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COURT OF APPEAL.

APRIL 9TH, 1910.

*CONIAGAS MINES LIMITED v. TOWN OF COBALT.

*CONIAGAS MINES LIMITED v. JACOBSON.

Mines and Minerals—Patentees of Mining Rights — Owners of Surface Rights—Roadway from Mines—Right of User—Right to Search for Minerals—Townsite—Streets and Lots—Plan—Survey—Dedication—Sale of Town Lots—Discovery of Minerals—Order in Council — Statutes — Substituted Way — Priority of Claim—Declaration of Rights—Injunction.

Appeals by the respective defendants from the judgment of BOYD, C., 13 O. W. R 333, in so far as it was adverse to them; and cross-appeal by the plaintiffs against so much of the judgment as denied them further relief.

The appeals were heard by MOSS, C.J.O., OSLER, GARROW, MACLAREN, and MEREDITH, JJ.A.

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

H. H. Collier, K.C., for the plaintiffs.

MOSS, C.J.O. (after briefly stating the facts and the Chancellor's findings, and referring to the provisions of secs. 23 and 24 of 7 Edw. VII. ch. 18 (O.)):—Apart from the effect of the statutory provisions already referred to, the questions seem to resolve themselves into an inquiry into the extent of the rights of a grantee or owner of mines, minerals, and mining rights in, upon, and under lands, as against the grantee or owner of the surface,

* These cases will be reported in the Ontario Law Reports.

whose title has been acquired subsequently to that of the owner of the mines, etc. Having regard to the course of dealing and the order of conveyancing, if it may be called such, there is no reason to think that the title of the individual defendants is not subject to all the rights which are expressed to be granted to the plaintiffs by the letters patent of the 15th December, 1905. It appears clear that sec. 42 of R. S. O. 1897 ch. 36 is not applicable, for the reasons pointed out by the Chancellor, and therefore these defendants have no status to claim compensation for anything properly done by the plaintiffs in the exercise of their rights. This is a case in which the ores, mines, and minerals were dealt with separately from the surface of the land, but such dealing was before and not after the surface rights had been granted, leased, or located in the manner contemplated by sec. 42. It is conceded that they had not been granted or leased, but it is said they were located. In connection with public lands the term "located" has a well-known meaning, and it is not to be presumed that it was intended to be used in sec. 42 in a different sense. It is clear that in its ordinary sense it would not comprise such dealings with these lands as took place under the direction of the Department or the Commissioners of the Temiskaming and Northern Ontario Railway prior to the issue of the grant to the plaintiffs. The case of the defendants, corporate and individual, must rest upon whatever rights remained to be acquired and were acquired after the plaintiffs' grant—aided, however, as to the former, by any subsequent legislative enactments by which the plaintiffs' rights may be affected.

What, then, are the plaintiffs' rights?

The learned Chancellor has held that they may no longer use the roadway across the surface of the lots in question, resting his view chiefly upon the fact of the streets and lots in the townsite having been delineated and shewn on a plan before the construction of the plaintiffs' roadway. It is not questioned that the plan was not properly recorded until after the issue of the letters patent to the plaintiffs' predecessors in title.

The grant thereby made unquestionably carried with it everything that was reasonably necessary to the proper enjoyment and use of the thing granted, including, of course, such convenient way or ways, or means of ingress and egress, as were required.

The delineation on a plan of courses of streets for the use of the town-dwellers could not conclude the question of what was reasonable as a way or means of access to the plaintiffs' mining works, which had been in operation before the preparation or recording of the plan.

Upon the evidence, the plaintiffs appear to have decided upon their present roadway after due consideration of the topography and the engineering difficulties to be overcome.

It appears to be at the present the only practicable way by which the plaintiffs can bring whatever is required for the prosecution of their mining operations and the due and proper working of their mines, including the carrying away of the ores, metals, and other products. The defendants have shewn no good reason for interfering at the present time, and under present conditions, with the reasonable user by the plaintiffs of the roadway for their necessary purposes. And to the extent of enjoining the defendants from interfering with and obstructing the way, the plaintiffs' cross-appeal should be allowed.

In support of their claim to begin and carry on mining operations upon the streets without the hindrance of the defendant corporation, the plaintiffs contend that the provisions of secs. 23 and 24 of the Act 7 Edw. VII. ch. 18 do not apply to them or affect their rights. It is said that to give effect to them as against the plaintiffs would be to deprive them of vested rights. The authority of the legislature to do so, if it deems it proper and right, must be conceded. The real question is, what has been intended and effected by the legislation?

Section 23 seems to be intended mainly for the protection of the title and rights of owners of mines, minerals, and mining rights, and to be declaratory of the existing law in that respect. Section 24 is intended to regulate the manner in which owners shall exercise their rights, and in that sense is restrictive. But that alone is not sufficient for concluding that it should not apply to owners who acquired their titles before the passing of the enactment. The obvious policy is, not to prevent the use and enjoyment of the mining rights, but to so order them in the public interest that the highways and those travelling in and upon them may be kept secure and free from danger owing to mining operations being carried on. And the language of the enactment may well be read as applying to conditions as they arise, and as so far affecting all owners of mining rights such as the plaintiffs have in the lands in question here. The plaintiffs' cross-appeal as to this part of the judgment fails.

The defendants' appeal fails, for the reasons given by the Chancellor.

The rights of the individual defendants as owners of the surface rights have been already touched upon in dealing with their claim to be entitled to compensation. The conclusion on that branch of their case is substantially a determination of their

other contentions as against the plaintiffs' rights in, upon, and under their respective lots. There is nothing to shew that the plaintiffs were doing anything upon the defendants' lots to justify the acts of obstruction and prevention on their part of which the plaintiffs complained; and the Chancellor so found.

The result is that the defendants' appeal should be dismissed, and the plaintiffs' cross-appeal allowed to the extent indicated, with costs to the plaintiffs.

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

OSLER, GARROW, and MACLAREN, JJ.A., also concurred.

APRIL 9TH, 1910.

*CLARK v. BAILLIE.

Broker—Purchase of Shares for Customer on Margin—Hypothecation—Conversion—Interest—Contract.

Appeal by the plaintiff from the order of a Divisional Court, 19 O. L. R. 545, affirming the judgment of MACMAHON, J., which dismissed the action.

The plaintiff sued for damages for the conversion of and other wrongful dealings with company shares purchased for her by the defendants as her brokers.

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

W. C. Mackay, for the plaintiff.

I. F. Hellmuth, K.C., and E. G. Long, for the defendants.

MEREDITH, J.A., who delivered the judgment of the Court, said that for two plain reasons the plaintiff's action seemed wholly to fail, and to have been rightly disposed of at the trial and in the Divisional Court.

*This case will be reported in the Ontario Law Reports.

In the first place (he continued), I have no difficulty or doubt in finding that there was no breach by the defendants of their agreement with the plaintiff. . . . There is no law upon the subject, except that, whatever the contract was, the parties are bound by it; it is essentially and entirely a question of fact. . .

The terms of the bought notes are also significant upon this question. They were printed, drawn, and used in the defendants' ordinary, if not invariable, course of business; and they very plainly set forth a term as to raising money upon the bought stock. But it is argued: (1) that that term forms no part of the contract, because the note was not delivered at the inception of the contract; and that anyway (2) it means nothing. I am, however, far from being able to assent to either of these contentions. The bought note was an essential part of the contract, intended from the first to be given, and to be the best evidence of the transaction, in respect of all things to which it properly related, and as such it was given by the defendants and accepted by the plaintiff; and so . . . at least prima facie evidence in respect of the matter in question. . . . Why insert it at all if it meant nothing? . . . "In any way most convenient to us" can never have meant merely, "in the way which the law allows without your consent." But in any case the bought notes, so printed and used and so given and accepted, at the least afford some evidence of what the real tacit contract was; and, in my opinion, cogent evidence of that which, apart from this document, I have had no difficulty in finding it to have been.

But, even if all that were not so; assuming that the defendants were guilty of a score of "conversions" of the plaintiff's stock, how can she recover, in the face of the facts of this case? At the appointed time and in the agreed manner, her stock was duly transferred to her, accepted by her, and sold and transferred, beyond recall, by her; the "conversions" brought no sort of profit to the defendants, nor any sort of loss to the plaintiff; on the contrary, they brought in truth a gain to her, in the lesser rate of interest charged by the pledgees because of the stock having been pledged in a "way most convenient" to the defendants. . . .

I have no doubt that the appeal should be dismissed.

APRIL 9TH, 1910.

*MACKENZIE v. MAPLE MOUNTAIN MINING CO.

