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APPELLATE DIVISION.

NOVEMBER 17TH, 1913.

*ONTARIO ASPHALT BLOCK CO. v. MONTREUIL.

Vendor and Purchaser—Contract for Sale of Land—Mistake as to Vendor's Title—Life Estate in Lieu of Fee in Land—Improvements Made by Purchaser—Action for Specific Performance—Part Performance with Abatement in Price—Inquiry as to Title—Rights of Remaindermen—Vendor's Breach of Trust—Damages for Breach of Contract so far as not Performed.

Appeal by the defendant from the judgment of LENNOX, J., 4 O.W.N. 1474.

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

M. K. Cowan, K.C., and J. W. Pickup, for the defendant.

D. L. McCarthy, K.C., and J. H. Rodd, for the plaintiff company.

The judgment of the Court was delivered by MEREDITH, C.J.O. (after setting out the facts) :—Upon the argument of the appeal, it was contended by counsel for the appellant that specific performance to the extent to which it has been adjudged ought not to have been awarded, because: (1) it was not in the contemplation of the parties, when the lease was made, that anything but the whole of the land should be sold, and that, as it is impossible for the appellant to convey anything but his life estate and such interest as he has in the water lot, the contract should have been held to have been entered into owing to a

*To be reported in the Ontario Law Reports.

mutual mistake as to the nature of the title of the appellant, and it would be inequitable to compel him to convey the water lot and his life interest in the devised land and to make an abatement of the purchase-money to the extent of the proportion of it which is attributable to the estate in remainder in fee which is vested in his children, and still more inequitable to require him to compensate the respondent company for the loss it may have sustained by not being able to acquire the whole of the land which was the subject of the contract of sale; (2) the effect of the judgment will be to cause injury to those entitled in remainder to the devised land; (3) the effect of it will be to require the appellant to commit a breach of trust by conveying the water lot for an estate in fee simple.

The appellant also contends that damages should not have been awarded; that the only damages to which the respondent company is entitled are the costs of investigating the title; and that damages beyond this are recoverable only where there has been fraud or misrepresentation, and then only in an action of deceit; and that, at all events, where specific performance as to part, with an abatement, is ordered, the purchaser is not entitled to any damages.

Ordinarily, where the vendor is unable to convey the whole of the land which he has contracted to sell, the purchaser has two courses open to him: either to refuse to complete the purchase, in which case he may sue for damages; or to require the vendor to convey that to which he can make title, and to submit to a proportionate reduction or abatement of the purchase-money in respect of the remainder of the land.

Where a purchaser takes the first of these courses, if the inability of the vendor to perform his contract is due to want of title or a defect in title, the rule is that the damages recoverable for the breach of contract are limited to the expenses the purchaser has incurred. This rule is without exception, and applies even where the vendor enters into the contract knowing that he has no title to the land nor any means of obtaining it, though in that case the purchaser may have a remedy by action of deceit: Bain v. Fothergill (1874), L.R. 7 H.L. 158.

No doubt, the principle of that case has application only where the contract remains executory, and it is not applicable where the vendor, to save himself trouble or moderate expense, or from mere caprice, absolutely refuses or wilfully neglects to perform to the best of his ability his part of the contract: per Street, J., in Rankin v. Sterling (1902), 3 O.L.R. 646, 651, citing

Engel v. Fitch (1868-9), L.R. 2 Q.B. 314, L.R. 4 Q.B. 659; Williams v. Glenton (1866), L.R. 1 Ch. 200, 209; and Day v. Singleton, [1899] 2 Ch. 320, 332-3.

The rule applicable where the other course is taken is nowhere, as far as I am aware, more clearly, or, as I think, more correctly stated than in the following passage from the Cyclopædia of Law and Procedure, vol. 36, p. 740: "Although the purchaser cannot have a partial interest forced upon him, yet if he entered into the contract in ignorance of the vendor's incapacity to give him the whole, he is generally entitled to have the contract specifically performed as far as the vendor is able, and to have an abatement out of the purchase-money for any deficiency in title, quantity or quality of the estate." This is not, it is said, making a new contract for the parties, since the vendor is not compelled to convey anything which he did not agree to convey, and the vendee pays for what he gets according to the rate established by the agreement.

At p. 742 of the same volume it is said that, "if the purchaser at the time of entering into the contract, was aware of the defect in the vendor's interest or title, or deficiency in the subject-matter, he is not, suing for specific performance, entitled to any compensation or abatement of price;" and Barker v. Cox (1876), 4 Ch. D. 464, is treated as "an exceptional case, where enforcement of the rule would have been a great injustice to the vendee" (note 78 (England), p. 743); though it is cited in Fry on Contracts, 5th ed., sec. 1266, as authority for the statement that "even if a purchaser has from the first been aware of the state of the title, that circumstances will not necessarily exclude him from the benefit of the principle under consideration (i.e., that stated in sec. 1257, which is, "Although as a general rule where the vendor has not substantially the whole interest he has contracted to sell . . . he cannot enforce the contract against the purchaser, yet the purchaser can insist on having all that the vendor can convey, with compensation for the difference.")

The statement quoted from p. 742 is supported by the high authority of Lord Hatherley, L.C., in Castle v. Wilkinson (1870), L.R. 5 Ch. 534, 536, and is treated by him as settled law; and sanction for it is to be found in the opinions of Judges recorded in several reported cases.

In the circumstances of the case at bar, it is immaterial whether the rule be or be not subject to the qualification that the purchaser at the time of entering into the contract was

ignorant of the defect; for, in my opinion, for the purpose of the application of the rule, the time of the respondent company's entering into the contract was the date of the lease, and not the date of the notice of the intention to purchase, though, no doubt, that was the day upon which the contract to purchase became complete; for it is common ground that when the lease was executed both parties believed that the appellant was the owner in fee simple of the land.

I am, therefore, of opinion that, subject to what I shall say later on as to the other objections to the application of the rule, the case at bar falls within it, and the respondent company is entitled to require the appellant to convey as much as he can and to submit to an abatement of the purchase-money.

I confess that I do not understand, either from the reasons for judgment of the learned Judge or from the formal judgment as settled, upon what principle the calculation as to the abatement to be allowed is to be made. The proper method is that indicated in the quotation I have made from the Cyclopædia, that by which the respondent will pay for what he gets according to the rate established by the agreement, or, in other words, by the purchase-price. . . . Where the vendor is the owner in fee simple of parcel A, and has only a limited interest . . . in parcel B, having ascertained the proportionate part of the purchase-price attributable to that parcel, it will be necessary to ascertain the difference in value between the limited estate and the estate in fee simple in parcel B on the basis of the proportionate part of the purchase-price attributable to it; and the difference will be the sum by which the purchase-price is to be abated. The mode in which the amount of the compensation in Powell v. Elliot (1875), L.R. 10 Ch. 424, was ascertained, was in accordance with this principle. If the judgment is to stand, it should be varied by substituting for the declaration as to the abatement a declaration in accordance with the opinion I have just expressed.

It is, I think, clear, upon principle, that the purchaser who elects to take what the vendor can convey, with an abatement of the purchase-money for a deficiency in title, quantity, or quality of the estate, is not entitled to anything beyond that. He is not bound to take what the vendor can give, but may rescind the contract or claim damages for the breach of it; and what he in effect does when he makes his election is to agree to take the partial performance with the abatement, in lieu of the rights he might otherwise have arising out of the contract or the breach

of it; and it is probably for that reason that the rule has been criticised as involving the making of a new contract for the parties.

I do not find this stated in so many words in any of the very many cases in which the rule has been applied, but in none of them have damages in addition to the abatement of the purchase-money been awarded, nor have they, as far as I have been able to discover, ever been claimed. . . .

[Reference to Horrocks v. Rigby (1878), 9 Ch. D. 180, 183, 184.]

What was said by Sir F. H. Jeune at the end of his reasons for judgment in Day v. Singleton (supra) also supports the view I have expressed as to an abatement of the purchase-money. . .

To give to the purchaser in a case such as this, in addition to what his vendor can convey, an abatement of the purchase-money, damages for not getting that which the vendor cannot convey, would be, I think, directly contrary to what was decided in Bain v. Fothergill. If he had elected to treat the contract as broken and to claim damages for the breach of it, he would be entitled to recover as damages only the costs of the investigation of the title; and it would be anomalous indeed if, having elected to take what the vendor could convey, with an abatement of the purchase-money, damages for the breach of the contract, in so far as it was not performed, were to be assessed on a different basis, and the purchaser were to be entitled to recover for the loss of his bargain.

The learned trial Judge appears to have been of opinion that the respondent company was entitled, in addition to the abatement of the purchase-money, to damages for the breach of the contract, because, as the learned Judge was induced to believe, the appellant might by a little exertion have obtained the title and carried out his bargain, and because, after the discovery in 1908 of the defect in his title, and notwithstanding the letters written to him by the respondent company . . . he "by his deliberate and continuous silence invited and encouraged the plaintiffs to continue their improvements and expenditures, and to believe, as they evidently did believe, that the defendant would be able to and would in fact carry out his contract."

I am unable to agree with this view. There was no duty resting upon the appellant to get in the title of the remaindermen; and, therefore, no ground upon which damages could be awarded against him for not having done so. No doubt, as was said in

Bain v. Fothergill (supra), referring to Engell v. Fitch (supra), p. 209: "The vendor in that case was bound by his contract to do all that he could to complete the conveyance. Whenever it is a matter of conveyancing, and not a matter of title, it is the duty of the vendor to do everything that he is enabled to do by force of his own interest and also of the interest of others whom he can compel to concur in the conveyance;" and in Day v. Singleton (supra) the plaintiff was entitled to the damages which were awarded to him because of his vendor's omission to do his best to procure the consent of the lessor to the assignment of the lease.

In the case at bar what it has been assumed that it was the duty of the appellant to do was a matter of title, and not a matter of conveyancing; but, if it had been a matter of conveyancing, it was not in his power to compel the remaindermen to join in the conveyance to the respondent company; and there was, therefore, no ground upon which he could be held answerable in damages for not having procured them to join. So far from the inaction of the appellant after the discovery of the difficulty in his title and the receipt of the letter in reference to it being a ground for awarding damages against him, the law is, that a purchaser can in no case recover damages in respect of anything he has incurred since he discovered the defect in title: Mayne on Damages, 8th ed., p. 240.

For these reasons, I am of opinion that the judgment should be varied by striking out the declaration that the respondent company is entitled to damages.

There remains to be considered the question whether, in the circumstances, the case is one for the application of the rule as to partial performance with abatement of the purchase-money. The fact that the appellant, when he made the lease, believed himself to be the owner of the land, is no reason for not applying it, nor is the fact that he had only a life estate in a considerable part of the property a reason. Where, however, the carrying out of the contract would involve a breach of trust on the part of the vendor, he will not be required specifically to perform it.

I am not able to say that it appears, on the material before the Court, that the conveyance of the water lot would involve a breach of trust on the part of the appellant, though the evidence points in that direction, unless the remaindermen are estopped by their delay and apparent acquiescence from impeaching the letters patent of it. If the judgment stands, and the water lot is

conveyed, the conveyance will contain covenants for title and quiet enjoyment; and, if the remaindermen should hereafter establish their title to the lot, the appellant would be liable in damages on his covenants. I do not think that he should be subjected by the judgment to that risk; and the proper course to be taken, in the circumstances, is either to direct an inquiry into the title of the water lot or to retain the action for six months in order to enable the remaindermen, if so advised, to take steps to establish their right; and the case may be spoken to as to them and as to the question of costs.

It may seem a hardship that the rights of the respondent company should be limited to the relief to which, as I have indicated, it is entitled; but it is to be borne in mind that the respondent company had the same opportunity of knowing what the nature of the appellant's title was as the appellant himself had, and the loss to it which may result might have been avoided if the precaution had been taken to investigate the title before embarking upon the very large expenditures which have been made.

I have refrained from citing all of the numerous cases I have examined which, in my opinion, support the conclusion to which I have come, as most of them are cited in Mayne on Damages, 8th ed., pp. 238-263, where a complete, and, I think, accurate, exposition of the law as to the damages recoverable in actions such as this, will be found.

Appeal allowed in part.

NOVEMBER 17TH, 1913.

*REX v. WING.

Criminal Law—Attempt by False Pretences to Procure Girl for Immoral Purpose—Criminal Offence—Criminal Code, secs. 216, 571—Conviction—Evidence.

Case reserved for the Appellate Division of the Supreme Court of Ontario by Edward Morgan, Esquire, a Judge of the County Court of the County of York, exercising criminal jurisdiction under the provisions of Part XVIII. of the Criminal Code, R.S.C. 1906 ch. 146, relating to the speedy trial of indictable offences, in reference to a conviction of the defendant made by the said Judge on the 18th September, 1913.

*To be reported in the Ontario Law Reports.

The following questions were submitted for the consideration of the Court:—

1. Was I right in holding that an indictment would lie for an attempt to commit the offence mentioned in clause (*h*) of sec. 216 of the Criminal Code.

2. Was I right in holding that, under clause (*h*) aforesaid, "by false pretences or false representations," a conviction could be made against Horace Wing, the defendant, of an attempt to procure Minnie Wyatt to commit the offence mentioned in clause (*h*)?

3. Was I right in holding, under the evidence produced at the trial, that there was a false pretence or false representation made by the defendant to Minnie Wyatt?

4. Was I right in holding that, although no false pretence or false representation was made to attempt to procure Florence Annie White to commit the offence mentioned in clause (*h*), her evidence could be used in making a conviction against the defendant for attempting to procure Minnie Wyatt to commit the offence mentioned in clause (*h*)?

5. Was I right in holding that, under the first count in the indictment against the defendant (attempt to procure), he could be found guilty, under clause (*h*), of attempting to commit the offence therein mentioned?

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

J. Tytler, K.C., for the defendant.

E. Bayly, K.C., for the Crown.

Sections 72, 216, 571, and 572 of the Criminal Code were referred to.

The judgment of the Court was delivered by MEREDITH, C.J.O.:—We think that these questions should be answered against the contention of the prisoner. It is clear, we think, that sec. 571 of the Criminal Code makes an attempt to commit the offences mentioned in the various clauses of sec. 216, in which an attempt is not dealt with, an offence punishable as sec. 571 provides. . . .

