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APPELLATE DIVISION.

FEBRUARY 16TH, 1915.

BARISINO v. CURTIS & HARVEY (CANADA) LIMITED.

Parties—Uncertainty as to Identity of Plaintiff—Misnomer—Person Acknowledging himself to be Plaintiff and Submitting to Examination for Discovery — Estoppel — Order Amending Style of Cause by Changing Name—Jurisdiction to Set aside Order—Rule 217*—Order Right on Merits—Restoration on Appeal.*

Appeal by the defendants from an order of the Judge of the District Court of the District of Timiskaming.

This action was begun in that District Court in the name of "Barisino" as plaintiff. There being no one of that name, one Bardessano, who had a claim against the defendants, was served with an appointment for examination for discovery, at the instance of the defendants. He appeared, with a solicitor, before the examiner, and swore that he was the plaintiff, gave particulars of his claim, etc. The action proceeded on that basis, and at the trial evidence was given on behalf of the plaintiff. Judgment went for the defendants, who taxed their costs. Upon the Sheriff attempting to seize the goods of Bardessano, on a writ of fieri facias for these costs, Bardessano denied that he was the plaintiff. The defendants applied ex parte to the District Court Judge, who made an order on the 26th October, 1914, directing that the judgment and writ of fieri facias should be amended by inserting in the style of cause, as plaintiff, the name of Bardessano in place of Barisino. Bardessano moved before the District Court Judge to set aside the order of the 26th October, and on the 21st December, 1914, the Judge made an order setting aside the said order of the 26th October.

The appeal was from the order of the 21st December, and was heard by FALCONBRIDGE, C.J.K.B., RIDDELL, LATCHFORD, and KELLY, JJ.

R. McKay, K.C., and J. M. Hall, for the defendants, appellants.

L. Duncan, for Bardessano, respondent.

THE COURT held that, although the District Court Judge had jurisdiction, under Rule 217, to entertain the motion to set aside his own ex parte order, he should not have set it aside, upon the facts. Bardessano, by representing himself as the plaintiff, a representation upon which the defendants acted, was estopped from saying that he was not the real plaintiff.

Appeal allowed with costs here and below.

MARCH 22ND, 1915.

HAY v. COSTE.

Contract—Construction—Scope—Partnership — Contemplated Profits from Oil Leases and Agreements—"Extensions"—Profits from Natural Gas Leases and Agreements—"Oil and its Products"—Findings of Fact of Trial Judge—Appeal.

Appeal by the plaintiff from the judgment of MIDDLETON, J., 6 O.W.N. 443.

The appeal was heard by FALCONBRIDGE, C.J.K.B. HODGINS, J.A., LATCHFORD and KELLY, JJ.

J. W. Bain, K.C., and Christopher C. Robinson, for the appellant.

C. A. Masten, K.C., and G. C. Cooper, for the defendant, respondent.

The judgment of the Court was delivered by KELLY, J.:—The plaintiff sought an accounting of all profits made by the defendant or for his benefit, either directly or indirectly, from oil and gas discoveries, on the ground that a partnership existed between them entitling him to a one-half interest in all profits from such discoveries, and from any and all leases, rights, agree-

ments, purchases, benefits, and concessions obtained by the defendant.

The defendant, prior to the events which led up to this action, had had much experience in the line of gas and oil development and exploration, particularly in Ontario; and the plaintiff claimed to have an extensive connection with investors and persons of large means in England and Scotland, and that he was thus in a position to procure capital necessary for the promotion of undertakings such as that involved in the present dispute.

They were on terms of intimate acquaintance; and, for several months prior to their entering into their written agreement of the 20th July, 1905, they had discussions on the subject of their becoming jointly interested in development work of the kind with which the defendant was familiar; and the possibilities of the North-West brought them to the consideration of a development in that region. . . .

The plaintiff took the position that there existed a general partnership between him and the defendant as the result of the conversations and negotiations between them in 1904 and the early part of 1905.

The learned trial Judge has found as a fact that, though there were some differences in the accounts given of these preliminary negotiations, there was not any concluded partnership arrangement or any concluded agreement of any kind prior to the making of the agreement evidenced by the written document of the 20th July, 1905. This view is quite supported by the evidence; so that that agreement is of chief importance in determining the rights of the parties.

Following the making of the agreement between the railway company and Coste, the work of development contemplated by it proceeded for several years, during which Coste gave the services he agreed to give. The work did not result in the finding of oil, but gas was found in abundance. The discovery of gas did not interest the railway company; what they still desired was oil; and, at the end of years of experimental development work with only this result, the company or their representatives decided to discontinue operations—a course open to them under the terms of their contract. Had they decided that the discovery was of sufficient commercial value, they were under obligation to pay $25,000, to one half of which the plaintiff would have been entitled. But, having decided adversely, that is, not to prosecute operations further, the only right the parties to this action possessed was to purchase the company's interest by re-

imbursing it for all its expenditures in connection with the experiment. In determining the extent of this right, it must be borne in mind that the experiment and the possible discovery dealt with in the letter of the 8th February, 1906, from the company to the defendant, had reference to oil only. . . .

The learned trial Judge refused to take into consideration and give effect to expressions found in the correspondence between the parties both before and after the agreement, and took the agreement as solely embodying the expression of their rights. In this, I think, he was correct. He adds, however, that he has carefully read the letters submitted, but cannot find in them anything which leads him to modify the views which he expressed as to the effect of the agreement.

Unless it can be held that the enterprise, in the profits of which the plaintiff now seeks to share, is the outcome of the negotiations which preceded the written agreement of the 20th July, 1905, or that it is an "extension" thereof, the plaintiff cannot succeed. The mention of gas as well as oil in the letter of these parties to Sir Thomas Shaughnessy referred to in their agreement of the 20th July, 1905, is pointed to as being of significance in supporting the plaintiff's present claim. The discovery of oil was, alone, the subject of the agreement; and the mention there made of gas, which was only in speaking of the probable necessity of obtaining gas and oil leases, is explained by the fact that gas and oil are not in practice the subject of separate leases. The reference to gas, therefore, was only incidental, and not an essential element of the contract; and its use under these conditions cannot have the effect of enlarging the scope of the agreement so as to include anything beyond the only commodity manifestly in the contemplation of the parties in their negotiations and in the agreement which followed.

The position is also untenable that the enterprise, the profits from which are now in question, is, in the sense contended for by the plaintiff, an "extension" of the agreement for the earlier operations in which the defendant was engaged, or the outcome of the negotiations leading up to that agreement. The only right left to Messrs. Hay and Coste, when the company decided to discontinue experimenting for oil, was to exercise the option of purchase of the company's interests. The option was not exercised—no doubt for the very excellent reason that there did not exist anything of such value as to justify payment of the expenditures the company had made in connection with the experiment—and that undertaking was then at an end.

The enterprise of gas development afterwards entered upon by the defendant and the railway company was altogether distinct from and independent of the earlier experiment for oil. The railway company owned the gas properties, and were under no obligation to associate Messrs. Hay and Coste, or either of them, with them in the new venture or to afford them any opportunity of engaging in it. It is more than probable that the defendant's well-known experience and recognised efficiency in that class of operation suggested to the company the probability of success through him, if the time had come when gas development could be made profitable in that region. The plaintiff did not, when the matter was discussed between him and the defendant, take any part in or contribute to furthering the scheme, and nothing was accomplished by or through him. What followed was the outcome of the defendant's independent efforts, and on his own account, unaided by the plaintiff.

The learned trial Judge has also satisfactorily disposed of the contention put forth by the plaintiff that natural gas is to be treated as a product of oil—the expression "oil and its products" having been made use of in a letter put in at the trial—when he says that " 'products' is there used in the sense of artificial products or products resulting from manufacture."

In any view of the case, I am unable to support the appellant's position; and, in my opinion, the judgment of the learned trial Judge is correct; and the appeal should be dismissed with costs.

MARCH 22ND, 1915.

DONOHUE v. McCALLUM.

Vendor and Purchaser—Agreement for Sale of Land—Uncertainty as to Land Intended to be Sold—Description—Boundaries—Evidence of Identity—Small Element of Uncertainty—Disregard by Court—Statute of Frauds—Authority of Agent—Ratification—Specific Performance.

Appeal by the defendant from the judgment of BOYD, C., 7 O.W.N. 534, awarding the plaintiff specific performance of an agreement for the sale and purchase of land.

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

J. M. McEvoy, for the appellant.
D. S. McMillan, for the plaintiff, respondent.

The judgment of the Court was delivered by FALCONBRIDGE, C.J.K.B.:—On the 6th March, 1914, the defendant wrote the following letter to one Alfred M. Baxter: "I am going to ask a favour of you, if you will. Find out the value of property on the London road around my house there, as I want to sell the lot between my house and Mr. Markle. Find out if you can what Mr. Broderick is asking for his lot on the opposite side from his house, St. Margaret's Hospital, I mean, and telephone on Sunday or some other evening soon at my expense if it is too much trouble to write me. . . ." There is an endorsement or postscript on this letter as follows: "This is on the *cute*. If you hear of a prospective buyer for this lot and could secure him for me I would pay you just the same as the real estate men charge, 2½% on purchase-price. Mum's the word."

Baxter answered that letter and received the following undated letter from the defendant: "You asked me what I would take for the 50′ of my lot on London road. $600 cash will be a cheap place for you, best location in the city. Were I able to look after house building I would not sell it but build on it myself. I intend to go back to my old house some time, and would just like you very much as a neighbour. Let me know on Monday morning, as Mr. Holland is after the price of it in his last letter to me."