Company—Services of President — Remuneration — General By-law — Confirmation by Shareholders — Resolution Fixing Amount—Ontario Companies Act, sec. 88 — Organisation of Company—Unsealed By-laws—Evidence—Appeal.

Appeal by the plaintiff from the order of a Divisional Court 20 O. L. R. 170, dismissing an appeal by the plaintiff from the judgment of CLUTE, J., whereby the action was dismissed.

The action was brought to recover the $525 alleged to be due to the plaintiff by the defendants for the plaintiff's services as president of the company from the 7th September, 1907, to the 12th February, 1908, pursuant to certain by-laws and resolutions of the directors and shareholders, which the trial Judge and the majority of the Divisional Court held not to be in compliance with sec. 88 of the Ontario Companies Act, 7 Edw. VII. ch. 34.

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

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

R. C. Levesconte, for the defendants.

MEREDITH, J.A.:— It is now contended, apparently for the first time, that the organisation meetings of the company were not regularly held, and that therefore the agreement to pay the plaintiff was invalid; but no such contention is now open to the respondents; no evidence was directed to it at the trial, nor was it in any way dealt with there, so that there is no evidence upon which it could be now considered; nor can I think that, if there had been, it would prove a serious obstacle.

It was also contended that the by-laws of the company were invalid because, as it was alleged, they were not under seal; but this, again, is a question not now open to the respondents, for the same reasons.

If one can hope by such objections to establish in law that all the acts of the company are without lawful foundation and invalid, he must at least lay the foundation for his contention in facts duly established in the progress of the action.

*This case will be reported in the Ontario Law Reports.

I see no way of opening the gate to wider contentions than such as were dealt with at the trial and in the Divisional Court; nor any justification for doing so if it were possible. . . .

The single question is one of the proper interpretation of the enactment, which is in these words: "88. No by-law for the payment of the president or any director shall be valid or acted upon until the same has been confirmed at a general meeting."

A by-law was passed by the company's board of directors providing that the president, among other officers, should receive such remuneration for his services as might by resolution of the board be determined.

A general meeting of the shareholders confirmed that by-law, and also by resolution fixed the president's salary at $100 per month. Subsequently the board, in the same manner, fixed the same salary at the same amount: the plaintiff filled the office for a little more than five months, upon the understanding and agreement that he was to be paid according; and he was credited with the amount of his salary in the books of the company, and now appears in them as the company's creditor for the amount which he claims. In February, 1908, a meeting of the shareholders passed a motion "annulling" the payment of the $100 a month to the president; and it is up to this time only that the salary is claimed.

In these circumstances, there seems to me to have been a literal as well as a substantial compliance with the terms of the enactment in question, and with the terms of the by-law also.

There was a by-law of the directors for the payment of the president, confirmed at a general meeting of the shareholders; and there was, under the by-law, a resolution of the shareholders fixing the amount of remuneration; and there was a due performance of the duties of his office by the president upon the faith of being so paid.

The Judges in the Courts below seem to me to have dealt with the case as if the statute required that each contract, for such payment, should be confirmed by the shareholders, which, of course, is not the case. It is a by-law with which the statute expressly deals, and by-laws ordinarily deal with the subject in a general way; the contract deals with a specific case under the general authorisation of the by-law. . . .

The purpose of the enactment is that these who govern the company shall not have it in their power to pay themselves for their services in such government without the shareholders' sanction. There is nothing to indicate that the shareholders must

sanction the details of each payment; that would be quite unnecessary, and in many cases practically quite unworkable. . . .

I would allow the appeal, and direct that judgment be entered for the plaintiff in the action for $525 as claimed.

OSLER, J.A., concurred; reasons to be stated in writing.

MOSS, C.J.O., GARROW and MACLAREN, JJ.A., also concurred.

APRIL 9TH, 1910.

*LE SUEUR v. MORANG & CO.

Contract—Author and Publisher — Historical Book Written to Order—Delivery of Manuscript—Payment of Price—Refusal to Publish—Right of Author to Return of Manuscript on Refund of Money—Implication of Term in Contract.

Appeal by the defendants from the judgment at the trial of CLUTE, J., in favour of the plaintiff.

The plaintiff, a well-known literary man, having agreed with the defendants, a publishing company, to compose for them a biography of William Lyon Mackenzie, for which work he was to be paid $500, and having delivered to the defendants the manuscript which he had prepared, and which they declined to publish, sought to compel the defendants to hand him back the manuscript so delivered, on receiving from him the $500, which he offered to restore.

The judgment in appeal adjudged that the contract to write the life of William Mackenzie be rescinded, and that, upon the plaintiff paying to the defendants $500, they should deliver the manuscript to the plaintiff.

In his statement of claim the plaintiff asked for delivery of the manuscript and damages for its detention, but the claim for damages was abandoned.

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

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

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

*** This case will be reported in the Ontario Law Reports.**

GARROW, J.A.:— . . . The plaintiff prepared the manuscript of the proposed book and delivered it to the defendants, who, after examination, declined to publish it, upon the ground that it was unsuitable for the series of "Makers of Canada," of which it was to form part, for reasons which they specified.

The plaintiff had meantime been doing other work for the defendants, and, under a new arrangement as to payment, had been paid the $500; but, upon the defendants' refusal to publish, he at once offered back the $500, and demanded a return of the manuscript, which the defendants refused.

Clute, J., found as a fact that it was, in all the circumstances, a condition of the contract that, if the plaintiff would write the book, the defendants would publish it in the series, and that, upon the defendants' refused to publish, the plaintiff became entitled to a return of the manuscript, on returning the $500 which he had been paid.

No such condition, it is clear, is expressed in the correspondence. It must, therefore, depend upon a proper consideration of the written evidence, in the light of the surrounding circumstances, which may, of course, be looked at. There is no conflict of evidence. The plaintiff was the only witness examined. It is common ground that a contract of some kind was made. Neither party contended that the parties were never ad idem, and such a contention could scarcely have succeeded . . . And, if there was in fact a completed contract, a mere dispute as to the meaning of some of its terms would not make it any the less an agreement; the dispute would be considered and adjusted by the Court as a matter of construction. See Barnes v. Woodfall, 6 C. B. N. S. 657.

The circumstances under which the law sometimes, in furtherance of the intention, implies a term not expressed, have been frequently considered: see Bowen, L.J., in The Moorcock, 14 P. D. 64; Hamblyn v. Wood, [1891] 2 Q. B. 488; Ogdens Limited v. Nelson, [1903] 2 K. B. 287, [1904] 2 K. B., and [1905] A. C. 109; . . . Douglas v. Baynes, [1908] A. C. 477, 482; Littleton Times Co. v. Warners Limited, [1907] A. C. 476, 481.

It must always be a delicate matter to imply a term. One thing that must certainly appear is that the term to be implied was clearly within the intention of both parties, the implication being justifiable only for the purpose of giving effect to such mutual intention. And, while I have no doubt that both parties intended, when this contract was made, that the proposed book should be published as one of the series, and that such publication formed a material part of the consideration to the plaintiff

in undertaking the work, I am, with deference, unable quite to adopt the view of Clute, J., that there is good ground in the circustances to infer an absolute and unconditional term to publish.

The book was intended to form one of a series. It was wholly unwritten. The defendants, and not the plaintiff, were to take the risk of publication. The plaintiff was doubtless looking not merely for money but for reputation as an author: see per Tindal, C.J., in Planché v. Colborn, 34 R. R. 613, 614. But the defendants were mainly interested, as a business concern, in making a profit; or at all events so far as possible avoiding a loss. They had already had one satisfactory book from the plaintiff, and had, in the circumstances, every reason to expect an entirely satisfactory result in the case of the book now in question. But, as prudent business men, it seems to me very doubtful whether, if they had been asked, they would have agreed in advance to publish whatever the plaintiff might write.

A more probable inference, and one which the circumstances would, I think, justify, is this, that if, when the book was written, it was considered by the defendants to be from any cause unfitted for the series, they would, "at all events," in the language of Bowen, L.J., in The Moorcock, supra, return the manuscript, and thus enable the plaintiff to secure publication elsewhere. They had no right, under any view of the agreement, to keep it and also refuse to publish. That was never contemplated by either party. It is unnecessary to consider whether, in the case of such an inference, there would be the further inference of a condition that the plaintiff also return what he had been paid, because he submits to do so, and abandons all claim to damages.

