 9 and 10 of the statement of claim. But apart from this it is essential to the

plaintiff's case to shew, if he can, that all the persons who he says were his sub-agents were really so and to the full extent that he claims them to have been.

Either there will be found in the company's books entries which will assist him in so doing or there will not. These men were all admittedly acting for the company, and it seems from the source of dealing between the plaintiff and the company that accounts of the company with the 15 persons named in the notice of motion may assist the plaintiff in establishing his right to commission in respect of the whole or part of the business they did. This will not extend to such a minute investigation of the accounts as would be proper after the right to an account has been established, unless defendants' demand for particulars of paragraph 10 of statement of claim is pressed.

Whether the discovery to which the plaintiff is entitled can in fact be separated from the fuller consequential discovery to which plaintiff will be entitled after a judgment in his favour may present some difficulty. But no doubt this can be arranged so as to give plaintiff all he is entitled to now and yet limit him to that.

If any more precise directions are required by either side they can be considered on the settlement of the order.

The costs of this motion will be to plaintiff in the cause.

HON. SIR G. FALCONBRIDGE. MARCH 19TH, 1913.

BROWNE v. TIMMINS.

4 O. W. N. 983.

Pleading—Statement of Claim—Motion to Set Aside Irregularity—Hudson v. *Fernyhough, 61 L. T. 722, Distinguished.*

MASTER-IN-CHAMBERS validated a statement of claim filed long after the time therefor had expired, but ordered the action to go down to trial at once and made the costs of the motion to defendants in any event.

Hudson v. *Fernyhough*, 61 L. T. 722, distinguished.

FALCONBRIDGE, C.J.K.B., dismissed defendant's appeal with costs.

Appeal by defendants from judgment of Master in Chambers, *ante*, p. 187, validating upon terms a statement of claim filed too late.

Grayson Smith, for the defendant.

R. McKay, K.C., for the plaintiffs.

HON. SIR GLENHOLME FALCONBRIDGE, C.J.K.B.:—The Master in Chambers has taken the correct view. The United Cobalt Exploration Company were added as party plaintiffs by the Divisional Court and the only question before the Master was as to the extension of time.

The attention of the Judge at the trial is pointedly and properly drawn to the question of interest.

Appeal dismissed with costs to plaintiffs in any event.

HON. MR. JUSTICE MIDDLETON. MARCH 22ND, 1913.

PEAKE v. MITCHELL.

MITCHELL v. PEAKE.

4 O. W. N. 988.

Way—Public Street—Alleged Encroachment Thereon—Street Laid Out on Unregistered Plan—Innocent Purchaser—Registry Act—Streets Excepted from Conveyance — Estoppel — Locus Standi —Costs.

MIDDLETON, J., *held*, that a person who purchases lands without knowledge of streets laid out thereon by a registered plan is entitled to the protection of the Registry Act, but where his conveyance excepts certain streets shewn upon a registered plan he is estopped from claiming that the plan laying out such streets is invalid as encroaching upon a previously registered town plan.

The first action was brought by Margaret Peake, the owner of lot 162 on plan 73A., for a declaration with respect to her rights upon Victoria Terrace, and with respect to certain other streets shewn upon the said plan, and for a mandatory order directing the removal of certain fences, and for an injunction.

The second action was brought by the defendant in the first action against L. C. Peake, husband of Margaret Peake, for damages for trespassing upon the lands claimed by the plaintiff as his own, and for an injunction. The actions were tried at Toronto on the 13th March.

John A. Paterson, K.C., for the plaintiff in the first action and the defendant in the second.

E. D. Armour, K.C., and C. P. Smith, for the defendant in the first action and the plaintiff in the second.

HON. MR. JUSTICE MIDDLETON:—The Niagara Assembly was incorporated for the purpose of acquiring certain property on the shores of Lake Ontario near the mouth of the

Niagara river, with the design of laying out these lands in grounds, the major portion of which would be sub-divided and leased to cottage holders, and with the idea of erecting an amphitheatre where educational and religious meetings would be held. Ancillary to this an hotel was to be erected upon the grounds.

In pursuance of this scheme, on the 4th May, 1887, William Ryan, then owner of the lands in question, conveyed to the Niagara Assembly certain town lots in the town of Niagara and a large parcel of irregular shape immediately west thereof. This parcel has an extensive frontage on the south shore of Lake Ontario, and is intersected by an inlet from Lake Ontario—sometimes called the One Mile pond, sometime called Lansdowne lake—and by a ravine.

The Niagara Assembly caused the whole lot to be sub-divided into smaller lots. The amphitheatre was located in about the centre of the western portion, and was surrounded by a circular street, called the Chatauqua Amphitheatre. From this circle radiated a number of avenues on which sites for cottages fronted; and along the entire lake front both east and west of Lansdowne lake, Victoria Terrace was laid out. East of Lansdowne lake the land is similarly laid out in building lots, and a site was reserved for the hotel.

Access to these grounds was obtained to the east from Queen street, a well established highway, which ran to the lake shore almost immediately to the east of the entire parcel.