The only ground upon which it can plausibly be argued that the provisions of sec. 571 do not apply, would be the application of the rule "expressio unius est exclusio alterius"; and that having provided in some of the sub-sections of sec. 216 that an attempt shall constitute an offence against the section is an indication of the intention of the Legislature that in the case

provided for by the other sub-sections the operation of sec. 571 should be excluded.

In the cases in which an attempt is dealt with by sec. 216, the offender is liable to be imprisoned for two years; and, there being no express provision in the Act for the punishment of a person who attempts by false representations "to procure any girl . . . to have unlawful carnal connection . . . with any other person or persons;" sec. 571 plainly applies to the attempt to commit that offence.

As to the second question—whether or not there was evidence of an attempt within the meaning of the statute—we think that there was ample evidence to justify the conclusion that there was an attempt. It is manifest from the evidence that it was in the mind of the prisoner to procure girls who were seeking employment to come to his office, or the place where he was living, for the purpose of his having carnal connection with them.

The prisoner received from Minnie Wyatt a letter answering an advertisement in a newspaper, seeking employment, I think, as a stenographer. In pursuance of the object he had in his mind, he wrote her a letter, in which he stated that he had two rooms; that he desired a girl for the purposes of the business he was carrying on—the real estate business; and that they could live in those rooms.

His object, no doubt, was to get the girl there with the hope of making her his concubine.

It is said that there was no completed attempt. It seems to us that it was just the same as if he had gone to the girl and said in words what he wrote to her. There was the false pretence that he had these rooms. And there was also the false pretence that he wanted her for an honest purpose.

It may be that an experienced person, reading the letter, would see that the proposition was an immoral one. But we know that there are many young women who would not see it, and who would, unfortunately, assume that they were wanted for an honest purpose, and have been inveigled into the net set for them; might be tempted and might fall.

It would be practically to wipe out the provisions of the law if we were to hold that what was done by the prisoner did not constitute an offence.

The questions will be answered against the prisoner and the conviction affirmed.

NOVEMBER 18TH, 1913.

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

Railway—Passenger—Expulsion from Train—Findings of Jury—Failure to Produce "Hat Check" Given by Conductor when Ticket Taken up—By-law of Company—Railway Act, R.S.C. 1906 *ch.* 37, *sec.* 217.

Appeal by the defendant company from the judgment of the County Court of the United Counties of Stormont, Dundas, and Glengarry, dated the 11th June, 1913, which was directed to be entered on the verdict of the jury, after trial before the Senior Judge of that Court.

The action was brought to recover damages for the wrongful expulsion of the plaintiff from a train of the defendant company, upon which he was travelling from Guelph to Prescott as a second-class passenger.

The jury found a general verdict for the plaintiff, and assessed his damages at $250, for which sum the learned Judge directed that judgment should be entered.

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

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

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

The judgment of the Court was delivered by MEREDITH, C.J.O.:— . . . In view of the verdict and the Judge's charge, the jury must be taken to have found that the respondent was travelling upon a second-class ticket from Guelph to Prescott, for which he had paid; that half of this ticket was given up to the conductor of the train between Guelph and Toronto, and the remaining half to the conductor of the train between Toronto and Prescott; and that (which was not disputed by the respondent), when he gave up his ticket to the last-named conductor he received a hat check, as it is called; but, when his ticket or fare was afterwards demanded by the conductor, he declined to pay his fare, because, as he said, he had already paid it, and was unable to produce his ticket, because, as he said, he had already given it

*To be reported in the Ontario Law Reports.

†GARROW, J.A., being ill, took no part in the judgment.

up to the conductor; and, when his hat check was called for, he said he had lost it.

The hat checks are used, presumably, for the convenience of the conductor, to enable him to identify the passengers whose tickets he has taken up and more easily to ascertain the stations from which they are booked; and possibly also for the convenience of the passengers, as the position of the check, which is usually placed on the hat-band, saves them the trouble of being called upon to exhibit their tickets more than once.

The by-laws of the appellant company, which were adduced in evidence, contain no provisions as to the use of hat checks, nor do they authorise or assume to authorise, in terms at all events, the conductor to expel from his train a passenger, to whom a hat check has been given in exchange for his ticket, who does not produce it on demand of the conductor, or pay his fare. The provision of the by-laws which deals with the expulsion of passengers from the train is that "whenever and so often as the conductor in charge of any train requests any passenger to produce and deliver up his or her ticket, such person shall comply with the request, or in default thereof shall be deemed to be a person refusing to pay his fare within the meaning of section 217 of the Railway Act of 1903, and may be expelled from and put out of the train as therein provided."

This by-law does not extend the right of the appellant company beyond that which, according to the decision of the Supreme Court of Canada in Grand Trunk R.W. Co. v. Beaver (1894), 22 S.C.R. 498, it possesses under sec. 217. It was held in that case that the corresponding section of the Railway Act of 1888 (sec. 248) authorised the conductor to put out of his train a passenger, although he had paid for and obtained a ticket entitling him to be a passenger, if he refused or was unable to produce and deliver up the ticket on the demand of the conductor. . . .

It was contended by Mr. McCarthy that it was the duty of the respondent to produce the hat check which he had received, when required by the conductor to do so, and that, as he was unable to produce it or refused to do so, the conductor had authority, under sec. 217 and the by-laws, to put him out of the train; that the check was but a substitute for the ticket; and that there was the same duty resting upon the passenger with respect to it as he was under with regard to a ticket.

There are, no doubt, decisions of American Courts which support this contention; but, so far as they rest the right to expel

a passenger upon an implied term of the contract between him and the railway company, Butler v. Manchester and Sheffield R.W. Co. (1888), 21 Q.B.D. 207, a decision of the Court of Appeal, is opposed to that view.

The view of the Court of Appeal in that case was that a passenger, who has paid his fare and obtained a ticket entitling him to be carried on the railway, cannot, while pursuing his journey lawfully, be put out of the train because he is unable to produce his ticket when required to do so by the proper officer of the company, or to pay his fare, at all events in the absence of a by-law of the company authorising that to be done; and doubts were expressed by one member of the Court (Lord Esher, M.R.) as to the power of the railway company to pass such a by-law; and that it has not that power was decided in Saunders v. South Eastern R.W. Co. (1880), 5 Q.B.D. 456.

The Court of Appeal (Osler, J.A., dissenting) in Beaver v. Grand Trunk R.W. Co. (1893), 20 A.R. 476, had held, on the authority of Butler v. Manchester and Sheffield R.W. Co., that the expulsion of Beaver from the train was unlawful; and the ground upon which the Supreme Court of Canada proceeded was, not that that case had been wrongly decided, but that the power which was wanting in that case was supplied by sec. 248 of the Railway Act of 1888.

The ratio decidendi of the Beaver case was that, "having regard to the circumstances and condition of the country, and the ordinary practice of railway companies, the practice being for passengers to pay their fares to the conductors on the train, either in money or by handing to him a ticket purchased by the passenger before entering the train," sec. 248 was to be read as meaning that, if a passenger refuses to pay his fare, either in money or by exhibiting and delivering up to the conductor, if required to do so, his ticket, the power of expulsion from the train might be exercised.

We are asked by the appellant company's counsel to go one step further, and to hold that the non-production of the hat check was a refusal of the respondent to pay his fare within the meaning of the section; but we do not think that it was. The respondent had done all that, according to the Beaver case, he was bound to do; he had paid his fare by delivering his ticket to the conductor; and there was, therefore, no right to put him out of the train.

The appeal should be dismissed with costs.

NOVEMBER 18TH, 1913.

UNITED NICKEL COPPER CO. v. DOMINION NICKEL COPPER CO.

Contract—Mining Agreement—Right of Entry—Agreement not Executed by all the Joint Owners—Rescission of Agreement—Finding of Fact—Interim Injunction—Damages by Reason of—Counterclaim—Reference—Costs.

Appeal by the plaintiff from the judgment of KELLY, J., 4 O.W.N. 1132.

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

J. T. White, for the plaintiffs.

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

THE COURT dismissed the appeal with costs.

NOVEMBER 19TH, 1913.

HICKS v. SMITH'S FALLS ELECTRIC POWER CO.

Master and Servant—Injury to and Death of Servant—Dangerous Machinery—Negligence—Defect in Condition of Premises—Common Law Liability—Efficient Cause of Injury—Place where Deceased at Work—Negligence of Superintendent—Workman Bound to Conform to Orders and Conforming—Liability under Workmen's Compensation for Injuries Act.

Appeal by the defendant company from the judgment of LATCHFORD, J., 4 O.W.N. 1215.

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

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

J. A. Hutcheson, K.C., for the plaintiffs.

The judgment of the Court was delivered by MEREDITH, C.J.O.:—The action is brought by the widow and infant daughter

*GARROW, J.A., being ill, took no part in the judgment.

of Richard Hicks, deceased, who was a workman in the employment of the appellant company, to recover damages under the Fatal Accidents Act for his death, which, as it is alleged, was caused by the negligence of the appellant company.

The facts are fully stated in the reasons for judgment of the learned trial Judge, and it is unnecessary to restate them. His finding was, that there was in use by the appellant company "a defective system which caused the death of Hicks;" and he held that the respondents were entitled to recover at common law, and he assessed the damages at $4,000. He also assessed them contingently at $2,000 if ultimately it should be held that the respondents were entitled to recover only under the Workmen's Compensation for Injuries Act.

The right of the respondents to recover under the Act was but faintly denied; but it was contended that they were not entitled to recover at common law.

I should not have differed from the conclusion of the learned trial Judge that the appellant company was liable at common law, if the place in which the deceased was working at the time he met with the injury which caused his death had been a place in which, in the ordinary course of the business of the company, workmen would be required to be employed; for in that case the company would have failed to perform the duty which it owed to its workmen: Ainslie Mining and R.W. Co. v. McDougall (1909), 42 S.C.R. 420; Brooks Scanlon O'Brien Co. v. Fakkema (1911), 44 S.C.R. 412. No such case was made by the respondents. The place in which the deceased was working was not ordinarily used or intended for workmen to work in. It was a passage-way, seldom used; and the occasion of the deceased being at work there was a very exceptional one, due to the necessity of moving through the passage-way the large pulley which was to be placed in the engine-room. The duty of guarding against the risk to which the deceased was exposed in moving the pulley was, therefore, I think, not one which the appellant company might not delegate to a competent superintendent or foreman. Besides this, the projecting end of the shaft was not a source of danger to any one unless the shaft was in motion; and in the usual course of the business it was not in use during the daytime.

On the morning of the accident, owing to something having occurred which necessitated the repair of a belt in connection with the shaft, which was ordinarily used for the purpose of supplying power to the customers of the appellant company, it

could not be used, and the other shaft was being temporarily used instead of it. There was, therefore, the conjunction of two exceptional circumstances which led to the deceased being at work at a place in which he was exposed to unnecessary risk of injury.

For these reasons, I am of opinion that the efficient cause of the deceased's injury was not the failure of the appellant company to perform the duty which rested upon it, to which I have referred, but the negligence of the superintendents who had charge of the moving of the pulley, in requiring the deceased to work at a place where, owing to the shaft with the projecting end being in motion, he was in a position which needlessly exposed him to risk of injury.

The judgment should, in my opinion, be varied by reducing the damages to $2,000, and with that variation it should be affirmed. There should be no costs of appeal to either party.

NOVEMBER 21ST, 1913.

JEWELL v. DORAN.

Conversion of Chattels—Return or Payment of Value—Reference—Costs—Appeal.

Appeal by the plaintiff from the judgment of BRITTON, J., 4 O.W.N. 1581.

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

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

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

THE COURT varied the judgment of BRITTON, J., by striking out the second third, and fourth paragraphs thereof, and in lieu thereof declaring that the defendants wrongfully converted to their own use the chattels, furniture, etc., enumerated in the lease, except such articles as were missing at the date of the lease; directing a reference to the Local Master at Sault Ste. Marie to inquire, ascertain, and report as directed in the judgment; and requiring the defendants to pay the amount found due and interest from the 31st December, 1911, and the costs of the action and appeal. Judgment not to be enforced against the defendant Mackie. Further directions and subsequent costs reserved.

HIGH COURT DIVISION.

BRITTON, J. NOVEMBER 15TH, 1913.

*NEW YORK AND OTTAWA R.W. CO. v. TOWNSHIP OF CORNWALL.

Assessment and Taxes—International Bridge — Liability to Assessment of Part Lying within Ontario—Recovery of Taxes Voluntarily Paid—Assessment Act, 1904, *secs.* 2 (7), 5, 43(1), 58, 65—"*Real Property*"—*Jurisdiction of Ontario Railway and Municipal Board*—6 *Edw. VII. ch.* 31, *secs.* 17(3), 51(2), (3) — *Declaratory Judgment — Injunction—Jurisdiction of Supreme Court of Ontario—Action—Discretion—Appeal.*

An action to recover money alleged to have been wrongfully collected for the taxes of 1912 upon that part of the International bridge over the river St. Lawrence on the Canadian side, for a declaration that the bridge was not liable to assessment, and for an injunction restraining the defendants from collecting taxes for 1913 upon the assessment of 1912.

W. L. Scott, for the plaintiffs.
G. I. Gogo and J. G. Harkness, for the defendants.

BRITTON, J.:—In the year 1912, the plaintiffs were jointly assessed for the Canadian part of the bridge for the sum of $300,000. This assessment was separate and distinct from the roadway of the plaintiffs the Ottawa and New York Railway Company. That company appealed to the Court of Revision, and upon the appeal the assessment was confirmed. On the 6th November, 1912, the Ottawa and New York Railway Company, one of the plaintiffs, paid to the defendants as taxes, in respect of that assessment, $6,090. The defendants have again assessed the said plaintiffs for the same part of the bridge for the same amount, viz., $300,000, for the year 1913, and intend to collect taxes thereon unless prevented by the order or injunction of this Court.

The plaintiffs' submission is that there is no legal right or authority for such assessment, and they ask for a declaration accordingly, and an injunction restraining the defendants from

*To be reported in the Ontario Law Reports.

collecting taxes for 1913 upon that assessment. They also seek to recover in this action the $6,090 paid by the Ottawa and New York Railway Company in 1912.

As to the $6,090 paid, the plaintiffs are not entitled to succeed. The property in the bridge was considered by the plaintiffs in 1912, and for that year, as something the Court of Revision could deal with. An appeal was accordingly lodged; the decision was against the plaintiffs, and thereupon payment was made. The payment was voluntary; no attempt to recover by distress; no threat of distress; no payment under protest; payment was not made under mistake of facts. The money so paid to the defendants has been expended by them; about one quarter of the amount has been paid out for school purposes.