Another view may be presented . . . A contract to prepare a manuscript, notwithstanding its peculiar nature, must be subject to similar warranties and conditions to those implied by law in the case of any other article to be provided under contract by its manufacturer, such as to the quality, condition, and fitness for the purpose intended. The defendants did not, apparently, reject the book because of careless or defective work, but rather because of the conclusions reached, which they in effect say, in their letter to the plaintiff, were contrary to the contents of others of the books in the series, and were such as would probably prejudicially affect the sale of not merely the book itself, but of the whole series. This was, I think, a complete rejection of the book, whether the reason was or was not a valid one and such as the defendants might urge under the contract. The plaintiff was thereupon, in my opinion, at liberty to waive any objection

to the sufficiency of the reason, and accept the rejection as within the defendants' rights under the contract, and as final, upon which the contract would be at an end; and the defendants entitled to get back their money and the plaintiff his manuscript. And this is exactly the position taken by the plaintiff. . . .

While, therefore, I differ with Clute, J., as to the reasons, I agree in the result at which he arrived. And the appeal should, therefore, in my opinion, be dismissed with costs.

MACLAREN and MEREDITH, JJ.A., agreed that the appeal should be dismissed, for reasons stated by each in writing.

OSLER, J.A., also concurred.

MOSS, C.J.O., dissented, for reasons stated in writing.

APRIL 9TH, 1910.

COWIE v. COWIE.

Husband and Wife—Alimony—Cruelty—Unfounded Suspicions—Injury to Health—Apprehension of Danger to Life—Evidence.

Appeal by the plaintiff from the order of a Divisional Court, 14 O. W. R. 226, allowing the defendant's appeal from the judgment of CLUTE, J., at the trial, 13 O. W. R. 599, in favour of the plaintiff in an action for alimony, and dismissing the action.

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

J. E. Jones and J. W. McCullough, for the plaintiff.

George Wilkie, for the defendant.

GARROW, J.A., referred to the facts and the conflicting views of the result of the evidence as to the husband's cruelty expressed by the trial Judge and the Chancellor delivering the judgment of the Divisional Court, quoted from his own judgment in Lovell v. Lovell, 13 O. L. R. 569, at p. 575, and concluded:—

The view there expressed is still my view, and the language is, I think, very appropriate to the circumstances of this case. At all events it is a guide to me in preferring, as I certainly do, the conclusions of the trial Judge to those stated in the judgment of the Chancellor.

No one can read the judgment of Clute, J., and the evidence, without observing that he believed the evidence of the plaintiff and her witnesses, and where there is conflict did not believe the defendant. For instance, he finds, against the defendant's denial, that the defendant did charge that the son Russell was not his offspring. This and similar findings, based upon contradictory evidence, are, it seems to me, conclusive upon an appellate Court, unless it is clear that a mistake of some kind has been made whereby a miscarriage of justice will ensue unless rectified. Nothing of the kind appears. Indeed, I entirely agree, not only upon the principle to which I have referred, but on the evidence itself, in the conclusions arrived at by Clute, J. The great weight of evidence supports them; indeed, a different result could, in my opinion, only be judicially arrived at by treating the defendant, as was apparently done in the Divisional Court, as the accredited instead of the discredited witness. There was no dispute, there could be none, about the state of the defendant's health at the trial. She was there, and was only with difficulty and after an interruption examined. She swore that her then condition was brought about by the long-continued strain of the defendant's very gross and wholly inexcusable conduct. This, on its face, does not seem unreasonable. The Chancellor suggests as a cause the "dosing" sworn to by the defendant. But the defendant's counsel, when Dr. Stacey was in the box, advanced no such nor indeed any other reasonable cause to explain the plaintiff's condition of ill-health, and called no expert testimony on his own side upon the subject. On the other hand, Dr. Stacey, who heard the story as told by the plaintiff, and believed by the trial Judge, gave it as his opinion that the conduct complained of, as detailed by her, would fully account for her then condition. This, it seems to me, was much more than speaking of "her present condition," as the Chancellor seemed to think, and was indeed quite sufficient, added to the plaintiff's evidence, to connect the misconduct and the injury, and to establish the plaintiff's case.

The appeal should, in my opinion, be allowed, and the judgment of Clute, J., be restored, with costs.

MOSS, C.J.O., OSLER and MACLAREN, JJ.A., concurred.

MEREDITH, J.A., dissented, for reasons stated in writing, saying, among other things, that there was really no evidence that the defendant's misconduct was the cause of the plaintiff's state of health at the time of the trial.

APRIL 9TH, 1910.

CROUCH v. PERE MARQUETTE R. W. CO.

Railway—Persons Killed in Crossing Track—Negligence—Findings of Jury—Statutory Warning — Absence of Sign-board—Evidence—Cause of Accident—Contributory Negligence.

Appeal by the defendants from the order of a Divisional Court (24th September, 1909), dismissing an appeal by the defendants from the judgment of TEETZEL, J., upon the findings of a jury, in favour of the plaintiff, in an action by the widow of Samuel Crouch to recover damages for the death of her husband and daughter, who were killed while driving across the defendants' line of railway, on the evening of the 11th January, 1908, through the alleged negligence of the defendants. The finding and judgment were for the plaintiff for $1,200 damages with costs.

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

F. Stone, for the defendants.

L. J. Reycraft and H. D. Smith, for the plaintiff.

OSLER, J.A.:—There is, in my opinion, no reason to interfere with the judgment of the Divisional Court. The jury absolved the deceased persons—the plaintiff's husband and daughter—as well as the driver of the vehicle in which they were being carried—from contributory negligence; and, while I do not say that their finding in this respect is entirely satisfactory, the whole of the circumstances were before them, and were, no doubt, taken into consideration under the charge of the learned trial Judge which is not open to objection. I cannot see that the evidence makes a case of the deceased being merely the authors of their own wrong, or that the finding is so absolutely against evidence as to warrant our granting a new trial on that branch of the case.

Then, as to the negligence of the defendants, the negligent omission of one statutory requirement is clearly proved, namely, the absence of any sign-board at the crossing. There was evidence which could not have been withdrawn from the jury that, notwithstanding the darkness of the evening, such a sign-board might and could have been seen by persons in the position of the deceased approaching the track. It is required to be maintained for the purpose of giving warning to such persons, and its pre-

scribed form and appearance are such as to make its usefulness for such purpose most probable under any circumstances, whether in broad daylight or in the evening. The jury found that the death was caused by the defendants' negligence, and that such negligence consisted, inter alia, in the absence of the sign-board. There was, to my mind, ample evidence to justify the jury in arriving at that conclusion. The defendants' strong point was the negligence of the deceased; but, that out of the way, it was easy, upon the evidence, to find that, if the sign-board had been there, they would have had that warning which it was the object of the legislation to give them, notwithstanding, it may be, their forgetfulness or inappreciation of the approaching danger.

Therefore, I would dismiss the appeal.

MOSS, C.J.O., GARROW and MACLAREN, JJ.A., concurred.

MEREDITH, J.A., dissented, for reasons stated in writing, his ground being, briefly, that there was no reasonable evidence that any of the alleged acts of negligence was the real cause of the accident, referring to Wakelin v. London and South Western R. W. Co., 12 App. Cas. 41.

APRIL 9TH, 1910.

CANADIAN NICKEL CO. v. ONTARIO NICKEL CO.

(TWO ACTIONS.)

Contract—Construction—Conveyance of Lands—Undertaking to "Erect" Refining Works—Forfeiture of Lands upon Failure—Condition Fulfilled by Part Completion of Works—Election to Use Land for Purpose Contemplated—Option of Purchase of other Lands—Mining Agreement—Failure to Mine—Retention of Moneys Paid for Option.

Appeal by the defendants and cross-appeal by the plaintiffs from the judgment of LATCHFORD, J., at the trial.

The actions were tried together, and the appeals were heard together.

In action No. 1 the plaintiffs sued for specific performance of a clause in an agreement dated the 2nd June, 1906, and to recover 20 acres of land in the township of Drury. The agreement

contained a number of provisions, and was the basis of the litigation in both actions, including the counterclaim in action No. 2.

Judgment was given in the first action in favour of the plaintiffs, and the defendants appealed therefrom.

Action No. 2 was for breach of the agreement in the failure of the defendants to mine, and in it the defendants counterclaimed for $14,134.31, being the balance of the sum of $15,000 paid by the defendants to the plaintiffs for an option, deducting a sum credited to the plaintiffs.

Judgment was given dismissing the second action and also dismissing the counterclaim; the defendants appealed from the dismissal of the counterclaim; and the plaintiffs appealed from the dismissal of the action.

The appeals were heard by MOSS, C.J.O., OSLER, GARROW, MACLAREN, and MEREDITH, JJ.A.