Another established highway, known as William street, was continued under the name of Longfellow avenue, so as to reach the street known as the Chatauqua Amphitheatre.

This plan was not registered; but a number of lots fronting on different avenues were leased for a term of 99 years. None of the leases are produced; but from what was said, I infer that a lump sum was paid in the first instance, and the annual rental reserved was nominal only. None of these leases were registered.

On the 1st September, 1887, the Assembly mortgaged the entire parcel to Mr. George Gooderham, to secure $25,000 The description of this mortgage follows the description in the conveyance to the Assembly, and ignores the sub-divisions. Some of the leases had been granted prior to this mortgage, but, being unregistered, the rights of the lessees became subject to the mortgage. The amphitheatre building, the hotel

building, and a number of cottages were erected on the grounds, and for some time there was an era of apparent prosperity.

In the meantime Mr. Gooderham assigned the mortgage to the Manufacturers Life Association. The mortgage contains a provision that the whole mortgage money is charged upon the whole of the lands and that no person should have the right to require the mortgage moneys to be apportioned, but the mortgagee is given the right to discharge any part of the lands for such consideration as he should think proper, or without consideration if he saw fit, without diminishing or prejudicing his security as against the remaining lots.

On the 10th February, 1891, an agreement was made between the Manufacturers Life and the Assembly, reciting that the mortgagors have subdivided the lands and laid out lots, have sold some, are proposing to make sales of others and have applied to the mortgagees to discharge the mortgage as to the lots sold and to be sold. The mortgagors then agree to discharge any of these lots upon certain terms set forth. The lot in question was not discharged from the mortgage under this provision.

A foreclosure action was instituted by the mortgagee, and on the 8th January, 1894, a report was made by the Master in Ordinary, finding a sum of $29,815 due upon the mortgage, but also finding that portions of the property had been leased according to the unregistered plan, and that as the leaseholders had been added as parties defendant, the Master found each leaseholder entitled to redeem his lot upon payment of the amount set opposite in a schedule. This finding is said to have been made "the plaintiffs not objecting." Apart from the plaintiffs' consent, it is hard to see upon what the finding could have been based. L. C. Peake was a party defendant. Margaret Peake was not, but she is scheduled as a leaseholder.

On the 30th July, 1894, a final order of foreclosure of the mortgage was made, foreclosing those named as defendants, including among others L. C. Peake.

Prior to the making of the mortgage, lot 162, Tennyson avenue, had been leased either to L. C. Peake or to Margaret Peake. No satisfactory evidence is produced to shew which was the lessee; and, in the view that I have come to, it is not material, as Mr. Peake was a consenting party to the

transactions which subsequently took place and says that if the property ever stood in his name he held it for his wife.

The position of the leaseholders who had erected cottages upon the parcels leased to them respectively, and who had either lost priority by reason of the failure to register the lease or whose leases were subject to the mortgage, was manifestly critical when the mortgage fell into arrear. Some of the wealthier leaseholders who had been identified with the undertaking formed a syndicate for the purpose of purchasing the property from the mortgagees. This syndicate consisted of Mr. Gurney, Mr. Brown, Mr. Donogh, and Mr. Warren.

Minutes were regularly kept, from which the history of the transaction can be gathered. On the 29th June, 1893, the syndicate held its initial meeting; Mr. Warren reported that he had arranged with the mortgagees to foreclose and for the purchase of the property by the syndicate. A solicitor was appointed to negotiate with the solicitors for the mortgagees. Documents were submitted for approval. There was some doubt as to whether what was proposed would constitute the syndicate trustees and, for the protection of the syndicate, the arrangement embodied in the report was suggested; each leaseholder being given the opportunity of redeeming upon payment of the same amount as he had originally paid for his lease. It was subsequently arranged (see the minutes of October 10th, 1893), that if the cottage lot-holders dropped proceedings before the Master and concurred in the shortening of the period for foreclosure, the syndicate, on receipt of the redemption money, and upon the cottage holders consenting to a re-survey of the land south of the line of the amphitheatre, would, upon its acquiring title, convey the lots; the deeds to contain all conditions and reservations contained or implied in the leases current.

On the 17th October, the solicitor reported to the syndicate that the lot-holders wished the syndicate to obtain a discharge from the mortgage for the net price paid for lots discharged; and the syndicate replied that as the proposition for a deed comes from the lot-holders, although the syndicate is anxious to retain the good-will of all parties, the difficulty is not created by the syndicate which has stepped in and assumed liability without any hope of profit, and the syndicate is not in a position to give any better terms than the mortgagees are willing to give to it; the principle upon

which the mortgagees are prepared to act having been settled in the case of Mr. Howland, but that the syndicate is ready to give a deed instead of a lease, and if this is not acceptable, it is ready to allow anyone desiring to assume its position to do so.

On March 20th, 1894, a draft form of agreement and deed between the syndicate and the lot-holders was considered and approved.

On May 3rd, 1894, a plan of a certain portion of the property to be registered, was presented and agreed to.