Baxter found a purchaser, viz., the plaintiff, for the sum of $600 cash, and telephoned to the defendant on the 19th March, who said it would be all right. Baxter went down to the plaintiff; she was satisfied, and gave him $5 to bind the bargain, and he gave her the following receipt: "$5.00, Sarnia, March 19th, 1914. Received from Mr. Donohue ($5.00) in sale of lot on London road of Mrs. McCallum. A. M. Baxter."

Then the defendant wrote the following letter to Baxter, also undated, and said to be posted about the 27th March: "Thanks very much for disposing of my lot. Kindly hold on to her till my own lawyer comes back to London to look after the deed." Then Mr. McMillan, the plaintiff's solicitor, wrote to the defendant and received the following reply on the 16th April: "I am looking after the lot and will send you the deed in a few days." Apparently Mr. McMillan wrote to the defendant again and received a letter on or about the 23rd April as follows: "Your letter received. My lawyer is preparing the deed, and as soon as they are ready with you shall get it." It is mani-

fest from both these letters to Mr. McMillan that McMillan mentioned his client's name in his letters to the defendant, because she says in one letter that she will send the deed, and in the other that the lawyer is preparing the deed.

Some difficulty then arose about a mortgage on the property, and the defendant refused to carry out the contract.

The learned Chancellor delivered the following interim judgment: "This case should be settled between the parties. There is no doubt of the intention and the willingness of the defendant to sell her 50-foot lot for $600 to Mr. Baxter at first, and then to the person found by Mr. Baxter, whom the plaintiff was willing to accept as a purchaser. I think that the objections taken of technical character and resting on the Statute of Frauds are none of them sufficient to stay the hand of the Court if the identity of the parcel sold can be clearly made out. This is not so on the front end, but I am disposed to let this be supplied by further evidence of actual measurement on the ground between the defendant's house and the Markle lot, and if on the ground the depth of the lot is marked by visible boundaries. On payment of the costs of the day, fixed at $25, I would let the case stand for further evidence as to the locality till the next non-jury Court at Sarnia. If this is not accepted and the money paid within a week, the action is dismissed with costs from the filing of the statement of defence."

Further evidence was taken before Mr. Justice Britton on the 15th December.

The learned Chancellor considered that the further evidence sufficiently cleared up the description in order to make plain the identity of the lot in question, and gave judgment for the plaintiff. See 7 O.W.N. 534.

The defendant now appeals from this judgment, on the grounds: (1) that there was no memorandum in writing sufficient to satisfy the Statute of Frauds; (2) that there was not sufficient identification of the property intended to be sold, if any was intended to be sold.

As to the second objection, the learned Chancellor is perfectly right in holding that, in view of all the evidence as to identity, there is introduced such a very small element of uncertainty (see Wylson v. Dun (1887), 34 Ch.D. 569, 573) that the Court may reasonably disregard it.

In argument, the defendant urged, although the point is not expressly taken in the notice of motion, that the utmost authority that was given to Baxter was to find a purchaser and not to sign a contract.

The objection as to there being no sufficient memorandum in writing was that the name of the purchaser does not appear in the correspondence.

The answer to both these objections is, that there is complete ratification by the defendant of the acts of her agent, and it is manifest from the correspondence that the name of the purchaser was mentioned, probably in a letter from Baxter to the defendant, and certainly in a letter from Mr. McMillan to the defendant.

The objections therefore fail, and the appeal must be dismissed with costs.

MARCH 22ND, 1915.

*SMITH v. HUMBERVALE CEMETERY CO.

Company—Cemetery Company—Power to Sell Lands not Required for Cemetery Purposes—Act respecting Cemetery Companies, R.S.O. 1887 *ch.* 175*—Status of Plaintiffs in Action—Estoppel—Reincorporation of Company under Companies Act,* 2 *Geo. V. ch.* 31*—Additional Powers—Effect of sec.* 13*—Order in Council—Powers of Provincial Secretary —Trusts.*

Appeal by the plaintiffs from the judgment of BRITTON, J., 7 O.W.N. 462.

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

E. F. B. Johnston, K.C., and D. Inglis Grant, for the appellants.

G. H. Watson, K.C., and G. A. Grover, for the defendants, respondents.

RIDDELL, J. (after setting out the facts) :—The plaintiff Smith was . . . one of the original incorporators of the cemetery company, and became a shareholder in the new company. Barlow is the owner of a burial lot. These two with one Robertson —as to whom there is no evidence—began this action on the 24th July, 1913, against the two companies. Paterson, the president,

*This case and all others so marked to be reported in the Ontario Law Reports.

and Fraser, the secretary, of the new company, and Dr. Winter, claiming in effect that the new company had no power to convey the land to Winter, and consequential relief. Pending action an application was made to the Provincial Secretary, and an order in council was issued on the 2nd September, 1914, that all the powers of the new company, save and except those possessed by the old company, should be as from the date of the reincorporating charter suspended until further order.

No proceedings in the nature of a sci. fa. have been taken. The Attorney-General is not a party, and has not been asked, nor has he agreed, to lend his name to these proceedings. . . .

The plaintiffs suing not only for themselves but for all others in their class, it has been decided more than once, both in England and Ontario, that that fact should appear in the style of cause as on the writ: see Rule 5(1). But this may and should be amended.

The locus standi of the plaintiffs is attacked. Smith seems to have taken part in the movement to obtain the new charter; and, if the act of the new company here complained of were the obtaining the new charter, there might be reason in holding Smith to be estopped. But the participation in one improper act of the company is no bar to a shareholder objecting to another, even of the same kind. He may undoubtedly object if the second is claimed to be ultra vires: Mosely v. Koffyfontein Mines Limited, [1911] 1 Ch. 73; Koffyfontein Mines Limited v. Mosely, [1911] A.C. 409. And here the act is wholly different from that in which it is said Smith took part.

Where the act is ultra vires in the strict sense, one shareholder my sue: Simpson v. Westminster Palace Hotel Co. (1860), 8 H.L.C. 712; and may of course sue for others in his class as well: Russell v. Wakefield Waterworks Co. (1875), L.R. 20 Eq. 474; Burland v. Earle, [1902] A.C. 83, and cases cited.

The plaintiff Barlow bought a lot before the granting of the new charter, but I do not decide as to his position, that of Smith being ample to support this action. Nor do I proceed upon any supposed sacredness of the cemetery. What the company propose to do is wholly repugnant to my sense of propriety, but it is the legal right we must investigate, not their good taste and regard for the feelings of others.

The law in England as to graveyards I disregard. The parish graveyard has its own law, but this cemetery is a pure creation of the statutes, and we must look to the statutes for the law applicable.

The company, being formed under sec. 1 of R.S.O. 1887 ch. 175, an Act respecting Cemetery Companies, could do what it pleased with its land by the unanimous consent of its members; it was not a corporation, but an ordinary company or partnership. But, when the certificate mentioned in secs. 2 (*b*) and 3 was registered, a very great change took place: "The company shall henceforth become and be a body corporate," with a corporate existence. Any debts thereafter incurred were not chargeable against the individual members; the "company" is vested with powers of compulsory expropriation (conditionally): sec. 32; and receives the benefit of the Winding-up Act if it desire to be wound up. But the land also changes its character: before registration it is the property of the company to do with as it pleases, but thereafter the company "may take, hold and convey the land to be used exclusively as a cemetery or place for the burial of the dead" only (sec. 2): the land can "be freed . . . from . . . trusts arising on account of its having been held for the purposes of a cemetery or cemetery company," by being sold in a winding-up proceeding: sec. 33; but not otherwise.

And the land is not wholly in the company's control even as to who shall be buried in it: "strangers and . . . the poor of all denominations" must be furnished with a grave "free of charge:" sec. 12. The land may be sold for burial sites, and the money employed in repaying to any member who does not desire to take land to the full extent of his stock, interest or paid-up stock, not exceeding 8 per cent. per annum, and also repay the paid-up stock: sec. 17 (1); but, "except as aforesaid, no dividend or profit of any kind shall be paid by the company to any member thereof:" sec. 17 (3).

The land—all the land and not a part of it—is held in trust for the benefit of the stranger and the poor as well as those who may desire to buy a place for their dead to sleep. All this is wholly inconsistent with a power to sell except for burial sites sold to individual proprietors.

The next question is the effect of the reincorporation, which was under the Companies Act, 2 Geo. V. ch. 31—for convenience I refer to R.S.O. 1914 ch. 178, which is a consolidation of that statute without change of terminology.

Section 11 enables the company to make an application to the Lieutenant-Governor, and the Lieutenant-Governor (or the Provincial Secretary—sec. 4) may grant letters patent; by sec. 12, the powers of the corporation may be limited or extended to such other objects as the petitioner may desire. I shall as-

sume that the power to sell the land to Dr. Winter was intended to be asked for, and that the Provincial Secretary intended by his charter to grant the power. I think, however, that this is not justified by the words of the section, and that the Legislature could not have intended by such general words to enable an officer of the Crown to give power to trustees to sell lands they have in trust and put the proceeds in their own pockets, or the pockets of the shareholders; the proper execution of the trust requiring the trustees to hold the land. This becomes clear when we read the next section.

Section 13 seems to me to prevent such a power being exerciseable: "All debts, contracts, liabilites and duties of such corporations shall thenceforth attach to the new . . . corporation, and may be enforced against it to the same extent as if such debts, contracts, liabilities and duties had been incurred or contracted by it."

That it was the plain duty of the former corporation to hold this land upon the trusts declared by the statute is clear, and I think this duty attaches to the new corporation, and may be enforced against it as though it had itself incurred this duty ab origine.