In Watt v. City of London, 19 A.R. 675, it was decided that the plaintiffs, having been illegally assessed and having paid the money, under protest, were entitled to recover it in an action.

For these reasons, the action fails as to recovering any part of the amount paid for bridge assessment of 1912.

As to the assessment for 1913, the defendants contended: (1) that the part of the bridge in Canada is properly assessable; (2) that, even if not assessable, this Court has no jurisdiction to entertain the plaintiffs' claim; they must get relief, if entitled to any, by way of the Court of Revision, and then by appeal to the Railway and Municipal Board for the Province of Ontario. (3) It is further contended that, the plaintiffs having appealed against the assessment for 1912, and the appeal having been dismissed, that decision is binding, not only for the year 1912, but for the next four years, pursuant to sec. 45 of the Assessment Act, 1904.

I am of opinion that this bridge is assessable. The Assessment Act of 1904 was in force when the assessment complained of was made. The Assessment Amendment Act of 1913 received the Royal assent on the 6th May of that year. The time for notice of appeal from the assessment complained of was the 30th April. The Act of 1913 may apply as to the appeal from the Court of Revision. By sec. 5 of the Assessment Act of 1904, 4 Edw. VII. ch. 23, "All real property in this Province . . . shall be liable to taxation, subject to" certain exemptions. By sec. 2, sub-sec. 7 (*d*), "Real property" shall include "all buildings, or any part of any building and all structures," etc. This bridge is real estate—real property—within the meaning of the Act. It does not come within any of the exemptions in the sub-secs. of sec. 5. This is an international bridge. Section

43, sub-sec. (1), furnishes a means or method for the valuation of such a bridge if liable to assessment at all. This is a bridge in possession of the plaintiffs, or one or more of them, and a part of that bridge is within Ontario. If this bridge is not assessable, it would be difficult to find any that would be. Belleville and Prince Edward Bridge Co. v. Township of Ameliasburg, 15 O.L.R. 174, is entirely in point; International Bridge Co. v. Village of Bridgeburg, 12 O.L.R. 314, does not assist: in that case the Court of Appeal decided that, as the case then stood, the jurisdiction of the Court of Revision, and the Courts exercising appellate jurisdiction therefrom, was confined to the question of valuation. Whether the property was assessable or not was for the assessor alone to determine.

The assessment of the Suspension Bridge at Clifton was confirmed. See Niagara Falls Suspension Bridge Co. v. Gardner, 29 U.C.R. 194. . . .

The defendants further contend that, even in a case where no appeal is taken to the Court of Revision, this Court has no jurisdiction, but that now the sole jurisdiction is with the Ontario Railway and Municipal Board. The provisions of 4 Edw. VII. ch. 23, respecting Courts of Revision, their powers and duties, are found in secs. 58 and 65 and their sub-sections. These Courts did not decide upon the assessability of property, but dealt with persons improperly placed upon or omitted from the assessment roll, and as to the amount, having full power to increase or reduce it.

The difficulty, if there is any difficulty as to the jurisdiction of the Supreme Court of Ontario except by way of appeal, arises because of the appeal in certain cases to and the powers of the Ontario Railway and Municipal Board. In cases like the present the appeal must be to that Board: Ontario Railway and Municipal Board Act, 6 Edw. VII. ch. 31, sec. 51, sub-sec. 2. . . .

The argument was strongly pressed at the trial by counsel for the plaintiffs that the only jurisdiction of the Railway and Municipal Board was upon appeal, and that such jurisdiction did not oust the Supreme Court of Ontario of jurisdiction in a case like the present for a declaration or injunction, where there has been no appeal to the Court of Revision. But that argument ignores sub-sec. 3 of sec. 17 of the Act last-cited. . . .

Section 51 confers jurisdiction upon the Board, such jurisdiction to be exercised upon appeal; and, while not

free from doubt, I must decide, in view of the authorities, that, apart from any right to bring an action for money illegally exacted as and for taxes, where such money is recoverable at all, there is no jurisdiction in this Court in an action to grant a declaratory judgment or injunction. With some hesitation, I think that the case is within the rule that, when a statute gives the right to recover or the right to redress in some Court of summary jurisdiction, the person entitled to exercise the right can take proceedings only in the latter Court. See Barraclough v. Brown, [1897] A.C. 615.

In Toronto R.W. Co. v. City of Toronto, [1904] A.C. 809, where the action was for a declaratory judgment to permit the plaintiffs to use certain streets in a certain way, it was held that, while there was the undoubted power in the Court to grant declaratory judgments, it was a discretionary power. As I interpret the decisions, this is not a case where discretion should be exercised in the plaintiffs' favour, as the plaintiffs have their remedy—certainly as to years other than 1913—by way of appeal from the Court of Revision, and on to the Appellate Division of the Supreme Court of Ontario. See sub-sec. 3 of sec. 51 of 6 Edw. VII. ch. 31. See Grand Junction Waterworks Co. v. Hampton Urban District Council, [1898] 2 Ch. 331. . . . Attorney-General v. Cameron, 26 A.R. 103, cited on the argument, is distinguishable, but has a bearing upon the present case.

I think the four-year period has no application to any other phase of this case than the amount at which the bridge was assessed. The Act now in force is 3 & 4 Geo. V. ch. 46.

The action will be dismissed with costs.

MIDDLETON, J. NOVEMBER 17TH, 1913.

MERCANTILE TRUST CO. v. STEEL CO. OF CANADA.

Railway—Injury to and Death of Person Employed in Removing Ice from Tracks—Spur Line in Yard of Industrial Company—Negligence in Moving Cars on Tracks—Liability of Railway Company—Non-liability of Industrial Company—Finding of Fact of Trial Judge—Damages—Assessment of.

Action under the Fatal Accidents Act, brought by the administrators of the estate of Walter Dynski, against the Steel Com-

pany of Canada and the Grand Trunk Railway Company, to recover damages for his death on the 14th February, 1913, while engaged in removing ice from the rails of a railway spur upon the premises of the steel company.

The action was tried by MIDDLETON, J., without a jury, at Hamilton, on the 30th October, 1913.

W. S. McBrayne and W. M. Brandon, for the plaintiffs.

E. F. B. Johnston, K.C., for the defendant steel company.

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

MIDDLETON, J.:—The line in question is a curved line used for the purpose of bringing cars upon the steel plant to a convenient position for loading and unloading. A gang-plank was placed across the track for the purpose of enabling cinders, scrap, etc., to be conveniently moved by men with wheel-barrows. This plank ran from a platform at the works, across the track, to a bank on the opposite side of the tracks, and was from two to three feet from the rails. It consisted of two three-inch boards, one foot wide and about fourteen feet long. Much material was taken over it daily, it being almost constantly in use. When cars were placed upon the siding, either to be loaded or unloaded, they were uncoupled, and a space was left for the gang-plank. On the day in question there was a car about a foot away from the plank on either side.

Water flowed down the hill and on to the tracks; and ice formed and accumulated to a considerable extent. All through the severe weather this ice had to be chopped away from the tracks and the wheels of the standing cars to enable them to be moved. The custom was to shift the cars during the forenoon of each day. They would then remain until the following forenoon. Instructions would be sent from the steel company to the railway yardmen, indicating the cars that were to be handled, and instructions were given by the steel company as to the precise placing of the cars.

On the day in question, there were several cars upon the track which had to be moved. These included the cars on either side of the gang-plank. Dynski was what is known as a gang-foreman, and it was his duty, among other things, to supervise the gang having the work of clearing this track. On the morning in question he was engaged in this work. His duty was not himself to work with pick and shovel, but to see that those

under him worked intelligently and accomplished satisfactory results. He was under the orders of the yard foreman, Slater.

At the time of the happening of the accident, notice had been given to the railway men of the cars to be moved, and the engine proceeded along the track for the purpose of removing these cars. Dynski was, at that moment, upon the ground between the gang-plank and the end of the car. The engine moved the cars, with the result that Dynski was crushed between them and the gang-plank, and instantly killed.

The cars should not have been moved until the gang-plank had been taken away. Those in charge of the engine were unable to see that the gang-plank was still in position, owing to the curve in the line, and they relied, they say, upon the statement of the foreman, either that he had the plank removed so that the cars were ready, or that he would have it removed in time for the engine to take the cars out. Those in charge of the engine knew that the gang-plank was always across the track except when removed for the purpose of allowing the cars to be moved; they also knew that this gang-plank was in almost constant use, so that it would be almost certain to cause danger, if not actual injury, if due care was not taken.

The engine approached these cars with some speed and violence, intending to free them from ice yet remaining and to make a coupling. This was not in itself negligent or improper.

I have come to the conclusion that the employees of the railway company in charge of the engine were negligent in not themselves seeing that there were no men in a position of danger before actually moving the cars. In my view, they were not justified in relying upon the statement of the foreman, but should have seen that all was right before undertaking to move the cars, particularly when they knew that men might be working around them, or around the gang-plank, who could not be seen from the engine.

I find it difficult to assess the damages upon any satisfactory principle. Viewing all the contingencies as best I can, I fix the damages at $2,500, which I apportion equally between the widow and the infant child, and I would allow maintenance to be paid to the mother out of the infant's share at the rate of $125 per annum, for the next five years, payable half-yearly.

On no theory of the case does it appear to me that there is any liability on the part of the steel company.

I may add that I prefer the evidence of the steel company's foreman to that of the train crew, if this is found to be of importance.

MIDDLETON, J. NOVEMBER 17TH, 1913.

GUEST v. CITY OF HAMILTON.

Municipal Corporation — Expropriation of Land — By-law — Notice of Expropriation—Repealing By-law—Expropriation of Smaller Portion — New Notice — Withdrawal of First Notice—Entry upon Land before Passing of Second By-law—Claim to Payment for Lands Covered by First By-law—Municipal Act, 1903, *sec.* 463—*Right to Repeal By-law—Absence of Authority to Enter before Award — Municipal Act*, 1913, *sec.* 347—*Damages by Reason of Passing of By-law.*

Action against the city corporation to recover $29,250, as the value of certain lands said to have been expropriated.

The action was tried before MIDDLETON, J., without a jury, at Hamilton, on the 21st October, 1913.

J. L. Counsell, for the plaintiff.

F. R. Waddell, K.C., for the defendants.

MIDDLETON, J.:—The plaintiff owns a block of land at the corner of Valley and Hunt streets, in the city of Hamilton. On the 29th January, 1912, the corporation passed an expropriation by-law (1242) purporting to take the greater portion of the plaintiff's land for municipal purposes, in connection with certain sewage works. In pursuance of this by-law, notice of expropriation was served on the 8th July, 1912. On the 12th July, the plaintiff served notice claiming compensation at the rate of $5,000 per acre for the lands taken and injuriously affected. A year later, on the 15th July, 1913, an amending by-law (1492) was passed, providing for the expropriation of a much smaller portion of the plaintiff's lands; and, pursuant to this, a notice of expropriation was served on the 30th July, along with a notice abandoning and withdrawing the former notice of expropriation. In the meantime, on the 20th June, 1913, Mr. Guest had obtained an appointment from the Official Arbitrator to proceed with the arbitration, returnable on the 7th July, which was enlarged until the 30th July; when the arbitrator refused to proceed with the arbitration under the earlier and cancelled notice.

The plaintiff in this action sues to recover $29,250, being the value of the lands proposed to be taken under the original notice:

5.85 acres, at $5,000 per acre; setting out the expropriation by-law, a notice given by the corporation contemporaneously offering $2,040.50, as damages and compensation, his claim, $5,000 per acre; and then alleging that the defendants proceeded with the construction of the work in question on or about the 3rd July, 1913, and entered upon and took possession of the plaintiff's property in the carrying out of the work.

At the trial it was proved that certain officers of the defendant corporation went upon the lands and constructed a small ditch, a few yards long, across the corner, for the purpose of draining water which accumulated in an excavation being made on other lands in connection with the sewage disposal plant, to a watercourse flowing from the lands in question. This work was done on the 3rd July, 1913, a year after the original expropriation by-law, and almost a fortnight before the amending by-law.

There is no foundation whatever for the assumption that this entry constitutes the municipality purchasers of the land at the price named in the claim put in.

The more serious contention is, that there was no right to repeal the existing by-law, and that the municipality is now bound to proceed with the expropriation proceedings under it.

Grimshaw v. City of Toronto, 28 O.L.R. 512, deals with a somewhat similar situation. Section 463 of the Municipal Act of 1903, in force when the original by-law was passed, does not preclude the repeal of the expropriating by-law or compel the municipality to take up the award, if "the by-law did not authorise or profess to authorise any entry or use to be made of the property before the award has been made."

This by-law contained no such provision. It may be that the entry for the purpose of constructing the twenty feet of ditch was entirely unauthorised, and that the municipality may be rendered liable for what was then done. That is not a matter of moment, as the defendants are now and always have been ready to proceed with the arbitration respecting the smaller parcel, which covers the land upon which this ditch is.

No claim was made for damages sustained by the plaintiff by reason of the passing of the by-law. His counsel did not contend that sec. 347 of the Act of 1913 applied, nor would this action be the proper remedy if any such claim exists; as, in the absence of an agreement, damages are to be dealt with upon arbitration.

The action fails, and must be dismissed with costs.

MIDDLETON, J. NOVEMBER 17TH, 1913.

KREUSZYNICKI v. CANADIAN PACIFIC R.W. CO.

Railway—Injury to Pickman in Yard by Shunting Cars—Negligence—Evidence — Defective System—Pleading—Findings of Jury—Fault of Foreman—Fellow-servant—Action not Brought within Time Limited by Workmen's Compensation for Injuries Act—Liability at Common Law.

Action by an employee of the defendants to recover damages for personal injuries sustained by him by being run down by cars in a yard of the defendants, owing to the negligence of the defendants, as alleged.

The action was tried before MIDDLETON, J., and a jury, at Toronto, on the 6th and 7th October, 1913; and the question of law raised was argued on the 8th November.

W. H. Price, for the plaintiff.

Angus MacMurchy, K.C., for the defendants.

MIDDLETON, J.:—In this case many of the facts were not disputed, and it was agreed by counsel that certain questions only should be submitted to the jury, all other matters of fact being determined by myself.