On the 10th July, 1894, instructions were given to have the deeds to the cottage holders ready for the next meeting.

On September 25th, 1894, the foreclosure having taken place and the syndicate having purchased from the mortgagees, a mortgage was received for the purpose of approval and execution, to secure the balance of the purchase price, also copies of the new plan for registration; and on October 2nd agreements with cottage holders were submitted as approved and ordered to be executed. These covered some twelve agreements; among others, an agreement with Margaret Peake.

On October 9th the solicitor reported that the title deeds and mortgages had been completed and registered and that a new plan had been registered as number 73A.

On the 8th September, 1894, the Manufacturers Life conveyed to the syndicate; and on the 17th October, 1894, the Niagara Assembly executed a quit claim deed in favour of the syndicate. This left the syndicate the owners in fee of the entire parcel, subject only to the outstanding mortgage to the Manufacturers Life for the balance due on purchase money, and subject to the agreement with the cottage holders.

The agreement with Margaret Peake is not produced; but an agreement with Christina and Agnes Cavers, dated 18th June, 1894, has been found; and no doubt all the agreements were in similar form. This agreement recites the mortgage held by the Manufacturers Life, and that in the foreclosure proceedings it has been found that the Misses Cavers were entitled to redeem a certain lot referred to on the plan of the 19th June, 1891, which had been leased to the Misses Cavers by the Assembly, and that the syndicate has agreed to purchase all the lands comprised in the mortgage after the completion of the foreclosure proceedings and has requested the Misses Cavers not to redeem their lot; the

syndicate agreeing to convey the lot to them after acquiring title under the foreclosure. Appropriate agreements then follow; a form of conveyance attached is provided for; and the Misses Cavers then agree to the registration of a new plan of that portion of the property subdivided by the original plan and covered by the plan known as 73A.; also to accept a conveyance of the lot in accordance with the new plan; a discharge is to be procured releasing the lot from the new mortgage to be given to secure the balance of the syndicate's purchase money; the Misses Cavers agreed to accept the title of the syndicate derived through the foreclosure proceedings. The form of deed attached contains certain retroactive covenants respecting the use of the land, and provisions for the assessment of the lot for certain expenses to be incurred in connection with the entire grounds.

The conveyance to Mrs. Peake, dated 21st October, 1894, is in precisely the same form, and conveys to her the lot already mentioned, 162 on Tennyson avenue, according to the new plan which has been registered on the 5th October, 1894. This plan covers only that portion of the lands lying west of Lansdowne lake, and does not cover any portion of the lands to the east of the lake. Only about one-third of the lake shore drive, called Victoria terrace, appears on this plan, and no access to Queen street is indicated; the sole mode of ingress and egress being by Longfellow avenue.

The transaction with Mrs. Peake was closed by the registration of a discharge of her lot from the Manufacturers Life mortgage, dated October 23rd, 1895.

On the 29th January, 1910, Mr. Donogh retired from the syndicate, and conveyed his interest in the lands to his colleagues.

On the 31st January, 1910, the syndicate made a conveyance intended to cover all that then remained of the lands, to Mitchell, in consideration of $30,000. This conveyance covers all the lands to the east of Lansdowne lake, and was intended to convey whatever rights the syndicate had in the lands west of the lake. The mode adopted was by describing the lands as in the conveyance prior to the registration of the plan 73A., and by adding "which includes all lots laid out upon plan sub-division registered in the Registry Office for the said county of Lincoln as plan No. 73A. saving and excepting thereout lots (then are enumerated all the lots which had been conveyed to cottage holders including, *inter*

alia, Mrs. Peake's lot 162), as laid out by the said registered plan No. 73A."

As an additional parcel is described "all the right, title, and interest of the party of the first part in the lands comprising the streets and lanes laid out upon said plan 73A., subject to the rights therein of all purchasers of lots or portions of lots on said plan 73A."

Mitchell, claiming title under this conveyance, has enclosed within fences what he understood to be the lands conveyed to him, excluding certain streets laid out upon other plans covering part of the land east of Lansdowne lake. This has involved the erection of fences across that portion of Victoria terrace east of Lansdowne lake.

Upon plan 73A. Tennyson Avenue borders Lansdowne lake on the west. The streets on the plan are shewn as coloured brown, and the brown colour extends to the water's edge and covers what is shewn upon the plan as the bank of Lansdowne lake. The measurements are shewn upon the plan extending from the lot line on the west across to the top of the bank on the east. Mitchell has assumed that the street limit on the west is the top of the bank, and has erected his fence below the crest of the bank and following it to the shore of Lake Ontario. This has included in his enclosure a narrow strip of sloping bank and part of the flat sandy beach of Lake Ontario.

The first and most important question is the right of Mrs. Peake as one of the cottage holders, and by virtue of her ownership of lot 162, to have access to Victoria terrace throughout its whole length. This is important not only because the existence of the terrace as a drive and parade is greatly to the advantage of the occupants of the cottage, but also because it affords access to Queen street, an important thoroughfare leading to the business part of the town. Mrs. Peake claims that having leased according to the unregistered plan of 1891, the streets and lanes shewn upon that plan became and were highways by virtue of the statute now found as 1 Geo. V., ch. 42, sec. 44.

