THE

ONTARIO WEEKLY REPORTER

(TO AND INCLUDING MAY 12TH, 1906.)

VOL. VII. TORONTO, MAY 17, 1906. NO. 18

APRIL 30TH, 1906.

DIVISIONAL COURT.

MONTGOMERY v. SAGINAW LUMBER CO.

Third Party Procedure—Service of Notice on Third Party out of Jurisdiction—"Proceeding"—3 Edw. VII. ch. 8, sec. 13—Rule 162 (e)—Breach within Ontario of Contract—Employers' Insurance Contract—Indemnity.

Appeal by the Standard Life and Accident Insurance Company, from order of ANGLIN, J., ante 619, allowing appeal by defendants from order of local Judge at Windsor setting aside his own ex parte order allowing defendants to issue and serve upon the appellants a third party notice, and setting aside the service thereof on the appellants.

C. A. Moss, for appellants.

W. E. Middleton, for defendants.

The judgment of the Court (MEREDITH, C.J., BRITTON, J., MAGEE, J.), was delivered by

MEREDITH, C.J.:—We have come to the conclusion that upon the single ground, without considering the others, that the case is not, within the Rules, one in which leave to serve a proceeding out of the jurisdiction could have been granted, the appeal must be allowed and the order of the local Judge restored. But for the provisions of the Act of 1903, which amended the Rule and made it apply not only to the writ, but to any other document by which an action or other proceeding may be commenced, there would be clearly no jurisdiction. (The reference is to 3 Edw. VII. ch. 8, sec. 13: "In

Consolidated Rule 162 the word 'writ' shall be deemed to include any document by which a matter or proceeding is commenced. . . .")

We agree with the argument of Mr. Middleton that the third party notice is a "proceeding" within the meaning of the statute of 1903; but then the difficulty comes that there is no jurisdiction to permit service upon a third party unless the third party proceeding is in respect of a breach happening within Ontario of a contract, whether it is made in Ontario or elsewhere. (Rule 162 (1)—Service out of Ontario of a writ . . . may be allowed . . . wherever . . . (e) the action is founded on . . . a breach within Ontario of a contract, wherever made, which is to be performed within Ontario. . . .)

We are unable to yield to the argument of Mr. Middleton that if the action is one within the terms of the Rule, the third party notice may be served, although in an action by the defendant against the third party the case would not be within the Rule.

We think the word "action," in that portion of the Rule applicable to this case, must be read as if "third party proceeding," or words to that effect, were the language used.

Then, if that be so, it follows that in this case there was no breach within Ontario. The contract under which indemnity is sought is a contract under which there is no obligation to indemnify until judgment has been recovered and the amount paid by the defendants, who are the persons to be indemnified.

The time, therefore, has not arrived when a breach of that contract can take place, and upon that short ground we think this case must be disposed of adversely to the contention of the respondents.

It would very probably be desirable, if the judgment could be made effective against the third parties, that the Rules should be made wide enough to cover such a case as this, because it would be undesirable to have the matter litigated between plaintiff and defendants, and all gone over again, with possibly a different result as to the liability between the plaintiff and the defendants in this action to that reached in the action between the defendants and the persons who have agreed to indemnify them.

The appeal will be allowed, without costs here or below. The learned Judge below seems to have proceeded upon the

assumption that it was conceded that there had been a breach within Ontario; so that we are really not reversing anything that he has determined.

APRIL 30TH, 1906.

DIVISIONAL COURT.

WAY v. CITY OF ST. THOMAS.

Statutes—Special Act—Repeal by Implication—Repugnancy to Subsequent General Act—Rule of Construction—Assessment and Taxes—Exemptions—Railway—By-law of Municipality—Commutation—School Rates.

Appeal by plaintiff from judgment of TEETZEL, J., ante 194, dismissing with costs an action brought by a ratepayer of the city of St. Thomas against the city corporation and the Michigan Central and Canada Southern Railway Companies to obtain a declaration of the invalidity of a by-law passed by the city corporation on 6th April, 1897, enacting that the annual sum of $3,750 should be accepted by the city for each of the succeeding 15 years in lieu of all municipal rates and assessments in respect of the lands of the railway companies in the city. Plaintiff asserted that the by-law was invalid as regarded school rates, by reason of the provisions of the Schools Act, 55 Vict. ch. 60, sec. 4. TEETZEL, J., held that the provisions of a special statute (48 Vict ch. 65, sec. 3), authorizing the by-law, were not repealed by the general Schools Act.