E. D. Armour, K.C., and J. F. Edgar, for the defendants.

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

GARROW, J.A.:—The plaintiffs were the owners of certain mineral lands, of which the 20 acres formed a part. Upon another portion of their lands they, in and by the same agreement, gave an option to the defendants to purchase at $175,000 upon certain conditions, including a deposit of $15,000, and provisions as to mining, which properly fall to be considered in action No. 2, although the circumstances may not be without a bearing in considering the facts in action No. 1, which is wholly confined in its scope to the 20-acre parcel and to the relief in respect of it by way of specific performance, which was granted by Latchford, J.

The only recitals in the agreement are a list of the mineral lands in question, and this: "Whereas the parties hereto desire that the purchasers shall have from the Nickel Company (plaintiffs) an option to purchase said lands and rights on the terms hereinafter set forth."

Paragraph 1 contains the agreement for the conveyance of the 20 acres for the expressed consideration of $100, but subject to the mineral rights which were reserved by the plaintiffs.

Paragraph 2, upon which the questions involved plainly turn, says: "In consideration of the conveyance to the purchasers by the Nickel Company (plaintiffs) of the 20-acre piece provided for in paragraph 1, the purchasers bind themselves and agree to pay to the Nickel Company the sum of $100. In the event that the purchasers do not before December 1st, 1908, erect works for re-

fining upon said 20 acres, they shall deed back said 20 acres to the Nickel Company and receive $100."

Paragraph 3 then provides for the option to purchase the other property as before mentioned, to expire at the latest on the same date, that is, the 1st December, 1908, but which might be terminated at an earlier date for a failure to mine, as subsequent paragraphs of the agreement provided for.

There is no covenant binding the purchasers to erect "works for refining" nor providing in any way for the extent or nature of the works, and in fact no other provision of any kind which bears, at least directly, upon the question involved in action No. 1.

After obtaining the conveyance of the 20 acres, the defendants expended about $55,000 in erecting buildings and for plant placed upon the 20 acres for the purpose of establishing refining works; but it is not denied that they were on the 1st December, 1908, incomplete—requiring to complete them about $40,000 more. It is also the fact that the defendants did not exercise the option to purchase the other lands.

Latchford, J., found as a fact that the defendants did not erect works for refining within the meaning of the contract, and the judgment apparently proceeds upon that ground alone.

The conclusion reached is, I think quite properly, not made to depend at all upon the failure to exercise the option as to the other lands, for it is quite clear that in the one case it was to be a purchase, and in the other a mere option. . . .

The real question is purely one of properly construing, in the light of the surrounding circumstances, the words forming the second clause of paragraph 2. . . .

I am with deference, unable to agree with Latchford, J., in the extensive meaning which he has evidently ascribed to the word "erect," which he seems to have regarded as the equivalent of "erect, complete, and have ready for operation." According to that construction, if the defendants had exercised the option to purchase the other lands, and had paid the purchase money, and had expended $99,000 in erecting a $100,000 refining plant, but had left unfinished a $1,000 chimney, the whole expenditure on the 20-acre parcel would be forfeited. On the other hand, if "works" of the most primitive and inexpensive kind, such as a hand-mortar and a crucible, with which I suppose some refining might be done, had been "erected" and completed, the contract would have been satisfied. Neither of these results would have been in the contemplation of the parties; nor, having regard to all the circumstances, is either of them the reasonable or necessary result of the language of the agreement—which language, in my

opinion, simply amounts to this: the defendants in effect say: "If we do not elect within the time mentioned to use the land for the purpose of erecting, as we at present intend, a refining plant, we will then reconvey it for what we are now paying you for it." They did elect to use it for that purpose, and had the plant more than half finished within the time; so that the event upon which, in my opinion, the plaintiffs were to become entitled to a reconveyance did not occur, and their action should have been dismissed.

With reference to action No. 2, I agree with the conclusions of Latchford, J., upon both appeals. With reference to the plaintiffs' action to recover damages for not mining as agreed, it is clear that, if the defendants had exercised the option to purchase, they would not have been accountable to the plaintiffs for either ore or timber taken, or for any failure to mine as agreed, and the $15,000 deposit would have gone simply as a payment upon the purchase money. Not having exercised the option to purchase, the plaintiffs have in hand the $15,000, and, so far as it has not been otherwise appropriated by the terms of the agreement, they, I think, are entitled to retain it: see Howe v. Smith, 27 Ch. D. 89; Soper v. Arnold, 14 App. Cas. 429. That the case is one of option rather than of completed contract to purchase seems to make the case all the stronger for the plaintiffs.

But, if the defendants refused to exercise the option to purchase, and had performed the contract as to mining, the whole of the $15,000 might, under the agreement, have been consumed in payment of the sums which, by the agreement, were to have been paid for the ore and other material which the defendants were entitled to take. They took only a small quantity, amounting to $865.69, leaving the balance in the plaintiffs' hands. The plaintiffs, therefore, have this balance, and also the ore and other material which, to that extent, the defendants might have taken. And, so far as I can see upon the evidence, the plaintiffs fail to establish any legal claim to damages beyond.

I am quite unable to accede to Mr. Armour's argument that, because no express provision is made for the disposition of the balance, it is therefore to be considered as money in the hands of the plaintiffs to the use of the defendants. On the contrary, the fact that no such provision was made is to me a strong circumstance to indicate a contrary intention. The money is paid over as one of the conditions of the agreement, the only consideration in fact moving from the defendants, and at once became the property of the plaintiffs. The defendants have themselves to blame for losing it. They could have saved it, or at least have got value

for it, in two ways: (1) by taking up the option; or (2) by doing the mining. They did neither. And now, after having had the plaintiffs' property tied up for the greater part of two years, their claim to the whole balance returned is not only, in my opinion, unwarranted by a proper construction of the agreement, but is wholly unjust.

For these reasons, I think action No. 1 should be dismissed with costs, and the appeal as to it allowed with costs. As to action No. 2, both appeals should be dismissed with costs.

MOSS, C.J.O., OSLER and MACLAREN, JJ.A., concurred.

MEREDITH, J.A., dissented in both cases, for reasons stated in writing.

APRIL 9TH, 1910.

MARSH v. LLOYD.

Trusts and Trustees—Purchase of Property in Name of Agent—Evidence to Establish Trust — Conflict — Finding of Trial Judge — Reversal by Divisional Court after Hearing Fresh Evidence — Further Appeal — Burden of Proof — Statute of Frauds.

Appeal by the defendant from the order of a Divisional Court, 14 O. W. R. 612, reversing the judgment of ANGLIN, J., at the trial, and declaring that the defendant acquired and held certain timber rights, conveyed to him by one Lemon and one Proctor, as the agent of the plaintiff, for whom he was a trustee of them, and directing that the property should be conveyed to the plaintiff, and that an account should be taken, etc.

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

C. A. Moss and Featherston Aylesworth, for the defendant.

McGregor Young, K.C., and T. H. Lennox, K.C., for the plaintiff.

MOSS, C.J.O.:— . . . The learned trial Judge, upon the evidence before him, determined the facts in the defendant's favour. The Divisional Court, having before it the same evidence, with further testimony adduced before it, came to the opposite conclusion.

In dealing with the case upon this further appeal, the question the Court has to decide is . . . not whether the first judgment was right, but whether the judgment appealed from is wrong. And, having read and considered the case with some care, I find myself unable to say that the judgment should not stand.

There are circumstances in the case and surrounding it which, viewed by themselves, appear to lend probability to the plaintiff's version of the case. The fact that the defendant negotiated the Proctor purchase apparently for himself, took the instrument of agreement from Proctor to himself, and paid some, though a small part, of the consideration with his own money, and that, nevertheless, he now admits that in so doing he was acting on behalf of the plaintiff, and that the latter is the beneficial owner, though there was no memorandum in writing signed by the defendant to that effect, is significant and important in considering the transaction for the purchase of the Lemon property. The reason for the plaintiff intrusting the defendant with the office of nominal purchaser from Proctor, viz., the former's strained relations with Proctor, existed also in the case of Lemon. . . .

[Review of the evidence.]

Support is lent to the plaintiff's case by the testimony of presumably independent witnesses as to declarations by the defendant inconsistent with his present attitude, and, although evidence of this class is always and properly open to criticism such as was forcibly presented in this instance, it is not to be wholly disregarded when weighing the conflicting testimony of the interested parties. There may be ground for surmising that, as was forcibly urged by Mr. Aylesworth, the plaintiff did determine to have no more to do with the purchase, and that it was only afterwards that he repented and sought to regain his first position; but there is not sufficient on which to base a finding to that effect.

I think the conclusions of the Divisional Court must be affirmed.