The marginal note is referred to as against this interpretation. A marginal note is no part of a statute: 3 & 4 Geo. V. ch. 2, sec. 9 (4); Duke of Devonshire v. O'Connor (1890), 24 Q.B.D. 468; Sutton v. Sutton (1882), 22 Ch. D. 511; though it may sometimes be of some assistance to shew the drift of a section: Bushell v. Hammond (1904), 73 L.J.K.B. 1005; Nicholson v. Fields (1862), 31 L.J. Ex. 233, 7 H. & N. 810.

It would, in my view, be giving too narrow an interpretation of this section to limit it to the claims of creditors.

This section was not brought to the attention of my brother Britton, as it should have been, and it is upon it that I would base my opinion. It is common ground that the powers of the Provincial Secretary are limited strictly by the statute.

I would allow the appeal, and give judgment for the plaintiffs, with costs throughout. The exact form of the order may be spoken to if necessary.

FALCONBRIDGE, C.J.K.B., agreed with RIDDELL, J.

LATCHFORD and KELLY, JJ., agreed in the result, for reasons stated by each in writing.

Appeal allowed.

MARCH 22ND, 1915.

*M. BRENNEN & SONS MANUFACTURING CO. LIMITED v. THOMPSON.

Principal and Agent—Undisclosed Principal—Action against Principal and Agent—Judgment Obtained against Agent by Default—Bar to Prosecution of Action against Principal—Judgment not to be Set aside except on Consent of Principal—County Court Appeal — Right of Appeal — Order "Final in its Nature"—County Courts Act, R.S.O. 1914 ch. 59, sec. 40 (2).

Appeal by the defendants Levy and Crerar from an order of the Junior Judge of the County Court of the County of Wentworth, in an action in that Court, setting aside the judgment entered upon default by the plaintiffs against the defendant Thompson and allowing the plaintiffs to amend their statement of claim and writ of summons.

The plaintiffs, a company carrying on business in Hamilton as lumber dealers, on the 23rd October, 1914, began this action, against the defendants Thompson, Levy, and Crerar, to recover $319.12 for goods sold and delivered and for interest.

The endorsement of the writ of summons was as follows:—

The following are the particulars:—

1912. August 17.	To 73900 No. 2 white pine lath at $3.80	$280.82
	To interest thereon from Nov. 20, 1912, when same became due, to Oct. 20, 1914, at 7% per annum, the defendant having agreed to pay interest at the said rate on all due accounts.	38.30
	And the plaintiff claims ..... and interest on $280.82 from the date hereof until judgment, at the rate aforesaid.	$319.12

The defendants Levy and Crerar entered an appearance, but Thompson did not; and on the 3rd December, 1914, judgment was entered against him on default of appearance for $320.77 and $21.30 costs.

The affidavits filed by the defendants Levy and Crerar, un-

der Rule 56, were in the same form—that they had a good defence to the action on the merits; that they did not agree to pay for the goods, and that the goods were not delivered to them.

The plaintiffs delivered a statement of claim, which in substance set out that the defendant Levy and the defendant Crerar's testator had been in partnership to build a number of houses, and had employed Thompson to do the lathing; that Thompson had bought from the plaintiffs the goods the price of which was sued for; that the plaintiffs had signed judgment against Thompson by default; but, if it should appear that the defendants Levy and Crerar were liable as principals, they asked that the judgment should be set aside as against Thompson.

The defendants Levy and Crerar moved for an order striking out the statement of claim, on the ground that it disclosed no cause of action against them, and dismissing the action as against them accordingly.

The order appealed from was made by the Junior Judge upon that motion, against the opposition of the applicants—who now appealed.

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

W. E. B. Coyne, for the appellants.

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

The judgment of the Court was delivered by RIDDELL, J. (after setting out the facts as above):—It is quite clear from the pleadings and statements before us that the real claim of the plaintiffs is this: "We sold laths to Thompson; we do not know whether the other defendants are undisclosed principals; if they are, we claim judgment against them, and, to enable us to obtain that judgment, we ask to have the default judgment set aside; but, if they are not, we want judgment (already had) against Thompson." . . .

[Reference to Partington v. Hawthorne (1888), 52 J.P. 807; Re Harper and Township of East Flamborough (1914), 7 O.W.N. 468, 32 O.L.R. 490, and cases there cited; Campbell Flour Mills Co. Limited v. Bowes (1914), 32 O.L.R. 270, 7 O.W.N. 331.]

The present case is the case of an alleged undisclosed principal, and it is quite clear that where the agent has been sued and judgment taken against the alleged agent this operates as a bar to the prosecution of the action against the principal, even

if the judgment be by default: Morel Brothers & Co. Limited v. Earl of Westmorland, [1903] 1 K.B. 64, [1904] A.C. 11, 14; French v. Howie, [1905] 2 K.B. 580, [1906] 2 K.B. 674; Cross and Co. v. Matthews and Wallace (1904), 91 L.T.R. 500, 117 L.T.J. 220.

The cause of action having passed into a judgment, transit in rem judicatam, this judgment cannot be set aside without the consent of the principal. "There cannot be more than one judgment on one entire contract." See especially McLeod v. Power, [1898] 2 Ch. 295; Hammond v. Schofield, [1891] 1 Q.B. 453; In re Hodgson (1885), 31 Ch. D. 177.

The only other question to consider is, whether the order appealed from is "final in its nature," not "merely interlocutory," under the County Courts Act, R.S.O. 1914 ch. 59, sec. 40 (2).

The application was in substance for a determination of the action against the defendants Levy and Crerar, upon the ground that it could not be legally prosecuted against them further; that is, that the facts alleged in the statement of claim did not constitute a cause of action. The decision is that these facts do give a cause of action—that the defendants have not a perfect defence on the plaintiffs' own shewing. This is final in its nature, though it may be in form interlocutory. . . .

[Reference to Smith v. Traders Bank (1905), 11 O.L.R. 24.]

I am of opinion that the County Court Judge should have acceded to the defendants' motion, and dismissed the action as against them with costs.

The appeal should be allowed with costs, and the action dismissed with costs; the judgment against Thompson to stand.

No case is made for amendment, nor is there any pretence that the facts are not as stated.

MARCH 22ND, 1915.

ELLIOTT v. SIMPSON.

Contract—Work and Labour—Completion of Work—Supplying Defects—Reference—Report of Referee — Appeals — Costs.

Appeal by the defendant from an order of one of the Junior

Judges of the County Court of the County of York dismissing an appeal from the report of an Official Referee.

The action was brought to recover $800 for material supplied and work done and services rendered by the plaintiff to the defendant. The Referee, after making certain deductions, found the balance due to the plaintiff to be $696.60.

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

W. G. Thurston, K.C., for the appellant.

H. E. Rose, K.C., for the plaintiff, respondent.

The judgment of the Court was delivered by FALCONBRIDGE, C.J.K.B.:—Pursuant to consent of counsel, I have conferred with the learned . . . Referee. . . . He informs me that his clear impression was that after the plaintiff had gone back to remedy the defects, and he (the Referee) had visited the premises, whatever he might award would be treated as final and conclusive between the parties. In this view and by way of compromise, he allowed the deduction of $75. In any other view, he feels that he made too great an allowance, and that a much smaller sum, in fact a nominal sum, would have been more reasonable.

He did not, and does not, intend the words "certain work to be done upon it to make it in good condition" to bear the construction that the work was not completed. He would have found specifically, if requested so to do, that the work was not merely substantially but practically entirely completed.

It thus appears that the plaintiff has supplied the thing contracted for, but there are some trifling complaints about its condition—effectually distinguishing this case from those cited, e.g., Sherlock v. Powell (1899), 26 A.R. 407.

The appeal will be dismissed with costs.

Leave has been given to appeal from the disposition of costs. We see no reason to interfere. The defendant should have known when he was well off, and rested content with the equitable and reasonable award of the Referee.

MARCH 22ND, 1915.

*DEVITT v. MUTUAL LIFE INSURANCE CO. OF CANADA.

Life Insurance—Policy—Non-forfeiture Clause—Construction —"Cash Surrender Value"—Determination by Insurance Company — "Available" — Pleading — Contract — Forfeiture—Promissory Note Given for Part of the Premium Unpaid — Waiver — Policy not in Force at Death of Assured—Costs.

Appeal by the defendants from the judgment of BRITTON, J., 7 O.W.N. 575.

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

G. H. Watson, K.C., and W. H. Gregory, for the appellants.

R. S. Robertson and J. A. Scellen, for the plaintiff, respondent.

RIDDELL, J.:—The first matter for consideration is the meaning of the expression "cash surrender value" in clause 9 of the policy (set out in the reasons for judgment of Britton, J.) . . .

It is admitted that if "cash surrender value" means the same thing in clause 9 as in the table of surrender values, the plaintiff's case must fail on this point.

"Surrender value" is a well-recognised expression in life assurance. It means the amount of money or its equivalent which the company could afford to pay to be rid of the existing policy. Actuarially, it is a function direct of the amount of the policy, inverse of the probability of life and the amount of the premium. (Of course the amount of the premium is itself in practice a function direct of the amount of the policy and inverse of the probability of life; but there is no necessary fixed relation, and every company decides the amount for itself). So far the amount is capable of calculation within reasonably narrow limits.

But there are other elements which must be considered by an assurance company. As a matter of business the proposition must be made attractive. The company which offers the largest "surrender value" will, *cæteris paribus*, get the largest business; but at the same time surrenders are to be discouraged—

every surrender reduces the amount of outstanding insurance, and the advertisement becomes the less alluring. It is human nature to follow the crowd, and the "largest company" is apt to get the most insurance. An assured liberally dealt with on surrender is likely to be a friend; one dealt with in a penurious spirit is a potential enemy. Many such considerations the wise insurance man must bear in mind. The effect has not been tabulated and cannot be tabulated without an enormous number of observations, if at all. Any one with a fair knowledge of the theory of probabilities and practised in mathmatical calculation could readily, with available tables of mortality, etc., figure out the theoretical "surrender values," but the psychological element is obscure, and every company may differ from every other in its estimate of its significance. Accordingly every company must be permitted to determine its own "surrender value;" this may or may not agree with that of any other company.