J. M. Glenn, K.C., for plaintiff

W. B. Doherty, St. Thomas, for defendant city corporation.

D. W. Saunders, for defendants railway companies.

The judgment of the Court (MEREDITH, C.J., BRITTON, J., MAGEE, J.), was delivered by

MEREDITH, C.J.:—We think it is impossible to interfere with the judgment pronounced by Mr. Justice Teetzel in this case. For myself, I agree with the judgment and the reasons which he has given for it. It addition to the reasons

which he has given, it may be observed that there is nothing here to shew—indeed the contrary appears—that the sum which the railway company are to pay is not considerably more than the school taxes which they would be liable to pay if they are not entitled to any exemption; so that, even if the general law were applicable, there has been no exemption in fact from the payment of school taxes.

One would think that the reasonable way in which to apply this by-law, if there was no power to relieve from school rates, would be to pay first the school rates out of the commuted sum, and then to apply the remainder, if any, in discharge of the general taxes.

The railway company and the corporation of St. Thomas seem to be satisfied. I do not think we ought to go out of our way to disturb what seems to be in the interests of both the city and the railway company.

Appeal dismissed with costs.

MAY 4TH, 1906.

DIVISIONAL COURT.

STONE v. BROOKS.

Illegal Distress—Damages—Violation of Agreement for Suspension—Trespass—Conversion—Measure of Damages—Seizure and Sale of Stock of Business—Interference with Business—Goodwill, Allowance for—Chattel Mortgage—Acceleration of Payment—Chattel Mortgagee Distraining as Landlord—Appropriation of Payments.

Appeal by defendant and cross-appeal by plaintiff from order of BOYD, C. (ante 463), on appeal by defendant from report of a referee assessing damages to plaintiff in an action for wrongfully distraining and selling when no rent was due, and also for wrongfully seizing and selling goods mortgaged by plaintiff to defendant at a time when defendant had no right to seize under the terms of the mortgage. The facts appear in the judgment of the Court of Appeal, 3 O. W. R. 527, directing a new trial. At the second trial the reference was directed. The referee assessed plaintiff's damages at $1,548.94, and the Chancellor reduced the amount to $648.94.

J. E. Jones, for defendant, contended that the amount should be still further reduced.

J. MacGregor, for plaintiff, opposed defendant's appeal, and contended that the amount found by the referee should be restored.

The judgment of the Court (MEREDITH, C.J., MULOCK, C.J., MAGEE, J.), was delivered by

MEREDITH, C.J.:—We think no good purpose will be served by reserving judgment in this case. It has been very fully argued and we are now in possession of all the facts, and the conclusion we have come to is, that the finding of the referee that no good cause existed for accelerating the payments of the mortgage ought not to be disturbed.

That finding standing, the only remaining question as to the seizure under the chattel mortgage is whether anything had been done that was a breach of the provisions of the mortgage, entitling the appellant to take possession, or whether there was default in payment which entitled him to do so.

It is stated by Mr. MacGregor and not controverted by Mr. Jones, seriously at all events, that so far as it was attempted to support the taking of the goods for breach of the conditions of the mortgage in the selling or disposing of parts of the property, a case was not made out.

In a mortgage such as this, of a going concern, the authorities are clear that the mortgagor is entitled to deal with the property in the ordinary course of business. That is an implied condition of such a document; and here what was done was of that nature. There was no parting with or selling of the goods in the sense in which the provision of the mortgage speaks of parting with or selling them.

The only remaining question then is, Was there anything in arrear?

I should, of course, always pay great respect to any statement or deliverance of Mr. Justice Osler, in the Court of Appeal or elsewhere, dealing either with a question of fact or a question of law; but here we have to determine upon the evidence now before us, which is not the same as that before the Court of Appeal, what the proper conclusion of fact is; and, unless we are concluded by the judgment of another

Court, the law is clear that upon a question of fact the lowest Court is not bound by the finding in another case by the highest Court in the land.

It appears to me that there is upon the facts—leaving out the testimony of the parties or only accepting what they say in part—after discounting their statements as being made by persons desiring each to serve his own case—there remains sufficient in the documents themselves to make it practically conclusive that defendant had applied on the chattel mortgage so much of the money that had been paid by plaintiff as was necessary to satisfy the arrears upon the chattel mortgage.

Upon 11th February defendant issued two warrants, in one of which he directed his bailiff to distrain for $143.38, being the balance of rent due to him; and in the other to distrain under the chattel mortgage for $1,600, which he says is the amount owing upon it.

