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DIVISIONAL COURT.

JULY 11TH, 1912.

HOWSE v. TOWNSHIP OF SOUTHWOLD.

3 O. W. N. 1592, O. L. R.

Negligence—Obstruction on Highway—Telephone Pole Erected by Unauthorised Person—Liability of Municipality—Municipal Act (1903), s. 606.

Action for damages sustained by plaintiff by collision with a telephone pole on the highway belonging to a company which had no statutory or other right to erect it there.

MIDDLETON, J., *held*, 22 O. W. R. 212; 3 O. W. N. 1295, that the omission of the municipality to remove an obstruction in the roadway placed there by a stranger was mere nonfeasance, and the action not having been brought within 3 months, plaintiff could not recover.

Divisional Court dismissed appeal therefrom with costs.

An appeal from a judgment of HON. MR. JUSTICE MIDDLETON, 22 O. W. R.. 212, 3 O. W. N. 1295.

The appeal to Divisional Court was heard by HON. SIR GLENHOLME FALCONBRIDGE, C.J.K.B., HON. MR. JUSTICE BRITTON, and HON. MR. JUSTICE RIDDELL.

J. D. Shaw, for the plaintiff.

S. Denison, K.C., for the defendants.

HON. SIR GLENHOLME FALCONBRIDGE, C.J.K.B.:—I agree with the learned Judge that the only possible liability would be under sec. 606, arising from failure to repair.

And this is nonfeasance and not misfeasance, and plaintiff's right of action is barred by lapse of time.

Appeal dismissed; with costs if exacted.

HON. MR. JUSTICE BRITTON:—The liability of the township, if any, arose by reason of the highway being in a

dangerous condition—a condition created by the erection of the telephone pole. The township did not place the pole there—but the members of the council knew it was there. Even if express notice or knowledge could not be established—the pole was there for so long a time that notice and knowledge would be implied. That liability is for non-repair—not a liability for the act itself of placing the pole on the highway. The liability being for nonfeasance—the limitation of 3 months as the time within which an action must be brought bars any recovery by plaintiff. For these reasons and for reasons given by the learned Judge from whose decision this appeal is taken—the appeal must be dismissed and with costs if demanded.

HON. MR. JUSTICE RIDDELL:—I would dismiss the appeal with costs on the short ground that the case stated does not contain any allegation of any act or omission of the defendants which resulted in or allowed the erection of the offending pole. I attach the whole case (Here attach the case).

It will be seen that there is no permission to erect any pole on the highway—all that may be meant may be permission to string the wires across the highways out of all danger.

If there is any fact which has not been brought to the attention of the Court, that is no fault of ours: we have no right to go beyond the case as stated.

I would dismiss the appeal with costs.

HON. MR. JUSTICE KELLY. JULY 15TH, 1912.

GUNDY v. JOHNSTON.

3 O. W. N. 1601.

Judgment—Summary—Con. Rule 603—Action by Solicitors for Costs—2 Geo. V. c. 125, s. 6—Sum Fixed as Solicitor and Client Costs—Solicitor's Lien—Taxation of Costs—Defence.

KELLY, J., set aside order of local Judge at Chatham, awarding plaintiff summary judgment on a claim for certain solicitor and client costs.

Costs reserved for disposition at trial.

An application by way of appeal from the judgment or order of the Local Judge at Chatham, dated 6th July, 1912, whereby the plaintiffs were awarded summary judgment

against the defendant, and for an order setting aside the judgment.

Shirley Denison, K.C., for the defendant, applicant.

H. S. White, for the plaintiffs, contra.

HON. MR. JUSTICE KELLY:—On the evidence adduced I do not think summary judgment should have been given in this case. The defendant shewed a reasonable ground for his objection to the claim put forward by the plaintiffs that the $1,800 directed by sec. 6 of 2 Geo. V., ch. 125, to be paid by the township of Tilbury East to the defendant as his costs as between solicitor and client, in the litigation therein referred to, was intended to be in payment of plaintiffs' solicitor and client costs against him in that litigation, and that they are entitled to all of that sum.

Defendant's objection is *bona fide,* and of such a kind that opportunity should have been afforded of disposing of the matter in dispute in the ordinary way, and not on a summary application for judgment.

Then as to the items in the endorsement on the writ of summons, other than the $1,800 item, defendant has taken the objection that those items are subject to taxation before judgment being given upon them, and his objection is well taken.

For these and other reasons the judgment should, in my opinion, be set aside.

It is stated that the township, in whose hands the $1,800 or part of it is, has been notified of the solicitors' lien claimed by plaintiffs, and that defendant acknowledges such lien to the extent of whatever may be the true amount due by him to the plaintiffs.

In view of this the money should not be withdrawn from or paid over by the township pending the determination of the questions in dispute.

The costs of this application and of the motion for judgment now set aside are reserved to be disposed of at the trial or other final disposition of the matter.

HON. SIR G. FALCONBRIDGE, C.J.K.B. JULY 12TH, 1912.

VOLCANIC OIL & GAS CO. v. CHAPLIN.

3 O. W. N. 1597, O. L. R. .

Water and Watercourses—Crown Grant of Land Bounded by Highway Running near Bank of Lake—Encroachment of Water upon Highway and Lands beyond—Right of Grantee to Lands Encroached upon by Water—Crown Assuming to Make Lease of same Lands—Trespass by Lessee—Action—Parties — Attorney-General—Injunction—Damages.

Action for trespass on certain lands alleged to belong to plaintiff. Plaintiff's land as described in the Crown patent to his predecessor made in 1824, was bounded on the south-west by the Talbot road. This latter road ran close to the shore of Lake Erie and the waters thereof gradually encroached thereon, so much so that in 1838 the road was abandoned and a road to the north dedicated known as the new Talbot road. The gradual erosion of the waters has by the present not only destroyed the old Talbot road but brought the shore line some rods north of the old road allowance. Plaintiff maintained that that portion of the original grant north of the original road allowance still belonged to him and that he was entitled to restrain defendants, who claimed the water lot under a Crown lease dated August 1st, 1911, from trespassing on his property.

FALCONBRIDGE, C.J.K.B., *held*, that where a parcel of land has a definite fixed boundary other than the shore line it is unaffected by the changing of the said shore line by natural causes, and the consequent erosion of part of the land composing the said parcel.

Review of authorities.

Judgment for plaintiff for injunction and $10 damages. Costs on High Court scale.

G. F. Shepley, K.C., and J. G. Kerr, for the plaintiffs.

O. L. Lewis, K.C., for the defendant Curry.

W. Stanworth, for the defendant Chaplin.

HON. SIR GLENHOLME FALCONBRIDGE, C.J.K.B.:—The plaintiffs' company carry on business in the counties of Essex and Kent in the production and sale of petroleum and natural gas. Plaintiff Carr is a farmer: defendant Chaplin is described as a wheel manufacturer; defendant Curry is an oil and gas drilling operator.

Plaintiff Carr is the owner and occupant of the westerly half of lot 178, Talbot Road Survey, in the township of Romney. It was granted by the Crown by patent dated 29th January, 1825, to Carr's predecessor. The lands are described in the patent in manner following, that is to say:

"All that parcel or tract of land situate in the township of Romney in the county of Kent in the western district in our said province containing by admeasurement one hundred acres, be the same more or less, being the south-easterly part of lot No. 178, on the north-westerly side of Talbot

road west, in the said township, together with all the woods and waters thereon lying and being, under the reservations, limitations, and conditions hereinafter expressed, which said one hundred acres are butted and bounded or may be otherwise known as follows, that is to say: Commencing at the north-westerly side of the said road in the limit between lots Nos. 177 and 178, at the easterly angle of the said lot 178; thence on a course about sixty degrees west along the north-westerly side of the said road 20 chains, 71 links, more or less to the limit between lots Nos. 178 and 179; thence north 45 degrees west 60 chains more or less to the allowance for road between the townships of Romney and Tilbury East; thence east 29 chains more or less to the limit between lots Nos. 178 and 177; thence south 45 degrees east, 47 chains more or less to the place of beginning."

Plaintiffs claim that the original Talbot road which formed the south-westerly boundary of the lands included in the above patent ran near the bank of Lake Erie, which at this point is many feet above the beach, and rises perpendicularly therefrom, having a clay front facing the waters of the lake. Plaintiffs further allege that along the shore of Lake Erie in that locality the waters of the lake have been encroaching upon the lands, undermining the bank, causing it to subside and then gradually washing it away; that by reason of this encroachment of the lake, Talbot road at an early period grew dangerous and unsafe for public travel until about the year 1838, it was abandoned as a means of public travel and a new road, which has for many years been known as the Talbot road, was opened up and dedicated to the public travel; that this road still continues to be the travelled road known as Talbot road, but the original Talbot road across the lake front has long since been washed away by the waters of the lake, and now those waters have advanced beyond where they were at the time of the original Talbot road survey; so that they have washed away the reserve left in front of the Talbot road, also the Talbot road itself and some rods of the front of the surveyed lots; so that now so much of the lands patented to Carr's predecessor and now owned by him as are now above the waters of Lake Erie border on the waters of the lake and not on the original Talbot road.

The above statements are denied by defendants, but I find them to have been proved, as I shall hereinafter state.

On or about the 4th day of July, 1908, plaintiff Carr executed and delivered to the plaintiff Volcanic Company a grant and demise of the exclusive right to search for, produce and dispose of petroleum and natural gas, in, under and upon the said lands, together with all rights and privileges necessary therefor, etc.

By instrument under the Great Seal of the province of Ontario, dated the 1st day of August, 1911, known as Crown lease number 1836, the Government of the province demised and leased unto defendant Chaplin, his heirs, executors, etc., the whole of that parcel or tract of land under the waters of Lake Erie in front of the lot, above described.

About the month of September, 1911, defendant Chaplin made a verbal contract with defendant Curry for putting down a well for the production of petroleum and natural gas in and upon the lands so demised by the Crown to Chaplin, and Curry, acting under such contract, entered upon what plaintiff Carr claims to be his land, with men and teams, and constructed a derrick and engine-house, etc.

Plaintiffs claiming that this entry was wholly unlawful, made objection thereto, and on defendants persisting in their operations, plaintiffs obtained an injunction from the local Judge, which injunction was continued until the trial. Plaintiffs now ask (1) that the injunction be made perpetual; (2) a declaration of their rights as to the ownership of the land, and as to riparian rights, and damages.

The defendants claim that, if the waters of the lake have washed away the bank and encroached in and upon lot 178, the lands up to the foot of the high bank beforementioned became the property of the Crown, and that the south-westerly external boundaries of the lot shifted as the waters of the lake encroached thereon, giving full right to the Crown to enter into the Crown lease before mentioned.

The point involved is extremely interesting and is one which has never yet been expressly decided, either in England or Canada.

The surveyors who were called all agree that by reason of the original survey having been made so long ago, and of the disappearance of original monuments, etc., they could not now lay out upon the land and water as they now exist, the old Talbot road. Numerous witnesses were called who

remembered that road and could speak of its boundaries, and of the erosion of the beach causing the road to be carried away north to its present position, many rods north of its original situs.

The evidence is overwhelming (I disregard the curious evidence of Samuel Cooper) and I find it to be the fact that the locus now in controversy is part of the lot 178 north of the old Talbot road.

Having come to this conclusion, it follows that if plaintiffs' contention in law is well founded it is quite immaterial whether or not the construction of the derrick is entirely in the water, or partly in the water and partly on the beach—the fact being that it is on Carr's property.