Notwithstanding Mr. Robertson's very clear and cogent argument, I think this company have fixed the surrender value of this policy for all purposes. The policy has a table giving the "cash surrender value" at the end of each year, and it would require very strong considerations to authorise us to hold that when the same words are used in clause 9 they mean something else. No such considerations exist. The argument based upon clause 10 does not, I think, lead to the conclusion desiderated by the plaintiff.

In the first place, while in one part of the clause the words are not the same, being "surrender value in cash," instead of "cash surrender value," the difference is trifling and the meaning identical. There is nothing to shew that any difference of meaning was intended. Again, the very expression "cash surrender value" is used in the latter part of the clause, clearly synonymous with "surrender value in cash" in the earlier part.

But it is said that the table was only for the purposes of clauses 10 and 7. I do not find anything which so indicates; and the fact that the "surrender value in cash" is "available to the assured or legal beneficiary" only "at the end of the third or any subsequent year during which full premiums have been paid or within thirty days thereafter," does not assist the contention now under consideration.

"Available" does not mean "existing." It means "in such a condition as that it can be taken advantage of." . . .

[Reference to Brett v. Monarch Investment Building Society, [1894] 1 Q.B. 367; Birchall v. Bullough, [1896] 1 Q.B. 325;

Ashling v. Boon, [1891] 1 Ch. 568; In re Chrichton's Oil Co., [1902] 2 Ch. 86.]

Remembering that the company must be the sole judge of surrender value, it is perfectly justified in making that surrender value arbitrarily increase at any particular time and at any interval. It may cause it to increase day by day, month by month, year by year, quinquennially, decenially. I think the company here has fixed the surrender value for the purposes of this policy, increasing at the end of each year (after the third). The surrender value so fixed at the end of any one year continues to be the surrender value until it is increased. The assured cannot avail himself of it. It is not "available" to him if he allow the thirty days to elapse, but it exists nevertheless and exists at the amount fixed by the company. If, during the thirty days, the assured desires cash, he has a right to demand and to receive it; if he lets that period go by, he cannot; it is no longer available to him so that he can realise on it, *invitâ* the company. If he applies at any other time, the company may refuse, and the matter will become one of contract ultra the policy.

On the facts of this case, I do not think that the plaintiff can succeed under the terms of clause 9 of the policy. . . .

Then the defendants rely upon clause 3, and upon the clause at the bottom of page 2. Clause 3 in the policy reads thus: "3. TERMINATION AND REVIVAL. If any premium or written obligation given therefor be not paid when due (except as provided in the clause respecting non-forfeiture hereinafter contained), or if the interest on any loan secured by this policy remain in default until such loan and the accrued interest thereon capitalised annually amount to its cash surrender value, the policy shall be void, and all liability of the company thereon shall cease; but it may be revived by the company, within twelve months from the date of lapse, on satisfactory evidence being furnished of the good health and habits of the assured and on payment of arrears."

The added clause reads (so far as material): "And I further agree . . . that the principles and methods which may be adopted by the company for the determination and apportionment to such policy of any surplus or profits shall be and are hereby ratified and accepted by and for every person who shall have any claim under such policy . . . and I further agree that if a promissory note or other written obligation be given for any premium or part thereof, and be not paid at maturity, the assurance granted and policy issued on the application shall

not be in force, and the operation thereof shall be suspended while such default in payment continues, but I am nevertheless to be liable upon such obligation to the full amount unpaid thereon; and upon payment as aforesaid during my life and good health, and before the lapse of the policy by efflux of time, the policy shall again acquire force."

It is contended for the plaintiff that the latter clause is not pleaded; and strictly that is so. But the plaintiff sets up the policy and sues on it; and the Supreme Court of Canada in Lake Erie and Detroit River R.W. Co. v. Sales (1896), 25 S.C.R. 663, decided that, where the plaintiff's claim is explicitly on a contract, all the terms of the contract may be taken advantage of by the defendant without special plea: see p. 677. There is no change in the rules of pleading affecting this question since that decision, and I think the objection not well taken.

But, even if such a plea should have been specifically set out, the defendants should be allowed so to plead, and in case the matter is to go further they would be wise to amend their defence accordingly. Since the Judicature Act, defendants have been held to their pleadings generally in two cases only: first, when the other side would be taken by surprise; and, second, when the defendant was considered to have declined to avail himself of a defence which would amount to a valid and sufficient answer to the demand and waived his right to insist upon that defence. *Quilibet potest renunciare juri pro se introducto.* Here the facts relied upon are specially pleaded, and it cannot be suggested that the plaintiff is taken by surprise or that he could better his case by evidence; and it is plain from the pleading in other respects that the defendants never intended to waive any defence based upon the added clause.

The real defence on the point is, that a note for $15.25 made by the assured on the 7th July, 1913, at three months after date, was not paid at maturity. This note, the defendants say, was given for part of a premium and its non-payment at maturity, the defendants claim, furnishes a complete bar to the plaintiff's demand.

That the note was made by the plaintiff, and that it was not paid at maturity, is admitted; and, if the defendants can make it come within the words in the added clause "given for . . . any part" of "any premium," I think they should succeed.

All the material facts appear from the documents. A premium becoming due on the 28th March, 1913, the assured writes on the 16th April, 1913, with a money order for $25 as part

payment of the premium, and asks the company to send him "a note for sixty days for the balance," which he agrees to sign and return. A note for $30.50 at two months is sent him; this he signs at Vancouver on the 24th April, and returns to the company. Clearly this note was given for part of the premium; it was sent to the assured in answer to a request from him to send him a note "for the balance" of his premium then due. When this note was not paid at maturity, I have no doubt, the company could have declared that the policy "shall not be in force;" and if the assured had died without change of circumstances, the policy would not have been payable.

But there was a change. The assured by letter of the 30th June, 1913, asks, "Will you kindly renew my note for $30 due on the 24th June, for two months?" The company decline, but say they "will accept an extension note when one-half and interest is paid; therefore if you forward to us $15.55 we could extend the balance for you for a period of three months. Enclosed herewith you will find a note on the company's form which you could complete for $15.25 and return to us together with an order for $15.55. This will keep your insurance in full force. Kindly let us hear from you by return mail so that your assurance will not lapse. . . ." The note was signed and returned with the money order to the company, who write acknowledging receipt of "your favour enclosing money order for $15.55, covering one-half of your note which fell due on the 24th June and a note for the remainder. You will herewith . . . find enclosed the old note." This note for $15.25 it was which was never paid, and the non-payment of which is set up by the defendants as furnishing an answer to the plaintiff's claim.

The mere receipt of the money order and a note to satisfy the remainder of the April note would not be of consequence as a waiver of the right to declare the policy not in force; the added clause specifically provides for the liability of the maker continuing although the policy is no longer in force. But the statement that the money order and the note would keep the insurance in full force is conclusive of waiver, and indeed the defendants do not contend to the contrary.

It seems to me that the real state of affairs is this: the company had the right in June to declare the policy at an end (at least *sub modo*); for their own purposes, laudable enough no doubt, they prefer to make a new bargain with the assured quite outside of the policy: "you pay to us $15.25, and 'this will keep

your insurance in full force.' '' The assured agrees, pays his money, and sends his note, and I cannot see why this is not a perfectly good contract on the part of the company to keep the ''insurance in full force.'' But the contract can scarcely be read as keeping the policy in full force other than on its terms. And it does really nothing more than specifically to agree to what the law would enforce without specific agreement. The plaintiff does seem to be advanced by this agreement beyond what the defendants concede.

Were it not for authority binding upon us, I should be inclined to hold that the April note was paid, and the new note was not one which came within the added clause.

The mere taking of a new note for the amount of a former is not in itself payment of the old one: Falconbridge on Banking and Bills of Exchange, p. 577; Maclaren on Bills of Exchange, 3rd ed., p. 320; if the holder retains the original, the presumption is that it is to continue to exist: Ex p. Barclay (1802), 7 Ves. 596. . . .

[Reference to Noad v. Bouchard (1860), 10 L.C.R. 476, 477.]

The delivery up of the former note has often, if not universally, been considered strong evidence of novation: Parsons on Notes and Bills, 2nd ed., vol. 2, p.203; Daniel on Negotiable Instruments, 6th ed., paras. 1266, 1266a; and where, as in this case, the new note is given for a smaller amount, the conclusion is well-nigh irresistible: 7 Cyc. 1012, para. b.

Everything here points to an intention to consider the new note and the money order as payment of the note of April.

The new note then was not precisely a ''written obligation given'' for ''any premium,'' and so does not come precisely under the terms of clause 3. Nor, as I should have thought, is it ''a promissory note or other written obligation . . . given for any premium or part thereof,'' under the added clause. It was given in part payment not of any premium but of a note, itself given in part payment of a premium. We should interpret a policy of insurance with reasonable strictness against the company which puts it forward, and whose language it contains—more especially when forfeiture is claimed as the result of another interpretation. But it would seem that authority binds us to hold the contrary.

McGeachie v. North American Life Insurance Co. (1894), 23 S.C.R. 148 (S.C. (1892-3), 22 O.R. 151, 20 A.R. 187), is mainly relied on. . . .

The policy was therefore not "in force" at the time of the death of the assured, and the plaintiff cannot succeed.