Now, looking at the statement of account, which bears the same date, it is manifest that if he had not before done that, defendant by that act so appropriated the payments made as to discharge the moneys overdue upon the mortgage, for in no other way could there be $143.38 due for rent.

It is not, I think, open to question that that is the true position of the matter, and, besides, Mr. Johnston's testimony is that there was no pretence that there was anything behind in payments upon the chattel mortgage, but that defendant was asserting the right to take possession in consequence of the payments having been accelerated under the provisions of the mortgage.

Then it appears that there were separate distresses, one upon a comparatively small part of the goods, for the rent in arrear; and that the larger body of goods was seized under the chattel mortgage.

It appears to us that with regard to the goods that were seized under the chattel mortgage and not for the rent, there being no justification for the seizure, defendant was a wrongdoer, and that he is answerable for the full value of the goods and for the injury that was done in breaking up—if the result was to break up—the business of plaintiff, and that the measure of damages is not what these goods would bring at a forced sale, but what they were worth as the stock in trade of a going concern.

The learned Chancellor in dealing with the question of damages has deducted a sum of $900, which was allowed by the referee, which he treats as the sum paid on the purchase of the property by plaintiff from defendant for the goodwill of the business.

Technically there was no goodwill dealt with. It was a purchase of the goods, and there was no transfer, as far as I have been able to gather, by defendant to plaintiff of the goodwill; and I think rather that what was treated as goodwill was the increased value the goods had because they had been used and were intended to be used in a going business, and, if so, that value is properly one of the elements to be considered in determining the amount of damages to be paid by a wrong-doer who has converted them, as we have concluded defendant is and has done.

Then, in regard to the goods that were distrained for rent, the facts, to my mind, present no serious difficulty. It appears to me abundantly clear that what took place upon that 13th day of February was that defendant had $162.55 coming to him; that he had his two warrants in; that all that he wanted was to get his $162.65; and, if that was paid, he was content to withdraw. Plaintiff has accounts which were good, mainly against medical gentlemen in the city, as I gather from the names; and in consideration of plaintiff assigning to him these accounts, which were, when paid, to go in satisfaction of the rent, defendant agreed to extend the time for payment of the $162.65 until after the 1st of the following March. Before 1st March defendant took possession of the goods, or interfered with the possession of them by plaintiff, on 28th February removed them from the premises, and subsequently to 1st March—on 4th March, it is said—sold them under the landlord's warrant for the rent.

Now, upon plaintiff's own statement, these accounts were not taken as payment of the $162.65, but were to satisfy it when the amounts payable by the debtors were received. There is nothing to shew that upon 4th March, when the sale took place, defendant was not in a position to proceed under the distress, which he had not abandoned, and to seal the goods in order to realize what remained due for the rent, so that he is not, in respect of these, in the position that he is in in regard to the other goods. He was there rightfully; he had seized the goods; he had them in pledge—that was

his legal position—with the right to sell them; and, with regard to these goods, it seems to us that, as Mr. Jones contended, the proper measure of damages is not the value of the goods, but the injury done by the interference with the business in advance of the time when of right and according to the terms of his contract defendant would have been entitled to have so interfered.

It may not make so very much difference in this case, because I apprehend that the destruction of the business was due to the taking of the larger quantity, which we have already determined was unlawfully taken under the other distress warrant.

These are the principles upon which we think the damages should be assessed. It will be perhaps best—there has been a great deal of expense already in this litigation—if the parties can agree upon what the damages are; if not, we shall endeavour to fix them and state at what sum they ought to be assessed.

We think all that defendant ought to be charged with is the amount he actually received. Apparently it was through no fault of his that the whole amount was not received. The plaintiff has got the benefit of it in the payment of his debts.

My brother Magee calls my attention to the fact that I have not said anything about the point that is suggested, that the seizure under the distress warrant for the rent was a breach of the terms of the mortgage, entitling defendant to take possession and sell.

There are probably two answers to that. The warrant was issued and the distresses were made simultaneously. Supposing they were not simultaneous, I think the provision ought to be strictly construed, and that it could not have been in the contemplation of the parties that the issue of a landlord's warrant by the mortgagee himself should be a ground for accelerating the payment. One can easily see how that might seriously embarrass the mortgagor. The parties might not be conducting matters strictly, and the rent might be due half a day, and the landlord, for the purpose of getting his money in advance, might issue a landlord's warrant and so accelerate the payment. I think it was intended that if somebody other than the mortgagee caused the goods to be taken under a landlord's warrant, the acceleration clause should operate.