In "Gould on Waters," 3rd ed., par. 155, pp. 306, to 310, inclusive, after stating the general rule that "land formed by alluvion, or the gradual and imperceptible accretion from the water, and land gained by reliction, or the gradual and imperceptible recession of the water, belong to the owner of the contiguous land to which the addition is made: and that conversely land gradually encroached upon by navigable waters ceases to belong to the former owner," quoting the maxim *Qui sentit onus debet sentire commodum*, the author proceeds (p. 309). "But when the line along the shore is clearly and rigidly fixed by a deed or survey, it will not, it seems, afterwards be changed because of accretions, although as a general rule, the right to alluvion passes as a riparian right."

In *Saulet* v. *Shepherd* (1866), 4 Wall. S. C. U. S. 502, it was held that the right to alluvion depends upon the fact of continuity of the estate to the river—when the accretion is made before a strip of land bordering on a river the accretion belongs to it and not to the larger parcel behind it and from which the strip when sold was separated, citing at length the judgment in a case of *Gravier* v. *City of New Orleans*, which is in some little known report not to be found in the library at Osgoode Hall. In *Chapman* v. *Hoskins* (1851), 2 Md. Ch. at p. 485, the general rule is stated as follows (par. 2, head-note): "Owners of lands bordering upon navigable waters are as riparian proprietors, entitled to any increase of the soil which may result from the gradual recession of the waters from the shore, or from accretion by alluvion, or from any other

cause; and this is regarded as the equivalent for the loss they may sustain from the breaking in, or encroachment of the waters upon their lands."

Now in the case in hand plaintiffs say that they could gain nothing by accretion, by alluvion or other cause, and consequently they should not lose by encroachment of the water upon their land, to which fixed termini were assigned by the grant from the Crown. This doctrine seems to be well supported by decisions of Courts which are not binding upon me but which command my respect, and which would seem to be accurately founded upon basic principles. In *Smith* v. *St. Louis Public Schools*, 30 Mo. 290, the principle is very clearly stated: "The principle upon which the right to alluvion is placed by the civil law—which is essentially the same in this respect as the Spanish and French law, and also the English common law—is, that he who bears the burdens of an acquisition is entitled to its incidental advantages; consequently, that the proprietor of a field bounded by a river, being exposed to the danger of loss from its floods, is entitled to the increment which from the same cause may be annexed to it. This rule is inapplicable to what are termed limited fields, *agri limitati*; that is, such as have a definite fixed boundary other than the river, such as the streets of a town or city." The reference in the judgment to the English common law is not quite so positive as the head-note states it. The Judge (Napton) in the course of a very learned opinion says: "It will be found, indeed, that upon this subject the Roman law, and the French and Spanish law which sprung from it, are essentially alike, if we except mere provincial modifications; and it is believed that the English common law does not materially vary from them. This uniformity necessarily results from the fact that the foundation of the doctrine is laid in natural equity." In saying this he may have had in his mind the language of Blackstone, to be now found in book 2, Lewis ed., at pp. 261-2; although he does not cite him. There are some earlier English authorities to which I shall refer later.

Then there is a case of *Bristol* v. *County of Carroll* (1880), 95 Ill. 84; (Par. 3 of head-note):—

"3. To entitle a party to claim the right to an alluvial formation, or land gained from a lake by alluvium, the lake must form a boundary of his land. If any land lies between

his boundary line and the lake, he cannot claim such formation."

In "Doe on the demise of the Commissioners of Beaufort v. Duncan" (1853), 1, Jones' L. R. N. C. at p. 238, Battle, J., says: "Were the allegations supported by the proof, an interesting question would arise, whether the doctrine of alluvion applies to any case where a water boundary is not called for, though the course and distance called for may have been co-terminous with it? We do not feel at liberty to decide the question, because we are clearly of opinion that the evidence given on the part of the defendant does not raise it."

Cook v. *McClure* is a judgment of the Court of Appeal of the State of New York (58 N. Y. 437). The head-note is as follows: "It seems the rule that where a boundary line is a stream of water, imperceptible accretion to the soil, resulting from natural causes, belong to the riparian owner, applies as well where the boundary is upon an artificial pond as upon a running stream."

"In an action of ejectment, plaintiff claimed under a deed conveying premises upon which was a mill and pond. The boundary line along the pond commenced at 'a stake near the high-water mark of the pond,' running thence 'along the high-water mark of said pond, to the upper end of said pond.' Held, that the line thus given was a fixed and permanent one, and did not follow the changes in the high-water mark of the pond; and that defendant, who owned the bank bounded by said line, could not claim any accretions or land left dry in consequence of the water of the pond receding, although the gradual and imperceptible result of natural causes."

In *The School's* v. *Risley*, 10 Wall. S. C. U. S. p. 90, the decision was as follows: "A street or tow-path or passway or other open space permanently established for public use between the river and the most eastern row of lots or blocks in the former town of St. Louis, when it was first laid out, or established or founded, would prevent the owners of such lots or blocks from being riparian proprietors of the land between such lots or blocks and the river. But this would not be true of a passage-way or tow-path kept up at the risk and charge of the proprietors of the lots, and following the changes of the river as it receded or encroached, and if the inclosure of the proprietor was advanced or set in with such recession or encroachment."

In *Re Hull and Selby Railway* (1839), 5 M. & W. 327, the general law as to gradual accretion or recession is stated. Alderson, B., says, p. 333: "The principle laid down by Lord Hale, that the party who suffers the loss shall be entitled also to the benefit, governs and decides the question. That which cannot be perceived in its progress is taken to be as if it never had existed at all"

See also *Giraud's Lessee* v. *Hughes* (1829), 1 Gill & Johnson (14 C. A. Reports, Md., 115.)

Defendants' counsel, in the course of a very elaborate and careful argument, cited numerous authorities in support of the view that the plaintiff Carr had lost the land by the encroachment of the water. I do not cite all of these because they are set out at large in the extended report of the argument, but I do not think there is any case in which it has been expressly held that a person in the position of this individual plaintiff loses his property because of the gradual encroachment of the water past the land in front of the road, past the road and past the fixed boundary of plaintiffs' land. He could not have gained an inch of land by accretion even if the lake had receded for a mile and therefore it seems that the fundamental doctrine of mutuality, formulated in the civil law and adopted into the jurisprudence of many countries, cannot apply to him.

Perhaps the strongest English case cited by defendants' counsel was *Foster* v. *Wright* (1878), 4 C. P. D. 438: "The plaintiff was lord of a manor held under grants giving him the right of fishery in all the waters of the manor, and, consequently, in a river running through it. Some manor land on one side of, and near but not adjoining the river, was enfranchised and became the property of the defendant. The river, which then ran wholly within lands belonging to the plaintiff, afterwards wore away its bank, and by gradual progress, not visible, but periodically ascertained during twelve years, approached and eventually encroached upon the defendant's land, until a strip of it became part of the river bed. The extent of the encroachment could be defined. The defendant went upon the strip and fished there." Held, that an action of trespass against him for so doing could be maintained by the plaintiff, who had an exclusive right of fishery which extended over the whole bed of the river notwithstanding the gradual deviation of the stream on to the defendant's land."

That case goes a long way in support of defendants' contention. But Lord Coleridge, C.J., concurs only in the result arrived at by Lindley, J. He thinks the safer ground appears to be "that the language of the grant conveys the rights to take fish, and to take it irrespective of the ownership of the soil over which the water flows and the fish swim. The words appear to me to be apt to create a several fishery, i.e., as I understand the phrase, a right to take fish in *alieno solo* and to exclude the owner of the soil from the right of taking fish himself; and such a fishery, I think, would follow the slow and gradual changes of a river, such as the changes of the Lune in this case are proved or admitted to have been."

There is a reference in the argument, and in the judgment in this case, to some of the old authorities, for example, "Bracton, Book 2, ch. 2, sec. 7, Nichols' translation, p. 218: 'But if the increase has been so gradual, that no one could discover or see it, and has been added by length of time, as in a course of many years, and not in one day or in one year, and the channel and course of the water is itself moving towards the loser, in that case such addition remains the purchase and the fee and freehold of the purchaser, if certain bounds are not found."

Lindley, J., seems to think that in *In re Hull and Selby Railway*, to which I have already referred the Court, declined to recognise this principle.

As against the authorities in the United States which I have cited, there is a very strong case of *Widdecombe* v. *Chiles* (1903), 73 S. W. R. 444, a judgment of the Supreme Court of Missouri. The head-note is as follows: "Defendant was the owner of the south half of a section of land between which and the river bed there was originally a strip of 8 acres, forming the fractional north half, which had not been patented. The river changed its bed until it had washed away the 8 acre strip, and flowed through defendant's land, when it began to rebuild to defendant's land all that it had washed away, and about 200 acres additional. Plaintiff then received a patent for the fractional north half of the section as described by the original survey. Held, that the accretion being to defendant's land, plaintiff took no title by his patent." And Valliant, J., says, p. 446: "This Court has not said in either of those cases, and we doubt if any Court has ever said, that land acquired under a deed giving metes and bounds which do not reach the river—

which in fact did not reach the river when the deed was made—does not become riparian when the intervening land is washed away, and the river in fact becomes a boundary."

In considering authorities which are not binding upon me and when I have to decide "upon reason untrammeled by authority," (per Werner, J., in *Linehan* v. *Nelson*, 197 N. Y. 482, at p. 485), I prefer those United States decisions, which I have earlier cited. There have also been cited to me authorities which it is claimed dispose completely of the *Widdecombe Case*, viz., the *Lopez Case*, which is reported as "*Lopez* v. *Muddun Mohun Thakoor*," in 13 Moore's Indian Appeals, at p. 467; *Singh* v. *Ali Kahn*, L. R. 2 Indian Appeals, 28, and Theobald on Land, p. 37.

It was strongly contended by the junior counsel for the plaintiffs that, apart from the main question, and granting that the erosive action of the lake has encroached upon the plaintiff Carr, and that he has lost some of his land, then at any rate he only loses it down to the low water mark. But having regard to the view that I take about the main question, it is not necessary to consider that argument.

I do not see that the Statute 1 Geo. V. ch. 6, has any application to this case; nor do I see that the Attorney-General ought to bring the action or is a necessary party, the plaintiffs being concerned only with the trespass upon their lands and not with any supposed public right.

The good faith, or the opposite, of the defendants in making the trespass is a matter of no consequence in the disposal of the action.

I find, therefore, that there has been a trespass by defendants upon the plaintiffs' land, and that they are entitled to have the injunction herein made perpetual, with full costs on the High Court scale and ten dollars damages.

Thirty days' stay.

The injunction orders are not before me. If any questions of costs are reserved for the trial Judge, plaintiffs are to have costs all through.

HON. SIR G. FALCONBRIDGE, C.J.K.B. JULY 15TH, 1912.

FULLER v. MAYNARD.

3 O. W. N. 1602.

Vendor and Purchaser—Contract for Sale of Land—Time for Completion — Extension — Evidence — Notice to Complete — Reasonableness — Right of Vendor to Determine Contract—Specific Performance — Refusal — Discretion — Return of Part of Purchase-money Paid — Costs.

Action by purchaser for specific performance of an agreement to sell certain lands, which defendant had attempted to rescind owing to delay in closing. The sale was to have been closed on September 17th, 1911, but as plaintiff was in England and about to return his solicitors succeeded in postponing completion thereof. On October 14th defendant's solicitors gave notice that they intended cancelling the agreement on October 19th, unless it was closed by that date. On October 24th plaintiff returned home, on October 28th defendants gave notice that the agreement was at an end and on November 10th plaintiff made a tender of the purchase-money which defendant refused. Defendant claimed that plaintiff was not until this latter date in a position to finance the purchase and that he was delaying matters in order that he might turn over his agreement at a profit.

FALCONBRIDGE, C.J.K.B., *held*, that even if defendant had not validly rescinded the agreement, plaintiff was not entitled to specific performance in view of his dilatory conduct and in view of the fact that he had not always been ready and eager to carry out the contract. *Harris* v. *Robinson*, 21 S. C. R. 397, and other cases referred to.