The appeal should be allowed and the action dismissed with costs. As to costs of the appeal, in the case of Re Stinson and College of Physicians and Surgeons of Ontario (1912), 27 O.L. R. 515, a Divisional Court refused all costs (but one counsel fee) to a successful appellant when the material furnished was incomplete; such a course is a fortiori when the material furnished is incorrect. I think the same order should be made in this case. . . .

FALCONBRIDGE, C.J.K.B., agreed.

LATCHFORD and KELLY, JJ., were of opinion, for reasons stated by each in writing, that the appeal should be allowed with costs.

Appeal allowed.

MARCH 23RD, 1915.

RE ONTARIO AND MINNESOTA POWER CO. AND TOWN OF FORT FRANCES.

Assessment and Taxes—Valuation of Land and Buildings of Water Power Company—Principle of Valuation—Evidence —Onus—Appeal—Question of Law—Business Assessment.

An appeal by the company (by leave) from a decision of the Ontario Railway and Municipal Board.

The assessment of the company for the year 1914 by the assessor of the municipality was as follows: land, $100,000; buildings, $415,142; business assessment, $122,500: total, $637.642. These figures were altered by the Court of Revision: land, $95,000; buildings, $705,000; business assessment, $200,000: total, $1,000,000. This was confirmed on appeal to the District Court Judge. There was a further appeal to the Board, and the Board's variations left the assessment: land, $550,000; buildings, $250,000; business assessment, $480,000: total, $1,280,000.

The appeal of the company was on two grounds: (1) that under the law and the facts the assessment of $550,000 on the

land exclusive of buildings could not be sustained; (2) that under the law and the facts the assessment of $480,000 as a business assessment could not be sustained.

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

Glyn Osler, for the appellant company.

G. H. Watson, K.C., and A. G. Murray, for the respondent town corporation.

RIDDELL, J. (after setting out the facts at length) :—From a perusal of the reasons given by the Board for their judgment, it appears that, on the evidence before them, they fixed the value of the buildings at $250,000. This is not complained of, and I see no reason for doubting its substantial accuracy. This appears in clause 2 of the order now appealed from.

The method of arriving at the value of the "land exclusive of buildings thereon," as set out in clause 1, is as follows:—

The finding of the District Judge "affirms that the actual value of the company's lands, with business assessment added, is $1,000,000. On this appeal the validity of that judgment is questioned by the company on the ground of overvaluation. The appellants can succeed only by adducing proof that the actual value of these lands, including any increment accruing from the development of this water power, is less than the amount at which they are assessed. The president of the company, the most likely of all men to know, asked upon the witness-stand as to the value of the water power development, which the Board conceives to be the determining factor in fixing the value of these lands, declines to give an estimate, alleging as his reason the difficulties in the way. It may well be a matter of extreme difficulty to form such an estimate, involving as it must, where an enterprise of such magnitude and extent is concerned, a synthesis of many elements of conjectural value. But, whatever the difficulties in the way of the appellants, in default of satisfactory proof of overvaluation, which can best be made by shewing the property's actual value, there is no other course open to the Board but to dismiss the appeal and confirm the assessment, but this should be subjected to the following modifications, which are in part matters of form.

"Without disturbing in other respects the aggregate amount of the assessment, exclusive of the business assessment, namely, $800,000, the Board is of opinion that it should be otherwise ap-

portioned as between land and buildings. The readjustment proposed will respect the evident intention of the Court of Revision and District Court Judge, while bringing the assessment into harmony with the Board's holding as to the devolution of the value created by the development of this water power."

This seems to me, with great respect, to involve a complete misunderstanding of the situation. The District Court Judge did not assess the value of the land and buildings in a lump at $800,000 and then divide the amount between land and buildings. He valued the land at $95,000 and the buildings at $705,000. It is precisely such a case as though the plaintiff had sued for damages in a collision and obtained a verdict for a certain sum for personal injuries and another sum for injury to property. In an appeal on the ground of excessive damages the defendant would succeed if he proved an excessive amount on one head; it would not be necessary for him to prove that, taken altogether, the amount was excessive. If the plaintiff desired to hold the verdict for the full amount, i.e., for the sum of the two assessments, he must prove affirmatively that the other amount should be increased. This is a question of onus, and therefore a question of law, and is properly appealable to this Court.

I think the Board erred in holding, as they did, that, having proved that the amount assessed for buildings was excessive, the appellants were bound to go on and prove that the total was excessive, that is, that the assessment on the other head should not be increased by the same amount as the former was diminished.

If we could see that the value was arrived at by the inspection of the Board, the case might be different; but nothing of the kind appears. The whole decision is based upon the supposed onus on the appellants. I do not express any opinion on the true method of arriving at the "actual value" of the land; but I am not to be taken as acceding in the least of Mr. Osler's argument. The appeal should be allowed on this head.

The other branch of the appeal depends on a pure question of fact. That fact is to be determined upon the evidence, and the evidence is at least ambiguous. The Board have taken one view of the evidence, and the appellants press another view. The Board saw and heard the witnesses, and I am unable to say that their view is clearly wrong. If any error has crept in, it is the fault of the appellants in not making their evidence quite clear, and they cannot complain. I think this branch of the appeal fails.

Success being divided, there should be no costs.

FALCONBRIDGE, C.J.K.B., agreed with RIDDELL, J.

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

LATCHFORD, J., agreed with KELLY, J.

Order accordingly.

MARCH 23RD, 1915.

KNOWLTON v. UNION BANK OF CANADA.

Mortgage—Ratification—Promissory Note — Bank — Account —Estoppel—Reference—Report—Appeal.

Appeal by the defendants from the order of LENNOX, J., 7 O.W.N. 817, dismissing, on the main grounds, the defendants' appeal from the report of a Local Master, but reducing the amount found due to the plaintiff from $1,790.98 to $1,552.18.

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

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

S. H. Bradford, K.C., for the plaintiff, respondent.

The judgment of the Court was delivered by KELLY, J., who, after setting out and commenting upon the facts in evidence, said that he could find no satisfactory ground for disturbing the order of LENNOX, J.

Appeal dismissed with costs.

MARCH 23RD, 1915.

*CROWLEY v. BOVING AND CO. OF CANADA.

Evidence—Motion to Divisional Court of Appellate Division for New Trial—Discovery of Fresh Evidence—Examination of Witnesses on Pending Motion—Appointment for, Set aside.

This action was brought by Charles Crowley to recover damages for injuries sustained by him while working for the defen-

dants. The action was tried before MEREDITH, C.J.C.P., and a jury; and, upon the findings of the jury, the action was dismissed.

The plaintiff appealed, and his appeal was heard by a Divisional Court of the Appellate Division on the 11th February, 1915, and was dismissed.

On the 16th February, 1915, the plaintiff served notice of a motion to reopen the hearing of the appeal and for a new trial, on the ground that the plaintiff had discovered since the trial and since the hearing of the appeal that the testimony given by a certain witness at the trial did not relate to the place where the plaintiff was when he received the injury, and that the plaintiff was taken by surprise at the trial, and upon other grounds.

In support of this motion the plaintiff proposed to examine three witnesses, with the view of reading their depositions at the hearing of the motion, and obtained from a local officer an appointment for the examination of the three witnesses.

Upon the application of the defendants, the appointment was set aside by an order of the Local Master at Lindsay.

The plaintiff appealed from the order of the Local Master, and the appeal came before BOYD, C., in Chambers, on the 12th March, 1915.

The learned Chancellor adjourned the appeal for hearing by the Divisional Court of the Appellate Division which should hear the motion to reopen the appeal and for a new trial.

On the 23rd March, 1915, the appeal was heard by FALCONBRIDGE, C.J.K.B., RIDDELL, LATCHFORD, and KELLY, JJ.

W. Laidlaw, K.C., for the plaintiff, appellant.

C. A. Moss, for the defendants, respondents.

THE COURT, approving and following Trethewey v. Trethewey (1907), 10 O.W.R. 893, held that the appointment was improperly issued, no leave having been obtained from the Appellate Court.

A substantive application to the Court for leave was refused; and the main motion, to reopen the hearing and for a new trial, was also refused.

Costs were awarded to the defendants throughout.

MARCH 25TH, 1915.

RICHARDSON v. CANADIAN PACIFIC R.W. CO.

Carriers—Shipment of Grain—Loss by Fire in Elevator—Insurance—Marine Policy—Negligence of Carriers — Evidence —Damages—Findings of Trial Judge—Appeal—New Trial.

Appeal by the defendants from the judgment of BRITTON, J., 7 O.W.N. 458.

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

I. F. Hellmuth, K.C., and J. D. Spence, for the appellants.

J. L. Whiting, K.C., Glyn Osler, and A. B. Cunningham, for the plaintiffs, respondents.

The judgment of the Court was delivered by RIDDELL, J.:—

On the argument of this appeal it was urged that the assured could not have succeeded in an attempt to compel the insurers to pay on any other basis than that of the policy being purely marine—and that in any event it would not have been honest for him to attempt to do so.

The members of the Court are not agreed as to what the evidence establishes in that regard on the questions of fact. The amount of the judgment being very considerable, we all think that it would be unwise to dispose of the case upon the evidence now in, as there must be evidence available which will have a material bearing on the facts.

We think, therefore, that, without expressing any opinion on the law, we should direct a new trial, upon which all the facts may be established—the evidence already in may be utilised if the parties agree.

Upon the new trial the defendants may perhaps give further evidence as to "the rules and usages of companies comprising the Canadian Fire Underwriters' Association."

Costs of the former trial and of this appeal to be costs in the cause unless otherwise ordered by the trial Judge.

MARCH 25TH, 1915.

MURRAY v. MUIR.