The railway company have an extensive yard at West Toronto. Part of this yard consists of a ladder track with six weigh leads and a switching lead. On these leads, cars are brought in from the east end lead, and are there weighed and sorted ready for distribution to their various destinations in West Toronto, Parkdale, and Toronto; the trains brought in being entirely rearranged to facilitate distribution. This necessitates, at times, great traffic upon these leads.

At the time of the happening of the accident, the 14th March, the snow and ice upon the ground would thaw during the day and freeze at night. A ditch crossed the yard for the purpose of conveying away water that had accumulated upon the tracks. It was necessary to have this ditch opened by pick and shovel. A gang of yardmen, including the plaintiff, were detailed to attend to this task. The position of these men, while actually upon any of the tracks, was dangerous, as cars might at any time be shunted along the tracks. The plaintiff was run down and injured. No action was brought within the time limited by the

Workmen's Compensation for Injuries Act; and this action, if it can succeed at all, must be found to be maintainable at common law.

The plaintiff in his statement of claim sets out that the cars were shunted along the tracks where he was working, without any warning to him of their approach, and that this failure was a "defect in the ways, works, machinery, plant, or the condition and arrangement thereof, and was negligence" which entitles him to recover.

At one stage of the trial—I think after the close of the plaintiff's case—some suggestion was made that the system of operation of the defendants' line was defective. The defendants' counsel objected that this was not the case made upon the pleadings, and that, if the system was to be investigated, he would require a postponement. I ruled against the admission of evidence of this kind without an amendment, which would involve a postponement, and the case proceeded.

The defendants' case upon the evidence was, that the man in charge of the shunting gave ample warning by word of mouth to the men upon the track. The plaintiff denied this warning, and denied the sufficiency of the warning alleged. I, therefore, asked the jury whether they accepted the evidence of these witnesses. In their answer to the third question, they say they do not; so that it must be taken that the warning said to be given was not actually given.

In answer to the other questions submitted, the jury found negligence because of the failure of the company's servants to give reasonable warning; and the answer to the question submitted as to the existence of defects in the ways, works, etc., was that there was a defect, it being "a lack of arrangement to reasonably warn men working on tracks of approaching danger." Neither counsel desired me to ask the jury to amplify or supplement these answers. The failure of the men in charge of the shunting train to warn is, I think, negligence of fellow-servants, and imposes no common law liability.

The plaintiff relies on the lack of arrangement whereby warning would be given, as constituting a defective system importing common law liability. Mr. MacMurchy contends with much force that, upon the record, it is not open to enter into this inquiry. He may be right in this, although paragraph 7 of the statement of claim may be read thus: "The said failure" (i.e., the failure to give notice) "was negligence for which the defendant company are responsible;" and this may be regarded

as a sufficient allegation that the failure to give notice amounted to something making the company liable at common law.

I do not think it can be regarded as a defect in the works, ways, etc.; and, rather than rest the case upon the narrow ground of the pleader's allegation, I prefer to consider the situation upon the assumption that the finding of the jury is properly before me for consideration.

This being so, I have arrived at the view that this does not constitute common law liability. The railway, as a railway, was perfect. The system of operation as a railway was entirely satisfactory. The work which was undertaken formed no part of the general system. It was a mere piece of work which had to be undertaken on that particular occasion, quite subsidiary, although ancillary, to the operation of the road; and all work of that class was intrusted to a gang of labouring men under a competent foreman. He had the right to send them anywhere in the yard to do any work required to be done, and the particular mode of carrying out an individual task was a matter for which he was responsible. If he ought himself to have stood guard over those men while working in this position of peril, or if he ought to have taken precautions to see that no shunting was done upon the track where the men were actually working, or if he ought to have detailed one of their number to watch for the rest when he himself was called to another part of the yard, and he failed to discharge these duties, this was the negligence of a fellow-servant.

In no aspect of the case can I find common law liability.

In the event of any other Court being of a different opinion, I would assess the damages at $1,000.

MIDDLETON, J. NOVEMBER 17TH, 1913.

PIGOTT v. BELL.

Highway—Proposed Dedication—Refusal of Municipal Corporation to Accept—Agreement between Land-owners—Registration—Cloud on Title—Declaration that Agreement Terminated—Reservation—Parties.

Action for a declaration that a certain agreement between the parties, with regard to their respective parcels of land, was at an end, and formed no cloud upon the plaintiff's parcel.

The action was tried at Hamilton on the 1st November, 1913, before MIDDLETON, J., without a jury.

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

C. W. Bell, for the defendant.

MIDDLETON, J.:—The facts in this case were not disputed. The plaintiff owned a block of land at the corner of Wentworth street and what is now known as Rutherford avenue, in the city of Hamilton; having a frontage on Wentworth street of 275 feet by a depth of 320. The defendant owns a parcel of similar dimensions immediately to the north, having its northern boundary on Delaware avenue. South of the plaintiff's land is a tract formerly owned by the Bank of Hamilton, which has been subdivided and sold to numerous persons. This last-named block included Rutherford avenue.

By an agreement of the 9th January, 1909, between the bank, the plaintiff, and the defendant, it was agreed that the bank would, on or before the 1st April, 1909, consent to the strip of land now constituting Rutherford avenue being laid out as a street running easterly from Wentworth street, and would make the usual application to the Corporation of the City of Hamilton for its consent; consent being necessary, not only as to acceptance of the proposed dedication, but because of the narrow width of the street.

The plaintiff then agreed that, within two years from the 1st April, 1909, he would consent to the opening of a street, fifty feet wide, along the easterly side of his parcel of land, extending northerly from the proposed Rutherford avenue across the rear of his parcel, and that he would make the usual application to the city corporation for that purpose; he having the right to a foot reserve on the east side of the proposed street; for the purpose, it is apparent, of preventing the owners of the adjoining lands to the east from obtaining access thereto. The defendant, on her part, agreed, in similar terms, that she would, within two years from the 1st April, 1909, consent to the opening of a street, fifty feet wide, across the rear of her lands to Delaware avenue; thus making a continuous street from Rutherford avenue to Delaware avenue. She agreed within that time to make the usual application to the Corporation of the City of Hamilton; and she was in the same way to be entitled to a one-foot reserve. If the proposed Rutherford avenue was accepted by the city corporation, and grading was required, then the plaintiff and the bank agreed to pay half of the cost of grad-

ing that portion between their respective parcels. These are the only provisions of the agreement now material.

Application was made to the city by the bank, and Rutherford avenue was accepted and has been laid out and opened up; the bank has sold all the land, and counsel on its behalf stated in Court that the bank had no longer any concern in the matters in difference between the parties to the action.

No application was made with reference to the proposed street at the east of the lands of the parties until long after the period named in the agreement; but an application was made in March, 1912. The city corporation refused to accept the dedication or to approve the opening of the proposed street.

The agreement in the meantime was registered, and the plaintiff, desiring to dispose of his lands, is met by an objection that it is a cloud on his title. This action is brought to have it declared that the agreement is spent and forms no cloud upon the title.

Before the action, application was made to the defendant to release any claim she might have, but she took the position now indicated by the defence filed in the action:—

"5. The defendant submits that, under the terms of the said agreement, the said street can be opened without the approval of a plan by the said corporation, and that the said agreement is not conditional upon the consent of the said city corporation.

. . .

"8. The defendant submits that neither the plaintiff nor the defendant can successfully refuse to open the said street over their said lands, when called upon so to do by the said Bank of Hamilton or any purchasers from it as aforesaid, or from the Cumberland Land Company, which was incorporated to take over the said lands of the said bank fronting on the south side of Rutherford avenue."

At the trial, objection was taken that those purchasing from the Bank of Hamilton were concerned and ought to be parties to the action. I do not think that this is so; but the plaintiff's counsel stated his readiness to accept judgment without prejudice to the rights of any persons claiming under the bank. No person other than the plaintiff has ever made any claim, and it appears to me that, under the circumstances, it would be entirely unnecessary to put the parties to the expense incident to the joining of these owners.

All that the agreement called for was an honest application by the parties to the city corporation to accept the proposed

street and to consent to its being opened. This application, according to the terms of the agreement, ought to have been made on or before the 1st April, 1911. The application was not in fact made until March, 1912. The city corporation then refused its consent; and the result of that refusal was, I think, to bring the agreement to an end, and to leave the title as it was in the respective owners. It was not intended by the agreement to tie up this fifty feet of land forever. Upon the city corporation rejecting the overtures, the agreement was spent and at an end.

The judgment may, with the reservation that I have indicated, declare that the agreement forms no cloud upon the title of either plaintiff or defendant and now confers no right to either in the lands of the other. I think that the agreement might well have more clearly provided for the event which has happened, and this justifies me in refusing to award costs to either party.

MIDDLETON, J. NOVEMBER 17TH, 1913.

MILLER v. COUNTY OF WENTWORTH.

Highway—Nonrepair—Insufficiency of Guard-rail at Curve of Road—Dangerous Hill—Negligence of Municipal Corporation—Injury to and Death of Driver of Motor Vehicle—Injury to Passenger—Knowledge of Danger—Cause of Accident—Negligence of Driver and Passenger in Attempting to Descend Hill on Dark Night—Consent of both to Take Risk.

Two actions arising out of an automobile accident which happened on the 23rd July, 1913: one by the representatives of Duncan Miller, who was killed, to recover damages for his death; the other by Fred Miller, who was severely injured, to recover damages for his injuries.

The actions were tried at Hamilton on the 31st October, 1913, before MIDDLETON, J., without a jury.

W. S. McBrayne, for the plaintiffs.

J. L. Counsell, for the defendants.

MIDDLETON, J.:—The late Duncan Miller, the plaintiff Fred Miller, and his wife and three daughters, left Hamilton on the

evening of the 23rd July, at 7.15 p.m., driving along the Guelph road, ascending what is locally known as the "Clappison Mountain." They returned well on in the evening, and, while on the road, before turning to descend the mountain, the automobile ran into a ditch, from which it was extricated with some difficulty. The result of this mishap was that the search-lights of the automobile were in some way rendered useless and could not be lit. The automobile is not shewn to have been otherwise injured. It was then very dark and raining, and manifestly most dangerous to descend the road. The remaining lights upon the car were so small and dim as to give no useful light. Nevertheless, Mr. Duncan Miller decided to make the attempt.

Dr. McClenahan had arrived upon the scene while the automobile was yet in the ditch, and it was arranged that he should go down the hill first, Miller following. The road takes three turns as it descends the hill, and the grade is very steep, about eight feet in a hundred, the total descent being about eighty feet in a short distance.

After successfully passing two curves, Miller arrived at a place where the road turns abruptly, practically at a right angle. At this point Dr. McClenahan was about one hundred and fifty feet in front, and well round the curve, when Miller, failing to turn, but continuing in a straight course, broke through a guard-rail and ran over a steep embankment. The automobile fell some twelve feet; Duncan Miller was killed and Fred Miller severely injured. The other passengers fortunately escaped. The automobile was badly wrecked.

These actions are brought against the county corporation, the road being a county road, and the allegation being that the guard-rail was inadequate and insufficient to afford reasonable protection at the place of the accident. The defendants set up that the accident was the result of the negligence of the plaintiffs in attempting to descend the hill in the darkness and making the descent at too high a rate of speed.

I think that the defendants are right, and that the accident must be attributed to the negligence of the plaintiffs. Miller had ascended the hill, and knew the danger. Manifestly, the undertaking to descend was most difficult and dangerous. The speed of the automobile was given as at from eight to twelve miles an hour; and to take a vehicle of that weight down the grade in question, having regard to the sharp curves and high embankments on a dark, rainy night, was suicidal. The automobile travelling in front would necessarily be of little assist-

ance. Duncan Miller and Fred Miller were warned of the danger and advised against making the attempt in the darkness; yet they took the chance.

At the request of both parties, I viewed the place of the accident, which is well shewn in the photographs. The photographs, however, fail to give any adequate idea of the peril of the situation arising from the steepness of the grade; and neither they nor the plan put in give any indication of the difficulty arising from the curves in the road higher up on the mountain.

It is sought to distinguish the case of Fred Miller, upon the ground that he was a passenger in the car, and that the negligence of the late Duncan Miller would not interfere with his right to recover, if negligence on the part of the municipality could be shewn. Reliance is placed upon the case of Plant v. Township of Normanby, 10 O.L.R. 16; but I do not think that this can help him. It is true that the driver's negligence is not necessarily to be attributed to the passenger; but here the whole situation was as much known to the one brother as to the other. Each consented, I think improperly, to take the risk of making this descent in the darkness, and this negligence precludes either from recovering.

The action, therefore, fails, and must be dismissed with costs, if costs are asked.

MIDDLETON, J. NOVEMBER 17TH, 1913.

*PEDLAR v. TORONTO POWER CO.

Fatal Accidents Act—Death of Infant of Tender Years—Action by Parents—Reasonable Expectation of Pecuniary Benefit from Continuance of Life—Failure to Shew—Cause of Death—"Allurement"—Dangerous Place—Invitation—Negligence of Power Company—Contributory Negligence of Parents.

Action by the father and mother of a child, aged two and a half, who was drowned at Burlington Beach, to recover damages, under the Fatal Accidents Act, for the death, alleging that the defendants negligently maintained a dangerous board walk from which the child fell into the water.

*To be reported in the Ontario Law Reports.

The action was tried at Hamilton on the 24th October, 1913, before MIDDLETON, J., without a jury.

W. M. McClemont, for the plaintiff.

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

MIDDLETON, J.:— . . . At Burlington Beach the power company's lines are carried on towers, some of which are erected in the water. The particular tower in question is about one hundred yards from shore. A trestle is constructed from the tower to the beach. This consists of posts planted in the sand, connected by timbers, and upon the timbers are laid boards. The water near the tower is quite deep. Nearer the shore the water is shallow and marshy; so full of growth that it would be difficult to push a boat through it. South of the beach road which runs along the shore the power line is upon a private right of way enclosed by wire fences. North of the beach road it passes over an unenclosed parcel of land between the road and the shore, to the tower in question. The residence of the plaintiffs is on the north side of the beach road, immediately west of this open parcel.

On the 7th May, 1913, the plaintiffs' infant son, two years and two months old, who was apparently allowed to play pretty much at large, was found drowned in the marsh about two hundred feet from the shore. The proper inference is, I think, that he fell from the plankway, where he had been playing. Upon this state of facts the father and mother sue under Lord Campbell's Act, alleging that the trestle work was a "dangerous thing" which the defendants ought to have known and appreciated as being likely to attract children.