Action dismissed with costs save as to the claim for return of the $500 purchase-money paid on account as to which judgment is given for plaintiff with $50 costs to be set off against general costs of action.

Tried at Toronto.

Action by purchaser for specific performance of a contract for the sale of land.

G. Kappele, K.C., for the plaintiff.

A. J. Russell Snow, K.C., for the defendant.

HON. SIR GLENHOLME FALCONBRIDGE, C.J.K.B.:— Wherever Messrs. C. Kappele and Nasmith differ in their recollection of what was said either face to face or by telephone, I am bound by law to find the statements of the former not proven. There two witnesses are on the same plane as regards worldly position and demeanour in the box, and there are no compelling outside circumstances to turn the scale in favour of Kappele's statements.

On the contrary it is quite manifest from K. & K.'s letter to their clients of 1st September, that they were then attaching very little importance to their requisitions on the title. The only faint suggestion in the argument about title was one calling for an outstanding mortgage and discharge thereof.

This is a mere question of conveyance and not of title.

Armour, 3rd ed. 47, 150, 151. *Townsend* v. *Champernown,* 1827 1 Y. & J. 449 (incorrectly cited in cases and text books as Champerdown).

There was therefore no verbal extension of time granted by plaintiff's solicitors, and they had no reason to believe that their answers to the requisitions were not satisfactory, nor that any question of title stood in the way of closing the matter. That was the position before and on the 17th September—the day fixed for completion according to the terms of the contract.

Plaintiff was in England and his solicitors being pressed by Nasmith to close cabled him on the 6th October: "Maynard Tilley titles satisfactory, cable moneys." And again on 10th October: "Vendors threatening, cable."

Plaintiff answered on 12th October: "Wait my arrival 23rd day of October," and this was communicated to defendant's solicitors.

On 14th October defendant's solicitors write to plaintiff's solicitors "without waiving the benefit of the clause making time the essence of the contract and in order that your clients may not have any cause of complaint, we now notify you on behalf of your client that the sale must be completed on or before Thursday the 19th day of October, 1911, inclusive, otherwise," etc.

Plaintiff's solicitors say this did not reach them until the 16th. Plaintiff arrived in Toronto on 24th October. Defendant's solicitors waited until 28th October and then wrote to say that the sale was off. They now suggest (and the circumstances lend colour to the theory), that plaintiff did not arrive with the money to carry out the transaction, but was marking time in order to turn his bargain over to some one at a profit. This he thought he had succeeded in doing, and on 8th November, his solicitors signified to defendant's solicitors their readiness to close out the purchase.

A tender of money (temporarily supplied to plaintiff for the purpose by certain persons to whom he had apparently succeeded in reselling the property), and documents was made by plaintiff on 10th November—the deeds and mortgages not being in the form settled by defendant's solicitors in this respect at least, that a lady's name was inserted along with plaintiff's as grantees "as joint tenants and not as tenants in common," and her name appears also with his as mortgagors. This it is said was done with the view of preventing Mrs. Fuller's dower attaching—she being in England, and plaintiff having forgotten, he said, to bring out the mortgages which had been sent to him there for execution.

Assuming that the stipulation in the original contract that time should be of the essence thereof was waived by conduct of the parties, e.g., by Nasmith urging Kappele to cable to his client, etc. (*Davlin* v. *Radkey,* 1910, 22 O. L. R. at p. 411; Fry, sec. 1120), was the notice of 14th October, a reasonable one? That is a question of fact, Fry 5th ed. (Can. notes), sec. 1128.

The 14th October was a Saturday. Defendant's solicitors knew plaintiff was in England or on the sea. In *Hetherington* v. *McCabe,* 1910, 16 O. W. R. 154, my brother Britton, held a notice given on Friday 7th to close at or before 3 p.m. on Monday 10th of same month, not be a reasonable notice. *Vide Crawford* v. *Toogood,* 1878, 13 C. D. 153.

So here it might be considered that the notice was not reasonable. But defendant did not assume to act promptly or strictly upon it. The utmost consideration and leniency were extended to plaintiff. Defendant waited till plaintiff had been 4 days in Toronto, when it was manifest that he was only playing fast and loose with defendant so as to get some one to step into his shoes. Nasmith says if plaintiff had come in on 24th October, he believes Ryrie (the man behind defendant), would have accepted the money.

The jurisdiction in specific performance, is in the discretion of the Court, Fry, sec. 44—a discretion not to be arbitrarily or capriciously exercised, but only in cases where circumstances *dehors* independent of the writing are shewn making it inequitable to interpose for the purpose of specific performance, per Plumer, V.-C., in *Clowes* v. *Higginson,* 1 V. & B. 527.

That eminent civilian and equity Judge, Strong, J., says in *Harris* v. *Robinson*, 1892, 21 S. C. R., at p. 397, that "the exercise of the jurisdiction is a matter of judicial discretion, one which is said to be exercised as far as possible upon fixed rules and principles, but which is nevertheless more elastic than is generally permitted in the administration of judicial remedies. In particular it is a remedy in the application of which much regard is shewn to the conduct of the party seeking the relief," and further on p. 404: "The rule which governs the Courts in giving relief by way of specific performance of agreements even in cases in which time is not made of the essence of the contract, is that a plaintiff seeking such relief must shew that he has been always ready and eager to carry out the contract on his part."

Lamare v. *Dixon*, L. R. 6 H. L. 423, and *Coventry* v. *McLean*, 22 O. R. at p. 9.

Judged by these standards the plaintiff fails to qualify himself to invoke the interposition of the Court by way of specific performance, even if the other issues involved were decided in his favour, e.g., if there were no valid rescission by defendant.

Therefore, I will not decree specific performance, and as to this, his action stands dismissed.

But he will have judgment for the $500 paid on account. This was in the present state of the real estate market a minor, nay an inconsiderable side issue. The disposition of the costs will, therefore, be that defendant shall have full costs minus the sum of $50 representing costs of the issue as to the $500. Defendant will retain the balance of his costs out of the $500.

Thirty days' stay.

DIVISIONAL COURT.

JULY 17TH, 1912.

ZOCK v. CLAYTON.

3 O. W. N. 1611.

Crown Lands—Patent—Misdescription—Application for same Lands—Dispute—Finding of Minister of Lands, Forests and Mines—Patent for same Lands Issued to Second Applicant—Certificate of Title—Action by First Patentee to Establish Title—R. S. O. 1897 c. 138, s. 169—Parties—Attorney-General—Intervention.

Action for a declaration that plaintiff is owner in fee of a certain island, and for an injunction restraining defendants trespassing thereon. Plaintiff's predecessor in title, one Duncan, had applied in 1907 for a patent for what he considered was a specific island with which he was well acquainted. By inadvertence and mistake the application and the patent issued in pursuance thereof had apparently described another and much smaller island in the same lake. Defendant in 1909 applied for the island which Duncan had intended to purchase, knowing Duncan considered it his, and a patent therefor was issued to him after a hearing before the Minister of Lands, Forests and Mines of which both Duncan and plaintiff were notified. Plaintiff then brought action as above.

LATCHFORD, J., gave judgment for plaintiff with costs.

DIVISIONAL COURT, (BRITTON, J. *dissenting*) *held*, that as plaintiff alleged fraud on the part of defendant in his application to the Department, the Attorney-General should be given an opportunity to intervene and until then judgment should be withheld.

Held, that the Court has no power to review the decision of the Minister on an application of this character.

Per FALCONBRIDGE, C.J.K.B., if the Attorney-General decides not to intervene, the appeal from the judgment of Latchford, J., should be allowed and the action dismissed with costs.

Per BRITTON, J., the appeal should be allowed and the action dismissed with costs.

An appeal by the defendant from a judgment of HON. MR. JUSTICE LATCHFORD, at trial of an action for a declaration that plaintiff was owner in fee of a certain island, and for an injunction restraining the defendants from entering thereon, and for other relief.

The appeal to Divisionaal Court was heard by HON. SIR GLENHOLME FALCONBRIDGE, C.J.K.B., HON. MR. JUSTICE BRITTON, and HON. MR. JUSTICE RIDDELL.

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

M. C. Cameron, for the plaintiff.

HON. SIR GLENHOLME FALCONBRIDGE, C.J.K.B.:—The Minister of Lands, Forests and Mines, before the issue of defendant's patent, considered and disposed of the claim arising under Zock's patent, and thereupon defendant received the certificate of title. That the Court cannot review his finding and judgment, is well settled.

But in view of the very strong opinion of the trial Judge that statements not only false, but false to the knowledge of Clayton were made by him to the department, whereby the officials were misled, and the Minister's judgment practically obtained by fraud, and of the further fact that in the present case a prior patent issued to the plaintiff, I agree that the Attorney-General should have an opportunity to intervene herein.

The plaintiff will notify him accordingly. If the Attorney-General signifies his intention not to intervene this appeal will be allowed with costs and the action dismissed with costs.

If the Attorney-General should desire to be heard or to adduce evidence or to cross-examine witnesses already called, he may be added as a party, and arrangements may be made either for re-argument or for hearing the new evidence.

Judgment will be withheld until the Attorney-General shall have determined what course he will take.

HON. MR. JUSTICE BRITTON:—All the material allegations in the statement of defence have in my opinion been established by the evidence.

The evidence before the Court shews that the Crown intended to grant, and did grant, to the defendants the island in question.

The claim of the plaintiff is that the island granted to Walter Duncan by patent No. 2803, and as to which a certificate of ownership under the Land Titles Act, was obtained by the said Duncan, calling the land parcel 1024, is the same island as was subsequently granted to the defendants by patent No. 3368, and as to which the defendants obtained a certificate of ownership under the Land Titles Act—describing the island as parcel 1620. The answer to plaintiff's case—apart from any question of fraud, is first, that the identity of parcels separately described as only one parcel

is not established. The evidence does not satisfy me that what plaintiff got as Duncan Island is, or was, intended to be the same as what the defendants got as the Clayton Wood Island. The description in grant to plaintiff's predecessor is "Duncan Island, containing 2¼ acres, more or less, situate in Bolger lake opposite lots No. 20 and 21 in the 7th concession of the said township of Burton."

The description in the patent to defendants, is "Clayton Wood Island, containing 7 and 1/5 acres, more or less, situate in Bolger lake, in the said township of Burton, as shewn on a plan of survey . . . a copy of which plan is attached to and forms part of the said letters patent." It is not clear to me that any person can possibly from this plan say, with any degree of certainty, that the islands so differently described are really only one island. The plaintiffs attack the ownership of what was unquestionably conveyed to them as Clayton Wood Island—and the proof must be made by plaintiff that this very island bought and paid for by defendants had already, by another name, been bought and paid for by Duncan. The plaintiff has failed in his proof.

Second.—The question of identity was raised by the plaintiff in opposition to the application of the defendants to the Minister of Lands, Forests, and Mines, for a patent for this island. An investigation was had—enquiry was made—the result of which was that the opposition of plaintiff was not effective, and the patent issued to defendants. The Minister issued his certificate. The plaintiff had caused a caution to be filed against the issue to the defendants of a certificate of title.

After the disposition of the matter by the Minister of Lands, Forests, and Mines, the plaintiff withdrew this caution and the certificate of title issued to the defendants. The question of identity seems to me as between the parties to this action is *res judicata*. As I said the act of the Crown was advisedly done. The plaintiff had full opportunity if the facts would warrant it of preventing the patent issuing to the defendants.

Fraud in applying for the purchase of land should not be imputed where all parties interested were heard—and when there was a decision apparently on the merits.

I am of opinion that the appeal should be allowed and the action dismissed, both with costs.