The defendant did not plead the Statute of Frauds in his defence, but at the commencement of the trial application was made to set it up. Owing to the course the case took, the application has never been finally disposed of. It has been laid down in decisions which are binding here that, in a case such as this has been found to be, the statute is of no avail as a defence.

Upon the whole, the result must be a dismissal of the appeal.

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

OSLER, GARROW, and MACLAREN, JJ.A., also concurred.

HIGH COURT OF JUSTICE.

BRITTON, J. APRIL 6TH, 1910.

BELL v. CITY OF HAMILTON.

Highway—Non-repair—Snow and Ice on Sidewalk—Dangerous Condition—Knowledge of Servants of Municipal Corporation —Weather Conditions—Evidence.

Action for damages for personal injuries sustained by the plaintiff by a fall upon the sidewalk of Victoria avenue in the city of Hamilton, owing, as the plaintiff alleged, to the sidewalk being out of repair by reason of snow and ice allowed to accumulate thereon. The accident occurred on the 5th February, 1910, about seven o'clock in the evening.

The action was tried without a jury.

W. M. McClemont, for the plaintiff.

F. R. Waddell, for the defendants.

BRITTON, J.:—It is alleged that the sidewalk "where the plaintiff fell was covered with frozen snow and ice of a thickness varying from seven inches in the inner to three inches on the outer side thereof, which, through continuous neglect in not being cleaned off after some storms, had accumulated and become tramped down in an irregular and uneven manner by the daily traffic on said street, and which, gradually slanting towards the outer edge thereof, caused the surface of the same to be in a very slippery and treacherous condition, by which the plaintiff was thrown as aforesaid and received his injuries."

The evidence, in my opinion, establishes that the sidewalk was, in the main, at this point, in a condition somewhat like that described, and that it was in a condition dangerous to persons walking upon it. It was hardly denied by the defendants that the sidewalks generally in Hamilton—and this sidewalk was not an exception—were at times last winter more or less dangerous.

It was stated that last winter was, for snow and ice, one of the worst ever known ; that it was quite impossible to keep the snow and ice off in a way most desired by those in charge of the matter for the defendants. It was shewn that there are, exclusive of streets in territory recently added to Hamilton, 164 3-10 miles of streets in that city; that there was expended for taking care of

snow and keeping walks safe and clear the sum of $7,547.44, of which $2,962.64 was before the 1st January and $4,584.80 after that date.

From the evidence I have no doubt that, in a general way and in regard to most of the streets, the best possible was done, but as to this street and as to the place where the accident to the plaintiff happened, there was negligence and "gross negligence" as that is defined in Drennan v. City of Kingston, 27 S. C. R. 46. I had occasion to consider this question in Merritt v. City of Ottawa, 12 O. W. R. 561. Some of the facts in that case are very like what were disclosed in this case.

The evidence given in behalf of the plaintiff, and in some important particulars corroborated by witnesses for the defence, established that the surface was slippery, "lumpy," "knolly," "wobbly"—that the depth of snow or ice was six inches at least inside and three at outside. . . . I am satisfied that the evidence of the plaintiff, his wife, their son, Robert Wilson, and George Reeves, can be relied upon. . . .

[Record of snow fall from the 19th January to the 5th February.]

Upon this record, and applying the evidence as to the condition of the walk, it is clear, I think, that the snow which fell on the 21st and 23rd January, which was not cleared off in front of No. 338 (where the plaintiff fell), followed by the hard frost of the 24th and 25th, created the condition which existed at the time of the accident. The weather conditions from the 26th January to the 2nd February inclusive were not such as would prevent the defendants from having the walk in front of No. 338 cleaned. The defendants had money and men at their disposal. Conceding the large mileage of sidewalks to look after, they had men whose duty it was to oversee the streets in the vicinity of and including Victoria avenue. It was well known to these men that No. 338 was a vacant house, and the walk in front of it was neglected. . . .

The plaintiff was not guilty of any contributory negligence. . . .

Judgment for the plaintiff for $350 with costs on the County Court scale and without set-off of costs.

TEETZEL, J. APRIL 8TH, 1910.

RE BOOTH AND MERRIAM.

Will—Construction—Bequest of "All my Goods and Possessions" —Devise of Land—Title of Devisee—Vendor and Purchaser.

Motion by the vendor, under the Vendors and Purchasers Act, for an order declaring that the vendor had a good title to land which he had agreed to sell.

The question was whether the vendor acquired a title to the land in question under the will of his wife, which read: "I hereby bequeath to my husband George W. Booth all my earthly goods and possessions."

A. C. McMaster, for the vendor.

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

TEETZEL, J.:—I think it is well established that, while the use of the word "bequeath" in the language of wills is primarily applicable to a disposition of personal property, yet, if the intention of the testator, to be gathered from the whole will, is to dispose of his real estate, the use of the word "bequeath," instead of the more appropriate word "devise," cannot defeat that intention: Whicker v. Hume, 14 Beav. 509.

Does the language of this will, therefore, disclose an intention of the testatrix to give her real as well as her personal estate to her husband? I think it does. Unless the word "possessions," by reason of its being conjoined with the words "all my earthly goods," is to be limited to possessions of a similar character, it is as comprehensive in its application to everything she owned as if she had used the word "estate" or "property." The language is not such that to ascertain the meaning in which the testatrix intended to use the word "possessions" the ejusdem generis rule of construction can apply; and therefore the unqualified ordinary meaning must be given to the word, and it, as I have said, is abundantly comprehensive to include everything she owned, both real and personal.

Besides the cases cited upon the argument which support this construction, reference may be had to Wilce v. Wilce, 7 Bing. 764; In re Greenwich Hospital Improvement Act, 20 Beav. 458; and Evans v. Jones, 46 L. J. Ex. 280.

The order will therefore be that the vendor has a good title so far as the will is concerned. As agreed by the parties, there will be no costs of the motion.

BRITTON, J. APRIL 11TH, 1910.

*FOWELL v. GRAFTON.

Negligence—Sale of Air-gun to Boy under 16——Injury to Person from Use by Boy—Liability of Vendor—Criminal Code, sec. 119.

Action for damages for personal injuries sustained by the plaintiff by reason, as she alleged, of the negligence of the defendants, in the following circumstances.

The defendants were merchants, and in certain cases issued premium tickets or coupons to purchasers upon sales of goods. On the 6th October, 1909, the defendants, in exchange for 25 of these tickets, gave or sold or placed in the hands of John O'Connor, 13 years of age, an air-gun. The defendants gave no ammunition with the gun, but the boy got ammunition elsewhere. He took the gun and ammunition to the house where he lived with his parents, nearly opposite to the plaintiff's house. The boy's father did not know that the boy had the gun, but his mother did know of it, and did not take it from him. On the 7th October the boy, standing at or near his own door, saw a bird, fired at it with the gun loaded with shot, and missed it. The shot struck the left eye of the plaintiff, so injuring it that she completely lost the use of it.

The action was tried with a jury. The defendants' counsel moved for a nonsuit, on the ground that there was no evidence of actionable negligence on the part of the defendants. BRITTON, J., reserved his decision, and left the question of negligence to the jury, subject to the result of the motion. The defendants did not call any witnesses or put in any evidence, and no objection was taken to the charge. The jury found the defendants guilty of negligence, and assessed the damages at $800.

The defendants renewed the motion for a nonsuit.

J. L. Counsell, for the plaintiff.

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

BRITTON, J.:—It is laid down in Dixon v. Bell, 5 M. & S. 1198, that "the law requires of persons having in their custody instruments of danger that they should keep them with the utmost care." . . .

[The learned Judge then referred to the facts of that case, which were somewhat similar to those of the case at bar, and to the language of Ellenborough, C.J.]

* This case will be reported in the Ontario Law Reports.

It is common knowledge that an air-gun in the hands of a child is "capable of doing mischief."

It was because of this, I think, that sec. 119 of the Criminal Code was enacted. By that section it is an offence for any person to sell or give any air-gun or any ammunition therefor to a minor under the age of 16 years, unless it is established, to the satisfaction of the justice before whom the person in charged, that he used reasonable diligence in endeavouring to ascertain the age of the minor before making such sale or gift, and that he had good reason to believe that such minor was not under the age of 16.

In this case there was no inquiry made as to the boy's age, and on the trial there was no explanation by the defendants. What actually happened, in due course after the boy got the air-gun, was one of the things that might reasonably be expected from its use by a boy under the age of 16.