With regard to the costs of this appeal and the cross-appeal, there has been part success and part failure, and we think the better course, instead of dividing the costs, will be that they should not be to either party.

My own view—we have not discussed that question—is that all the damage to the business was done, or at least the business would not have been destroyed if defendant had not distrained under the chattel mortgage, and that the proper amount to be allowed would be reached if there were deducted from the damages awarded by the referee what has been allowed for the goods that were distrained for the rent, and there were added to the balance remaining the damages for the interference for the days on which plaintiff was wrongfully interfered with, which would not be considerable, I should think, because defendant is being treated as a wrongdoer from the 11th, and plaintiff is getting damages for the destruction of the business on that day; and it is difficult to see how subsequent interference with it two days afterwards put plaintiff in any worse position, beyond depriving him of the use of the goods. However, if counsel cannot agree, we will consider that and reach a conclusion.

We have a proposition to make to counsel. If they are content to leave it to us to assess the damages, finally, not taking further the question of damages, we will assess the damages. If counsel are not willing to do that, we may probably refer the matter to the referee, and shall have to consider how the costs of the reference will be borne.

CARTWRIGHT, MASTER. MAY 5TH, 1906.

CHAMBERS.

PINKERTON v. TOWNSHIP OF GREENOCK.

Trial—Postponement — Proposed Absence of Witness—Servant of Crown.

Motion by defendants to postpone trial on account of the impending absence of a necessary and material witness.

G. H. Kilmer, for defendants.

A. R. Clute, for plaintiff.

THE MASTER:—This action was begun just a year ago, but has not yet come to trial. Plaintiff asks damages and other relief in respect of the alleged wrongful construction of a bridge, whereby his land has been overflowed.

It is admitted that plaintiff intends to give notice of trial for the non-jury sittings at Walkerton on 18th June. Defendants move to postpone the trial until the autumn.

The motion is based on the fact that the engineer on whose plans and under whose directions the bridge in question was built has been appointed by the Dominion government to do surveying in the province of Saskatchewan. He says that he expects to leave at once and to be absent until the autumn.

This does not seem to be sufficient ground for postponement against the wish of the plaintiff.

The case is at issue, and discovery has been had, so that the contentions of plaintiff are well defined. It will be open to defendants to take the engineer's evidence before he leaves, or else later on by commission, and an order can go at any time for such examination.

The fact that the witness is going to do work for the Dominion government would not seem to be any more reason for granting the motion than if he was going away to do work for any one else. To postpone trials for the convenience of witnesses would be to introduce a new and dangerous practice.

The motion is dismissed without prejudice to any application that may be made at the trial. Costs in cause to plaintiff.

CARTWRIGHT, MASTER. MAY 7TH, 1906.

CHAMBERS.

LEFURGEY v. GREAT WEST LAND CO.

Discovery—Examination of Defendant Resident out of Ontario — Rule 477 — Proposed Examination in Ontario— Compelling Attendance.

Motion by plaintiffs for an order under Rule 477 requiring a defendant who resides at Cookshire, in the province of Quebec, to attend at Toronto and be examined for discovery.

G. B. Strathy, for plaintiffs.

J. E. Jones, for defendants.

THE MASTER:—The plaintiffs' counsel relied on Smith v. Babcock, 9 P. R. 97, and on the provisions to be found at p. 876 of R. S. O. 1897 as to issue of subpœnas. That provision seems to contemplate only the attendance of witnesses at a trial, and not to be applicable to the examination of a party for discovery merely.

In Lick v. Rivers, 1 O. L. R. 57, a plaintiff out of the jurisdiction was required to attend at Windsor. But a defendant stands in a very different position. And in Meldrum v. Laidlaw (12th December, 1902, not reported) a Divisional Court held that a defendant resident in New York could not be brought here for discovery. No subsequent case has been found where Smith v. Babcock has been followed. A defendant resident in Ontario cannot be examined outside the county where he resides without a special order under Rule 444. See Dryden v. Smith, 17 P. R. 500.

It would seem, therefore, to be a fortiori that a defendant resident out of the province cannot be compelled to attend for examination within the province, unless there is clear authority for such an order; and a reasonable ground for making it. It seems better to refuse the motion and let the matter be taken higher if plaintiffs so desire. . . .

As the point argued is to some extent new and doubtful, the costs may be in the cause.

[Affirmed by MEREDITH, C.J., 11th May, 1906.]

TEETZEL, J. MAY 7TH, 1906.

WEEKLY COURT.

RE VANDYKE AND VILLAGE OF GRIMSBY.