HON. MR. JUSTICE RIDDELL:—The learned Judge's findings of fact are in my opinion, after a careful perusal of the evidence, entirely justified. Some of his conclusions which are complained of might indeed have been the other way, and perhaps a reading of the words used by the witnesses as they appear in cold black and white would suggest that his view of the conduct of the defendants was unduly severe; but my brother saw the witnesses, and could best judge of them; and I cannot say that his conclusions are not wholly warranted.

Duncan, who had been shooting in the neighbourhood of Bolger lake in Burton township, district of Parry Sound, and who with three others, was the owner of a lot of 28 acres, upon which they had a shooting camp, was desirous of buying an island in the lake. He knew quite well the island he wanted to buy, the largest island in the lake; he saw Mr. Aubrey White, told him he wanted to buy the largest island in the lake—put in a formal application in which, being misled by the departmental map, he described the island as being intersected by a certain line—the extent of the island was by an officer of the department, estimated at 2½ acres. Duncan paid $25 the purchase-price, got his patent and then his certificate of ownership from the Registrar at Parry Sound. This all took place before the end of the year, 1907. Thereafter the island was commonly known as Duncan Island; and Duncan had no idea that he had not become regularly the owner of the island he had desired to buy until April, 1909—and in the meantime in 1908, sold to the plaintiff. The island he claims as having been patented to him is not intersected by the said line, and it contains in fact about 7½ acres, being admittedly the largest island in the lake. The defendant Clayton hunting in the vicinity was told by the guide, Brownell, that the large island was Duncan Island, but suggested some difficulty in the title. Clayton then made up his mind "to play for it and take a chance in getting it any way." I do not think there is any doubt that Clayton knew perfectly well that the island was claimed by Duncan—but he put in an application for the island—Duncan was notified as was Zock, and the Minister took the matter into his consideration, heard witnesses and

finally decided that Duncan's patent did not cover the island in question, and directed a patent of the island to issue to the defendants. Zock had in the meantime filed a caution, but upon receiving a notice under R. S. O., ch. 138, sec. 169 (2), he withdrew his caution, a certificate was produced whereby it appeared that the claim arising upon Zock's patent had been considered by the Commissioner and disposed of by him before the issue of the defendants' patent, and thereupon the defendants received their certificate of title.

The plaintiff brought his action claiming (1) patent to Duncan; (2) transfer to himself; (3) patent of same land to the defendants, and claimed; (a) a declaration that he is owner in fee of the island; (b) an injunction restraining the defendants from entering, etc., the same; (c) an injunction restraining the defendants from transferring or mortgaging, etc., the same; (d) costs; (e) general relief. At the trial my learned brother gave the plaintiff his claim (a), (b), and (d) only.

The defendants now appeal.

So far as the facts are concerned, upon the evidence there can be no doubt that the Crown did grant a patent to Duncan of the island, not quite accurately described in deed. No doubt, it was thought that there were only 2½ acres instead of 7½, probably because the water had been high when the original surveyors were in the neighbourhood. The exact position topographically also was not correctly represented. But that the large island for which the patent was afterwards issued to the defendants was bought and paid for by Duncan, and that it was intended that the patent he got should cover this island, upon the evidence adduced before the trial Judge and before us, there can be no doubt.

But it is contended by the defendants that the Court cannot go behind the finding and judgment of the Minister (Commissioner). There are several cases in our own Courts in which there was a dispute between parties as to who was entitled to a patent to certain lands—and it has been invariably held that where the Government have examined into and considered the claims of such opposing parties to receive the patent and decided in favour of the one, and issued a patent accordingly, the other cannot successfully appeal to the Court—the Court will not, and cannot interfere.

Boulton v. *Jeffrey* (1845), 1 E. & A. 111, is one example. The unsuccessful claimant filed a bill in equity to have the successful one declared a trustee for him; but he failed, and would have failed even if he had shewn improvidence, etc.

In *Barnes* v. *Boomer* (1864), 10 Gr. 532, the Crown Lands Department decided that one of two applicants should receive a patent; and it was held that the Court could not interfere. There, however, it was not shewn that the Crown acted in ignorance or misapprehension.

But in *Kennedy* v. *Lawlor* (1868), 14 Gr. 224, the Court (Vankoughnet, C.), held that it had no power to review the decision of the Commissioner, and say he acted improvidently or in error or mistake.

Somewhat to the same effect is *Farmer* v. *Livingstone* (1882), 8 S. C. R. 140.

But in none of these cases was there a prior patent issued to the plaintiff on the strength of which an attack was made on the defendants' patent or its validity as in the present case.

R. S. O. 1897, ch. 138, sec. 169, which was the Act in force at the time of the transactions in question, is relied upon by the defendants. The Local Master found Duncan's patent registered, sec. 169 (2), and gave notice accordingly to Zock, he received a certificate under sec. 169 (3), and thereupon discontinued the proceedings and disallowed the objection and claim founded on the Zock-Duncan instruments, as was his duty under that section. The legislation it seems to me makes the position of the defendants under their patent and the decision of the Commissioner unassailable—and the plaintiff must get rid of that patent before he can say that the defendants have no right in the island.

"A long line of decisions has settled that an action to declare void a patent for land, on the ground that it was issued through fraud or in error or improvidence, may be maintained, and that measure of relief granted, at the suit of an individual aggrieved by the issue of such patent, and to such an action the Attorney-General as representing the Crown is not a necessary party: *Bartyn* v. *Kennedy* (1853), 4 Gr. 61; *Stevens* v. *Cook* (1864), 10 Gr. 410, see also *Farah* v. *Glen Lake Mining Co.* (1908), 17 O. L. R. 1," per Moss, C.J.O., in *Florence, etc.* v. *Cobalt, etc.* (1909), 18 O. L. R. 275, at p. 284. If it were quite clear that there is nothing

more in the way of evidence, etc., available, one might now declare the defendants' patent void; but it must not be forgotten that the Commissioner has had before him witnesses and documents, perhaps he had personal knowledge or information which is not before us. It would not be proper—if the responsible advisers of the Crown desire to insist upon the propriety of the Commissioner's decision and to contend that Duncan's patent did not cover this island—for us in the absence of the Attorney-General and without affording him an opportunity of supporting by evidence and argument the view of his former colleague and the validity of the patent issued in accordance with such view, to decide in favour of the plaintiff. I have been careful to say that the conclusions of fact arrived at are such as are justified by the evidence before Mr. Justice Latchford and this Court; but these conclusions may be in fact quite erroneous and by further evidence shewn to be erroneous.

I think that the Attorney-General must be given an opportunity to state, and if necessary, to justify the stand taken now by the Crown. If he upon being applied to by the plaintiff states that the Crown does not desire to intervene, the case may be disposed of upon the evidence now before the Court without further argument; if he desires to be heard in argument, such argument may be heard on some day to be arranged; if he desires to cross-examine witnesses already heard and (or) adduce further witnesses, he may be made a party to the action, all proper amendments made in the pleadings and the trial continued before Mr. Justice Latchford at some convenient time, the evidence already taken to stand.

In the meantime this motion will be retained.

HON. MR. JUSTICE KELLY. JULY 16TH, 1912.

EVERLY v. DUNKLEY.

3 O. W. N. 1607.

Will—Testamentary Capacity—Claim by Daughter to Moneys Deposited in Bank—Trust—Evidence—Joint Account—Survivorship—Conduct of Bankers.

Action by executor of one Elizabeth Kenny, deceased, for the sum of $542.17, alleged to belong to the estate of the said deceased, and for an injunction restraining defendants dealing with the same. Defendant Esther Dunkley claimed the moneys in question were hers on the grounds that (1) her mother was mentally incapable of making a will, (2) The moneys after her father's death were held in trust for her under an alleged prior agreement between her father and mother. (3) The money was held by the defendant bank on a joint account of the testatrix and herself with a right of survivorship in herself.

This latter claim was based on the following order to the bank signed by testatrix in August, 1911, some six months prior to her death and when laid up in the hospital with bronchitis, "Arrange my money in Esther Dunkley's name so she can draw it. Elizabeth Kenny."

KELLY, J., *held*, that defendant Esther Dunkley had failed to prove that her mother was incapable of making a will or that there was any trust in her favour.

That the order to the bank relied on by her did not constitute her a joint owner of the moneys on deposit but was only given for the convenience of the testatrix.

Payne v. *Marshall*, 18 O. R. 488, and other cases referred to.

Judgment for plaintiff with costs.

J. A. Walker, K.C., and M. Houston, for the plaintiff.

W. G. Richards, for the defendant, Dunkley.

O. L. Lewis, K.C., for the defendant, Canadian Bank of Commerce.

HON. MR. JUSTICE KELLY:—The plaintiff, who is the executor of the last will of Elizabeth Kenny, deceased, claims $542.17, and an injunction restraining the defendants from dealing in any manner with these moneys, which were on deposit with the defendant, the Canadian Bank of Commerce, at the time of Elizabeth Kenny's death.

Testatrix, Elizabeth Kenny, made her will on the 16th November, 1911, and thereby appointed the plaintiff, one of her sons, as sole executor. She died in the city of Chatham on February 27th, 1912, and probate of the will was granted on April 4th, 1912, to the executor.

The assets, as claimed by the executor, consisted of some household furniture and the moneys so on deposit.

Defendant, Esther Dunkley, is the only daughter of the deceased, and is a half-sister of the plaintiff.

Deceased by her will gave to the executor $300 to be used by him for the benefit of another son, Charles Kenny, subject to certain directions as to the control thereof, and as to the conditions on which payment was to be made to Charles. The household furniture was given to the executor in trust for the use and benefit of Charles, with the right to the executor to retain possession of it until Charles should "alter his present mode of living," and all the rest of the estate was given to the plaintiff.

Defendant, Esther Dunkley, claims to be the owner of the money under the circumstances hereinafter set forth, and alleges in her defence that her mother at the time of making the will was not of sound mind, memory or understanding, and that if she signed the will, her signature was obtained by undue influence on the part of the plaintiff and his wife and others acting with them.

At the trial the claim of undue influence was abandoned, and there is no evidence that any such existed.

The defences, therefore, relied upon by defendant, Esther Dunkley, are, first, that the moneys in question were held by her mother in trust for her after her father's death, under an alleged understanding between her father and mother in 1896; secondly, that the money in the bank was held by the mother and this defendant in joint account with a right of survivorship in the latter; and, thirdly, that the mother was mentally incapable of making the will.

Dealing with the last of these claims, I find that at the time of making the will the testatrix was of sound mind and fully capable of making a will and disposing of any assets which she had.

The evidence shews that the testatrix had at times suffered from neuralgia, that on November 8th, 1911, she was taken ill in her rooms where she lived with her son Charles, and from that date until November 13th, her daughter stayed with her a considerable part of the day time, but not at night. The daughter says that during that time her mother was in a condition in which she did not at times understand what was taking place around her, that she had delusions, she did not recognize her or other members of the family who called

on her, and that she had a stroke of paralysis on or about November 8th.

On November 14th, Esther Dunkley being ill was taken to the hospital, and for several weeks following November 13th, she did not see her mother.

Elizabeth Liddy says she was in deceased's room for a few minutes on November 15th, that the deceased was then sitting up but did not know her or her daughter-in-law, the wife of the plaintiff, that on the following day, when she called, the deceased had difficulty in recognizing her and mistook her for the doctor. This witness on that day had come to borrow from the deceased $5 for the daughter, Esther Dunkley, and she admits that deceased was capable of understanding the nature of her message, and, of her own accord and without assistance, took from a pocket-book, which she had under the mattress of her bed, the exact amount of money asked for, and gave it to her. Her evidence on this point does not bear out her general statements about the mental condition of the testatrix.