Apart from any other answers to this claim or any discussion as to the meaning of the section in question, I do not think any such effect can be given to a plan which is not registered. Mitchell is, I think, entitled to the protection of the Registry Act. He purchased without knowledge of the

lease or the plan, and these instruments are void as against him.

I think also that when the arrangement was made for the purchase of the lands by the syndicate, the cottage holders deliberately gave up whatever rights they had, consented to the substitution of the new plan and its registration, and accepted conveyances in accordance with that plan; and I think their rights must be found in the conveyances which they then accepted.

As already stated, the effect of the foreclosure and of the conveyances to the syndicate was to vest in them the entire fee simple, subject only to the rights given by the agreements to the cottage holders, which were afterwards crystallized by the new plan and by its registration and by the subsequent conveyances.

The second question arises from what has already been indicated as to the location of the fence along Tennyson avenue. I think the proper inference to be drawn from the plan is that the whole of the lands coloured brown were set apart as highways or streets, and the Tennyson avenue extended to the water's edge or what is shewn as the water's edge of Lansdowne lake; and that Mitchell, therefore, had no right to enclose the small sandy beach near the outlet of the lake. I have no doubt that had his attention been drawn to this he would have removed the fence, and that this is no real factor in this litigation, although access to this portion of the beach appears to be of importance to the cottagers, as it is the only place where water can readily be obtained, to be drawn to the cottages.

The third question arises out of a matter that has not yet been discussed. Part of the land covered by the original plan was situated within the town of Niagara and part immediately west of the town line. When the original plan was prepared the grounds were laid out without any regard to the location of the town line or the subdivision into lots according to the registered town plan; and when part of this original plan was adopted as the basis of plan 73A. most of the land covered by it was outside the town limit. A small portion, however, extended into the town and covered lands included in the town plan. This included the easterly segment of the circle described as the Chatauqua Amphitheatre, about one-quarter of the entire circle. It also covers two short streets that have never been laid out: Froebel avenue and

Knox avenue, with a small portion of the end of Tennyson avenue, also never opened.

The portion of the amphitheatre which is cut off by the town line was laid out as a travelled road, and was used by the cottagers—who were all north of the amphitheatre—to reach Longfellow avenue, which was connected with the amphitheatre on its south side. Mitchell has erected his fence following the town line across the amphitheatre and across Freobel, Knox, and Tennyson avenues until it reaches Lansdowne lake. It thus cuts across the travelled road in two places, and is a source of substantial inconvenience to those entitled to use the street. He attempts to justify this by the statement that the plan is invalid where it encroaches upon the land within the town.

I do not think he is in a position to assert this invalidity; I think he is bound by the terms of his conveyance, which excepts from the lands conveyed to him the streets laid out upon the plan, and reserves the rights of all others entitled to use the streets thereto.

This I think covers all the questions argued, although I have not dealt with all the matters discussed by counsel. I think the plaintiff, Margaret Peake, has a *locus standi* to maintain this action; Mitchell having by his fences obstructed her ingress and egress from her property. See *Drake* v. *Sault Ste. Marie,* 25 A. R. 251. No case is made by which any lost grant can be inferred; nor was it possible for Mrs. Peake to obtain an easement along that portion of Victoria terrace east of Lansdowne lake. All the circumstances outlined conclusively shew that dedication cannot be presumed. I do not make any order as to the fence along the bank of Lansdowne lake as this does not amount to an obstruction of which plaintiff can complain—see also *Sklitzsky* v. *Cranston,* 22 O. R. 590.

As success is divided, I think each party may be left to bear its own costs.

HON. MR. JUSTICE BRITTON. MARCH 22ND. 1913.

RE LACASSE.

4 O. W. N. 986.

Will—Construction—Gift Durante Vidintate—Vested Interest Taken Subject to Divesting.

BRITTON, J., *held*, that a gift by a testator of everything to his wife, but if she should get married, to his children; followed by a gift of any residue not hereinbefore disposed of, gave the widow an absolute estate subject to a divesting in case she re-married.

Burgess v. *Burrows*, 21 U. C. C. P. 426, referred to.

Motion for construction of a will, heard at Ottawa weekly Court.

J. U. Vincent, for the executors and widow.

Mr. Lewis, Jr., for the Official Guardian.

HON. MR. JUSTICE BRITTON:—The only adult child of Napoleon Lacasse filed consent to this application on behalf of her mother.

Napoleon Lacasse died on the 6th of October, 1906.

His will was made on the day immediately preceding his death, and is as follows:—

"I revoke all former wills or other testamentary disposition by me at any time heretofore made, and declare this only to be and contain my last will and testament.

I direct that all my just debts funeral and testamentary expenses to be paid and satisfied by my executors hereinafter named, as soon as conveniently may be after my decease.