Trespass—Cattle—Using Dog to Drive out—Necessity for—Injury to Animal—Cause of—New Trial.

Appeal by the defendant from the judgment of the Judge of the County Court of the County of Oxford, in favour of the plaintiff, in an action for damages for injury to the plaintiff's cow, caused by the defendant setting a dog upon her when she was trespassing.

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

C. A. Moss, for the appellant.

Peter McDonald, for the plaintiff, respondent.

The judgment of the Court was delivered by RIDDELL, J.:—The defendant, in driving out trespassing cows of the plaintiff, set a dog on the animals; they ran quickly, and one of them broke her leg.

There is no doubt as to the law—counsel for both parties cited the same authorities. But the learned Judge does not seem to have directed his mind to the real questions, namely: Was what was done by the defendant in setting the dog on the cows reasonably necessary in the circumstances of the case? And was this the cause of the injury.

It may be a cruel kindness; but, as the defendant is entitled to a new trial, we should grant that relief if he desire it.

Costs of the last trial and of this appeal to be costs in the cause unless otherwise ordered by the trial Judge.

MARCH 26TH, 1915.

DAVIDOVICH v. SWARTZ.

Appeal—Evidence—Findings of Fact of Trial Judge—Motion to Reopen Hearing of Appeal.

This was an action for specific performance of an alleged agreement for the exchange of houses.

The action was tried by SUTHERLAND, J., who dismissed it with costs; and the plaintiffs appealed.

The appeal came on for hearing before FALCONBRIDGE, C.J.K.B., RIDDELL, LATCHFORD, and KELLY, JJ., on the 10th March, 1915.

No one appeared for the appellants.

I. F. Hellmuth, K.C., and H. H. Shaver, for the defendant, respondent.

THE COURT dismissed the appeal with costs.

The plaintiff Davidovich, in person, moved before the same Court to reopen the appeal.

Shaver, for the respondent.

The judgment of the Court was delivered by FALCONBRIDGE, C.J.K.B.:—On the 25th instant the plaintiff Davidovich appeared before us in person, and then and there was permitted to say what he could on his own behalf. The other plaintiffs had abandoned the appeal.

Mr. Shaver appeared for the defendants, and was informed that we would hear him later if we found it necessary to call on him.

We have perused the evidence with particular care, in view of the fact that the plaintiff Davidovich had not the advantage of a presentation of his case by counsel, and we find the appeal to be perfectly hopeless.

Not only is there abundant evidence to support the learned Judge's findings of fact, but those findings necessarily and inevitably result from the evidence.

As to the law there is no question.

We never intimated that we might, could, would, or should reopen the case, but merely desired to be sure that no injustice had been done.

The former dismissal of the appeal therefore stands.

If the defendants consider it worth while, they may tax against the plaintiff Davidovich alone the costs of this motion.

HIGH COURT DIVISION.

MEREDITH, C.J.C.P. MARCH 23RD, 1915.

*RE FEARNLEY'S ASSIGNMENT.

Assignments and Preferences—Assignment for Benefit of Creditors under Assignments and Preferences Act—Summary Application by Assignee for Determination of Conflicting Claims to Rank on Estate—Jurisdiction—Trustee Act, sec. 66—Rule 600—Contest between Creditor and Surety.

Motion by an assignee for the benefit of creditors for an order determining conflicting claims to rank upon the estate of the assignor in the hands of the applicant.

The motion was heard in the Weekly Court at Toronto.
G. M. Willoughby, for the applicant.
W. H. Barnum, for E. J. Fearnley, a surety.

MEREDITH, C.J.C.P.:—The applicant is an assignee for the benefit of creditors, under an assignment which comes within the provisions of the Assignments and Preferences Act: and the purpose of the application is to have conflicting claims of right to rank upon the estate determined, upon a summary application, in this Court.

It is said that the application is based upon the provisions of the Trustee Act—sec. 66, I suppose; and it is shewn that an application of the same character was recently made and given effect, under the provisions of Rule 600: but not without an expression of doubt as to the applicability of the Rule to such a case—a doubt which, I have no doubt, was well-founded.*

The novelty of such an application in itself raises a strong suspicion that it is misconceived: as I had and have no doubt it is.

In the first place the contest is over the right to a dividend which has already been paid to one of the contestants. No opinion, advice, or direction that could be given upon this application, if there were power to give any, could recall the money. . . . The creditors who have the money have not in any way submitted their rights for consideration upon this application; they have altogether ignored it, as they had a right to do.

But it is said that there may be another dividend; and so it may be that the questions which perplex the assignee may become practical; and the opinion, advice, or discretion sought really needed; and, that being so, it is necessary to consider the question whether the invocation of the Trustee Act or of Rule 600, in such a case as this, is in any way warranted, and I am yet unable to perceive how it can be.

Special comprehensive provisions are contained in the Assignments and Preferences Act for the winding-up of the assigned estate through the assignee, the assignor, the creditors and "inspectors" representing them, and the County Court Judge. Under sec. 33 of the Act, by which secs. 33 and 34 of the Creditors' Relief Act are made applicable, all questions respecting distribution are provided for, in addition to such other provisions on the subject as the Assignments and Preferences Act contains.

*See Re Battrim (1915), 7 O.W.N. 778.

When special provisions are enacted for dealing with particular cases, those provisions are to govern, even though there may be some general provisions of another enactment that might be deemed wide enough to cover some of them.

Besides this, I cannot think the Trustee Act wide enough to cover this case; nor can I see how Rule 600 can be.

Section 26 of the Assignments and Preferences Act provides that nothing in its two sub-sections shall interfere with the protection afforded to assignees by sec. 56 of the Trustee Act: and the protection afforded by that section is not to trustees merely, as it should be if the word "trustee" included assignee for the benefit of creditors, but is to "trustee, assignee, or personal representative." One section and one section only of the Trustee Act is made applicable to assignees such as the applicant. I hold that the provisions invoked of the Trustee Act are not applicable to this case.

In regard to Rule 600, it carries forward only that which was for very many years, to some extent, the practice of the Court of Chancery, applicable to the cases to which it is commonly applied; and is, as the words "without an administration of the estate or trust" shew, applicable only to cases that would be determinable properly in such an administration. Insolvent or bankrupt estates are not so administered.

However, at the urgent request of the parties who did appear upon this application, for some expression of opinion respecting the difficulties in which they think they are involved, it may not be amiss to add, but, of course, only as *amicus consultoris*:—

That it could hardly be possible to express any opinion upon facts so vaguely set out as they are upon this application. Both sides should be heard, and that can be only in proceedings which will compel the attendance of each; or else one side only heard after notice to the other in proceedings in a Court where there is the right to adjudicate in the absence of him who does not attend. An action by the surety, or the assignee ,or both, may be found to be the only way of recovering part of the dividend paid, if it be recoverable.

The law upon the subject of a contest between creditor and surety as to right to rank upon the debtor's estate is simple and not unreasonable. If the surety be surety for the whole debt he cannot rank in competition with the creditors until the whole debt is paid: why should he? His obligation is to pay the whole debt; how can he be be permitted not only to fail to do that, but to prevent, for his own gain, the creditor obtaining full pay-

ment from the debtor. But where the surety is answerable for part of a debt only—under no obligation as to any other part—on payment of that part, he, and not the creditor, is entitled to rank in respect of it. That debt is wholly paid to the crdeitor; he has no further claim on any one for it. The debt becomes the debt of the debtor to the surety, and he alone can prove it, rightly. The only difficulty that has arisen is one regarding a case in which, although the surety is surety for the whole debt, his liability is limited to a certain amount only; in that case the surety cannot rank in competition with the creditor: why should he? The arrangement is, that the whole debt is to be paid, but that the creditor is to look to his other rights for recovery of any sum due to him in excess of the surety's limit of liability. What right then should the surety have to prevent, for his own benefit, the creditor's full resort to his other rights until he is fully paid? The principle is logical and right—the difficulty is in saying whether any one who has limited his liability has also agreed that the whole debt shall be first paid: or, put as it ordinarily is in terms which to some may seem inconsistent, whether the surety has guaranteed the whole debt but limited the maximum amount of his liability.

If one has done no more than give an accommodation note for a certain sum for the benefit of the creditor, it may be very difficult to shew how he has guaranteed any greater debt: but that the parties must fight out, if they cannot otherwise settle it, or have it settled, without litigation.

No order is made upon this application.

MIDDLETON, J., IN CHAMBERS. MARCH 23RD, 1915.

*RE MASONIC TEMPLE CO. AND CITY OF TORONTO.

Municipal Corporation—Regulation of Buildings on Residential Streets of City—Municipal Act, R.S.O. 1914 *ch.* 192, *sec.* 406 (10)—*Municipal By-law—Erection or Placing of Building too near Line of Street—Steps Projecting from Wall of Building beyond Defined Line — Building Permit — Mandamus*

Motion by the company for a mandatory order requiring the city corporation to issue a permit for the erection of a building by the company upon land abutting on a city street.

G. F. Shepley, K.C., and T. Reid, for the applicants.
Irving S. Fairty, for the city corporation, the respondents.

MIDDLETON, J.:—The only ground alleged for the refusal to issue the permit is that the building is said to be closer to the street line than is permitted by a by-law of the city passed under sec. 406, sub-sec. 10, of the Municipal Act, R.S.O. 1914 ch. 192, authorising the municipality to pass a by-law "prescribing the distance from the line of the street in front of it at which no building on a residential street may be erected or placed."

The building in question, save as to the front steps, is well inside the prescribed line. In front of it, and as a means of access to the front door, it is proposed to construct steps which extend some distance from the front wall of the building and across the defined line. These steps, at their highest point, are 4 feet 6 inches above the ground level.