The child was found dead when men working upon the towers were leaving their work for the evening. He had been last seen alive going west along the beach road several hours previously. Men had been employed in painting the tower in question in the forenoon. They came in from the tower and worked upon a tower south of the beach road, and, having completed their work, were returning with their tools, ladders, etc., to store them for the evening at the tower in question, when the body was found.

At the shore end of the trestle work was a movable plank. This sometimes was carried on to the trestle, so as to leave a space of open water and discourage any trespasser from going upon the trestle. Upon the occasion this plank had not been removed, but had been shoved out into the water some two or

three feet; the water being seven inches deep at the end of the plank.

Two difficulties at least confront the plaintiffs. Before they can recover under Lord Campbell's Act it is necessary that there should be some evidence of pecuniary loss. . . .

[Reference to McKeown v. Toronto R.W. Co., 19 O.L.R. 361; Pym v. Great Northern R.W. Co., 2 B. & S. 759; Taff Vale R. W. Co. v. Jenkins, [1913] A.C. 1.]

In the case in hand the plaintiffs build much upon the life of this unfortunate little child; yet I fear that the case is one in which no damage can be awarded. It is not a case in which I have to review a finding made by a jury. I have myself to form an opinion as to what pecuniary benefit would have accrued to these plaintiffs by the continuance of this child's life, having regard to all the circumstances. I am unable to say that probability of any pecuniary loss has been sufficiently shewn. The case is one in which the amount of damage has so closely approached the vanishing point that it disappears. All benefit was in the remote future. In the immediate present there was a certainty of considerable outlay, and the possibility of greater outlay. The visions of the father of comfortable maintenance upon a farm in the west, where he might be maintained by the labours of this child, before he himself was fifty years old, seem to me too remote and speculative. . . .

But there are other difficulties in the plaintiffs' way. As I understand the decisions, the plaintiffs have failed to establish liability. Their counsel seeks to bring this case within Cooke v. Midland R.W. Co., [1909] A.C. 229, regarding that case as establishing some novel liability on the part of the owner of unfenced land in relation to children going thereon. That case has been much misunderstood by reason of failure to apprehend that all that is there said is predicated upon findings of a jury; the Court taking the view that there was evidence to go to the jury in support of these findings. Even then, the case was regarded as near to the line; and many perusals of the judgment convince me that none of the Lords intended to lay down any new law. The case has been so thoroughly canvassed and explained in Latham v. Johnson, [1913] 1 K.B. 398, as to leave little that can profitably be said. . . .

In the Cooke case there was liability, because it was found as a fact that there was a license, and that the turntable was an allurement in this particular sense, in that it not only attracted but was in itself a dangerous machine.

In the Latham case there was no liability where a child entering upon the railway land as a licensee, and playing upon a heap of ties, strayed away and was run down upon the railway track. There was no allurement, no trap, no invitation, and no dangerous object.

That is the situation here. There was no allurement "in the evil sense of alluring with malicious intent;" no trap, for everything was as it seemed, the danger was open and apparent; no invitation, but, on the contrary, a forbidding of children to go upon the trestle, and the boards had been moved out from the shore to prevent children going upon it; and no dangerous object placed upon the land in the sense in which that term is used, but merely a lawful user by the owner of his lands in a lawful way.

Beyond this, there is nothing to suggest that the company ever extended a license to children of tender years, such as this child, to go upon the trestle unaccompanied; and I think that the parents' right to recover is barred by their contributory negligence, as they admittedly knew of the peril to their children, and ought not to have allowed this child to be at large without some kind of supervision.

These conclusions are fortified by the decisions in Jenkins v. Great Western R.W. Co., [1912] 1 K.B. 525; Jackson v. London County Council, 28 Times L.R. 359; Morris v. Carnavon, 26 Times L.R. 391; Coffee v. McEvoy, [1912] 2 I.R. 290. See also the note in 26 L.Q.R., p. 2, and a valuable collection of American cases in 29 C.L.J., p. 600.

Upon all these grounds, the action fails, and must be dismissed. I trust that the defendants will be generous enough to forgo any claim for costs.

MIDDLETON, J. NOVEMBER 17TH, 1913.

RAMSAY v. BARNES.

Damages—Injury to Adjoining Land by Excavation—Deprivation of Lateral Support—Great Expense of Restoration—Damages in Lieu of Mandatory Injunction—Full Compensation—Costs.

Action for injury to the plaintiff's lands by excavations made by the defendant upon his adjoining land, thereby depriving the plaintiff's land of lateral support.

G. Lynch-Staunton, K.C., for the plaintiff.
C. W. Bell, for the defendant.

MIDDLETON, J.:—The parties are adjoining land-owners. The defendant excavated a gravel pit upon his lands, going to a considerable depth, practically up to the boundary line. The sides of this pit are almost perpendicular. At the time of this excavation, no particular harm resulted, as the gravel was firmly lodged; but the wall of the pit has now fallen in to some extent and will undoubtedly fall in more.

The action came on for trial at the Hamilton sittings on the 17th June, 1913. Each party then appeared, submitting plans for the construction of retaining walls, which, it was submitted, would be sufficient to protect the plaintiff's land; the defendant not setting up anything that would justify his interference with the plaintiff's lateral support. After some discussion, it was arranged that the case should stand over, and that in the meantime I should consult an expert engineer and place his views before the parties, who should be at liberty to challenge his report in any way, if they felt inclined to dissent from it. I accordingly placed the situation before Mr. C. H. Mitchell, a well-known consulting engineer. He made careful examination of the premises and a very full and satisfactory report. Neither party tendered any evidence to attack his findings in any way.

The report shews that the excavation extends some 230 feet from the road, and is of a depth varying from twenty to twenty-six feet. The soil will probably come to rest when sufficient has fallen to create a slope of one and a half horizontal to one vertical.

The works proposed by the plaintiff are, to my mind, altogether extravagant and unreasonable, for the reasons pointed out by the engineer. They would involve an expenditure of approximately $10,000. The remedy proposed by the defendant, a small retaining wall along the top of the bank, is entirely inadequate. The replacement of the slope would cost about $2,200.

I suggested to the parties a consideration of the question whether this case was not one in which damages might be awarded in lieu of an injunction or mandatory order. Counsel for the defendant accepts this suggestion; counsel for the plaintiff contends that this is not a case in which the statute ought to be applied; but, without waiving this contention, he gave evidence going to shew the injury done to his lands.

I have come to the conclusion that the case is one in which I should not award an injunction, but damages, and that the damages awarded should be in the nature of compensation, and should not be confined to the damages already sustained.

In Shelfer v. London Electric Co., [1895] 1 Ch. 287, A. L. Smith, L.J., at p. 322, lays down a working rule, stating that damages should be granted if the injury to the plaintiff's legal right is small and is capable of being estimated in money, and can be adequately compensated by a small money payment, and the case is one in which it would be oppressive to the defendant to grant an injunction.

I would supplement what is there said by pointing out that anything like laches or acquiescence on the part of the defendant, even though insufficient to defeat his right, ought to be a most material factor in considering the proper remedy.

In this case, the plaintiff probably shared the opinion entertained by the defendant, that the soil was sufficiently rigid to make it safe to leave a practically perpendicular wall; at any rate the plaintiff made no protest and sought no injunction until the entire excavation was made. This does not disentitle him to his legal remedy, that is, damages, as and when a subsidence occurs; but, I think, it puts him in a position in which he must rest content with the compensation proposed. I do not think that it would be to the interest of either party to leave the matter open for a series of actions to be brought after each subsidence. The plaintiff ought not to complain of compensation; and in Arthur v. Grand Trunk R.W. Co., 22 A.R. 89, it is indicated that compensation is the proper basis upon which damages should be estimated.

The plaintiff's experts place the injury to him by reason of the probable subsidence, and practical loss of from fifteen to twenty feet of land, at $2,500. I think this amount is too large; but, on the other hand, I am unable to accept the evidence of the defendant's experts, who place the damage at a nominal sum. I have also to bear in mind that by the wrongful conduct of the defendant he has been able to quarry from his own land a considerable quantity of gravel, of commercial value.

Bearing all the facts in mind, I think the proper sum to award is $1,750; intending by this to compensate the plaintiff fully. The soil and gravel which fall over on to the defendant's property and form a natural embankment to protect the plaintiff's land would then become the property of the defendant, but would be sterile in his hands, as it would be the means of afford-

ing the plaintiff lateral support. I have, however, in the sum mentioned, made an allowance for the value of this gravel of which the plaintiff is deprived. I have also considered the injury to the growing trees and the expense of restoring a fence upon the top of the embankment.

I regard the excavation as almost rendering useless, from a commercial standpoint, between fifteen and twenty feet of the plaintiff's land. It is true that it will not be absolutely valueless, but it will be much less desirable as a building site, and will materially interfere with possible plans for the laying out of the entire lot.

The judgment will, therefore, award to the plaintiff the sum named, $1,750, as damages, in lieu of an injunction, and the plaintiff will be entitled to recover his costs of action, including the fee of Mr. Mitchell and his assistants, which I fix at $164. This is to be paid by the plaintiff in the first instance, and included in his costs.

If any special provisions are deemed necessary in the judgment to protect the rights of either party, and they cannot agree, I may be spoken to.

HOLMESTED, REGISTRAR, IN CHAMBERS. NOVEMBER 17TH, 1913.

SNIDER v. SNIDER.

Pleading—Statement of Claim—Departure from Endorsement on Writ of Summons—Addition of Defendants—Legitimate Extension of Claim Made by Endorsement—Promissory Notes—Action against Executor of Deceased Maker—Addition of Foreign Executors—Claim of Set-off—Legacy—Judicature Act, 1913, *sec.* 16(*h*)—*Rule* 109.

Motion by the defendants the foreign executors of Thomas Albert Snider, deceased, to set aside the statement of claim, on the ground that a new claim, entirely different from that endorsed upon the writ of summons, was stated in the statement of claim, and to dismiss the action, on the ground that the plaintiff had abandoned the claim endorsed on the writ.

W. J. Elliott, for the applicants.
H. E. Irwin, K.C., for the plaintiff.
F. C. Snider, for the defendant Snider.

THE REGISTRAR:—The endorsement on the writ is for $10,000 upon two promissory notes, payable on demand, and interest thereon. The notes were made by Thomas Albert Snider; and the original defendant Snider was the sole defendant named in the writ, as being the Canadian executor of the maker of the notes, who is deceased. By an order made on the application of this defendant, in presence of the solicitors for the plaintiff and for Charles F. Malsbury and the Central Trust and Safe Deposit Company, executors in the United States of the said Thomas Albert Snider, these last-named parties were added as defendants on the 13th February, 1913. The order recites an undertaking by their solicitor to accept service of the writ and to enter an appearance, and an agreement to waive the issuing of a writ for service out of the jurisdiction.

It is said that this order was made at the instance and request of the added defendants; but that, if it were the fact, is not stated in the order. At all events, the order stands; it has never been appealed from; and, for weal or woe, these defendants are parties defendants to the action, and have attorned to the jurisdiction of the Court.

These defendants, having thus been made parties to the action and attorned to the jurisdiction of the Court, are parties for all purposes, and cannot now object to any question being raised in the action which might be legitimately raised had they been resident within the jurisdiction of the Court. A defendant cannot appear in an action and disappear at his pleasure. He cannot say, "I will appear and contest this question, but I will disappear if the plaintiff raises any other question."

The only question, therefore, it appears to me, is this. If the defendants were resident within the jurisdiction and served with the writ, could they object to the variation from the endorsement of the writ which is disclosed in the statement of claim? Rule 109 (Rules of 1913) contemplates that a statement of claim may alter, modify, or extend the relief claimed by the endorsement on a writ, because it provides that where the statement does this, the plaintiff shall not be entitled to judgment in default of defence unless the statement of claim is served personally, or in pursuance of an order for substitutional service. The object of the Rule is obvious. A plaintiff may vary his claim as endorsed on the writ, by his statement of claim (where the writ is not specially endorsed within the present Rules); but, if he does so, he must give the defendant due notice of the change. As long as the defendant has due notice of the variation, that is all that

is requisite, as it would be obviously unfair and unreasonable to permit a plaintiff to endorse his writ with one claim, and then, without notice to the defendant, to make an entirely different claim against him by the statement of claim.

It must be remembered that, as the objecting defendants in this case were not parties to the action when the writ was issued, the claim now set up in the statement of claim could not have been endorsed on the writ; but when the defendants, without objection, become parties to the litigation, the plaintiff by his statement of claim may, it seems to me, very properly and without offending any rule of practice, make such claim against the defendants, who have as it were thrust themselves into the litigation, as he may see fit. The action was instituted to recover the amount due upon two notes made by a deceased person, from his Canadian executor. The claim now is that these notes may be set off against certain notes of the plaintiff in the hands of the defendants the United States executors, and that the plaintiff may be declared to be entitled to a legacy in their hands free from any claim on the notes, which the plaintiff thus proposes to satisfy by set-off. All this seems to me quite legitimately to be connected with and arise out of the plaintiff's claim on the notes sued on. The Court, being properly seized of the action, and having all proper parties before it, is bound, under the Judicature Act, 1913, sec. 16(h), to deal with the whole question; and it does not seem to me that these defendants are entitled to say that the plaintiff, having recovered a judgment on the notes sued on, must then proceed to the United States and litigate the question whether he is entitled to set off his judgment against the notes held by these defendants, and whether he is entitled to his legacy free from any claim of the defendants on the notes held by them.

For these reasons, it appears to me that the plaintiff has not in his statement of claim departed from his original cause of action; but, by reason of these objecting defendants having become defendants after the suit was instituted, he has a perfect right to present for determination the questions raised in the statement of claim as against them.

The motion is, therefore, refused with costs to the plaintiff in any event of the action against the defendants other than Snider.

MIDDLETON, J. NOVEMBER 19TH, 1913.

SCHOFIELD v. R. S. BLOME CO.

JOHNSTON v. R. S. BLOME CO.

Master and Servant—Injury to Servant—Improper Use of Hoist—Negligence of Foreman—Workmen's Compensation for Injuries Act—Operation of Hoist—Reasonable Safety from Accident—Building Trades Protection Act, 1 Geo. V. ch. 71, sec. 6—Findings of Fact of Trial Judge—Damages.