Municipal Corporations—Local Option By-law—Irregularities—Publication of Notice of Day for Taking Votes—Mistake—Correction—Passing of By-law by Council—Validity of Election of Members—De Facto Councillors—Signing of By-law by Reeve—Resignation—Acceptance.

Motion by Vandyke to quash a local option by-law of the village corporation.

J. Haverson, K.C., and C. H. Pettit, Grimsby, for the applicant.

W. E. Middleton and T. Urquhart, for the village corporation.

TEETZEL, J.:—The grounds of objection are: (1) that the day fixed for taking the votes was more than 5 weeks after the first publication, in violation of sec. 338, sub-sec. 1, of the Municipal Act, 1903; (2) that the council which finally passed the by-law, after it had been voted on by the electors, was not legally elected, and that the persons who assumed to be members thereof, were mere usurpers of office; and (3) that the by-law was not duly signed by the reeve.

The by-law fixed 1st January, 1906, as voting day, and the council intrusted the clerk with the duty of publication. By mistake he caused the by-law to be published in a newspaper on 22nd November, which would be more than 5 weeks before voting day. Very shortly after the publication on 22nd November, the clerk's attention was called to the mistake, and he at once ordered its cancellation; and on 29th November he caused another publication of the by-law to be made in the same newspaper, and on or about 30th November caused 4 copies of the by-law to be posted, as required by the Act. Appended to the copies of the by-law so published was the notice required by sub-sec. 3 of sec. 338, in which the date of the first publication was certified to be 29th November. The publication on 22nd November was thereafter regarded by the clerk and council as a nullity, and the publication on 29th November as the real first publication.

It is manifest that the mistake was unintentional, and there is not in the material any suggestion that the result of the voting was in the slightest degree affected by it. . . .

[Re Armstrong and Township of Toronto, 17 O. R. 766, distinguished.]

In my opinion, it would be doing great violence to well settled rules of construction to hold that the will of the electors must be thwarted by the unintentional mistake in question, notwithstanding its immediate correction, and notwithstanding the absence of any suggestion that such mistake in any way affected the result of the vote.

The objection is therefore overruled.

As to the second objection, I do not think it necessary to express any opinion upon the validity of the election of the members of the council who finally passed the by-law. Whether legally elected or not, they were in fact returned as duly elected, by the clerk, who acted as returning officer,

under sub-sec. 4 of sec. 129, and they took the oath of office. Being de facto members of council, the validity of their legislative acts cannot be impeached on the ground that their election was invalid in law. . . .

[Reference to Scadding v. Lorant, 3 H. L. Cas. 418; Brice on Ultra Vires, 3rd ed., pp. 304, 613; and Dillon on Municipal Corporations, 4th ed., sec. 276.]

This objection is also overruled.

The 3rd objection is also untenable. The council on 15th January adopted a resolution finally passing the by-law, and directed that the same should be signed by the reeve and clerk, and the corporate seal attached. It was shortly afterwards duly signed by the clerk and the seal attached, and on 3rd February it was signed by William Mitchell, who was then de facto reeve, notwithstanding it would appear that on 2nd February he went through the form of resigning his position as reeve. His resignation, however, in my opinion, was not effective to disqualify him from signing the by-law, inasmuch as there was not a compliance with sec. 210 of the Municipal Act, which provides for resignation with the consent of the majority of the members of the council present, to be entered upon the minutes of the council. This not being done, the resignation was not effective. See Chaplin v. Woodstock Public School Board, 16 O. R. 728; Hardwick v. Brown, L. R. 8 C. P. 406; Biggar's Municipal Manual, p. 228.

The motion will, therefore, be dismissed with costs.

MAY 7TH, 1906.

DIVISIONAL COURT.

MERCHANTS BANK v. STERLING.

Principal and Agent—Moneys Advanced by Bank to Agent—Liability of Principal—Evidence—Authority of Agent—Burden of Proof.

Appeal by defendants from judgment of BRITTON, J., ante 67, in favour of plaintiffs in an action to recover moneys advanced by plaintiffs to one E. J. Witherford, the

agent of defendants, for the purpose of buying, taking care of, and shipping live and dressed hogs.

The appeal was heard by BOYD, C., MAGEE, J., MABEE, J.

M. Wilson, K.C., and R. L. Gosnell, Blenheim, for defendants.

J. H. Rodd, Windsor, for plaintiffs.

BOYD, C.:—Witherford opened an account with plaintiff bank by means of money supplied chiefly by defendants—the object being that Witherford should buy and ship hogs to defendants and pay himself out of these moneys. The account was kept in the name and for the benefit of Witherford, and by degrees he began to overdraw, and then the bank said they could not let the overdrafts go on unless defendants should guarantee their payment.