I have come to the conclusion that the construction of these steps is not the erection or placing of a building, within the by-law and the statute. In each case it is a question of fact whether what is done is within the prohibition of the statute.

Much light is thrown upon the situation by the decision in Boyce v. Paddington Borough Council, [1903] 1 Ch. 109, [1903] 2 Ch. 556, and, *sub nom.* Paddington Corporation v. Attorney-General, [1906] A.C. 1, 3. . . .

[Reference also to Child v. Douglas (1854), Kay 560, 5 DeG. M. & G. 739; Hull v. London County Council, [1901] 1 K.B. 580, 588; Pears v. London County Council (1911), 105 L.T. 525; 13 Cyc. 716; Manners v. Johnson (1875), 1 Ch. D. 673; United States v. Mueller (1885), 113 U.S. 153.]

If steps were situated some little distance from the main wall of the building, and there was a walk from these steps to the building, then it would be perfectly clear that the steps did not form part of the building, within the meaning of this by-law; and I think I am quite safe in holding that the steps here contemplated, which are entirely outside of the main wall of the building, do not in any way interfere with the object which the statute aims at securing, and are not within its purview.

The question whether the architect could justify his refusal to grant the permit by reference to the by-law in question was not argued before me.

The mandatory order sought must, therefore, be granted, and costs must follow the event.

MIDDLETON, J., IN CHAMBERS. MARCH 24TH, 1915.

McGUINTY v. HAMER.

Judgment Debtor—Examination of—Scope of Inquiry — Refusal to Answer as to Assets Removed to another Province —Rules 580, 587—*Order for Further Examination — Refusal of Leave to Appeal.*

Motion by the defendant for leave to appeal from an order of MEREDITH, C.J.C.P., directing the attendance and submission to further examination of the defendant as a judgment debtor.

J. F. Boland, for the defendant.
W. H. Irving, for the plaintiff.

MIDDLETON, J.:—I do not think that this is a case in which the leave sought should be granted. There is a judgment in Ontario. At the time of the incurring of the liability there were assets in Ontario. These assets, the defendant says, he succeeded in removing beyond the jurisdiction—to the Province of Saskatchewan. He invites suit in the Courts of Saskatchewan, where he says he can successfully defend the action notwithstanding the judgment in Ontario, and he refuses to give any information touching the assets said to be in Saskatchewan, because he regards this as an attempt to examine him as to assets not exigible in Ontario, but only exigible in Saskatchewan, before a judgment has been obtained in that Province.

So stated, the case has some elements of plausibility; but, unfortunately, it ignores the full scope of the provisions of Rule 580, under which the examination is had. The examination is not confined to assets exigible under the execution, but extends to all assets possessed by the debtor when the debt or liability which was the subject of the action in which judgment has been obtained was incurred, and as to the disposal, if made, of any property since contracting the debt or liability. The consequence of the examination is not merely the disclosing of assets still exigible, but, if the transactions with exigible assets are not disclosed, and satisfactory answers made respecting the same, or if the property has been made away with in order to defeat or defraud his creditors, the debtor is liable to imprisonment under Rule 587. What is sought in this case appears to me to be entirely within the rights of the execution creditor; and, for this reason, I think the leave sought ought to be refused.

Motion dismissed with costs.

MIDDLETON, J. MARCH 24TH, 1915.

RE WILSON ESTATE.

Title to Land—Conveyance of Equitable Interest to Trustee for Certain Creditors—Prior Unregistered Mortgage—Notice—Validity against Trustee for Creditors—Prior Lien of Mortgagee.

The executors and trustees under the will of the late Dame Emma Wilson moved, upon originating notice, for an order determining to whom certain land contracted to be sold should be conveyed. The application coming before MIDDLETON, J., and it appearing that there were facts in dispute, he directed the trial of an issue between the contesting parties, the applicant submitting to convey in accordance with the finding upon the issue.

The issue was tried before MIDDLETON, J., without a jury, at Toronto, on the 18th March, 1915.

N. F. Davidson, K.C., for Vera Schmidlin.

C. P. Smith, for the Imperial Trusts Company of Canada.

MIDDLETON, J.:—The contract of sale was made with one C. M. Thompson on the 19th April, 1905. The whole consideration called for has been paid. Contemporaneously with the making of the contract, a declaration of trust was signed by Thompson, declaring that he held in trust for Amelia M. Lobb and A. F. Lobb. On the 17th October, 1914, A. F. Lobb conveyed the lands in question to John Hunter Richardson. The conveyance is absolute in form, but was in reality in trust. On the 16th November, 1914, Richardson and Lobb conveyed the lands to the Imperial Trusts Company of Canada, for the purpose of realising and dividing the proceeds ratably among certain named creditors of Lobb. By deed of the 8th January, 1915, Amelia M. Lobb conveyed her interest in the land—which by recital is stated to have been theretofore acquired by Lobb, though not conveyed to him—to the trust company. No conveyance having been made by the representatives of the Wilson estate, the title of the trust company to such conveyance appears to be clear, unless Vera Schmidlin is, by reason of the facts now to be stated, entitled to intervene.

On the 10th June, 1913, one Robert A. Staton purported to mortgage part of the lands in question to Vera Schmidlin, to

secure the sum of $600 advanced by her. This mortgage was not registered until after the conveyance to the trust company had been registered.

The circumstances under which this mortgage was given are these. Lobb, who was a practising barrister and solicitor, had been acting for Mrs. M. J. Britton, the widow of the late Dr. Britton, in connection with the affairs of his estate. He knew that she had some money on deposit to her credit in the Metropolitan Bank. He telephoned to her suggesting that this money be invested, and described to her the security as being a mortgage to be made by Staton upon property on Beech avenue which he knew. He advised the acceptance of this investment. Lobb then procured a mortgage to be executed by Staton, who had no title to the property. Staton acted in entire good faith, as he had on several occasions acted as trustee for Lobb at his request, and he assumed that this was property belonging to Lobb which had been placed in his name for convenience.

Some time after the mortgage was executed, the duplicate, unregistered, was handed over to Mrs. Britton. The mortgage was taken, at Mrs. Britton's request, in the name of her niece, Vera Schmidlin. After trouble had arisen, the duplicate mortgage so handed over to Mrs. Britton was registered. The other copy was found among the title papers and handed over to the trust company. At the time of the acceptance of the trust and the conveyance to the trust company, and until after the conveyance to it had been registered, it had no actual notice of the existence of this mortgage.

I have come to the conclusion that Vera Schmidlin has priority for her mortgage over the title of the trust company. As between herself and Lobb, who was then the equitable owner of the property, he is estopped from denying the validity of the mortgage, and the trust company, although it has the prior registered title, is a trustee for the benefit of creditors, and neither it nor the creditors can take from Lobb any greater title than he in truth and good conscience possessed. An assignee for the benefit of creditors takes no greater title than the assignor can give. The assignee has certain statutory rights as to attacking conveyances, etc., which the assignor has not, but these rights are purely statutory; and, apart from such statutory rights, he stands in the same position as his assignor. See Thibaudeau v. Paul (1895), 26 O.R. 385. The same rule applies where the assignment is not a general assignment but an assignment for the purpose of securing certain creditors only: Steele v. Murphy (1841), 3 Moore P.C. 445.

The judgment will therefore declare that the trustees of the Wilson estate should convey to the trust company, subject however to a lien or charge in favour of Vera Schmidlin to secure the amount due to her under her mortgage, with interest and costs, and, subject thereto, upon the terms of the trust deed. The executors are entitled to be paid their costs, to be fixed at some reasonable sum, before delivering the conveyance. The property, I understand, is worth much more than Vera Schmidlin's claim, so that she would undoubtedly be paid, and therefore no provision looking to the enforcement of her claim need be inserted in the judgment.

As the application is one for the purpose of clearing up the title, and as Staton disclaimed any interest, an appropriate provision may be inserted in the order which will now be issued, shewing that he has not and never had any interest in the land in question. No doubt he will be willing to execute a quit-claim deed. If so desired, the trust company may have a declaration that it is entitled to its costs of the litigation out of the proceeds of the lands after paying Vera Schmidlin's claim.

MIDDLETON, J. MARCH 25TH, 1915.

GRAND TRUNK R.W. CO. v. DONNELLY.

Vendor and Purchaser—Agreement for Sale of Land to Railway Company — Undivided Shares in Portion of Land Owned by Children of Vendor—Refusal of Children to Convey—Payment of Purchase-money to Solicitors for Vendor —Lien of Purchasers for Amount Necessary to Get in Title of Children—Specific Performance—Abatement of Price—Expropriation—Costs.

Action for specific performance of a contract for the sale by the defendant to the plaintiffs of a parcel of land at Mimico.

The action was tried without a jury at Toronto on the 15th March, 1915.

W. N. Tilley, for the plaintiffs.

Frank Denton, K.C., for the defendant.

MIDDLETON, J.:—Ellen Donnelly, the defendant, owned a parcel of land at Mimico. She was also entitled to a share in cer-

tain small lots, the remaining shares in which were held by her children.

In 1905, she agreed to sell the entire property to the plaintiffs, in consideration of a price which she then regarded as satisfactory, $4,500. It was understood that this price covered not only the land to which she was solely entitled and her interest in the lots to which the children had some title, but also the price to be paid for the children's interest.

Negotiations took place with the Official Guardian looking to the apportionment of the price between the defendant and her children, but nothing came of these negotiations because of the impossibility of concluding any arrangement with her. From time to time, she asked extensions of the time fixed for giving possession to the plaintiffs. These extensions were granted upon the understanding that the title would ultimately be completed. In the meantime the plaintiffs paid the entire price to the defendant's solicitors, and the money was deposited in a special interest-bearing account. The children are now of age. They refuse to join with their mother in a conveyance.