Actions for damages for personal injuries sustained by the plaintiffs respectively, whilst working for the defendants, by reason of the negligence of the defendants or of some one in their service.

The actions were tried on the 1st and 6th November, 1913, at Hamilton, before MIDDLETON, J., without a jury.

T. Hobson, K.C., and A. M. Lewis, for the plaintiffs.

E. F. B. Johnston, K.C., for the defendants.

MIDDLETON, J.:—The defendants were contractors for the erection of a large factory in Hamilton. The building was of brick and concrete; and, to facilitate its erection, a hoist was erected outside the main wall for the purpose of conveying material to the different storeys as they were erected. This hoist was not intended for passenger use, and consisted of a bucket or platform upon which materials could be placed and elected, it being removed from the hoist through openings left in the walls for that purpose. These openings were between two and three feet wide and about five feet high. The platform was hoisted by a cable passing over a wheel at the top of the elevator shaft, and operated by a drum driven by a stationary engine erected at some little distance from the foot of the hoist. This drum was attached to the main shaft, driven by the engine, by means of a friction clutch. It could be freed from this shaft by releasing the clutch; and, when so freed, it could be held in position by a dog which engaged with a ratchet wheel attached to one end of this drum. This same shaft also operated a fixed drum or winch called, in the evidence, "a nigger-head." It was close beside the free drum and its attachments, and, when the friction clutch was free, could be operated independently of the drum used for operating the hoist.

On the day in question, the building, so far at least as the exterior walls and heavy interior construction was concerned, was nearing completion. The time had arrived when the temporary holes in the wall could be stopped and the hoist removed. Schofield, the bricklayer, and Johnston, his assistant, were engaged in filling up these holes. Material had been taken up in the hoist and had been used in building up the holes in the wall from the inside. From the inside it was possible to build the lower part of this filling, both inside and outside; but, when the top was reached, the inside alone could be completed, and the outside would have to be completed from the outside. Johnston had descended to the ground by the stairway and ascended in the elevator, on the platform, taking with him mortar, bricks, etc., for the purpose of completing the holes on the outside. When he had reached a point opposite the highest hole, the hoist was stopped, and Schofield stepped out of a permanent window-opening, near the hoist, on to the platform. Almost at the same moment, the elevator fell, and both men were thrown to the ground, a distance of some fifty-three feet. Singularly enough, each man suffered almost precisely similar injury—his back was broken. Fortunately both are making good recovery.

It appears that at the time of the accident the cage was held suspended by the dog in the ratchet wheel, the clutch having been disengaged, and the shaft passing through this drum and the nigger-head beyond it were being used for the purpose of attempting to haul a car-load of sand, weighing about forty tons, along a contractors' siding close to the foot of the hoist. The rope was found unequal to the strain and broke. This occurred at the very instant of the fall of the elevator. The plaintiffs' theory is, that this in some way caused the accident—that it was entirely improper to use the nigger-head for any such purpose when the hoist was suspended outside the building. The plaintiffs further say that, although the hoist was not a passenger hoist, and was not intended to be used by the workmen as a passenger hoist, they were using the hoist as a temporary platform for the purpose of enabling them to complete the brick work in question, in obedience to the express orders of Stephan, the defendants' foreman. Stephan, on his part, denies giving any such instructions, and says that his instructions were to leave the outside completion until the hoist had been removed, when that work could have been done from a swing platform which had already been used for the purpose of cleaning and tuck-pointing the bricks at other parts of the wall. The defendants also contend that the accident more probably hap-

pened by the negligence of the engineer, Sullivan, who must have pulled the wrong lever, and so freed the dog from the ratchet, in a moment of excitement, when he realised that the rope had broken and men were suspended. If Sullivan was negligent, then the defendants claim immunity from liability, because he was not a workman having superintendence over the plaintiffs. The plaintiffs assert liability not only under the Workmen's Compensation for Injuries Act but also at common law.

After very careful reflection, I find myself compelled to accept the evidence of Schofield, corroborated by Johnston, not because of the corroboration, but because I believe Schofield; and, although I am, therefore, compelled to find against Stephan, I desire to say that I believe he must have forgotten the orders which Schofield says were given on the morning in question, and to exonerate him from any intentional misstatement. Nothing in the story told by Schofield is in any way improbable. The platform of the hoist was a much better place from which to complete the brick work, which required considerable bricks and mortar, than the comparatively narrow swinging platform. So long as due care was exercised, there was no particular risk in doing this work, using this hoist for this temporary purpose; but all agreed that it was an entirely improper thing to operate the nigger-head while these men were suspended in the elevator. I think that Stephan was negligent in that he failed to forbid Sullivan using the hoisting engine for any other purpose while these men were at work upon this temporary job.

I do not think that this constitutes liability at common law. The hoist was not being used for the erection of brick work as part of a system of construction. What was done that day was merely using a temporary expedient resorted to to meet the then present need—the completion of the brick work; and, if Stephan erred in ordering the men to take a position of peril in the elevator or in ordering the machine to be operated for other purposes while they were in the elevator, this was a negligent and improper act on the part of an entirely competent and fit superintendent, intrusted by the master with the care of the details arising in the general construction of the work.

The plaintiffs further contend that the rope was defective, and that its breaking caused the accident, and that this is sufficient to create common law liability.

This contention fails. The rope was not in any way defective. It was supplied for general use, and was improperly used to draw the cars, as it was too light for that purpose. This was

an abuse of good material supplied by the master. Beyond this, it is not shewn that this was the cause of the accident.

Mr. Hobson placed the case upon what appears to me to be much safer ground. The Building Trades Protection Act, 1 Geo. V. ch. 71, contains drastic and far-reaching provisions. Section 6 applies to this case: "In the erection . . . of any building, no scaffolding, hoists . . . shall be used which are unsafe . . . or which are not so . . . operated as to afford reasonable safety from accident to persons employed or engaged upon the building."

I do not need to go so far as he invites me, and to hold that this makes the master liable whenever an elevator or hoist is in fact "unsafe" in the sense that an accident has happened, for it is enough to find, as I think I must, on the undisputed evidence, that this elevator was not so "operated as to afford reasonable safety from accident." This liability is created by statute, and is not made subject to the limitations imposed by the Workmen's Compensation for Injuries Act.

The question of damages is not free from difficulty. The men will certainly be disabled for a year. Dr. Cockburn, a very careful and competent surgeon, who examined them under an order, thinks that there is probability amounting almost to certainty of some permanent disability and suffering. Under all the circumstances, I think I should award Schofield $3,500 and Johnston $2,500. If there is liability only under the Workmen's Compensation for Injuries Act, these amounts must be reduced to $2,700 and $1,500 respectively.

MEREDITH, C.J.C.P., IN CHAMBERS. NOVEMBER 20TH, 1913.

RE ANNETT.

Lunatic—Order Declaring Lunacy—Application by Lunatic to Supersede—Lunacy Act, 9 Edw. VII. ch. 37, sec. 10—Evidence—Insufficiency—Renewal of Application—Reference—Notice to Committee.

G. Annett applied, in person, for an order, under sec. 10 of the Lunacy Act, 9 Edw. VII. ch. 37, superseding an order of this Court, made on the 10th March, 1911, by which he was declared to be a lunatic, and his wife was appointed a committee of his person and estate.

MEREDITH, C.J.C.P.:—From the papers filed upon the application for the order of March, 1911, it appears that the man was, at that time, confined in a private hospital for the insane; but he is now, and apparently has been for some time past, quite at liberty; and, according to his own statements made in argument upon this application, is residing at his own house, with his wife and family, and caring for his own person—and, judging from his appearance, doing so very well—and is also, without any assistance, attending to such business as he has had. And he produces, upon this application, an apparently genuine certificate of Dr. Bruce Smith, dated the 2nd April last, in which that competent medical gentleman and provincial officer states that he has, upon examination, found that the man not only is not insane, but that, to prevent "worry that might have a tendency to disturb or annoy him," he (Dr. Bruce Smith) had suggested that the arrangement made for the care of the man's property while he was a patient at the sanitarium "might now with advantage to his peace be dissolved." He also in that writing expresses his belief that the man's "former illness" was an acute attack of insanity; and it is observable that, in the application for the declaration of lunacy, nothing was said, by any of the medical men who testified as to the man's insanity, in regard to the character of it, or as to its probable, or possible, duration; things which ought generally to be disclosed upon such an application, especially in acute cases.

No one who is sane should be compelled to live, or to die, under the ban of an order declaring him to be insane; there should be no undue delay in "superseding, vacating, and setting aside the order declaring the lunacy;" though, of course, care must be taken that one who has been insane is really sane again—that it is a real case of recovery.

Such cases as Ex p. Holyland, 11 Ves. 10, and Re Dyce Sombre, 1 M. & G. 116, shew the nature of the evidence which in those days was deemed needful to support an application for a supersedeas of a commission in lunacy; and, although the same question is involved in this less formal application, and the same principles apply to it, it must be borne in mind that important changes, since those cases were dealt with, have taken place in the legal, as well as in the medical, view of lunacy and the diseases which are the cause of it. The mind is not now looked upon anywhere, as it at one time was by some of the Judges, as one and indivisible; and in the methods of medical treatment, and in the medical view of the curability of the ailment, especially

in acute cases, progression is undoubted. As the Act very plainly puts it (sec. 10): "The Court, if satisfied that such person has become of sound mind and capable of managing his own affairs, may make an order so declaring;" to be followed, in due course, by an order "superseding, vacating and setting aside the order declaring the lunacy."

But, in this particular case, the difficulty is, that the application is made by the applicant himself, and he is quite unfamiliar with the practice of the law; so that it comes up in a very insufficient manner. The notice of motion has such a home-made appearance that it might have been misunderstood to be not a real and effectual one. The affidavit of service is made by the man himself, and there is no other affidavit in support of the application. It would, obviously, be improper to make the order asked for upon such material, however strongly one might feel, after a discussion of the subject with the man, that he may have a very good case, which might easily be presented properly, and however anxious one might be to avoid keeping a sane man under the cloud of an order of lunacy.

In the circumstances, the best I can do is to say that the application may be renewed on proper material, after proper service of a proper notice of motion upon the committee, or else with her consent properly verified; or that the applicant may have, at once, a reference to the local Master at London, at Chatham, at Sarnia, or at St. Thomas, to ascertain and state whether the applicant is now "of sound mind and capable of managing his own affairs;" notice of the proceedings on such reference to be given to the committee, unless her verified consent to the superseding order is filed.

BRITTON, J. NOVEMBER 20TH, 1913.

RE McDEVITT.

Will—Residuary Beneficiaries—Condition—Forfeiture for "Instituting Proceedings to Set aside Will"—Lodging of Caveat in Surrogate Court—Further Proceedings not Taken—Grounds for Caveat—Accounts of Executors and Committee.

Motion by Thomas Quinn and Charles Thomas Sweeney, the committee of the estate of Daniel McDevitt, under an order of the Court, and subsequently his executors, for an order (1) directing the passing of the applicants' accounts as committee

and (2) as executors, and (3) for the advice and opinion of the Court upon clause 4 of the will of Daniel McDevitt.

The application was made under the Lunacy Act, 9 Edw. VII. ch. 37, the amending Act 1 Geo. V. ch. 20, the Trustee Act, and Con. Rule 600, and was heard by BRITTON, J., in the Weekly Court at Toronto.

E. J. Hearn, K.C., for the applicants.

F. Arnoldi, K.C., for Patrick McDevitt.

J. F. Hollis, for Hugh McDevitt.

J. Tytler, K.C., for John McDevitt.

W. E. Raney, K.C., for James McDevitt.

BRITTON, J.:—The applicants, by an order made in Chambers on the 18th day of April, 1912, by Mr. Justice Middleton, were appointed jointly to manage and administer the estate, real and personal, of the said McDevitt, in accordance with the powers conferred and under the directions given by that order. These powers and directions are fully set out in the order. The applicants did many things acting under the said order. It was further ordered that these applicants, Charles Thomas Sweeney and Thomas Quinn, should receive, as compensation for their skill and trouble in so administering the said estate, such sum as might be allowed by a fiat of a Judge in Chambers, in addition to their lawful disbursements.

Daniel McDevitt died on the 29th September, 1912, having made his last will and testament on the 6th September, 1912. The said Thomas Quinn and Charles Thomas Sweeney were appointed executors, and probate of the said will was granted to them on the 4th November, 1912, by the Surrogate Court of the County of York.

The 4th paragraph of that will is as follows: "Should any of the beneficiaries named in this my will institute any proceedings to set aside this my will or any paragraph or clause thereof, he or they shall thereby forfeit all his or their rights and legacies herein provided."

John and James McDevitt, brothers of the deceased Daniel McDevitt, filed a caveat against the proof of the will. By the will the residue of the estate of the deceased was given to his four brothers, viz., James, John, Patrick, and Hugh.

The question is, was the lodging of the caveat, by John and James, "instituting proceedings to set aside the will or any paragraph or clause thereof," within the meaning of the above-recited clause 4.

The caveat lodged stated the grounds to be: (1) want of testamentary capacity; (2) that the will was executed after the testator had been declared by a Judge of the High Court to be a person of unsound mind; and (3) that the testator was unduly influenced to make the will.

There has not been in fact the institution by any of the beneficiaries of any proceedings to set aside the will; therefore, there has been no "forfeiture of any rights and legacies."

The filing of the caveat was not "instituting proceedings to set aside the will."

A caveator who states grounds for the caveat is not obliged to proceed to proof, or to attempt to prove these. A caveat is defined as "a formal notice or caution given by a person interested, to a Court, Judge, or public officer, against the performance of certain judicial or ministerial acts."

A caution, or caveat, while in force, may stop probate or administration from being granted without notice to or knowledge of the person who enters it. A caveat being lodged, a warning should follow; and then, if the person who lodged the caveat really intends to contest, he should cause an appearance to be entered. Even then, I do not say that the entering of an appearance would be instituting proceedings to set aside a will. It might well be that a beneficiary would desire to have the will proved in solemn form.

Neither John nor James entered an appearance. The caveat remained in force only three months. See Surrogate Rule 23. It was not a correct statement in the caveat that the testator had been declared a lunatic. It was stated in the order above-mentioned that "he was from mental infirmity, arising from constitutional causes, incapable of managing his own affairs." Such a condition may be quite consistent with testamentary capacity.