In my opinion, there was owed to the public by the defendants a duty not to sell or give to a minor under the age of 16 an air-gun for which ammunition could easily be obtained. The plaintiff, as one of the public, is entitled to the protection intended to be given by the enactment mentioned. Apart from the knowledge that may be imputed to any business man of the danger from the use of an air-gun in the hands of a minor, there is the law referred to. There was evidence upon which a jury could find that these defendants might reasonably have anticipated injury as a consequence of permitting the boy to have for his use the air-gun. . .

The question of negligence is always in a sense one of degree. There is a duty to a stranger owed by a person using dangerous substances or dangerous weapons not to leave them where they may be used by persons ignorant of the danger: see Makins v. Piggott, 29 S. C. R. 188.

There was, in my opinion, such evidence of negligence that the case could not properly have been withdrawn from the jury; so I direct judgment for the plaintiff for $800 with costs.

DIVISIONAL COURT. APRIL 11TH, 1910.

CLISDELL v. LOVELL.

Vendor and Purchaser—Contract for Sale of Land and Business—Sale to Syndicate—Subsequent Sale to another Person—Rights of Members of Syndicate—Fraud—Duty of Member of Syndicate—Trustee—Agent—Damages for Breach of Duty—Costs.

Appeal by the defendants G. A. Case Limited and George A. Case from the judgment of RIDDELL, J., 13 O. W. R. 748.

The action was brought by Clisdell and Orpen against Lovell, Case, G. A. Case Limited, MacKenzie, Millar, the Dominion Brewery Company Limited, and a new company incorporated on the 16th January, 1907, to take over, and which did take over, from the defendant Lovell, the property in question, that is, the property of the Dominion Brewery Company Limited.

As the statement of claim was originally framed, the plaintiffs sought to set aside a conveyance by the defendant Lovell to the new company as fraudulent as against them and to enforce the agreement of the 29th December, 1905, or, in the alternative, to recover damages from the defendants Case, G. A. Case Limited, and MacKenzie "for their wrongful acts aforesaid."

By an interim judgment of RIDDELL, J., the trial Judge, 12 O. W. R. 90, it was held that it had not been shewn that the defendant MacKenzie was acting for the defendant Case in making the purchase, and that it was not shewn that Case had the authority of MacKenzie to make the agreement of the 29th December, 1905, so as to find the latter; that Case was liable for breach of that agreement; and leave was given to the plaintiffs to repudiate that agreement and to stand on their rights as they existed before it was made, and to amend by adding the vendor Clark as a defendant and by claiming specific performance of an alleged agreement by Clark to sell to Case, or to Millar and his associates.

The plaintiffs elected to repudiate the agreement of the 29th December, 1905, and amended by adding Clark as a defendant, and claiming, in addition to the relief claimed by their original pleading, specific performance of the agreement of the 14th December, 1905, which they alleged to have become a completed and enforceable agreement, and making some other changes in the claim for relief.

After this and a further trial, the judgment in 13 O. W. R. 748 was given by RIDDELL, J.

By that judgment (as drawn up and settled), the action was dismissed as against all the defendants except Case, G. A. Case Limited, and Millar; it was declared that the plaintiffs were each entitled to a one-fifth interest and the defendant Millar was entitled to a two-fifths interest in the property in question "under agreement dated the 14th December, 1905, between the defendant Clark and the defendants G. A. Case Limited and George A. Case, in the pleadings mentioned, and that they were deprived of the said purchase by the violation by the defendants G. A. Case Limited of a duty which the last named defendants owed to the plaintiffs and the said Millar;" it was ordered and adjudged that the defendants G. A. Case Limited pay to the plaintiffs and Millar

the damages sustained by reason of the purchase not being carried out "and their respective interests allotted to them;" and it was further ordered and adjudged that Case and G. A. Case Limited should pay the costs of the action up to and inclusive of judgment, except such as were wholly occasioned by the plaintiffs making unfounded claims.

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

H. Cassels, K.C., and R. S. Cassels, for the appellants.

W. N. Tilley, for the plaintiffs.

W. N. Ferguson, K.C., for the defendant Millar.

The judgment of the Court was delivered by MEREDITH, C.J.:—I am unable to understand how, in view of the learned Judge's finding that the agreement of the 14th December, 1905, never became a completed instrument, the judgment is drawn up in the form in which it appears, and which is, besides, not in accordance with the direction of the Judge indorsed on the record. According to that direction, judgment was to be entered "declaring the defendants G. A. Case Limited liable to the plaintiffs and Millar for breach of the implied agreement to do all that was reasonably necessary to procure a sale of the brewery property to the said G. A. Case Limited for the syndicate." Such a declaration is intelligible, while that contained in the formal judgment is not.

The learned Judge appears to have reached the conclusion that the effect of the transactions prior to the making of the syndicate agreement was to constitute G. A. Case Limited the agents of Case and Millar to purchase the property for them at the price and on the terms mentioned in the agreement of the 14th December, 1905, and the duty for breach of which G. A. Case Limited have been held liable is apparently that which would be consequent on the employment of them as agents for that purpose, and the breach of duty was the failure to use reasonable efforts to secure the property for their principal, and the active assistance which the Judge found they had given to a rival purchaser in obtaining it.

I am unable to agree in that conclusion. The position of G. A. Case Limited under the agreement of the 14th December, 1905, when a purchaser had been found, was that of trustees for him, and there is nothing in the form of the agreement or the nature of the transaction to cast upon G. A. Case Limited any other duty than such as arose from their position as trustees. I see nothing to

indicate that it was intended that G. A. Case Limited should act as agents for anybody, except so far as occupying the position of trustees may be said to involve so acting.

There was, as matters then stood, or were supposed to stand, no necessity for the intervention of G. A. Case Limited in any other capacity than that which they were to occupy as stated in the agreement. Case was the agent of Foster's principal for the purpose of finding a purchaser, and he and Millar had agreed between themselves that they would become the purchasers; and, had the deposit been made in due time, the position of the parties would have been: Clark, vendor; Case and Millar, purchasers; G. A. Case Limited, trustees for the purchasers; and Case, agent for the vendor and entitled to be paid his commission of $12,500 when the purchase should be completed.

The form of the syndicate agreement is peculiar; . . . the parties between whom it is made are, "G. A. Case Limited, Fred. Clisdell, A. M. Orpen, and Charles Millar," and it provides that they "enter into a syndicate to purchase" the property; but the persons to be interested in the company which is to be formed to take over the property are Case, Orpen, Clisdell, and Millar, though Case is not a party to the agreement.

The draftsman of the agreement, Millar, appears to have understood the position of G. A. Case Limited to be what it really was, that of bare trustees for the purchasers, and, so far from anything appearing to indicate that G. A. Case Limited were to act as agents for the syndicate to purchase the property, provision is made that "George A. Case shall be paid $12,500 as a commission for purchasing" the property, though the fact was that the $12,500 was a commission to be paid to him by the vendor for his services in finding a purchaser.

It was argued by counsel for the respondents that a duty rested upon G. A. Case Limited, as a member of the syndicate, to do nothing to prevent the purchase from being made, and that the judgment might be supported on that ground. I am unable to agree with that contention, even if it were clear, which I think it is not, but the contrary, that G. A. Case Limited was a member of the syndicate. I know of no principle of law which casts upon the members of such a syndicate any such duty, and the learned counsel . . . was unable to refer to any authority in support of his contention.

For these reasons, I am of opinion that the case against G. A. Case Limited failed.

If I had come to the conclusion that there was such a duty as has been found to have rested upon G. A. Case Limited, I should

have had great difficulty in reaching the conclusion to which the learned trial Judge came, that it was shewn that owing to the breach of that duty the property was lost to the syndicate,

While there may be ground for suspecting the good faith of Case in the matter, my view is that it is not shewn that any effort he would have made would have resulted in the vendor agreeing to sell to the syndicate. . . .

I am also of opinion that costs should not have been awarded against Case. The plaintiffs' case as to him failed, and they obtained no other relief against him.

Wide as is the power of the Court over the costs, it has not jurisdiction to require a successful defendant to pay the costs of his unsuccessful adversary: Re Foster and Great Western R. W. Co., 8 Q. B. D. 575, and cases there cited; Lambton v. Parkinson, 35 W. R. 545; Andrew v. Gore, [1902] 1 K. B. 625.

The appeal should, in my opinion, be allowed, and judgment should be entered dismissing the plaintiffs' action as against the appellants, as well as the defendants as to whom it has already been dismissed, but there should be no costs to the appellants here or below.

DIVISIONAL COURT. APRIL 11TH, 1910.

GILBERT v. BROWN.

Principal and Agent—Contract entered into by Agent for Purchase of Goods—Attempt by Vendor to Make Principal Liable for Price — Evidence of Agency — Construction of Contract between Principal and Agent.