The bank supplied a printed form of general guarantee for all liabilities incurred by Witherford up to $2,000. This defendants refused to sign, but gave a limited obligation on 27th November, 1903, directing the bank to cash Witherford's cheques to farmers for hogs (live and dressed) each week, and to draw on defendants for the amount at sight till further notice.

It is admitted by the bank that this direction and method of dealing was not acted on, but that, on the contrary, the manner of doing business went on as before as between the bank and Witherford. The upshot was that both the bank and defendants appear to have trusted Witherford overmuch, so that on 17th September, 1904, he absconded, being indebted to the bank on overdrawn account to the amount of $650, and to defendants in the sum of $72. The bank now seek to collect this overdraft of Witherford from defendants. Upon the first overdraft, which led to the call for a guarantee, the bank appear to have had no right of action against defendants, and, the manner of dealing remaining unchanged, the onus is on the bank to make out that this situation is bettered as to the last overdraft.

The claim was at first based upon the limited guarantee, but that was abandoned, and the action is now based on the statement that Witherford was agent for defendants, and that advances were made to Witherford to carry on the business at the request of defendants, who undertook to repay the

same by drafts made upon the bank from time to time therefor. There was no arrangement as to the transactions other than that evidenced by the course of dealing; the bank dealt entirely with Witherford, who, in his turn, settled accounts with defendants in his own figures—shewing what he had bought and his expenses therefor, and to the extent to which he had expended money in the purchase of hogs received by defendants they honoured the drafts made by him through the bank. Defendants knew nothing of the method of accounting or of dealing as to details between Witherford and the bank, and, besides the moneys received by him through drafts, it appears that large sums were sent Witherford by express. . . . Defendants refused to honour the last draft for $2,000 on 31st August, because they had not received hogs in respect of it—but upon Witherford agreeing to send on and actually sending on to them 3 shipments, equal in value to over $1,400, defendants then, on 8th September, sent a cheque to take up the draft. That was the last transaction between defendants and Witherford before his disappearance, but the bank appear to have paid money on Witherford's cheques after this, and till a notice came from defendants (who had been advised by Witherford's wife that he had gone) not to pay his cheques pursuant to the agreement of November, 1903. Defendants' position is, that they have in fact paid Witherford for more hogs than they received (this Witherford admits . . .), and that the overdraft in the bank was expended by Witherford in some other way than in hogs for defendants. The bank repudiate the proposition that an account should be taken as to the expenditure of Witherford's drawings, and claim to hold defendants as principals and responsible for all moneys paid to their alleged agent in the course of his agency, no matter how expended by Witherford. I think the bank have not satisfactorily established this relationship of general agency, and that, though it may be true that Witherford was buying hogs for defendants, and was agent in that respect, he was not a general agent as between him and the bank so that his drawings are to be made good by defendants, without evidence that the moneys went into the purchase of hogs, and that these hogs came into the hands of defendants.

I do not think either action or counterclaim should be successful, and I would reverse the judgment—leaving both

parties where they were—and give no costs of action, counterclaim, or appeal.

I am not able to concur with my brother Magee's view that there should be a limited investigation of accounts as to the application by Witherford of moneys paid after 31st August, 1904, by the bank on his cheques. It is against the wish of the bank to have any general investigation of the dealings ab initio on the footing of the written obligation of 27th November, 1903, and it does not seem to me competent to introduce that document as of force after 31st August, 1904, when its terms were all along disregarded by the bank. Let it control all through or not at all.

MABEE, J., concurred, giving reasons in writing.

MAGEE, J., dissented, also giving reasons in writing.

OSLER, J.A. MAY 7TH, 1906.

C.A.-CHAMBERS.

PLAYFAIR v. TURNER.

Appeal to Court of Appeal—Leave to Appeal from Judgment at Trial—Final Judgment—Reference as to Damages.

Motion by defendants for leave to appeal from the judgment at the trial directly to the Court of Appeal.

R. McKay, for defendants.

F. E. Hodgins, K.C., for plaintiffs.

OSLER, J.A.:—I think an order may properly be made giving leave to appeal per saltum from the judgment at the trial.

The trial Judge has held that plaintiffs are entitled to recover damages amounting to upwards of $4,000, though I am told that, defendants not having elected to accept a judgment for that amount, the sum for which judgment will be entered—more than the above sum being claimed in the action—must now be ascertained by a reference.