The case of Rhodes v. Mansell Hill Land Co. (1861), 29 Beav. 560, applied in Williams v. Williams, [1912] 1 Ch. 399, is in point on the general question of what action will work a forfeiture under clauses in a will providing for the same. I find no case in which it is decided that lodging a caveat is in itself instituting proceedings to set aside a will.

The order will be as stated upon the third point; and all accounts will be referred to the Senior Judge of the Surrogate Court of the County of York. He will examine and report upon the charges and disbursements of the applicants payable under the order of Mr. Justice Middleton, and upon that report I

will grant a fiat for payment. The learned Surrogate Court Judge will finally pass the accounts of the applicants as executors.

The costs of all parties, except James and John McDevitt, will be paid out of the estate. James and John will bear their own costs respectively.

LENNOX, J. NOVEMBER 21ST, 1913.

HOUSTON v. LONDON AND WESTERN TRUST CO.

Trust Deed—Action to Set aside—Undue Influence of Beneficiary—Mala Fides—Confidential Relationship—Lack of Independent Advice and Assistance—Absence of Power of Revocation—Voluntary Settlement—Mental Incapacity of Settlor—Remuneration of Trustees—Costs of Action.

Action against the company and Annie Cook to set aside a deed executed by the plaintiff, a widow eighty-four years old, conveying her property to the defendant company in trust for the defendant Cook, upon the grounds of want of capacity, improvidence, lack of independent advice, undue influence, etc. The plaintiff executed a will and a power of attorney at the same time as the deed.

F. W. Pardee, K.C., for the plaintiff.
M. D. Fraser, K.C., for the defendant company.
W. N. Tilley, for the defendant Cook.

LENNOX, J. (after an elaborate statement of the facts and examination of the evidence):—The transaction attacked cannot be allowed to stand. The deed is a purely voluntary one. Confidential relations of an exceptionally intimate character existed between the plaintiff and the defendant Annie Cook. It is not alone that this defendant is an adopted daughter and was reared by the plaintiff and was married from her house. The most cordial relations were maintained afterwards. The plaintiff educated, or contributed very largely to the education of, Mrs. Cook's daughters, and the girls made their home with the plaintiff in their holidays. The question of influence is not here a mere implication arising from a fiduciary relation between the parties; it is shewn as a fact that the plaintiff placed great dependence in her (Mrs. Cook), had her in her home from time

to time, sent for her in her illness, and consulted with her. Mrs. Cook herself emphasised this phase of the case in giving evidence. Mrs. Cook was the only relative in communication with the plaintiff at the time the deed was executed and for weeks before. In such a case the defendant must shew that the plaintiff had the advantage of competent independent professional assistance: Rhodes v. Bate (1866), L.R. 1 Ch. 252, at p. 257. It was argued that Mr. Weir stood in the relation of solicitor to the plaintiff in this transaction. The terms of the letter of instructions, and the attitude of Mr. Moore (manager of the defendant company) and Mr. Weir, are, in my judgment, only consistent with the idea that Mr. Weir acted throughout as the company's solicitor. Whatever the plaintiff may have said to Mr. Moore, Mr. Weir was never told that he was to act for the plaintiff; and, in view of the obligations which such a position imposes—none of which could be said to be discharged—it is only fair to Mr. Weir to say that I do not think that he understood that he was drawing up the papers or attending their execution as the plaintiff's solicitor.

Practically speaking, the point is of no importance, as it is not the presence of the solicitor, but the actual protection of the client, that the law requires. A dormant solicitor is no more potent than a bottle of medicine with an immovable cork. The solicitor must fully acquaint himself with all the circumstances affecting the proposed disposition, must see that all the avenues by which improper influences might come in are closed, that the client's will is unfettered; he must protect the client against her own inclinations by advice and warning, point out the consequences of the contemplated act, and he must retire from the transaction if his advice is not followed: Powell v. Powell, [1900] 1 Ch. 243. In the circumstances of this case, he could never justify the absence of a power of revocation.

The plaintiff executed the deed and will without advice, warning, or explanation. The will is not moved against, as it is unnecessary to do so; but in determining the plaintiff's rights, and the situation created by the parties who were present, the deed, will, and power of attorney are to be regarded as one transaction.

And the introduction of a will is not by any means to be regarded as a mere formal departure from the instructions. On the contrary, it is a very drastic change; as, had the plaintiff died in the meantime, the burden of proof as to volition, understanding, capacity, and undue influence would have been shifted

from the beneficiary to the parties atacking the transaction, that is, the will; "natural influence" arising from the relation of the parties and even persuasion or entreaty being legitimate in the case of a will, but not so in the case of a deed: Parfitt v. Lawless (1872), L.R. 2 P. & D. 462; McDougall v. Paille, 4 O.W.N. 1602. And where the relations between the parties are of the nature here shewn, undue influence will be presumed and the transaction set aside, unless the party benefited by it can shew affirmatively that the other party to the transaction was placed in such a position as would enable him to form an absolutely free and unfettered judgment: Parfit v. Lawless, at p. 469, and Archer v. Hudson, 7 Beav. 551.

The defendants have not only failed to discharge this onus, but, on the contrary, the evidence satisfies me that the defendant Annie Cook was the means of separating the plaintiff from Thomas H. Manley, Dr. Bell, and Mr. Gurd, three of her most intimate and trusted friends; that, by coloured and false statements, she influenced the plaintiff against Mr. Manley and induced her to doubt his sincerity and goodwill; that the plaintiff's desire, if any she had, to alter the disposition of her property was brought about by Annie Cook or by Annie Cook and her husband; and that Mrs. Cook acted in bad faith and for the purpose of acquiring for herself as large a share as possible of the plaintiff's property.

Again, it is not enough, in the circumstances of this case, to shew that the plaintiff knew what she was doing and intended to do it. As was said by Lord Eldon, in Huguenin v. Baseley, 14 Ves. 300, the question is not "whether the donor knew what he was doing, but how the intention was produced; and, though the donor was well aware of what he did, yet if his disposition to do it was produced by undue influence, the transaction will be set aside." See also Hoghton v. Hoghton (1852), 15 Beav. 278.

I am of opinion that, so far as the plaintiff had any intention or disposition at all in this transaction, it originated with and was kept alive by Annie Cook. The old plan of dividing the property was satisfactory until Mrs. Cook assumed charge of the plaintiff's home. Equality of division was still the plaintiff's purpose, and, indeed, as Mrs. Cook shews, the first act of the plaintiff, when Mrs. Cook came over, was to give her $100 so as to keep her upon an equality with Thomas Manley, who had been recently given this amount. There was no thought then of cutting Manley off or that he had already got more than his

share, as John Cook stated in the memorandum a little later on. As soon as Mrs. Cook returned to Michigan, in the spring of the present year, the plaintiff sought out her old friends and took steps to have the deed set aside.

But, even aside from the confidential relations between the parties, the transaction cannot stand. "In every transaction in which a person obtains by voluntary donation a benefit from another, it is necessary that he should be able to establish that the person giving him that benefit did so voluntarily and deliberately, knowing what he was doing; and, if this be not done, the transaction cannot stand. . . . If the Court should be unable to arrive at a satisfactory conclusion, the transaction cannot stand:" Cooke v. Lamotte (1852), 15 Beav. 234, at p. 240, per the Master of the Rolls. See also the judgments of the Chief Justice of the Exchequer in Johnstone v. Johnstone, 28 O.L.R. 334, and Kinsella v. Pask, 28 O.L.R. 393. The evidence leads me to the opposite conclusion. . . .

I am clearly of opinion that the deed attacked was not the voluntary, deliberate, or conscious act of the plaintiff; that, as a matter of fact, she never intended to dispose of her property in the manner in the deed provided for, or, except as to the charitable gifts, to put her property out of her control in her lifetime; and that she did not know the nature, effect, or consequences of the trust deed when she executed it.

I am also convinced that on the 20th April, 1912, the plaintiff was not, under any circumstances, mentally capable of making a deed or will or transacting important business of any kind; and there is no evidence to indicate that she improved either mentally or physically between that date and the date of the execution of the deed. I am strongly inclined to believe, too, that, if competent independent advice had been procured for the plaintiff, the true condition of the case would have been revealed, and the deed would not have been executed.

Two questions remain: remuneration to the trustees and the costs of the action.

The first of these has given me a great deal of anxious thought. There should be no encouragement given to the method pursued in this case; but, as I am satisfied that Mr. Moore did not intend to wrong the plaintiff, and the property has been preserved in the meantime, I have decided to allow remuneration.

The other question stands upon a different footing. It is not heirs or next of kin bringing action upon a mere surmise; it is the very person whom the company primarily represent.

The company having made common cause with the defendant Annie Cook in actively opposing the plaintiff's claim, instead of submitting their rights to the protection of the Court—as in fact they declared that they proposed to do in their statement of defence—ought not now, I think, to be separated from their co-defendant in liability to the plaintiff for costs.

There will be judgment: (a) for the plaintiff against the defendant company for such sum as is found to be in their hands upon the taking of the accounts under the reference hereinafter directed, and against both defendants for the costs of the action and reference; (b) declaring that the trust deed in the pleadings mentioned, except as to moneys collected or received by the defendant company and moneys properly paid out by the defendant company under the terms of the said deed, including $2,000 paid to Point Aux Trembles School, St. Andrew's Presbyterial Church, Sarnia, and St. Paul's Presbyterian Church, Sarnia, before the commencement of this action, is null and void, and directing that it be delivered up to be cancelled, and that the registration of this deed in the registry office for the county of Lambton be vacated; (c) directing the defendant company to deliver to the plaintiff all deeds, bonds, stock certificates, promissory notes, vouchers for money, bank books, or other writings or papers belonging to the plaintiff, or to the estate of her husband, in their possession or control; (d) directing a reference to the Local Master at Sarnia to take an account of the moneys received and paid out by the defendant company and of the amount in their hands and payable to the plaintiff, after deducting these payments and allowing to the defendant a fair and reasonable remuneration for their services as trustees.

BRITTON, J. NOVEMBER 21ST, 1913.

GROCOCK v. EDGAR ALLEN & CO. LIMITED.

Master and Servant—Hiring of Salesman for Defined Territory on Salary and Commission—Breach of Agreement—Misrepresentations as to Amount of Business Done—Failure to Prove—Dismissal of Salesman—Notice—Acceptance—Delay in Filling Orders—Master not Bound to Provide Work for Servant—Claim for Damages—Exaggeration—Remoteness.

Action for damages for breach by the defendant company of an agreement with the plaintiff as salesman and for an

account of all sales of the defendant's company's tool steel, steel castings, etc., made by the defendant company and all contracts taken in Ontario during the terms of the plaintiff's engagement.

W. N. Tilley and J. J. Maclennan, for the plaintiff.

H. E. Rose, K.C., and J. W. Pickup, for the defendant company.

BRITTON, J.:—The plaintiff (in answer to an advertisement) applied by letter dated the 3rd September, which was followed by an interview at Sheffield on the 9th September. A second letter of the plaintiff on the 12th September was followed by an interview on the 15th September, when a verbal agreement was arrived at. This agreement was confirmed by the defendant company's letter to the plaintiff of the 16th September, 1910, which is as follows:—

"In reference to the interview you had with us yesterday, we now confirm our appointment of you as our representative in Ontario, Canada, under our manager for Canada—Mr. Thomas Hampton—who is resident in Montreal, and whose instructions you will, of course, be required to carry out.

"The terms of the appointment are as follows. Salary $85 per month, payable monthly. Commission two and a half (2½) per cent. on the net turn-over from Ontario. Travelling expenses will be paid by us and also hotel expenses when you are away from Toronto, which will be your headquarters.

"Notice. Three months' notice to be given on either side to terminate this arrangement, which is for one year certain.

"Books, letters, and business papers. These are to remain our property and are to be given up in the event of your leaving our service.

"We rely upon you giving your best attention to our business, and this appointment is made on the understanding that you do not engage in any other business whilst in our employ.

"Your salary will commence from the day you sail for Canada, and we shall pay your expenses whilst in Sheffield prior to sailing.

"We wish you every success and assure you that you can rely upon us to do everything possible to promote our mutual interests."

The plaintiff, by letter of the 19th September, accepted the terms of the defendant company's letter, and the contract was thus made.

The plaintiff entered upon his work and the salary commenced on the 22nd October, 1910. Upon the plaintiff's arrival at Montreal, the defendant company's manager for Canada, Mr. Hampton, limited the plaintiff's territory to that part of Ontario west of a line drawn west of Ottawa and Kingston. The plaintiff did not at the time object to this, nor did he subsequently attempt to work in the territory in Ontario east of the line mentioned; and I cannot say that the plaintiff has shewn any damage resulting from cutting off the eastern part of Ontario.

On the 22nd May, 1911, the defendant company gave to the plaintiff notice of terminating the plaintiff's employment on the 22nd October of that year. This was sufficient notice under the terms of the letter of hiring. The plaintiff by letter of the 6th June, 1911, definitely and in terms accepted the notice.

. . .

The plaintiff states that he accepted the engagement upon the representation made by the directors of the defendant company that the company had a very large number of customers in Ontario with whom they were doing business; and the plaintiff alleges that such representation was, to the knowledge of the defendant company, false and untrue.

I find, upon the evidence, that all the representations made by the directors of the company, so far as such representations were given in evidence, was substantially true; and I find that there was an entire absence of fraud and bad faith in the negotiations which led to the plaintiff's engagement.

The plaintiff's alleged loss on this branch of the case will be found in his particulars: commission of 2½ per cent. on sales of $6,000 per month, which the directors assured the plaintiff would be the turn-over, less commission on actual turn-over of $1,200 per month.

Any such loss by reason of alleged misrepresentation is not consistent with the plaintiff's letter of the 6th June, 1911, in which he says that he would have accepted a straight salary of $2,000 a year in lieu of $1,000 a year plus 2½ per cent. commission on turn-over for Ontario. The difference between what the plaintiff actually got in salary and commission and what he would have accepted, after all representations were considered, is comparatively small.

In reference to the plaintiff's complaint that the defendant company refused and delayed to fill orders procured by the plaintiff for goods: I find that, while at times there was delay,

such delay or refusal, if any refusal, was not intended to prejudice the plaintiff, but was occasioned in the management of the defendant company's business; and the management was reasonable, fair, and prudent and within what the defendant company had the right to do. It was in the interest of the defendant company to give to the plaintiff reasonable support and assistance; and this, in my opinion, the defendant company did, so far as consistent with its organisation and plan and system of management; and the plan and system were not, in my opinion, faulty or such as to entitle the plaintiff to damages for any alleged loss.