Appeal by the defendant Brown from the judgment of the County Court of Prince Edward Island in favour of the plaintiff.

The defendants, Brown and Nugent, entered into an agreement: "Brighton, Aug. 20th, 1908. In consideration of financial assistance and advice given me in my operations in apples during the ensuing season, I hereby agree to ship all by pack of apples to the firms in Europe represented by John Brown, Brighton, Ontario, or, should it be thought advisable or in my interest to dispose of my fruit elsewhere or on the spot, I undertake and consent to consult with the said John Brown before making any such sales, and I agree to pay the said John Brown a commission of 5 per cent. upon such sales. It is understood that the apples purchased by me are the property of the said John Brown until all advances on same are repaid. John A. Nugent."

Nugent was a man of not much means, and Brown represented a number of foreign commission merchants who dealt in fruit.

Nugent told Brown that he (Nugent) could buy some apples at Wellington, and Brown said "all right," and advanced him $100; but before Nugent left Brown, he told him not to pay more than $1 a barrel for the apples.

Nugent accordingly went to Wellington, to the plaintiff's house, told him he wanted to buy by the barrel, and found that he could not buy for less than $1.25 per barrel. Nugent told the plaintiff that he could not pay that price until he had consulted Brown (this being the first time that Brown's name had been mentioned between them); asked the plaintiff to wait until he could communicate with Brown. Nugent telephoned Brown and told him what arrangements he could make with the plaintiff, and Brown told him to buy. Nugent accordingly entered into a written contract with the plaintiff for sale by the plaintiff to Nugent of certain apples named. Nugent also got some barrels from the plaintiff, but did not pay for them. He paid for all the apples he took away, but the plaintiff complained that he did not take all he bought.

Judgment was given by the Judge of the County Court against both defendants (the pleadings having been noted closed as against Nugent) for $430 and costs.

The defendant Brown appealed, upon the grounds: (1) that judgment having been given against the alleged agent, a judgment cannot be sustained against the alleged principal; and (2) that the relation of principal and agent did not exist between Brown and Nugent.

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

I. F. Hellmuth, K.C., and G. Drewry, for the defendant Brown.

E. M. Young, for the plaintiff.

RIDDELL, J. (after setting out the facts as above):—I do not enter into a discussion of the first ground of appeal, which may not be without difficulty for the plaintiff, in view of such cases as Morell v. Westmoreland, [1903] 1 K. B. 64, [1904] A. C. 11; The Bellcairn, 10 P. D. 161; Cross v. Matthews, 20 Times L. R. 603; Willcocks v. Howell, 8 O. R. 576. Sanderson v. Burdett, 16 Gr. 119, 18 Gr. 417, is really a case of partnership and purchase by one partner for the firm. Sheppard Publishing Co. v. Press Publishing Co., 10 O. L. R. 243, which is, of course, binding upon us, is put upon the ground that the cause of action was a joint tort, though the joint tort-feasors were principal and agent: see p. 252.

But on the second point raised I think the appeal should succeed.

Throughout the case there is no attempt made to shew that the written contract produced was not the real contract between Brown and Nugent. Nugent, though apparently favourable to the plaintiff, does not affect to say that this was not the agreement; he did not represent to the plaintiff that he was agent for Brown, though he did say that he could not give the price demanded without Brown's consent. He says, "I was practically buying for myself"—"I was buying for myself, and Mr. Brown furnished the money"—"They belonged to me until they were shipped to Mr. Brown"—"I paid for the picking and packing"—"The money I got from Mr. Brown." "Q. Before you had any transaction at all, you had signed this contract? A. Yes." . . "Q. You gave your cheques on the Standard Bank? A. Yes."

No question of estoppel can arise, as Brown was not present at the negotiations between the plaintiff and Nugent.

The contract, then, must be taken as fixing the relations between the defendants.

I cannot read this document as making Nugent the agent of Brown—the fact is that Brown was, for a consideration, acting as the banker for Nugent. It is true that, as between the defendants, any apples which Nugent bought became the property of Brown, but that, as against these parties, could only be in respect of apples which had become the property of Nugent. I am unable to follow the County Court Judge in his view that the document contains some intrinsic evidence that the real relation between the parties was not that set out in the document itself. . . . Nor is there anything in the evidence to cast suspicion upon the bona fides of the instrument.

And this is not such a case as Rex v. Van Norman, 19 O. L. R. 447, in which the magistrate held that a document produced at the trial did not contain the true agreement between the defendant and a certain company. . . .

Here the onus was upon the plaintiff to prove that Nugent was the agent of Brown; and he failed to meet that onus.

It may be that the Judge disbelieved the witnesses; but no trial tribunal, simply because it disbelieves a witness or set of witnesses, has the right to find as proved the opposite of what is sworn to.

Nor is there anything in the manner in which the apples were dealt with which assists the plaintiff.

I am, therefore, of opinion that the appeal should be allowed and the action dismissed as against Brown. As to costs, the plaintiff was given a copy of the contract, and, notwithstanding, brought his action against Brown on a written contract made with Nugent, and took his chance of finding some means of making Brown liable. He has failed; and I cannot find anything in the conduct of Brown which should change the general rule. Costs should, therefore, follow the event.

BRITTON, J., agreed in the result, for reasons stated in writing.

FALCONBRIDGE, C.J., also agreed in the result.

BOYD, C., IN CHAMBERS. APRIL 12TH, 1910.

NORTHERN CROWN BANK v. YEARSLEY.

Summary Judgment—Rule 603—Promissory Notes—Defence—Conflict of Evidence—Complicated Transactions — Unconditional Leave to Defend.

Appeal by the defendant from an order of the Master in Chambers for summary judgment under Rule 603 in an action upon promissory notes.

C. P. Smith, for the defendant.

F. Arnoldi, K.C., for the plaintiffs.

BOYD, C.:—This appears to me to be an attempt to overwork the provisions of the Rule relating to summary judgment. That speedy relief is intended for plain and simple cases, not for transactions which are of complicated and difficult character, like the present. The evidence, as far as given by affidavit and examination, leads me to think that the defendant has been imposed upon, but to what extent and in what manner is not brought out. He has apparently a very confused notion of what the transaction was, but this much is disclosed, that the notes sued on were connected intimately with 200,000 shares of the Cobalt Development Co. Limited, and no intelligible account is given by the plaintiffs of the dealing with and present condition of these shares. Upon payment of the notes, I infer from the evidence that the defendant would be entitled to call for this stock or to have it accounted

for. It is in evidence that the officer of the bank with whom the business began had knowledge of the agreement dated the 15th April, 1907, and it also appears (though with conflict of evidence) that the notes were not discounted by the bank. Then one would like to know on what terms originally were they taken and to be held by the bank from its own officer. The defendant has a very confused knowledge, or, it may be, recollection, of the course of affairs. I am not able, on these materials, to test his credibility or to form any satisfactory opinion as to how far he is to blame or to be blamed in his dealings with the bank.

It is not a case in any aspect for unconditional judgment; but, apart from this, generally I cannot regard it as a proper case for summary judgment. The parties should plead and go to trial in the ordinary way. Costs below and in appeal in the cause.

MEREDITH, C.J.C.P. APRIL 13TH, 1910.

*RE BRANTON.

Will — Construction — Devise to Wife during Widowhood with Devise over in the Event of Remarriage — Gift over Taking Effect on Death without Remarriage—Vested Remainder under Gift over — Distribution of Share of Remainderman Dying Intestate.

Motion by Henry Branton, under Con. Rule 938, for an order determining certain questions arising on the will of Thomas Branton, deceased, dated the 26th January, 1874.

The testator, who died on the 17th January, 1875, by his will devised land to his wife Elizabeth "to have and to hold for her personal benefit so long as (she) shall remain my widow, and in the event of (her) remarrying, the (land) to become the property of my children, Fanny Lydia Branton and Mary Johnson Branton, to have and to hold as theirs without let or hindrance;" and, by the paragraph which followed this devise he provided "also that the said children shall receive their support, clothing, and education from the said Elizabeth Branton out of or from the said property willed by me to the said Elizabeth Branton."

The testator left surviving him these two daughters, issue of his marriage with Elizabeth Branton, and the applicant, his only child by a previous marriage.

Elizabeth Branton died in 1880, without having married again.

Mary Johnson Branton died on the 18th February, 1904, intestate and without ever being married, and the Toronto General

* This case will be reported in the Ontario Law Reports.

Trusts Corporation were on the 29th June, 1904, appointed administrators of her property.