Inasmuch as the children are not parties to the contract, they are not bound by what has taken place, but the plaintiffs are entitled to specific performance as against the defendant, and to recover possession of the land as against her. The money which is now in the hands of her solicitors may either be paid into Court, subject to further order, or the plaintiffs may be declared to have a lien upon it for whatever they may be compelled to pay to the children in order to get in their title. The railway must take proper expropriation proceedings against these children, and the purchase-price payable to the defendant must abate accordingly.

The contest thus becomes one entirely between the mother and her children; and, as they appeared to be in entire harmony at the trial, it is altogether likely that they can avoid the incurring of much useless expense, which must ultimately be borne by the mother.

I delay formally entering judgment to ascertain if the children will not join with the mother in making title to the property, so that the law-costs which are otherwise inevitable may be saved to the family. If I am advised that no arrangement can be made, I shall hand out the record at once.

Unless the plaintiffs see fit to forgo costs, they will have judgment against the defendant for the costs of the action.

I trust that good sense will prevail, and that further wasting of the purchase-price will be avoided.

MIDDLETON, J., IN CHAMBERS. MARCH 25TH, 1915.

RE MOTOR STREET CLEANING CO.

Company—Winding-up—Sale of Machinery to Company before Winding-up—Property not to Pass till Payment—Claim of Unpaid Creditors to Possession and Ownership of Machinery—Order of Judge on Appeal from Ruling of Master—Refusal of Leave for Further Appeal.

Motion by the liquidator of the Motor Street Cleaning Company, in course of winding-up under the Dominion Winding-up Act, for leave to appeal from an order made by MEREDITH, C.J. C.P., in the Weekly Court, on the 18th March, 1915, allowing an appeal by the Canadian General Electric Company from the ruling of the Local Master at Windsor against the claim of that company to possession of certain machinery sold by that company to the company in liquidation or to a lien upon the machinery for the purchase-price thereof.

J. W. Langmuir, for the liquidator.

John A. Paterson, K.C., for the Canadian General Electric Company.

MIDDLETON, J.:—The case is one devoid of merit, and the learned Chief Justice, if I may be pardoned for saying so, is so clearly right that there is no reasonable ground for appeal.

The company received the goods on the terms of the written contract, that the property therein should not pass until payment made. There was also an agreement that possession should not be given till payment made, but possession was obtained through an error on the part of the vendors' clerk, who ought to have attached the bill of lading to the draft. This cannot deprive the vendors of the title, and the alternative suggestion that the clause in the agreement ought not to bind the company, because the president did not read it before signing, is equally untenable. In his order the president had said that the transaction was to be cash, and the intention was that the purchaser should have no right till payment, and he asked the vendors to prepare any kind of document they thought necessary for their protection. They did so—he signed—and is bound. He could only obtain relief on restoring the vendors to the possession and ownership of the goods, and this is all that is sought.

Corporations, it has often been demonstrated, have neither soul nor conscience. It is the duty of the Courts to see that this defect does not attach to the liquidator.

Motion refused with costs.

SLATKY v. KAUFMAN—BRITTON, J.—MARCH 22ND.

Vendor and Purchaser—Agreement for Sale of Land—Incumbrance—Oral Agreement in Respect of—Onus—Failure of Proof—Discharge of Incumbrance—Payment of Amount to Purchaser—Counterclaim—Set-off.]—Action to compel the defendant to procure the discharge of a mortgage upon land sold to the plaintiff, and for other relief. Counterclaim upon promissory notes. The defendant, being the owner of the equity of redemption in a farm, agreed to sell it to the plaintiff. When the sale was about to be closed, it was discovered that the defendant had placed a second mortgage (for $1,500) on the farm, which had not been taken into consideration in settling the terms of sale and making the adjustments. The defendants admitted this; but said that the promissory notes made by the plaintiff in part payment of his purchase-money were not paid when presented for payment, and that an oral agreement was then made between the parties that the notes should be renewed, and that until these notes were paid the second mortgage should remain upon the property, and when these notes were paid the mortgage should be discharged. The action was tried without a jury at Toronto. The learned Judge said that the onus of proving this agreement was upon the defendant, and that he had not established it; nor had the plaintiff ratified what the defendant had done nor waived his right to have the original sale agreement carried out. Judgment for the plaintiff requiring the defendant to have the second mortgage released by a statutory discharge registered within two weeks, and, in default, for payment by the defendant of $1,500 and interest from the date and at the rate provided in the second mortgage, with costs of the action payable by the defendant to the plaintiff. Judgment for the defendant with costs upon his counterclaim for $516 and interest. If the defendant does not cause a discharge to be registered, but pays the $1,500 and interest and costs, he is to be entitled to set off pro tanto the amount of his judgment on the counterclaim for debt and costs. W. A. McMaster, for the plaintiff. G. R. Roach, for the defendant.

REYNOLDS v. CITY OF WINDSOR—LENNOX, J.—MARCH 22.

Nuisance—Dumping Refuse near Vacant Land in City — Liability of City Corporation—Opportunity to Abate Nuisance —Delay of Judgment.]—Action for damages for injury to the

plaintiff by the defendants dumping refuse and filth near to and upon the plaintiff's vacant land within the limits of the city of Windsor, and for a mandatory order requiring the defendants to remove the mound of refuse so accumulated as a menace to the public health. The learned Judge tried the action without a jury at Windsor, and now gives a short written opinion in which he discusses the evidence, and finds the facts against the defendants. Judgment is delayed, for two months at least, to enable the defendants to abate the nuisance. F. C. Kerby, for the plaintiff. F. D. Davis, for the defendants.

SMITH v. HAINES—MIDDLETON, J.—MARCH 23.

Fraud and Misrepresentation—Inducement to Buy Company-shares—Proof of Fraud—Evidence—Costs.]—This action was first tried by FALCONBRIDGE, C.J.K.B., who dismissed it without costs: Smith v. Haines (1914), 5 O.W.N. 866. A new trial was ordered by the Appellate Division: Smith v. Haines (1914), 6 O.W.N. 150. The second trial was before MIDDLETON, J., without a jury, on the 16th and 17th March, at Toronto. Judgment was reserved, and was now delivered as follows: I thought it better not to read the judgment of the learned Chief Justice before whom the case was first tried until I had my own mind made up upon the facts. On reading the judgment, I find that the general impression made upon him is precisely that made upon me. The plaintiff has failed to prove the fraud charged, and so his action fails, but the defendant's conduct is such that he ought not to receive costs, even though the particular fraud alleged has not been proved. He most certainly has not been "perfectly clear in his dealings with the plaintiff," or with others; and, in adopting this expression, I am using milder language than I contemplated before reading what my Lord has written. I. F. Hellmuth, K.C., and W. J. Elliott, for the plaintiff. Wallace Nesbitt, K.C., and R. McKay, K.C., for the defendant.

DONOVAN v. CHATHAM BRIDGE CO.—BRITTON, J.—MARCH 25.

Contract—Agreement to Build Vessel—Dispute as to Terms—Finding of Jury—Promised Speed not Attained—Breach of

Contract—Return of Money Paid—Damages.] — Action for breach by the defendants of their agreement to build and fully equip a sand barge or scow for the plaintiffs for use in transporting sand and gravel from points on the river Thames to Chatham, and for other purposes, for the price of $7,000. The agreement was not in writing. The two principal points in dispute were as to the time the scow would be ready for delivery and as to the speed it would be able to make. The plaintiffs claimed a return of the money paid on account of the price, and damages. The defendants counterclaimed the balance of the price. The action and counterclaim were tried with a jury at Chatham. Three questions were left to the jury, and in answer to them the jury found: (1) that by the agreement between the parties the boat was to have a speed of 8 or 9 miles an hour, and was to be delivered on the opening of navigation of the river Thames in the spring of 1914; (2) that the plaintiffs sustained no damages by not having the barge between the 1st April and the 1st July, 1914; (3) that the plaintiffs sustained $200 damages for the whole season of 1914. The other issues were tried by the learned Judge himself. He finds that all the work was well done and that the material furnished was excellent; that the plaintiffs did not accept the vessel; that the speed of the vessel was not equal to 8 or 9 miles an hour; that speed could not reasonably be attained by the barge or scow as constructed. Judgment for the plaintiffs for the amount paid by them, $400 (without interest), and for the $200 damages assessed by the jury, with costs. Counterclaim dismissed with costs. J. G. Kerr, for the plaintiffs. O. L. Lewis, K.C., for the defendants.

HOPKINS v. EDINGTON—BRITTON, J.—MARCH 26.

Fraud and Misrepresentation—Agreement for Sale of Farm —Dismissal of Vendor's Action for Specific Performance — Rescission of Agreement.]—Action to recover $1,000, the cash payment upon an agreement for the sale of a farm by the plaintiff to the defendant. The defence was, that the defendant was induced to enter into the agreement by misrepresentations and untrue statements made by the plaintiff to the defendant as to the condition and quality of the land. The action and counterclaim were tried without a jury at Toronto. The learned Judge,

after shortly stating the facts in a written opinion, said that the plaintiff may not have intended to perpetrate a fraud upon the defendant, but he made statements, upon which the defendant relied, and upon which the plaintiff intended that the defendant should rely, that were not true in fact; and so the plaintiff was not entitled to have specific performance, which was in effect what he sought. What the plaintiff did amounted to legal fraud. Action dismissed with costs. Judgment for the defendant setting aside the agreement. H. E. Choppin, for the plaintiff. F. Arnoldi, K.C., for the defendant.