The plaintiff and his wife and his son and Charles Kenny all deny that on the day the will was made deceased displayed the mental weakness which was claimed by Esther Dunkley and Mrs. Liddy. Then there is the evidence of the doctor and others, who were present when the will was made, some of whom can be said to be disinterested witnesses.

Dr. Holmes, a practitioner of over forty years' standing, who was deceased's medical adviser, visited her daily for several days beginning on November 9th, and saw her just before the making of the will, when he says she was in her "normal mental condition," and capable of doing business. Referring to the statements made to the effect that deceased suffered from paralysis, he adds that she never was paralyzed, and that he never believed her brain was affected.

Henry Dagneau, a friend of deceased, for whom she sent some days previously to consult about making her will, and who was present at the time the will was made, and Mr. Clarke, the solicitor called in by Dagneau, say positively that she was in a fit and proper condition to make the will. It is shewn, too, by the evidence of Dagneau and Clarke and others that, without suggestion from any one, she gave the instructions from which the will was drawn.

On the whole evidence, therefore, I am clearly of opinion that the deceased at the time of making her will was in a

fit mental condition and perfectly competent to do what she did.

Esther Dunkley, to establish her claim that the moneys in question were held by the mother in trust for her, after her mother's death, claims that in 1896, a purchase of some property was made by Esther Dunkley's father, Lewis Kenny, and that the deed thereof was made to his wife, Elizabeth Kenny, on the understanding that the daughter, Esther Dunkley, would have it after her death. The father died about eleven years ago, and Elizabeth Kenny in 1909, sold the property, and the daughter claims that $800 out of the proceeds of the sale was deposited in the Canadian Bank of Commerce in the account now in question, and that the moneys sued for are part of that $800.

To support her contention she produced a will made by her mother, in January, 1899, when she was suffering from an attack of typhoid fever, by which she purported to devise to her husband, Lewis Kenny, and this daughter, the lands acquired by her in 1896, to hold to them jointly during the lifetime of the husband, and at his death to the daughter, her heirs and assigns.

To corroborate this, John H. Barnes, one of the witnesses to that will, was called, and swore that at the time of the making of the will he heard Mrs. Kenny say she wanted Mrs. Dunkley to have the place, that that was the understanding between her and her husband.

Mrs. Liddy says she was in the adjoining room when the will was being made, and that she heard Mr. and Mrs. Kenny say the property would go to the daughter after their death.

The evidence of Charles Kenny, on the other hand, is that at the time the prior will was made his mother was so ill as not to be able to recognize him, and that a few months before her death she informed him she did not know of the will until two weeks after she had been returned from the hospital after recovery from the fever.

There is some doubt, too, about the ownership of the money with which the purchase of the property was made in 1896, and I am unable to say on the evidence that it is clear that it belonged to Lewis Kenny and not to his wife.

I am not prepared to accept the evidence of the trust as sufficient to establish it. I believe the defendant Esther Dunkley's account of the terms of the alleged understanding that the property was to be hers on the death of both

her parents was suggested to her largely by reading the prior will.

The evidence of Barnes and Mrs. Liddy is consistent with the terms of the will, and does not go further than to shew the intention of the testatrix at that time to make her daughter her devisee subject to the benefits given to the husband.

Mrs. Liddy's evidence throughout was weakened by an evident bias in favour of Esther Dunkley, and must be accepted with some hesitation.

Though Esther Dunkley claims that there was the understanding at the time of the purchase of the property that she would be entitled to it after the death of her parents, and that she knew of the understanding at that time, her subsequent conduct in no way indicated that she believed or relied upon such understanding. When the property was sold about three years ago, she was present, and saw and heard her mother make a statutory declaration, the terms of which might well indicate a denial of any trust in favour of the daughter, and it does not appear that either then or at any other time in her mother's lifetime she asserted any right to the property, or made the question of the alleged trust a subject of conversation either with her mother or with any other person. Moreover, when there was talk of a new will being made, in November, 1911, the daughter shewed considerable concern, and she says she warned Dagneau against drawing a new will.

Considering that all that the mother owned or professed to own at that time, outside of the furniture, which was of little value, was the money in question, which the daughter now claims was held in trust for her, one cannot well understand this concern or her anxiety that a new will should not be made, if she really believed the property was held in trust for her.

Dagneau's evidence is that a short time before the will was made, in November, 1911, he met Esther Dunkley, on the street, and she informed him that either she or her mother could draw the money which was then in the bank, and she asked him if he thought it would be safe to leave it there or should she draw it out; and in answer to his inquiry as to who owned the money, she replied: "Of course, it is mother's." She does not deny this, but says she does not remember making the statement. Dagneau also says

that when the testatrix first discussed with him the making of the will of November, a few days before it was made, Mrs. Dunkley wanted her mother to leave some of the money in the bank to her, but that the mother refused. Mrs. Dunkley denies this, however.

As between these two, it is to be considered that Dagneau is a disinterested witness and gave his evidence straightforwardly and candidly, while the evidence of Mrs. Dunkley is self-serving.

Do not these circumstances indicate that Mrs. Dunkley did not believe in the existence of the trust she now sets up, and that she considered the money as belonging to her mother?

It would, to my mind, be most dangerous to allow a trust to be established on evidence such as has been put forward in this instance.

The further claim of the defendant, Esther Dunkley, that she is entitled to the money in the bank by way of survivorship is based on the happenings in August, 1911. There was then on deposit the sum of $574.71 in the savings department of the Canadian Bank of Commerce, at Chatham, in the name of Elizabeth Kenny, the account being numbered K. 68. Elizabeth Kenny was then in St. Joseph's Hospital, Chatham, suffering from bronchitis, and on that day she signed a memorandum in the following words:—

"Arrange my money in Esther Dunkley's name so she can draw it. Elizabeth Kenny. Chatham, August 18th, 1911."

Esther Dunkley says this memorandum was drawn by her at her mother's dictation, and was signed by her mother who requested her to take it to the bank and have it arranged so that either could draw it. On the same day she took it to the bank, and on its being presented to the accountant of the bank he changed the heading of the deposit account so as to read as follows: "Made joint a/c, August 18th, 1911. Elizabeth Kenny & Esther Dunkley or either," after which she returned to her mother and told her that either of them could draw it, and that the mother was satisfied. The deposit book remained in possession of the deceased until the time of her death.

Between August 18th, and the death of Elizabeth Kenny, three withdrawals were made from the account, one on August 26th for $5, by Esther Dunkley; another on Sep-

tember 20th, for $5, and a third on October 24th for $35; these two being by Elizabeth Kenny.

Esther Dunkley further says that at the time the memorandum was drawn the mother said to her, "If anything should happen to me in the hospital, take my money and my furniture and do the best you can with it," and that the mother requested her to pay her funeral expenses.

During Mrs. Kenny's last illness, the wife of the plaintiff went to the bank and asked the manager if any one could draw the money in the event of Mrs. Kenny's death; but the manager says that the question was a hypothetical one, and he replied something to the effect that executors only could draw the money. He also says that at the time he had no personal knowledge of the account.

On March 9th, less than two weeks after the death of the testatrix, the defendant Esther Dunkley went to the bank and drew from the account the full balance then standing, namely, $542.17, and deposited it in the same bank in a private account in her own name, which she had there for some months previously. Before this was done, there had been talk of trouble being caused over the ownership of the money, and this had come to the knowledge of the manager of the bank before the money was paid over to Mrs. Dunkley.

Subsequent to the 9th March and prior to the service of the injunction order, Mrs. Dunkley drew from her account two sums, one of $99 and the other of $245, out of which she says she has paid $88 for her mother's funeral expenses, and $37.25 the accounts of two doctors, who attended her mother. Even if the money is found to be hers she makes no claim for repayment of these sums.

Are these facts sufficient to entitle Esther Dunkley to the moneys on her mother's death? If the claim is to rest on what was said to her by her mother at the time the change was being made in the bank account, i.e., that if anything should happen to the mother while in the hospital Esther was to take the money and furniture and do the best she could with it, she cannot succeed, for this would simply amount to an ineffectual attempt at making a testamentary disposition. *Hill* v. *Hill*, 8 O. L. R. 710.

On the other hand, did the signing of the memorandum authorizing a change in the bank account so that the daughter could draw on it, give the daughter any right to or owner-

ship in the moneys, either during the mother's lifetime or at her death?

I cannot find in the evidence any expression of intention on the part of the mother to so benefit the daughter or that the mother intended anything more than to make an arrangement by which, for convenience sake, the daughter could draw the money, the mother at the time being unwell and unable to go to the bank.

In *Payne* v. *Marshall* (1899), 18 O. R. 488, (cited for the defendants), the defendant had in her possession a large sum of money which her husband had given her, and she went with him to the bank to deposit it; and on a question arising as to the power of withdrawing it in case of the wife's illness, the money, at the suggestion of the banker, was deposited in both their names, subject to withdrawal by either; and it so remained uninterfered with up to the time of the husband's death. It was held that there was a good gift *inter vivos* to the wife. The effect of the decision in that case was that the moneys which were the wife's did not, merely by being deposited in the two names, cease to be the property of the wife. Mr. Justice MacMahon, in delivering the judgment of the Divisional Court, said (at p. 493):—

"There is no doubt the husband could have withdrawn the money and have deposited it to his own credit; but unless the wife after the gift to her made a regift or retransfer of the money to him, his removal of the money from its place of deposit would not deprive the wife of her right to that money and to follow it if it had been deposited to his own credit. The money being put in the husband's name as well as the wife's was not intended in any way to change the rights of the wife in the ownership of the sum deposited, but was merely deposited in that way for the sake of convenience so that it could be drawn upon in the event of the wife's illness."

The present case is not one where the money became the property of the mother and daughter jointly; it was the mother's and though the memorandum authorized its being placed in the daughter's name so that she could draw it, it remained the property of the mother, the daughter's powers or rights being limited to the power to draw.

In *Marshal* v. *Crutwell*, L. R. 20 Eq. 328, a husband in failing health told his banker to change his bank account from his own name into the name of himself and his wife,

and authorized the banker to honour the cheques of either himself or his wife; from that time until the husband's death, all cheques on the account were drawn by the wife at the direction of the husband, the proceeds being applied by her to household purposes and small sums for her own use; and all sums afterwards paid in by the husband were carried to the credit of the account in the joint name.

Sir George Jessel, M.R., in delivering judgment, held that the change in the bank account was a mere arrangement for convenience, that it was not intended as a provision for the wife, and that on the husband's death she was not entitled to it.

Low v. *Carter*, 1 Beav. 426, *Re Ryan*, 1900, 13 O. R. 224, and *Schwent* v. *Roetter*, 21 O. L. R. 112, all cited by the defendants, are distinguishable from the present case in that there was in them an intention on the part of the depositor that the survivor should become entitled to the money.

In *Low* v. *Carter*, a husband directed a stockbroker to make the purchase of certain stock in the joint names of himself and his wife for the purpose, as he stated to the stockbroker, of making a provision for his wife; there was also evidence that the testator the day before his death said that the property in the bank being in the joint names, he considered it belonged to his wife solely at his decease, and, therefore, he had no occasion to leave it to her by his will. By his will he bequeathed to his wife a life interest "in all his property that he was in possession of." It was there held that the stock did not pass. In that case there was a clear intention on the part of the husband, that on his death the stock should belong to his wife.

In *Re Ryan*, the husband made the deposit expressly in the name of himself and his wife jointly to be drawn by either or in the event of the death of either to be drawn by the survivor; and there was evidence too that the money which went into that account was owned partly by the husband and partly by the wife.

In *Schwent* v. *Roetter*, the depositor transferred money to the joint credit of himself and his daughter to be drawn by either of them. The learned trial Judge there, however, found upon the evidence that the father intended that the money should be at the call of either of them, and that if any were left at his death the daughter was to have it.