As they are stated to me, questions of some importance will arise on the appeal.

It was urged that the judgment was not a final judgment, and that no appeal could lie to the Supreme Court of Canada, and therefore that I had no power to make the order under sec. 76 of the Judicature Act.

In Frankel v. Grand Trunk R. W. Co., 1 O. W. R. 254, 339, 396, 3 O. L. R. 703, and S. C., sub nom. Grand Trunk R. W. Co. v. Frankel, 33 S. C. R. 115, the plaintiffs had judgment at the trial for $1,000. The sum demanded in the action was $1,500. The Court of Appeal set aside the judgment and directed a reference as to damages. It was held by this Court, quantum valeat, that the Supreme Court had jurisdiction to entertain an appeal since the Act of 60 & 61 Vict. (D.) In the Supreme Court, the judgment of this Court seems to have been treated as a final judgment, and the appeal was entertained and ultimately allowed and the action dismissed.

Re Cushing Sulphite Co., 37 S. C. R. 173, cited by Mr. Hodgins, is not in point. Davies, J., says that no amount whatever was involved in the appeal. The only question was as to the exercise of the judicial discretion of the Judge below in making an order to postpone a sale in certain winding-up proceedings.

Order accordingly. Costs in the cause.

CARTWRIGHT, MASTER. MAY 8TH, 1906.

CHAMBERS.

THOMAS v. IMPERIAL EXPORT CO.

Trial—Separate Trial of Preliminary Issue—Settlement of Action—Rule 531—Consent.

Motion by plaintiffs under Rule 531, in an action for the price of goods sold and delivered, for an order directing the trial of two of the issues before the others, viz.: (a) Whether in law defendants had accepted the goods in question, or

any of them. (b) Whether there was a settlement between the parties prior to the commencement of this action, as alleged in the statement of defence, which was binding upon plaintiffs.

W. J. McWhinney, for plaintiffs.

C. W. Kerr, for defendants.

THE MASTER:—It is agreed that the second issue should be tried before the others, as if this is found in defendants' favour, the action will be at an end. All the evidence on this will be found here, whereas it will be necessary to have commissions to England and New York if the matter is gone into on the merits.

But defendants are not willing to have the question of acceptance treated in this way, and, in view of their opposition, the motion as to this must fail, unless such issue, if found against plaintiffs, would admittedly end the action. See Smith v. Smith, 5 O. W. R. 520, 673, and cases cited. But, far from this, it does not seem that this issue can have any bearing except as to the measure of damages. And it is therefore not one of the class of issues which should be tried separately, unless perhaps by consent. The inconvenience arising from the application of the Rule, unless in very plain cases, has been pointed out by Jessel, M.R., in Percy v. Young, 15 Ch. D. 474. To the same effect is the language of Meredith, C.J., delivering the judgment of the Divisional Court in Waller v. Independent Order of Foresters, 5 O. W. R. 421, at p. 422: "Experience has shown that seldom, if ever, is any advantage gained by trying some of the issues before the trial of the others is entered upon, and certainly in this case the result of adopting that course is most unsatisfactory. . . . If the result of the preliminary trial in this case, whichever way it resulted, would have put an end to the controversy . . . it would have been different."

It would seem to follow from this that, unless both parties agreed, the trial, even of the question of settlement, could not be first had.

As it is, the order will go for that only, with costs in that issue. . . .

MAY 8TH, 1906.

DIVISIONAL COURT.

McWILLIAMS v. DICKSON CO.

Timber—Crown Lands—Issue of Patent—Consent of Timber Licensees—Agreement as to Timber—Ownership of Land—Estoppel.

Appeal by plaintiff from judgment of STREET, J. (6 O. W. R. 702), dismissing action brought to replevy a quantity of basswood, ash, elm, maple, cedar, hemlock, and other saw logs cut by defendants upon lot 18 in the 5th concession of Cavendish, and removed by them to Burley Falls on Stoney Lake. STREET, J., held that plaintiff had failed to make out a right to the logs.

R. F. McWilliams, Peterborough, and A. R. Clute, for plaintiff.

G. H. Watson, K.C., and G. M. Roger, Peterborough, for defendants.

The judgment of the Court (BOYD, C., MAGEE, J., MABEE, J.), was delivered by

BOYD, C.:—The evidence of Cochrane, as patentee, leads very strongly to the conclusion that there was no real transaction on his part in procuring the patent for lot 18. There is no reason to disagree with the inference drawn by Street, J., that Cochrane was acting for the father McWilliams or the son, and that, as the intermediary in whose name the patent issued, it was competent for him to agree with defendants as to taking off the timber, in consideration of their facilitating or not objecting to the issue of the patent. The relation of the licensees, the defendants, to this land was, in the opinion of Cochrane, an obstacle to the getting of the patent, and it was considered desirable to have this removed by having defendants assent thereto on the footing of the agreement of 4th January, 1902. Cochrane obtained the patent subject to this concession to defendants, and plaintiff, who takes under Cochrane, apparently without any value being given, cannot recede from it.