It is a fact that the plaintiff did not, during the term of his engagement, prior to the 22nd May, 1911, sell enough of the defendant company's goods reasonably to justify the expense of retaining him in their employment. Apparently, with the exception of one commission in dispute, the defendant company has paid to the plaintiff salary in full to the 22nd October, 1912, and all commissions when such commissions fell due. If there were any commissions not due at the time of issuing the writ herein, the plaintiff is entitled to recover such, but not in this action.

It was not on the trial shewn that any such commissions were unpaid. The one in dispute is that upon a sale of manganese steel crossings to the managers of the Intercolonial Railway. The amount of this purchase . . . was $2,200; the commission on it would be $55.

I accept the plaintiff's statement, which was, that he (the plaintiff) had heard that the managers of the Intercolonial Railway placed this order at Ottawa; and the plaintiff claims the commission, as Ottawa is in Ontario. Apart from the question of the effect of limiting the plaintiff's territory, by the defendant company's manager in Canada, to the line west of Ottawa, as I have mentioned, I am of opinion that the sale . . . of these steel crossings cannot be considered as part of the net turn-over from Ontario. The defendant company has not raised any question as to commissions on any sales of goods which could properly be called part of the Province of Ontario turnover. There is no doubt in my mind that a commission on this sale would have been paid by the defendant company if applied for and if suit not pending.

On the 1st September, 1911, the plaintiff was relieved from further work under his agreement. He was told by the manager: "Your holidays start from to-day and will continue until

the termination of your agreement with this company; and under these circumstances we shall not pay you any further moneys for travelling expenses after to-day, which please note.''

The plaintiff was asked to return all books, stationery, etc., the property of the company; and this presumably he did, as no question was raised about it at the trial.

The plaintiff was paid all commissions to the end of his term. It was not shewn that the plaintiff could have obtained any order that would have been accepted for any goods from the 1st Sepembter to the 22nd October other than those actually sold by the defendant company and upon which the plaintiff received commission.

As this contract is to pay wages, namely, a salary of $85 a month, together with commission for the entire output for Ontario, whether sales made by the plaintiff or not, I think the case falls within and is governed by Turner v. Sawdon & Co., [1909] 2 Q.B. 653. The contract is to pay wages, and the employer is under no obligation to provide work. The work might or might not increase the plaintiff's remuneration. If it must be presumed that the plaintiff would have made additional sales, so as to be entitled to additional commission, no amount was suggested. The evidence did not establish any. I think that this case is close to, but distinguishable from, Turner v. Goldsmith, [1891] 1 Q.B. 54. Putting an end to the term of the plaintiff's service was strictly within the agreement, and acknowledged by the plaintiff to be so. During the term down to the 1st September, 1911, the plaintiff was assisted in every reasonable way consistent with the carrying on of the defendant company's business, and was paid salary and commission to the end. This leaves the plaintiff without any good cause of action.

A great deal of evidence was put in, evidence taken upon commission and by witnesses called at the trial. I have considered it all, but no useful purpose would be served by my giving extracts from or further commenting upon it. No doubt, the result of the plaintiff's entering into this contract has been very unfortunate for him; but the damages claimed, even if there was liability on the part of the defendant company, are greatly exaggerated, and, in the main, too remote to be recovered.

This action will be dismissed, and with costs, if costs are demanded.

LANGWORTHY v. MCVICAR—HOLMESTED, SENIOR REGISTRAR, IN CHAMBERS—NOV. 17.

Discovery—Examination of Plaintiff—Privilege—Solicitor—Will—Representatives of Testator—Waiver.]—This was an action to establish a will of which the plaintiffs were executors, and which was impeached as being invalid. The plaintiff Langworthy was solicitor for the deceased, and acted for him in the preparation and execution of the impeached will. Being examined for discovery, he objected to answer certain questions, on the ground that they related to communications made to him as solicitor for the deceased. Upon a motion by the defendants for an order directing the said plaintiff to attend again and answer the questions, the learned Registrar said that the privilege was one for the protection of the client, and one which the client might waive. When the client is dead, it would seem that the privilege enures to the benefit of those who claim to be his representatives, but it is not for the benefit or protection of any one more than of another; and it would seem that any one claiming to be a representative, whether as heir or next of kin, might waive it. The present applicants claimed to be representatives of the deceased, on the ground that the will in question was void, and the questions to which answers were refused were directed to shewing the invalidity of the will. Langworthy, in the circumstances, could not claim, as one of the executors of the impeached will, the privilege as against the applicants: Russell v. Jackson, 9 Hare 387. He should attend again and answer all the questions he refused to answer, and also any questions properly arising out of his answers. He must also pay the costs of this motion in any event. Featherston Aylesworth, for the defendants. J. Haverson, K.C., for the plaintiffs.

LOVE v. LOVE—HOLMESTED, SENIOR REGISTRAR, IN CHAMBERS—NOV. 17.

Particulars—Statement of Claim — Alimony — Accusations against Husband—Discovery—Costs.]—In an alimony action, the defendant demanded particulars of the allegations contained in the 4th, 9th, 10th, and 11th paragraphs of the statement of claim. Pending a motion for particulars, the plaintiff answered refusing particulars of paragraphs 4, 9, and 11, but purporting to give particulars of paragraph 10. The learned Registrar said

that, after a careful consideration of the statement of claim, the demand, and the answer, he was of the opinion that the defendant was entitled to the particulars which he asked, and that the answer which had been given was insufficient. It was urged that the defendant might get the information he sought by an examination for discovery; but that was no answer to the application. The plaintiff made certain accusations against the defendant, on which she based her claim to alimony. The defendant was entitled to have these accusations stated so specifically that he might know what he had to meet at the trial: see Rodman v. Rodman, 20 Gr. 428. An examination for discovery cannot be an efficient substitute for particulars. A party is no way bound to confine his case at the trial to the matters to which he has testified on his examination for discovery; whereas the object of ordering particulars is that the party may be confined at the trial to those matters of which he has given particulars. The statement of claim was in too general terms, and probably, under the old system of pleading, would have been demurrable. The particulars demanded should, therefore, be given. In an ordinary case the plaintiff should pay the costs in any event; but, as it was an alimony action, the costs should be to the defendant in the cause, to be set off pro tanto against the costs, if any, which he might be ultimately ordered to pay. G. R. Roach, for the defendant. J. I. Grover, for the plaintiff.

RE CONSOLIDATED GOLD DREDGING AND POWER CO.—FALCONBRIDGE, C.J.K.B., IN CHAMBERS—NOV. 17.

Trusts and Trustees—Jurisdiction over Trustees — Trustee Act — Application of — Direction for Delivery of Securities — Pledge of Bonds.]—The Western Canada Securities Company applied for an order under the Trustee Act, directing the Union Trust Company to deliver over certain securities and title papers, and an order was granted accordingly by the Chief Justice; but, before it was issued, the Union Bank of Canada asked to have the matter re-opened, whereupon it was again argued, and the Chief Justice re-opened the order and dismissed the original application, giving reasons as follows:—It now appears that the agreement in question was not signed by Davison until after he had pledged the bonds with the bank. My judgment, therefore, was founded on a misstatement (I do not say a wilful misstatement) of the facts. But further consideration

satisfies me that, when I thought I could make an order under the Trustee Act, I had not the provisions of that statute sufficiently in my mind. I am now of the opinion that the statute is inapplicable; and this motion is, therefore, misconceived, and must be dismissed with costs. The matters involved are of vital importance to the parties, and this order will be made in Court or Chambers as may seem proper—my desire being that, if the applicants are advised to appeal, that appeal should be facilitated. R. C. Le Vesconte, for the Western Canada Securities Company. D. C. Ross, for the Union Trust Company. H. Cassels, K.C., for the Union Bank of Canada.

COOK v. GRAND TRUNK R.W. CO.—MIDDLETON, J.—NOV. 17.

Railway—Injury to and Death of Servant—Brakesman—Action under Fatal Accidents Act—Cause of Death—Fault of Deceased—Negligence—Findings of Jury.]—Action under the Fatal Accidents Act. The deceased was a brakesman employed upon the railway. A train was being made up in the railway yard. The deceased improperly went between the cars while in motion for the purpose of uncoupling them. At the moment when he was between the cars, they came in contact with cars already standing upon the track. As the result, he was crushed by logs projecting over the end of one of the cars and instantly killed. The jury found that, although the logs were properly loaded in the first place, the railway company were negligent in not discovering earlier that the logs were in a dangerous position. Held, that, upon these facts, the plaintiff failed. The accident causing the death was the direct result of the deceased's misconduct in going between the cars while in motion. J. L. Counsell, for the plaintiff. D. L. McCarthy, K.C., for the defendants.

MITCHENER v. SINCLAIR—HOLMESTED, SENIOR REGISTRAR, IN CHAMBERS—NOV. 19.

Pleading—Defence to Counterclaim—Striking out as Embarrassing—Leave to Amend.]—Application by the defendant to strike out paragraph 2 of the reply or joinder of issue, as being no answer to the defendant's counterclaim, and as being embarrassing. The Registrar said that the plaintiff's case might be

stated shortly thus: "I agreed with the defendant that he should buy for me certain property. He accordingly bought the property, and took the conveyance to himself, and now repudiates my right, and I claim that he should be declared to be a trustee for me." The defendant, by his defence, denied the plaintiff's case, and set up, by way of counterclaim, that he was the rightful owner of the land in question, and the plaintiff merely his tenant at will; and he claimed possession and rent and $254.40 for money lent and an injunction to restrain waste and to compel the plaintiff to remove a mechanic's lien which he had suffered to be registered against the property. To this the plaintiff replied that the defendant, by refusal to carry out his agreement to convey the land to the plaintiff, had occasioned damage to the plaintiff. The Registrar said that, even under the present loose system of pleading, it was difficult to see how this could be said to be any defence to the counterclaim. It was perfectly easy for the plaintiff, in answer to the defendant's claim to possession and an injunction, on the facts alleged, to frame a defence. It was also apparently an easy matter to frame a defence to the money claim, and there was no excuse for resorting to the ambiguous statement of paragraph 2 of the reply; and this paragraph must be struck out, with costs to the defendant in any event. The plaintiff might amend the reply as she might be advised; and, in default of amendment, the defendant should be at liberty to note the pleadings closed as to the counterclaim. J. King, K.C., for the defendant. G. R. Roach, for the plaintiff.

O'NEILL v. EDWARDS—MIDDLETON, J.—NOV. 19.

Chattel Mortgage—Sale by Mortgagee—Allegations of Improvidence and Misconduct of Mortgagee—Findings of Fact by Trial Judge in Favour of Mortgagee—Costs.]—Action to recover damages for loss alleged to have been sustained by the plaintiff by reason of an improvident sale, of the plaintiff's goods under a chattel mortgage made by the plaintiff. MIDDLETON, J., found, upon the evidence, that the sale was fair and conducted in good faith. The amount realised did not pay the amount due upon the mortgage. There was no collusion, nor was anything done to indicate other than an honest attempt on the part of the defendant to realise as much as possible. The sale was conducted by responsible and well-qualified auctioneers, of much experience. The defendant acted reasonably in em-

ploying them, and in what they did they acted not only reasonably but skilfully. The only serious matter was the inadequacy of the advertisement, published in two issues of three Hamilton newspapers, the sale being at Hamilton. The advertisement was not attractive or alluring; but it seemed to have served its purpose, for there was a good attendance at the auction sale of those who would be likely to buy such articles as were offered for sale; and no evidence was given to shew that on the whole an insufficient price was realised. The learned Judge was unable to find any misconduct on the part of the defendant, or that from the misconduct alleged any loss had occurred to the plaintiff. The defendant offered to forgo any claim for costs or for the balance due upon her claim, if the present judgment ends the litigation. If this is accepted, the judgment is to be accordingly. If not, the action is dismissed with costs. J. L. Counsell, for the plaintiff. G. Lynch-Staunton, K.C., for the defendant.

ROGERS v. NATIONAL PORTLAND CEMENT CO.—LENNOX, J.—NOV. 19.

Contract—Exclusive Agency for Sale of Goods for Definite Period—Breach of Agreement—Damages—Net Profits—Reference.]—Action by Alfred Rogers to recover damages for the breach by the defendant company of an agreement to employ the plaintiff as their sole and exclusive agent for the sale of the output of their works at Durham, for a period of five years. The learned Judge finds that at a meeting of the directors of the defendant company on the 13th January, 1910, it was distinctly stated and clearly understood that the plaintiff would not accept a contract for less than five years, and that the contract was authorised by a resolution duly and regularly proposed and passed at that meeting; that the record of that resolution in the minutes was not a correct record; that clause 4 of the contract was discussed at that meeting and explained, and it was then understood by all parties to mean only that the defendant company would not be bound to supply cement to the plaintiff if the price offered netted to the company less than $1.30 f.o.b. at the mill; and that the parties to the action had frequently dealt with each other according to that interpretation. After an elaborate examination of the evidence, the learned Judge finds that the contract was broken by the

defendant company and that it was not because of any contention as to meeting or not the market price, but because the defendant company, being compelled to meet this price, decided to offset the loss, in part at least, by reduced expenses of sale. Judgment for the plaintiff for damages for breach of contract and the costs of the action. Reference to the Master in Ordinary to ascertain and assess the damages by allowing to the plaintiff the actual net profit which would have accrued to the plaintiff had the contract been observed and performed by the defendant company on their part, taking into account all sales made by the company from the 15th March, 1912, to the date of taking the account, and ascertaining as nearly as may be the probable sales by the company from that time until the termination of the contract-period, namely, the 14th January, 1915. Order for payment by the defendant company of the damages so found. Costs of the reference reserved. I. F. Hellmuth, K.C., and M. L. Gordon, for the plaintiff. G. H. Watson, K.C., and J. L. Fleming, for the defendant company.

CORRECTION.

In Re Ketcheson and Northern Ontario R.W. Co., ante 271, the sentence beginning in the middle of line 2 of p. 272 should read as follows: "The appellants had no choice but to appeal to the Supreme Court of Ontario, and, having chosen a Divisional Court of the Appellate Division, are, therefore, saved from the difficulty," etc.