No such intention is to be found, however, in the present case. If anything further were necessary to shew that Esther Dunkley did not become entitled to these moneys on her mother's death, it is found in her admission to Dagneau above referred to, that the money was her mother's.

Prior to her mother's death she does not appear to have considered herself in any way interested in the money. On the evidence of Dagneau and from the evident concern which she shewed about the making of the will, it is difficult to understand how she could have believed that she was entitled to it.

I therefore find that there was no intention on the part of the mother to make the daughter the owner or part owner of the money or to give it to her by survivorship; the money continued to belong to the mother, and on her death it became part of her estate.

Then as to the claim against the bank. The memorandum signed by Mrs. Kenny clearly stated that the object of making the change in the bank account was "so that she (the daughter) could draw it," and nothing more. The authority of the bank was limited to doing what this memorandum directed, and in so far as the bank or its officers or clerks went beyond what was directed they exceeded the authority given. The bank took upon itself too much when it altered the bank account as it did.

It is a question in my mind whether the daughter would have made any claim to the moneys if the words "joint account" had not been used in altering the account. The use of these words may well have suggested ownership by survivorship to the daughter or some person representing her.

The bank, too, had notice before any of the money was drawn out, that there was trouble contemplated over the ownership of it; but it disregarded the warning and allowed the money to be transferred into the name of the daughter, and a considerable portion of it to be afterwards drawn by her. I think, under the circumstances, the bank, as well as its co-defendant, is liable to the plaintiff for the amount of the deposit (less, however, the sums which Esther Dunkley has paid as the funeral expenses and doctors' bills of the deceased), with interest from the commencement of action. Defendants are restrained from dealing with these moneys otherwise than to pay them to plaintiff.

Judgment will go accordingly with costs.

HON. MR. JUSTICE KELLY. JULY 16TH, 1912.

GRAY v. BUCHAN.

3 O. W. N. 1620.

Broker—Purchase by Customer of Shares on Margin—Contract—Terms—Failure to Keep up Margin—Resale by Broker.

Action by customer against brokers for rescission of certain contracts for the purchase of mining stock and for a return of the moneys paid on account of such purchase or for damages for the wrongful resale of the shares. Plaintiff, who was a solicitor, accustomed to stock transactions, purchased the stock in question on margin, one of the terms of the contract being that margins were to be kept up by the purchaser. The stock declined in price and plaintiff on being asked to put up further margins to protect it, neglected to do so, whereupon defendants sold out the stock at the market price and credited his account with the proceeds. Plaintiff set up lack of familiarity with the usages of the Exchange and with the terms of the orders executed by him.

KELLY, J., dismissed action with costs and allowed defendants their counterclaim of $18.10.

Action by customer against brokers for the rescission of a contract to purchase mining shares, tried at Toronto, without a jury, on June 13th and 14th.

Plaintiff in person.

A. G. Slaght, for the defendants.

HON. MR. JUSTICE KELLY:—Plaintiff, who is a solicitor, having in January, 1912, an office in South Porcupine, went to the defendants' office in Haileybury on January 15th, for the purpose of buying shares of Dome Extension stock. Defendants were dealing in such stocks and had direct communication with their correspondents in Toronto.

On plaintiff expressing a desire to make a purchase, defendants explained to him the terms on which the same could be made, that he would be required to pay in cash 25 per cent. of the purchase price, and from time to time to make such payments as would keep up a margin of 25 per cent. of the purchase-price should the selling price of the stock decline; and it was also explained to him that any purchases would be subject to the rules of the defendants' business.

The plaintiff then directed defendants to make for him a purchase of 1,000 shares of this stock at 42 cents per share, at sixty days, and the defendants prepared and submitted to the plaintiff for signature an order in the following words:—

"Buchan & Sims,
Brokers,
Haileybury, Ont.

15/1/12

"Buy for my account and risk 1000 shares Dome Ext. at 60 days subject to your usual terms and conditions. 42 cents.
Deposit $100. 43
This order good until

J. J. Gray.

All orders expire on date hereof unless otherwise stated."

On the margin of this order, as well as on the other orders hereafter referred to, there are printed the following:—

"This order is subject to your usual rates of commission, and I hereby agree to accept delivery of stock on arrival of same or when the same is tendered to me, and in case of non-acceptance on my part Buchan & Sims are hereby empowered to sell same.

It is hereby agreed and understood that on all marginal business Buchan & Sims have the right to close transactions when margins are in danger of exhaustion without further notice, and to settle contracts accordingly."

Plaintiff signed the order and soon after defendants informed him they had made the purchase, and he then paid them $100 on account. Immediately afterwards he signed a further order for the purchase of another 1000 shares on the same terms, and the same procedure was gone through. Following this he immediately instructed them to buy a still further block of 1,000 shares, and in this instance he himself filled out the form of order and signed it.

The total purchase-money of the 3,000 shares was $1,260, to which was added the defendants' brokerage of $15, making $1,275; the total of the cash payments made by the plaintiff on the three purchases was $300.

Defendants then gave plaintiff a bought note for the 3,000 shares, shewing the total purchase-money, the amount of the deposit received, and that there was a balance of $975 still unpaid. This bought note contained the following: "This transaction is made subject to the rules of the stock exchange and to our ordinary rules of business."

Plaintiff was then about to return to South Porcupine, and, as a convenient means of communication, it was ar-

ranged between him and defendants that any notice from the defendants to him relating to the transaction should be sent by wire to one Chalmers, in South Porcupine. There was direct telegraphic communication between Chalmers' office and defendants', but he was not the agent of or in any way the representative of the defendants.

Some days after the purchase was made, the stock having declined and its fluctuations being uncertain, defendants communicated with plaintiff, through Chalmers, asking for a further payment to maintain the 25 per cent. margin. Defendants say that this communication was on Saturday, January 20th; plaintiff, however, says that it did not reach him until Monday, January 22nd. On the 22nd, defendants sent through the same medium a further demand upon plaintiff, as the price of the stock on that date shewed considerable decline. This demand, which was for $300, was promptly communicated to the plaintiff. The decline in the stock at the time warranted the defendants in making this demand.

Plaintiff admits getting the demand and says that he offered $200, that Chalmers communicated this offer to the defendants and afterwards reported that defendants were satisfied.

Defendants and Chalmers both deny that any arrangement was made to accept $200. Chalmers' communication to the defendants was as follows: "Gray just in, is going to give me a cheque on Toronto $200. Will let you know when I get it."

Later in the day, plaintiff suggested to Chalmers that he would pay $150 instead of the $200, and he claims that Chalmers informed him afterwards that defendants were satisfied. This, however, is denied by Chalmers, and I am quite clear that there was no such understanding on defendants' part.

Plaintiff did, later on that day, give Chalmers an unmarked cheque for $150 on a bank in Toronto, which was dishonoured by the bank, plaintiff not having on that date or at any time afterwards sufficient money in the bank to pay it; on January 23rd, however, he paid to Chalmers $95, which the latter forwarded to defendants.

Defendants, on not receiving from plaintiff the $300 demanded on the 22nd January, sold the stock in the usual way, getting for it the market price at the time. The amount

realized on the sale, after deducting commission on making the sale, left the plaintiff indebted to the defendants to the extent of $113.10. On defendants receiving the $95 paid by the plaintiff to Chalmers on January 23rd, it was credited to the plaintiff, and his indebtedness was thus reduced to $18.10. For this sum, defendants in their counterclaim ask for judgment.

The conclusion I have come to after a careful consideration of all the facts and circumstances is that the plaintiff is not entitled to succeed. Dealing in stocks was not new to him. A full explanation of the defendants' methods, terms, conditions and rules of business in dealing in such stocks, the amount of deposit required on the purchase, and the amount of margin required to be maintained, was given to him before he entered on the purchase. He knew the character of the stock he was dealing in, that it was subject to rapid and serious fluctuations in value, and that unless the margin agreed upon was kept up the stock was liable to be promptly sold.

When the price of the stock declined, the defendants, by the means agreed upon between them and plaintiff, demanded as an additional payment a sum which, under the circumstances, they were entitled to demand.

Plaintiff did not have the money necessary to make payment of the amount demanded. His efforts to induce defendants to accept on account unmarked cheques for a smaller sum than he was bound by his bargain to pay, and they were entitled to receive, were unsuccessful. Had he promptly responded to the demand by forwarding the amount required to keep up the margin, as agreed upon, the stock no doubt would not have been sold, or, if after such payment defendants had sold it, he would have had a good cause of complaint against them.

Plaintiff also set up that he had signed the orders for purchase without having read them, and on that ground sought to be relieved from the terms they contained. There is nothing in the evidence entitling him to escape liability on that ground. He failed to live up to the bargain which he made, and he knew or should have known, its meaning and the consequences of his failure to keep up the payments which it had been made clear to him he would have to make if the stock declined.

There will, therefore, be judgment dismissing the action with costs, and allowing the defendants the amount of their counterclaim, $18.10.

HON. MR. JUSTICE KELLY. JULY 16TH, 1912.

RE WATSON & ORDER OF CANADIAN HOME CIRCLES.

3 O. W. N. 1605.

Insurance — Life — Benefit Certificate — Apportionment of Benefit — Change of Beneficiaries by Will — Identification of Certificate — Sufficiency — Insurance Act, R. S. O. (1897) c. 203, s. 160.

KELLY, J., *held*, that a reference in a will to "my Home Circle policy for one thousand dollars" was a sufficient identification of the policy under sec. 160 of the Ontario Insurance Act.
Re Cochrane, 16 O. L. R. 328, 11 O. W. R. 956, referred to.

Application by the executor of the will of the late Catharine A. M. Watson, for an order determining the disposition to be made of certain insurance moneys.

James Fraser, for the executor.

J. E. Jones, for the Order of Canadian Home Circles.

F. W. Harcourt, K.C., for the infants.

HON. MR. JUSTICE KELLY:—On February 13th, 1893, the Order of Canadian Home Circles issued a beneficiary certificate to Catharine Ann Minerva Watson, for $1,000 made payable on her death, $500 to her husband Daniel Webster Watson, and $500 to her son Richard J. T. Watson.

On December 30th, 1911, Catharine A. M. Watson made her will, and she died on January 5th, 1912. The will contains this provision: "My Home Circle policy for one thousand dollars to be divided as follows: to my daughter Margaret Minerva Watson, five hundred dollars; the balance of five hundred dollars in equal shares to my husband Daniel Webster Watson, my son James Richard Watson and my son Daniel Ross Watson."

The question to be decided is: Does the will alter the apportionment of the moneys represented by the certificate, or alter or vary the certificate as to beneficiaries?

Section 160 of the Insurance Act, R. S. O. 1897, ch. 203, provides that the assured may by instrument in writing attached to or endorsed on or identifying the policy by its number or otherwise, vary a policy . . . previously made so as to restrict or extend, transfer or limit the benefits . . . and may from time to time by an instrument in writing attached to or endorsed on the policy or referring to the same, alter the apportionment as he deems proper; he may also, by his will, make or alter the apportionment of the insurance money; . . . and whatever the assured may, under this section, do by any instrument in writing attached to or indorsed on or identifying the policy, or a particular policy or policies, by number or otherwise, he may also do by a will identifying the policy or a particular policy or policies by number or otherwise."

Does, then, the will in this case identify the policy (or certificate), in such a manner as to satisfy the requirements of sec. 160?

The question of identification was considered in *Re Cochrane,* 16 O. L. R. 328; 11 O. W. R. 956, a judgment of the Divisional Court, at p. 332, of which the Chancellor said that identification of a policy by its number " or otherwise " would include reference by date and amount and other means of incorporating one document with another.