The questions for decision were: (1) whether or not, in the events that happened, the gift over contained in the will of the testator took effect; (2) what share or interest in the land the applicant was entitled to.

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

E. G. Long, for the other parties.

MEREDITH, C.J., held that the devise over was not dependent on the contingency of the widow marrying again, but took effect on the determination of her estate, whether by marriage or death: Jarman on Wills, 5th ed., p. 759; Theobald on Wills, Can. ed., pp. 567, 576-7; Luxford v. Cheeke, 3 Lev. 125; S. C., sub nom. Brown v. Cutter, 2 Shower 152, Sir T. Raymond 427; Browne v. Hammond, Johns. 210, 214; Eaton v. Hewitt, 2 Dr. & Sm. 184; Wardroper v. Cutfield, 10 L. T. N. S. 19; Underhill v. Roden, 2 Ch. D. 494; In re Tredwell, [1891] 2 Ch. 640; Meeds v. Wood, 19 Beav. 215; Eastwood v. Lockwood, L. R. 3 Eq. 487; In re Martin, 54 L. J. Ch. 107; In re Dear, 58 L. J. Ch. 650; In re Cave, 63 L. T. N. S. 746; Burgess v. Burrows, 21 C. P. 426. [Pile v. Salter, 5 Sim. 411, disapproved in Underhill v. Roden, supra, and not followed in Scarborough v. Scarborough, 68 L. T. N. S. 851, is inconsistent with the other cases, and should not be followed.]

It was argued by Mr. Kilmer that the rule ought not to be applied in the case at bar, because the devise to the widow is not, in terms, for life if she should so long continue a widow, but I do not agree with that contention. The effect of the devise is precisely the same as if it had been expressed to be for life if she should so long continue a widow: In re Carne's Settled Estates, [1899] 1 Ch. 324; National Trust Co. v. Shore, 16 O. L. R. 177.

There must be a declaration that the two daughters took under the will a vested remainder in the land, to take effect in possession upon the marriage or death of the wife.

Upon the death of the daughter Mary Johnson Branton intestate and without issue, her undivided one-half of the land became, under the provisions of the Devolution of Estates Act, distributable in like manner as personal property, and the applicant, though but a half brother, is entitled as one of her next of kin to share equally with the other next of kin, the surviving sister, and there will be a declaration accordingly.

Costs out of the estate.

FALCONBRIDGE, C.J.K.B. APRIL 14TH, 1910.

COLONIAL LOAN AND INVESTMENT CO. v. McKINLEY.

Mortgage—Reference in Action—Party Added in Master's Office—Notice to Incumbrancers—Issue of Fact—Order and Notice Set aside.

Motion by J. W. Findlay to set aside a notice served on him as an incumbrancer and an order adding him as a party defendant in the Master's office upon a reference in a mortgage action.

Shirley Denison, for the applicant.

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

H. C. Macdonald, for the original defendants.

FALCONBRIDGE, C.J.:—Findlay insists, and the original defendants (the mortgagors) agree, that Findlay ought not to have been made a party in the Master's office.

It is sworn by Findlay and his solicitor that Findlay's claim is based, in part at least, on representations and conduct of the plaintiffs and their solicitors, and is not a claim of title to the lands in question through the defendants by original writ. These statements are denied, and there is an issue of fact which cannot be disposed of on this motion, nor, I apprehend, satisfactorily in the Master's office.

There may be a subsidiary question to be determined as to the authority of the plaintiffs' solicitors to do that which they are alleged to have done.

Findlay says in fact that the plaintiffs gave him title, and that he does not wish, and cannot be called on, to redeem; referring to Con. Rules 744 to 760; Holmested and Langton's Judicature Act, p. 959 et seq.; Bank of Montreal v. Wallace, 13 Gr. 184; Abell v. Parr, 9 P. R. 564; Lally v. Longhurst, 12 P. R. 510.

I am of opinion that the order should go setting aside the notice to incumbrancers and the order adding J. W. Findlay as a party in the Master's office, with costs.

SMITH v. FOX—MASTER IN CHAMBERS—APRIL 9.

Discovery—Production of Document—Relevancy.]—Motion by the plaintiff, under Con. Rule 452, for production of a letter admitted by the defendant Parker to be in his possession. The Master held that the letter was material and relevant to the plaintiff's case, and ordered its production, with costs to the plaintiff in the cause. Reference to Cutten v. Mitchell, 10 O. L. R. 734.

A. R. Clute, for the plaintiff. G. M. Clark, for the defendant Parker.

CLEMENS v. COMPTON—FALCONBRIDGE, C.J.K.B.—APRIL 9.

Fraud and Misrepresentation — Sale of Farm — Damages.]—Action to set aside a sale of a farm and chattels by the defendant to the plaintiff, on the ground of false and fraudulent representations. The Chief Justice finds the fact to be that the defendant made the false and fraudulent representations charged as to the value and condition of his lands, crops, and chattels, and the quantities thereof, with the intention that they should be relied and acted upon by the plaintiff's husband in order to effect the sale or exchange of the property for the Drayton business and property, and that the plaintiff's husband did rely and act thereon, whereby the plaintiff suffered great loss and damage. Any inspection that was made by the plaintiff's husband before the purchase or exchange was made under such conditions, climatic and otherwise, as to be of no value—in fact so as not to amount to inspection at all. Judgment for the plaintiff for $3,205.15 damages with costs. Counterclaim dismissed with costs. J. H. Ingersoll, K.C., for the plaintiff. R. W. Eyre, for the defendant.

FRASER v. GRAND TRUNK R. W. CO.—DIVISIONAL COURT—APRIL 12.

Interpleader—Payment into Court—Discharge—Costs.]—An appeal by the plaintiff from the order of FALCONBRIDGE, C.J.K.B., ante 469, allowing the defendants to pay into Court the sum apportioned to Ann Fraser by the judgment in this action, instead of paying it to the plaintiff under the judgment. The Court (BOYD, C., MAGEE and LATCHFORD, JJ.), dismissed the appeal without costs, and ordered that the money should not be paid out of Court without notice to the plaintiff's solicitor, and that the defendants should be discharged from any responsibility in respect of the moneys paid into Court under the order appealed from, and relieved from attendance upon any motion in respect thereof. F. Arnoldi, K.C., for the plaintiff. H. H. Dewart, K.C., for Ann Fraser. D. L. McCarthy, K.C., for the defendants.

ALLEN v. HAMILTON—MASTER IN CHAMBERS—APRIL 13.

Company — Winding-up — Ontario Companies Act, secs. 177 190, 191—Party to Action—Addition of Parties—Directors.]—

In an action against the general manager and an agent of the Canadian Oil Company Limited for damages occasioned by their alleged misrepresentations of the prospects of the company, in reliance on which he was induced to take stock for which he paid $14,800, the plaintiff moved for leave to add as defendants the company and the 14 directors of the company. The company was in course of voluntary winding-up under the Ontario Act 7 Edw. VII. ch. 43. The motion was made ex parte as to the directors, and was granted. As regards the company the motion was opposed. The Master held, in view of the provisions of sec. 177 of the Act, that the company could not be added as a defendant in this way; but, if the plaintiff was a creditor (which seemed doubtful), he could make an application to the proper tribunal under secs. 190 and 192. Motion refused as to the company. Order made directing an amendment of the writ of summons and statement of claim by adding the directors. Costs of the motion and order and all costs lost or occasioned thereby to be costs to the original defendants in cause. The plaintiff to pay the costs of the motion to the company, if required to do so. H. M. Mowat, K.C., for the plaintiff. M. Lockhart Gordon, for the defendant Hamilton. J. T. Loftus, for the defendant O'Leary. A. E. H. Creswicke, K.C., for the company.

COTTON v. MEDCALF—DIVISIONAL COURT—APRIL 14.

Vendor and Purchaser — Contract for Sale of Land—Possession—Title—Attempted Cancellation of Contract—Return of Deposit.]—Appeal by the defendant from the judgment of the County Court of York in favour of the plaintiff in an action to recover $300 paid to the defendant by the plaintiff as a deposit on an agreement to purchase a house and lot. The Court (BOYD, C., MAGEE and LATCHFORD, JJ.), held, upon an examination of the evidence, that the action of the plaintiff's (purchaser's) solicitor in terminating the contract, upon the ground of the defendant's alleged inability to give possession upon the day agreed to, and upon the further ground of the defendant's inability to make title, was not warranted by the circumstances of the case, and was in violation of the undisputed understanding arrived at between the solicitors upon the negotiation as to the title, etc. Appeal allowed with costs, and action dismissed without costs. R. J. Gibson, for the defendant. J. D. Montgomery, for the plaintiff.