I give devise and bequeath all my real and personal estate of which I may die possessed in the manner following, that is to say: 1st. My wife, Leocadie will have and possess everything that belongs to me, during her natural life—if she does not change her name, but if she shall get married, everything shall be divided between the children. I give to her the money that is deposited at the post office of Clarence Creek.

All the residue of my estate not hereinbefore disposed of, I give devise and bequeath to my wife Leocadie."

Then he named his executors.

On the 1st of June, 1907, the Honourable Mr. Justice Magee made an order for the partial distribution of the

estate—but declined then to construe the will. His order was without prejudice to any application by the widow or executors or any child of testator for its construction.

I am of opinion that under this will, the widow takes the whole of the property and estate, absolutely subject to her being divested of it should she marry again. I come to this conclusion upon consideration of the whole will, and in no other way, can full effect be given to the clause as to residue. Nothing of the testator's estate will descend to his heirs-at-law. It was not the intention of the testator to die intestate as to any part of his estate in case his widow should not marry again. If she does marry again, then at once thereafter all the property shall "be divided between the children."

Apart from the residuary devise, the widow would take an estate for life, with power of disposing of the fee should she not marry again—but the estate for life would be subject to the widow being divested of it, should she marry again. The power of disposing of the property can be exercised by her will.

For all practical purposes and apart from any technical terms in regard to an estate in fee or an estate for life with power of disposing of the fee if the widow should not marry, either construction will give the same result. The case of *Burgess* v. *Burrows*, 21 U. C. C. P. 426, is very like the present. The language of Gwynne, J., at p. 429, of the report is: "The widow took under the will either a fee simple estate in the property in question, or an estate for life with power of disposing of the fee if she should not marry again, but both estates subject to being divested if she should marry again, in either of which cases the heir is excluded."

That case fully discusses the whole question in the alternative as above stated. It came before the Court after the death of the widow. In the present case, the widow is living.

Costs of executors and widow for whom Mr. Vincent appeared, and costs of Official Guardian to be paid out of estate.

I fix Official Guardian's costs at $15.

HON. MR. JUSTICE MIDDLETON. MARCH 20TH, 1913.

NIAGARA & ONTARIO CONSTRUCTION CO. v. WYSE AND U. S. FIDELITY & GUARANTY CO.

4 O. W. N. 975.

Principal and Surety—Bond for Due Performance of Work by Contractor—Verbal Change in Contract Unknown to Sureties—Materiality — Alleged Variation by Subsequent Agreement—Release of Dubious Claim—Advances Made on Account of Contractor—Completion of Work by Contractor—Liability of Sureties—Reference.

MIDDLETON, J., *held*, that trivial verbal alterations in a contract after execution, of which sureties had no notice, did not operate to discharge them from their liability as they were in no way prejudiced thereby.

That where the liability upon a bond was conditioned upon the due completion of certain work by a sub-contractor and the contract was fully performed by him but only by reason of advances made to him or his workmen, the amount of such advances could not be recovered from the sureties, but that if the work was done by the head-contractor and charged up to the sub-contractor, the sureties were liable for the cost of such work.

Cadwell v. *Campeau*, 21 O. W. R. 263, referred to.

Action by a contracting company against a sub-contractor and his surety for breach of contract, arising out of the construction of the Hydro-Electric Transmission line.

W. N. Tilley, K.C., and A. W. Ballantyne, for the plaintiffs.

R. McKay, K.C., and W. B. Milliken, for the defendant guarantee company.

Defendant Wyse in person.

HON. MR. JUSTICE MIDDLETON:—The Hydro-Electric Power Commission entered into a contract with the F. H. McGuigan Construction Co., for the construction of the line. This contract covered the erection of steel transmission towers and cable for the transmission of high tension electric current, and also of a telephone line upon separate wooden poles. McGuigan entered into a contract with the plaintiff company for the performance of part of the work undertaken by him, including, among other things, the supply and erection of the telephone poles and the stringing of the wire.

The plaintiff company, in its turn, entered into an agreement with the defendant Wyse, dated the 15th February, 1909, for the supply of all material, labour and equipment necessary to properly construct and erect the telephone line in question, with the exception of instruments and wire, which were to be supplied to Wyse.

The guarantee company became sureties to the plaintiff company for the due performance by Wyse of his sub-contract. They also became sureties for the plaintiff company to the McGuigan Company for the performance of its contract; and became sureties to the Hydro-Electric Commission for the construction of the entire work. Wyse, it is said, failed to perform his sub-contract, and this action is brought upon the bond given to the plaintiffs.

A number of defences are raised, which had better be separately dealt with.

First, it is said that the contract between the plaintiff and Wyse, after the execution of the bonds sued upon, altered without the consent of the sureties, and that this alteration operates to discharge the sureties.

After the bond had been arranged and settled, engrossments were made for the purpose of execution by Wyse. Wyse arranged with the guarantee company to become his sureties, and furnished them with a copy of the unsigned agreement. The bond in question was then drawn and executed; the condition reciting that Wyse has entered into the written contract hereto annexed, and the condition is that he shall "well and faithfully in all respects perform, execute, and carry out the said contract."