Here we have identification by the name of the Order or body which issued the certificate and the amount of the certificate, and I know of no better means of identification by an instrument not attached to or endorsed upon a policy, unless it be in cases where the identification is by the date of the certificate as well.

My view is that a change as to the beneficiaries and an altering of the apportionment of the moneys has been effected, and that the moneys represented by this certificate are to be divided as directed by the will.

The shares of these moneys to which the infants are entitled will be paid into Court to be paid out to them as they respectively come of age. Costs of all parties to be paid out of the fund.

HON. MR. JUSTICE KELLY. JULY 16TH, 1912.

RE DOMINION MILLING CO.

3 O. W. N. 1618.

Company — Winding-up — Sale of Lands of Company by Mortgagee —Leave to Proceed with Sale after Winding-up Order — Terms —Costs.

Application by a mortgagee for leave of the Court to carry out a sale under the power contained in his mortgage of certain property belonging to a company which had gone into liquidation subsequently to the initiation of the sale proceedings.

KELLY, J., reserved judgment in order to give the liquidator an opportunity to look into the adequacy of the proposed sale price, but the liquidator having been unreasonably dilatory and there being a danger of the proposed sale falling through, the liquidator was ordered to pay to the applicant on or before a certain named day the full amount of his claim and costs including the costs of this application, failing which the applicant was to be at liberty to complete the sale.

Costs of application to be added to claim in any event.

B. N. Davis, for the applicant (mortgagee).

D. Inglis Grant, for the liquidator.

HON. MR. JUSTICE KELLY:—On May 28th, 1912, a liquidator of the Dominion Milling Company Limited was appointed. Proceedings for sale by the applicant under power of sale in a mortgage from the company to him were then in progress, the sale having been advertised to take place on June 5th. On that day, and a short time before the hour fixed for the sale, it came to the knowledge of the applicant's solicitor that the company had gone into liquidation, and the property was offered for sale and a sale made "subject to the right that any liquidator may have in law under winding-up proceedings should it hereafter prove that he has any right to interfere with the sale or that under the circumstances the mortgagee had not the right to go on with the sale on account of the winding-up proceedings."

The applicant has applied to be permitted to continue the proceedings for sale and to carry out the sale made on June 5th. The motion came on on June 28th, and it was adjourned to July 4th, to enable the liquidator to continue his inquiries about the sale, and the selling value of the property. On July 4th, he was still unable to say what course he should pursue, and I have since that time reserved

my decision in order to allow him still further time. He has had several weeks within which to inform himself, but so far there is nothing to indicate what course he intends to take in respect to this claim. The applicant appears to have advertised the property extensively, and to have given reasonable opportunity to possible purchasers to appear at the sale; he is in danger of losing the benefit of the sale, if there be further delay, and I think the property is not readily saleable.

Unless the liquidator, not later than twelve o'clock noon on July 17th, pay the amount properly due to the applicant on this claim, including the costs and disbursements of the sale, and the costs of this application, or give the applicant satisfactory security for such payment, the applicant is to be at liberty forthwith thereafter to continue the sale proceedings and carry out the sale, and he will be entitled to add to his claim the costs of this application.

HON. MR. JUSTICE KELLY. JULY 16TH, 1912.

DOUGLAS v. BULLEN.

3 O. W. N. 1619.

Trespass—Boundary—Interim Injunction.

KELLY, J., refused to continue until the trial an interim injunction restraining defendant from trespassing on certain lands alleged to belong to plaintiff where the only dispute was as to the ownership of a few inches of land at the rear of lots whose ends abutted on each other.

Costs to be in discretion of trial Judge.

A. McLean Macdonell, K.C., for the plaintiffs.

F. C. Snider, for the defendant.

HON. MR. JUSTICE KELLY:—Plaintiffs moved to have continued until the trial the interim injunction granted on June 10th, 1912, restraining defendant, his servants, etc., "from wrongfully entering upon the plaintiffs' lands and from pulling down plaintiffs' fences, from wrongfully taking away the support of the plaintiffs' lands, from encroaching on the boundary of the plaintiffs' lands with excavations for a building, or in any other way entering or trespassing upon the lands of the plaintiffs as set out in the writ of summons."

Plaintiffs' lands are situate on the south side of Bread-albane street, in the city of Toronto, and run southerly to the lands of the defendant which front on the north side of Grosvenor street. The southerly boundary of plaintiffs' lands as described in the writ of summons, runs (from the easterly boundary of the property as therein described) "westerly seventy feet and one inch along the line on which a stable formerly stood to the corner of an old fence and along such old fence, etc." The stable referred to was on defendant's lands, and "the line on which the stable formerly stood" was the northerly line of the north wall of the stable; the eave of the stable projected about three inches north of that line. Plaintiffs allege that the defendant in preparation for the erection of an apartment house on his lands encroaches to a small extent on their property, and that if defendant's proposed building be erected as intended it will so encroach.

Defendant claims that the northerly limit of his lands, as shewn by the conveyance to him, falls to the north of the line of the north wall of the old stable and old fence above referred to. As against this, plaintiffs set up that even if defendant's paper title be as he claims it is, they have by length of possession acquired title to the lands as far south as the line of the north wall of the old stable and old fence; and they also object to the defendant removing the old fence.

The amount of land in dispute is so small, and the value, having regard to its location at the rear of the two properties, must be so insignificant, that one cannot but express surprise that an amicable arrangement has not been arrived at. It will not be of service to either party to continue the injunction as already granted, namely, restraining the defendant, etc., from entering on plaintiffs' lands, etc., as the matter in dispute is what land at the place in question belongs to the plaintiffs.

To finally dispose of this dispute involves the settlement of the ownership of the disputed land and the fixing of the true boundary between what is owned by plaintiffs and defendant respectively. This cannot be done on the present application. I, therefore, dismiss the application to continue the injunction, leaving the parties to whatever rights they may be able to establish at the trial.

The costs of the application are reserved to be disposed of by the trial Judge.

HON. MR. JUSTICE KELLY. JULY 18TH, 1912.

NATIONAL TRUST CO. v. BRANTFORD ST. Rw. CO., GRAND VALLEY Rw. CO. & EDWARD B. STOCKDALE.

3 O. W. N. 1615.

Mortgage—Security for Bonds of Railway Company—Interest in Arrear — Acceleration of Payment of Principal — Action for Principal and Interest—Claim for Foreclosure and Possession—Payment of Interest Pendente Lite — Right to Possession — Receiver — Breaches of Covenants — Default in Payment of Taxes—10 Edw. VII. c. 51, s. 6—Costs.

KELLY, J., dismissed with costs the action of plaintiffs, trustees fo certain bondholders, claiming the appointment of a receiver of the properties of defendant railway company on account of breach of certain covenants in the bond mortgage contained, holding that as the appointment of a receiver was not a remedy given plaintiffs by the terms of their mortgage, their only remedy was by action on the covenants.

A mortgage action tried at Toronto, without a jury, on June 12th and 13th, 1912.

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

S. C. Smoke, K.C., for the defendants.

HON. MR. JUSTICE KELLY:—On July 1st, 1902, the Brantford Railway Company executed to the plaintiffs an indenture by which the company granted, bargained, sold, transferred, set over, mortgaged, conveyed, and confirmed to the plaintiffs certain properties and assets for the purpose of securing payment of an issue of bonds to the amount of $125,000. The indenture (or mortgage, as we may term it), was expressed to be made "in pursuance of the Act respecting Short Forms of Conveyances."

On July 2nd, 1907, the defendants, the Brantford Street Railway Company, granted to the defendant, the Grand Valley Railway Company, the properties and assets so mortgaged. Subsequent thereto the defendants, the Grand Valley Railway Company, mortgaged to the Trust and Guarantee Company Limited not only the properties and assets so granted to it (subject to the said bond mortgage for $125,000), but also other assets of its own which were then subject to a prior mortgage.

The time of maturity of the $125,000 of bonds is in the year, 1932.

The mortgage to the plaintiffs contains this provision: "In case default shall be made in payment of the interest on said bonds or debentures or any of them secured by these presents when the same shall become due and payable according to the terms hereof, the principal of all the said bonds and debentures shall immediately become due and payable."

On January 1st, 1912, coupons for the half-yearly payment of interest on these bonds became due, and this interest not having been paid, plaintiffs on February 27th, 1912, brought action against the defendants the Brantford Street Railway Company and the Grand Valley Railway Company, claiming payment of the whole sum of $125,000 and interest, and foreclosure, and possession of the lands and premises and assets covered by the mortgage, and for a receiver. Later on an amendment was made, adding a claim for sale of the properties and assets.

On May 29th, 1912, on the application of the Trust and Guarantee Company, Limited, Edward B. Stockdale was appointed receiver on behalf of the applicants, as trustee for the holders of mortgage bonds issued by defendants, the Grand Valley Railway Company, of all that company's "railways, undertakings, revenues . . . property . . . with power to pay out of any money coming to his hands as such receiver, any debts of that company having priority over the claims of the said debenture holders."

The present action came on for trial on June 5th, before His Lordship the Chancellor, when he ordered that the receiver be added as a party defendant, that he be forthwith served with the order and the pleadings and that the action should be set down for trial on June 12th.

On the opening of the trial on that date, it was shewn that on June 11th the defendants had paid to the plaintiffs all arrears of interest, and an undertaking satisfactory to the plaintiffs was given for payment of plaintiffs' costs up to the time of such payment.

It was conceded by the plaintiffs that the arrears of interest having been paid, they could no longer claim that the principal was overdue by reason of non-payment of interest.

The plaintiffs, notwithstanding this, contended that they were entitled to possession of the mortgaged properties and assets and to the appointment of a receiver on the ground that defendants had committed breaches of their covenants

contained in the mortgage to pay taxes, and to repair, and not to suffer or permit any other lien, charge or mortgage on the mortgaged property, etc. Taxes were then in arrear; evidence was given tending to shew a breach of the covenant for repair; and plaintiffs argued that the making of the sale and transfer by the defendants the Brantford Street Railway Company to the defendants the Grand Valley Railway Company, and the making of the mortgage subsequently by the latter company, constituted a breach of the covenant not to suffer or permit any other lien, charge or mortgage on the mortgaged property; and further that the legal estate in the mortgaged properties and assets being in them as mortgagees gave them the right to possession on breach of any of the covenants.

There is no express provision in the mortgage entitling the plaintiffs either to possession or to a receiver on the non-performance or non-observance of covenants. On the contrary, it is expressly provided that until default shall be made in payment of the interest on the bonds or debentures or some part thereof, the grantors (the defendants the Brantford Street Railway Company), and their assigns shall be suffered and permitted "to hold, use, occupy, possess, manage, operate, maintain and enjoy the said property," etc.

No authority was cited in support of this proposition put forward by the plaintiffs, and I have been unable to find any such authority. A breach of the covenants, did not, in my opinion, entitle the plaintiffs to possession or to have a receiver appointed. Their remedy is on the covenants themselves.

Apart from this, the plaintiffs further contended that under the provisions of sec. 6 of 10 Edw. VII., ch. 51, there was implied in the mortgage a covenant that "on default, the mortgagees shall have quiet possession of the said lands free from all encumbrances," and that as the default referred to in that Act includes default in payment of taxes, and there being such default in this case, they are entitled to possession.

In the case of a conveyance by way of mortgage this covenant on the part of the person who conveys is implied only, as stated in clause (a) of sec. 6, when that person "is expressed to convey as beneficial owner."

In the mortgage in question here, the grantors or mortgagors are not expressed to convey as beneficial owners, and the statute therefore does not apply.

I am unable to find that there was at the time of the trial such default as entitled the plaintiffs to possession of the mortgaged properties and assets or the appointment of a receiver.