Wyse, after executing the contract, sent it and the bond to the plaintiff. Mr. C. L. de Muralt, the chairman of the directors of the plaintiff company, who acted for them throughout in the transaction, compared the executed copies and the draft, with the result that he discovered some minor errors in the preparation of the copies signed, probably arising from the omission to insert words added upon its revision. He thereupon wrote Wyse, sending him four new copies prepared from the draft, including the added words, asking him to execute these instead of the four copies which had been forwarded; undertaking that the plaintiff company would execute them as soon as it received the copies executed

by Wyse. He added: "You may consider the contract as existing between us as soon as you have executed the four copies and mailed them to us." Wyse in due course executed and mailed the four copies; and the plaintiff on its part also executed them.

The bond executed by the sureties is dated 19th February, 1909. The copy of the contract annexed is dated 15th February, 1909. The contract actually executed also bears date 15th February, 1909, but was not in fact executed until after Mr. de Muralt's letter above referred to, which bears date 24th February.

The argument presented for the defendants is not based upon the fact that the contract had not been executed at the date of the bond, but upon the fact that the surety bond embodies in it, by reference upon its face, the contract as originally executed by Wyse; and that the plaintiff's endeavour is, to use the words of Lord Robinson (1903), A. C. 422, "the old and oft-rejected argument that a man can be forced to do something which he never agreed to, merely because it is very like and no more onerous than something which he did agree to.

It is said, and rightly said, that the surety became surety on the faith of the contract attached, and that by the contract of suretyship the terms of the original contract had become embodied in it; that any variation will discharge the surety; and that to hold the contrary would be to impose upon the surety a contract he did not in truth make.

The answer to this contention is, I think, obvious when the nature of the alterations is considered. They both occur in one short clause of the contract, and consist in the insertion of the words I have underlined:—

"The parties of the second part shall, *before doing any work*, submit for the approval of the Commission's engineer samples of all materials to be used; and the party of the second part shall place his orders for all materials in time to avoid delays *in the progress of the work* on this account."

This clause is, I think, a separate and independent obligation undertaken by the contracting party. He contracted to do the work, and for this surety is responsible. He has contracted before doing the work to submit samples, and for this also the surety is to be responsible. If the words constitute

an alteration in the contractual relationship between the parties, they would operate only to discharge in so far as the plaintiff claims on account of a breach of the second of these two obligations. See *Harrison* v. *Seymour,* L. R. 1 C. P. 518; *Croyden, etc.* v. *Dickson,* 2 C. P. D. 46.

Beyond this I think the words inserted do not in any way alter the contract. I think it would be implied that the samples were to be submitted before the work was done; and the second set of words added, "in the progress of the work" do not, I think, change the meaning of the sentence in any degree.

If it be of any importance, and if it be a question of fact, as I think it is, then I find that the alterations made in the contract are in no way material and could in no way prejudice the sureties. For these reasons I think this objection fails.

The second objection is also based upon an alteration of the contract. The contract between McGuigan Co. and the Commission is an exceedingly elaborate affair, embodying what are called "general conditions of contract," and extensive specifications for the entire work. The contract between the plaintiff company and the McGuigan Co., embodied certain of the provisions of this contract by express reference. The contract between the plaintiff and Wyse is a very short and simple document. It recites the plaintiff's contract with the McGuigan Co., for the construction of the high tension transmission lines and telephone lines for the Hydro-Electric Co., and that the plaintiff has agreed to sub-let to Wyse the supplying of material and labour for the construction of the telephone line on the conditions stated. Wyse then agrees to supply all the material, labour and construction equipment, and to construct and erect the line for a price named, "the said work to be done and material furnished strictly in accordance with the specifications, plans and general conditions of "the Commission, and subject to the approval of its engineer, "which specification, plans and general conditions are hereby made a part of this contract." After providing for payment, the contract proceeds: "The party of the second part shall commence such work within fifteen days after written notice from the party of the first part so to do, such notice to expire at any time after April 1st, when the frost is out of the ground, and the said work

to be fully completed subject to the approval of the Commission's engineer, within six months of the date of the commencement of the work or such later date as may be agreed upon between the parties."

In the contract under which the plaintiff was operating, it was entitled to have the access to the right of way upon which the telephone line was to be constructed, before being called upon to undertake any part of the work of erection; but this provision was not carried forward into the contract with Wyse.

Immediately after the execution by Wyse of the contract on the 15th February, he wrote (see his letter of that date) asking permission "to commence work by starting the distribution of the poles as soon as he could get the location staked, rather than wait until April 1st, as the contract now provides." On the 17th the plaintiffs reply: "We see no reason why you should not make your preparations to distribute the poles as soon as we have signed the contract and you can get the location staked out."

On the 22nd, in his letter enclosing the bond and contract Wyse reiterated his "desire to commence shipping poles at the very earliest possible moment."

On the 2nd March he asked to have, by return mail, "location of telephone lines so I can commence shipment of poles at once," adding that he understood these locations should have been furnished on or before February 15; meaning by that, furnished by the Commission to McGuigan and by McGuigan to the plaintiff.

The intermediate correspondence was not put in; but on April 1st the plaintiffs write Wyse enclosing a letter from the engineer of the Commission to the McGuigan Co., with reference to starting work on the telephone line, referring to a plan indicating the part of the right of way then ready for the distribution of the poles, and indicating that a substantial portion of the right of way was not yet ready. The plaintiffs then add: "Under the circumstances we are not yet able to give you a definite order to proceed with the work, unless you agree that you will in no way attempt to hold us responsible in case you should be interrupted or delayed in your work for any reason whatever. If you will write us a letter plainly accepting this condition, you may

consider our to-day's letter an order to commence the erection of the telephone lines at once."

On the 14th April, Wyse wrote a letter supposed to be in compliance with what was demanded, but, owing to its not being entirely satisfactory in phraseology, an amended copy, bearing the same date, was signed and accepted. This is exhibit 8 at the trial. After referring to the letter of April 1st, it proceeds: "I understand and accept your letter of April 1st, as an order to proceed with the work, and hereby agree that you are not to be held responsible by me for any delays or interruptions arising over the matter of right of way or by reason of any action on the part of the Hydro-Electric Power Commission or the McGuigan Construction Co., resulting in stoppage or delay of the work."

This, it is said, constitutes an agreement by which the contract is materially varied. It is said that by this arrangement Wyse undertook to do the work not in accordance with the provisions of his contract—which entitled him to proceed to completion upon a waiting right of way—but upon an uncompleted right of way which might occasion the shifting of his construction camps and their return at great expense, and that, the sureties not having been consulted, they are discharged.

Having regard to the terms of the contract between Wyse and the plaintiffs, I do not think this constitutes any change in his contractual obligation or in any way enlarges the obligation of the sureties. The plaintiffs were entitled to give notice at any time. Wyse simply waives any claim against them for damages, if they gave him notice at a time which was convenient to him.

I do not find anything in the contract imposing any such liability upon the plaintiffs. The default in the preparation of the right of way was not their own, but was the Commission's or McGuigan's; and the latter was, in my view, demanded entirely through over-caution on the part of the plaintiffs' manager.

Moreover, I would not regard the releasing of any possible claim by Wyse with respect to this one matter as such an alteration of the contract as would discharge the surety. If Wyse on the contract could have any claim for an allowance waived by him, then the sureties' right would be to have the

amount, which he voluntarily released, credited upon the taking of accounts.

I was told by counsel on the argument that whatever delay was occasioned by the failure of the Commission to have its right of way ready in time was compensated for by an allowance made by the Commission, and that that amount had been carried through the accounts between the various contractors and had been credited to Wyse; so that in fact the sureties had sustained no damage.

The third matter to be dealt with is one of far greater importance and difficulty. It is said that there is no default under the bond. Wyse started to his work near the end of April. Under his contract he was called upon to make at the end of each month, a progress estimate of all the work done and material delivered, and the plaintiffs agreed to submit this to the Commission's engineer as a basis for his monthly progress estimate. Eighty-five per cent. of the amount due, as based upon the engineer's estimate, was to be paid to Wyse immediately upon the receipt by the plaintiff of its corresponding payments from the Commission; the remaining fifteen per cent. to be paid after completion of the work to the satisfaction of the Commission's engineer, when the balance should be paid by the Commission.

Pursuant to this arrangement, progress estimates were duly made and reported, and interim payments were made, for the months of May and June, 1909. Some time in June the plaintiffs found that Wyse was not paying his men. I do not understand it to be suggested that there was anything wrong in Wyse's intentions, but he apparently had not the financial strength necessary to enable him to successfully carry out the contract. The plaintiffs, for their protection, intended to take steps to see that the men were paid before any further money reached Wyse; but McGuigan, learning of the situation, and claiming the right under his contract, insisted on constituting himself paymaster. Estimates were made and forwarded, and the amounts paid for Wyse were set off against the payments due to the plaintiffs. The plaintiffs from time to time enquired, and satisfied themselves that the amounts coming to Wyse upon the progress estimates about equalled the amounts so advanced by McGuigan. This went on until the summer of 1910, when no further estimates were sent in. The work was then approaching completion. The amount of progress estimates was something

like $65,000. The amounts ultimately paid by McGuigan, including the two progress estimates, May and June, amounted in all to about $100,000.

When the plaintiffs and McGuigan endeavoured to adjust matters in December, 1910, the statement rendered shewed that Wyse had been overpaid to the extent of $11,000 or $12,000. This included an estimated cost of completion, given at $2,000. Later on, in December, 1910, this estimate was shewn to have been entirely inadequate; the total overpayment when the work came to be completed was shewn to be $18,000 or $19,000.