Defendants are therefore entitled to judgment dismissing the action with costs from the time of payment of the interest on June 11th, 1912; the plaintiffs being entitled to the costs to that time.

HON. MR. JUSTICE MIDDLETON. JULY 23RD, 1912.

RE WEST NISSOURI CONTINUATION SCHOOL.

3 O. W. N. 1623.

Schools—Township Continuation School—Establishment of—Duty of School Board—Requisition for Funds—Mandamus.

Motion by certain ratepayers for a mandamus directing the school board and the several members thereof to forthwith take such proceedings as might be necessary to establish the school for which the board are trustees. The school district was validly established, but three of the trustees, constituting one-half of the board, shewed by their actions that they were opposed to the establishment of any school and had succeeded in blocking any attempt at such establishment.

MIDDLETON, J., *held*, that the trustees in question were not *bona fide* exercising their judgment as to the ways and means of establishment of the school but were endeavouring to prevent such establishment.

Order made as asked, costs of motion to be paid by opposing trustees.

Motion by W. B. Harding and John Macfarlane, ratepayers, etc., for an order directing the school board and the several members thereof to forthwith take such proceedings as may be necessary in order that the school for which said board are trustees, may be established and made available to such persons as shall desire and be entitled to attend the same, and further directing the said board (within the time limited by the statute), to make request or demand upon the township council of West Nissouri, for such money as the said board may in its discretion deem necessary in order to open and maintain said school.

Heard at London Weekly Court on Saturday, June 22nd, 1912.

J. R. Meredith, for W. B. Harding and John Macfarlane, the applicants.

G. S. Gibbons, for Simon Blight, John Salmon, and Ernest McCutcheon, three of the trustees.

HON. MR. JUSTICE MIDDLETON:—This motion is a continuation of the litigation which has been pending in the Courts for some considerable time, see 25 O. L. R. 550. It has already been determined that the Continuation School District has been validly established; and a mandatory order has been granted at the instance of the school board, directing the payment by the township to the school board of the sum of $1,000 for maintenance purposes. A motion for a mandamus to compel the payment of $7,000 (and the issue of debentures for the raising of that sum), for the purpose of erecting a school building, failed solely upon the ground of the insufficiency of the demand made by the school board.

Since that motion was launched there has been a change in the constitution of the board, and it is impossible to read the material, or hear the argument of counsel representing one section of the trustees, without being quite convinced that it is the intention of some members of the board to prevent the establishment of the continuation school. These gentlemen, no doubt actuated by reasons which appear to them to be good and sufficient, think the establishment of the continuation school undesirable, and, although they have accepted office upon the school board, are actively seeking to prevent the establishment of any school.

Following the decision of the Divisional Court rendering necessary the making of a further demand to obtain the $7,000, for which a by-law has already been passed by the township, a resolution was introduced at the meeting of the school board on the 27th March last, authorizing the making of the necessary formal demand. This resolution was defeated, upon an equal division of the board; the three trustees represented by Mr. Gibbons voting against it, the other trustees voting in its favour.

A resolution was at the same meeting moved to demand from the township $2,770 for the maintenance of the school, in order that the school might be carried on at once. This was lost upon the same division.

A third resolution, directing an advertisement for teachers, was also moved, and lost upon the same division.

A fourth resolution, directing instructions to be given to the architects to draw specifications and to advertise for tenders for the construction of a school building, was also moved, and lost upon the same division.

A newspaper account of the proceedings of this meeting is put in and verified; the attitude taken by those opposed to the resolutions being that the school should not be established because the ratepayers of the township are opposed to it. No amendment was moved to any of the resolutions; and, so far as appears, the sole issue raised was, "School or no school?"

Another meeting was held on the 16th of April, 1912, when a resolution was moved: "That the West Nissouri Continuation School Board do provide adequate accommodation for all purposes according to the regulations." This resolution was defeated; one at least of the trustees opposed stating that "they would never have a school."

A resolution was moved at this meeting by those opposed to the school: "That a committee, consisting of trustees Salmon, McCutcheon, and Fitzgerald, be a committee to look into the question of the location of the continuation school, and to advise as to the desirability of renting suitable premises or building, and to report to the trustees at their next meeting." This resolution was defeated by those in favour of the school being established, as the committee named were the three members opposed.

Upon the hearing of this motion, counsel opposing the granting of the order took the position that his clients are not opposed to the establishment of the school, and that the resolution last quoted was intended to be a step towards its establishment. These three trustees, examined as witnesses upon the motion, also took that position.

Upon the argument I intimated that in my view the trustees were called upon to discharge the duties imposed upon them by the statute; that is, to take all proper steps for the establishment of the school; but that how this was to be done, whether by renting temporary premises or by building, was a matter that was entirely and absolutely in the control of the trustees, and that the Court ought not in any way to interfere with the free and untrammeled exercise of this discretion by the responsible body.

The difficulty arises from the inference which counsel for the applicants suggests as irresistible, that there is no *bona fide* intention to adopt either one course or the other, but simply an intention to drag the matter on until the 15th of August, the time limited for making requisitions upon the township council. This fear was no doubt somewhat augmented by the position taken by the respondents' counsel that no mandatory order could be made until after the time for municipal action had expired; and it was suggested by counsel for the applicants that then the same argument would be adduced as on the former motion for a mandamus, that no order could be granted because the time had gone by.

To meet this situation I directed the matter to stand until after the 15th of July, and that in the meantime a meeting of the board might be held, and I gave leave to supplement the present material by placing before me the proceedings at that meeting, stating that this would give the trustees represented by Mr. Gibbons an opportunity of shewing that Mr. Meredith was quite wrong in stating that there was no intention to establish a school in any way. I offered to accept the undertaking of Mr. Gibbons on behalf of these three gentlemen that they would act upon the intention stated in their examination and take steps to establish a school in rented premises. Mr. Gibbons declined to give this undertaking, stating that his clients might not now be of the same mind, and that circumstances have changed —referring to the view that in December the county council may be induced to attempt to repeal the by-law establishing the school.

Since then copies of the notices calling the meeting and of the correspondence have been put in and these confirm the view that the three trustees in question have no intention of discharging the duties of their office in any way. This being so, the mandamus will go in the form indicated on p. 1, and Mr. Gibbons' clients will be directed to pay the costs of the motion.

I do not direct a stay as the demand must be made by 15th August, and Mr. Gibbons' main argument was based upon the statement that his clients would make the demand for such sum as might be necessary in their view to establish the school in rented premises, and their opponents have now abandoned the plan of at once erecting a suitable building.

HON. MR. JUSTICE KELLY. JULY 26TH, 1912.

REX v. MARCINKO.

3 O. W. N. 1626.

Criminal Law—Disorderly House—Keeping—Code s. 228—Conviction by Magistrate—Weight of Evidence—Excess of Penalty—Amendment.

KELLY, J., *held*, on a motion to quash a conviction for keeping a disorderly house, that if there was any evidence upon which the magistrate might have convicted, he was the judge of the weight to be attached to it.

R. v. *St. Clair*, 3 Can. C. C. 551, followed.

That if the magistrate had no power to amend a conviction imposing a penalty in excess of that authorised by the Code for the offence, by substituting therefor an authorised penalty, the Court itself has under the Code such power.

Motion dismissed but without costs.

Motion by defendant, Georgina Marcinko, to quash a police magistrate's conviction under sec. 228 of the Criminal Code, for keeping a disorderly house.

D. D. Grierson, for the applicant.

J. R. Cartwright, K.C., for the Attorney-General.

HON. MR. JUSTICE KELLY:—On the argument the chief grounds relied upon by the appellant for relief were: (1) that there was no reasonable evidence on which the conviction could be made, and, (2) that the police magistrate imposed a penalty in excess of what is authorized by the Criminal Code, and that after service upon him of the notice of motion to set aside the conviction and requiring him to make a return of the conviction, information, etc., he amended the conviction by substituting a penalty provided by the Code.

The conviction was under sec. 228 of the Criminal Code, for keeping a disorderly house.

In *Reg.* v. *St. Clair*, 3 Can. Crim. Cas. 551, a case very much resembling the present one, Mr. Justice Osler, in delivering the judgment of the Court of Appeal, said: "If there was evidence upon which the magistrate might have convicted he was the judge of the weight to be attached to it." In that case, as in this, there was no evidence of disorderly conduct except on one single occasion, but there was, as there is in the present case, evidence of the bad reputa-

tion of the house. The Court was of opinion that in the face of such facts it could not be said there was no evidence to support the charge.

I think in the present case there was evidence from which the magistrate might draw the conclusion of guilt, and on which he might have convicted; on that ground the conviction must be sustained.

Then as to the other ground, that of excessive penalty and the magistrate's amendment of the conviction, the amendment was made so as to bring the penalty within what is authorized by the Criminal Code, namely the payment of $100 (which includes costs), and in default of payment imprisonment for six months.

If the magistrate had the power to make the amendment, the defendant's objection is not well taken; but, assuming he had not that power, the liberal powers of amendment given by the Code enable the Court to amend in cases such as this; and I, therefore (if it be necessary), now amend the conviction of the accused, Georgina Marcinko, made on April 10th, 1912, by substituting for the words "($200.00) two hundred dollars besides costs," in such conviction, the words "($100.00) one hundred dollars." This $100 includes costs. The conviction being so amended, I dismiss the defendant's application, but without costs.

HON. MR. JUSTICE KELLY. JULY 27TH, 1912.

REX v. RIDDELL.

3 O. W. N. 1628.

Intoxicating Liquors—Liquor License Act—Amending Act, 2 Geo. V. c. 55, s. 13—Intra Vires—Conviction of Person Found Drunk in Local Option Municipality—Jurisdiction of Magistrates.

Motion to quash conviction of defendant under 2 Geo. V. c. 55, s. 13, for being found upon a street or public place in a municipality in which a by-law passed under s. 141 of the Liquor License Act was in force, in an intoxicated condition owing to the drinking of liquor.

KELLY, J., *held*, that the Legislature had power to enact the section in question.

Hodge v. *R.*, 9 A. C. 117, followed.

That if the information and the conviction follow the language of the section under which the conviction is made that is all that is required.

R. v. *Leconte*, 11 O. L. R. 408, followed.

Application dismissed with costs.

An application by the defendant to quash a conviction made by two Justices of the Peace, for the county of Lennox and Addington, under sec. 13 of 2 Geo. V., ch. 55, for being found upon a street or in a public place—in a municipality in which a by-law passed under sec 141 of The Liquor License Act was in force—in an intoxicated condition owing to the drinking of liquor.

J. B. Mackenzie, for the defendant, contended that the Legislature had no power to enact sec. 13, and "the offence could not be made to exist in local option territory or there alone."

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

HON. MR. JUSTICE KELLY:—The above objection taken by Mr. Mackenzie, is answered by *Hodge* v. *Regina*, 9 A. C. 117.

On the further objection that it was not proven that defendant's condition was owing to the drinking of liquor, and that there was no valid and sufficient evidence to prove the offence, the defendant must fail. There was evidence on which the convicting magistrates might have convicted, and, as said in *Reg.* v. *St. Clair*, 3 Can. Crim. Cas. 551, they were the judges of the weight to be attached to it.

Though in the notice of motion exception was taken that no by-law under sec. 141 was in force in the municipality in question, counsel for the defendant on the argument stated that he did not then raise any objection to the by-law. It is, therefore, not necessary to consider that objection.

One other exception was taken to the conviction, namely, that the information and the conviction charge two offences, and the evidence was not confined to one offence.

Both the information and the conviction follow the language of the section under which the conviction was made; and, following *Rex* v. *Leconte* (1906), 11 O. L. R. 408, that is all that is required.

As all the objections fail, I dismiss the defendant's application with costs.