The matter was further complicated by the fact that Wyse made an independent contract, either with McGuigan or the Commission, for the construction of a relay line. The work done was done by the same men upon both these contracts concurrently; and it may in the end turn out to be impossible to satisfactorily separate the respective cost. Roughly speaking, the amount payable for the telephone line, on the basis of which plaintiffs are entitled to be paid, would be $81,000; the cost of the relay line approximately $19,000; making a total above given of $100,000. The price as between the plaintiffs and Wyse will be ten per cent. less, making $73,000 which, plus the relay contract, would total $92,000. Wyse would also be entitled to payments on the force account, amounting to some $6,000, and increasing the total which he ought to have received to about $98,000. McGuigan's statements shews an amount paid of $126,000; so that the work, including the relay contract, cost $28,000 more than the contract price.

The bond in question being only for $10,000 it is unlikely that an accurate apportionment of the loss between the two contracts will be necessary, because it is not likely that the loss on the relay contract would be anything like $18,000. This is a matter not ripe to be finally dealt with here, and it must be faced upon a reference.

This, however, is not the defence mainly relied upon. The contract was for the construction of the work by Wyse. The bond was for the due performance of this contract. It is said that the work was constructed by Wyse; that he has performed his contract; and that therefore there can be no liability. It is said that the plaintiffs have not been damnified by any default of Wyse in that which he undertook to do

The McGuigan Co., has advanced moneys to Wyse to enable him to complete his work, and the McGuigan Co. seeks to recoup itself out of the moneys payable to the plaintiffs in respect to this work. It may be so entitled, by virtue of the terms existing between the McGuigan Co. and the plaintiff; if so, this is something against which the sureties did not undertake to indemnify.

I have come to the conclusion that this argument is well founded, in so far as it is applicable. I do not see how the payments withheld by the McGuigan Co. from the plaintiffs, to recoup themselves for advances to Wyse, which were made to enable him to complete his contracts, can be placed in any higher position than advances made by the plaintiffs themselves for the like purpose. In either case they do not fall within the letter of the bond.

The plaintiff relies upon the clause at the end of the general conditions, providing that before payment is made upon the final certificate the contractor shall furnish satisfactory evidence that he has paid for his labour and material. Even if this clause can be carried into the contract as referring to the obligations between the plaintiff and defendant, it has at most no greater effect than to make the proof of payment for labour and material a condition precedent to the right to obtain payment under the contract. The mere default in payment for labour and material is not the thing stipulated in the bond, which is performance and carrying out of the contract and its condition.

This question is not entirely unlike that which arose in *Cadwell* v. *Campeau*, 21 O. W. R. 263. There one surety, for the purpose of avoiding default on the part of the contractor, made advances to him. This inured to the benefit of the co-surety as it enabled the contractor to complete the work and prevented the making of any claim by the owner. It was held that this did not give a right to contribution, as the bond was for the due construction of the work.

The facts relating to the completion of the work here are not fully developed. It appeared, as already mentioned, that $2,000 was withheld to answer the completion of the work. It also appeared that this sum was entirely inadequate. If my memory serves me rightly, it did not appear whether the work which had to be done to complete was in fact done by Wyse or by the McGuigan Co. and charged up to Wyse. If

the work was done by the McGuigan Co. and charged up to Wyse and deducted from the money coming to the plaintiff, this will be within the terms of the bond; and, provided notice was duly given, the plaintiff will be entitled to recover.

Owing to the lack of definite information, I am not able to deal with the question of notice. If the plaintiff desires to have a reference to ascertain what sum, if any, can be recovered under the above finding, this question will be open upon a reference.

At the hearing it was arranged that if I thought there was liability upon the bond, judgment should be entered for the penalty, and the case be referred to ascertain the sum for which execution should issue. I am not sure, in view of the doubt upon the evidence whether there is anything which the plaintiffs are entitled to recover, that this can be done; but the result can probably be accomplished by inserting appropriate declarations embodying the views expressed.

Costs should be reserved until the final result is known.

HON. SIR G. FALCONBRIDGE, C.J.K.B. MARCH 20TH, 1913.

MURRAY v. THAMES VALLEY G. L. CO.

4 O. W. N. 984.

Jury Notice—Motion to Strike Out—Action for Rescission of Land Purchase—Con. Rule 1322.

FALCONBRIDGE, C.J.K.B., struck out a jury notice in an action for rescission of contracts for the purchase of certain lands upon the ground of fraud and misrepresentation.

Motion to strike out a jury notice in an action to rescind certain contracts for the purchase of certain lands, on the ground of fraud and misrepresentation. See *ante*, p. 52.

N. F. Davidson, K.C., for the plaintiff.

W. J. Elliott, for the defendant.

HON. SIR GLENHOLME FALCONBRIDGE, C.J.K.B.:—Neither I, nor I venture to say any other Judge on the Bench, would think of trying this case with a jury.

Rule 1322 made very material changes as to the power and discretion of a Judge in Chambers and the cases before 23rd December, 1911, have no application.

I direct that the issues herein shall be tried and the damages assessed without a jury.

Costs in the cause.