Had the interest of the McWilliamses in the transaction been disclosed, the Crown might have declined to issue the patent in derogation of the claim of defendants as licensees, so it was better in every aspect to secure defendants' assent.

I would affirm the judgment with costs.

CARTWRIGHT, MASTER. MAY 9TH, 1906.

CHAMBERS.

WOOSTER v. CANADA BRASS CO.

Security for Costs—Plaintiff out of Jurisdiction—Property in Jurisdiction—Shares in Company.

Motion by defendant Menzie for order requiring plaintiff to furnish security for costs of applicant.

Strachan Johnston, for applicant.

Z. Gallagher, for plaintiff.

THE MASTER:—It is admitted that plaintiff has left this province. But it is said that, as he is the owner of 50 shares in the defendant company, for which he had paid $5,000 cash, the motion should fail.

The statement of claim alleges that the defendant company "is insolvent and financially embarrassed, and has not and never had sufficient capital to carry on its business." The plaintiff therefore asks to have his subscription cancelled and to be repaid his $5,000, or else to be paid that sum as damages.

The argument of defendant Menzie is that these allegations of plaintiff shew that his shares are not such an asset as to be an answer to the motion. His counsel relied on the case of Walters v. Duggan, 33 C. L. J. 362. There it is said that in these cases there must be "plain and incontrovertible proof that plaintiff is in possession of sufficient property standing in his own name of which he is the beneficial owner, and which is easily exigible." This was affirmed on appeal by Meredith, C. J. See too, Parke v. Hale, 2 O. W. R. 1172.

I agree that the plaintiff's own statements as to the condition of the company shew that his stock does not comply with the above decision, and that the order should go for security (to be available for both defendants if plaintiff so desires). Costs in the cause.

Shares of this kind, which have no material existence, differ from real estate or chattels. When allowed as security, the plaintiff must undertake not to deal with them in any way wihout notice to defendant's solicitor.

TEETZEL, J. MAY 9TH, 1906.

CHAMBERS.

McCARTHY v. McCARTHY.

Summary Judgment—Action against Executor—Recovery of Legacy—Assent—Admission of Assets—Abatement.

Appeal by plaintiff from order of local Master at Ottawa refusing plaintiff's motion for summary judgment under Rule 603.

C. A. Moss, for plaintiff.

Grayson Smith, for defendant.

TEETZEL, J.:—Plaintiff, as legatee under will of J. J. McCarthy, sues defendant, as executor of the will, for a legacy of $1,000, and interest from June, 1901. The material does not satisfy me that defendant, as executor, has ever assented to plaintiff's legacy, either expressly or by implication, or that he has admitted receiving from the estate assets sufficient to satisfy debts and legacies. For this reason the case has not been brought within the authority of Hamilton v. Brogden, 60 L. J. N. S. 88. . . . On the other hand, defendant proves that the stock which represented the estate out of which plaintiff's legacy is payable could not, since testator's death, have been sold for sufficient to pay the legacies in full. If defendant's affidavit is true, plaintiff would not be entitled to judgment as asked. I think, in order to entitle a legatee to recover judgment for his legacy as a debt or liquidated demand, he must at least shew that the executor has received an estate sufficient to pay the debts and

legacies provided for under the will. If defendant's position is right, plaintiff may have to abate a portion of his legacy.

The appeal must be dismissed, with costs in cause to defendant.

ANGLIN, J. MAY 9TH, 1906.

TRIAL.

STODDART v. ALLAN.

Executors and Administrators—Action for Board of and Services to Testator—Evidence—Costs.

Action against the executor of the will of William Allan, deceased, to recover an amount alleged to be due for boarding and attending upon the deceased.

W. H. Wright, Owen Sound, and G. M. Vance, Shelburne, for plaintiff.

S. H. Bradford and J. Bradford, Sturgeon Falls, for defendant.

ANGLIN, J.:—After carefully considering the evidence I have reached the conclusion that the plaintiff is entitled to succeed for a portion of his claim in this action.

Until 2nd December, 1902, his deceased father-in-law was an ordinary boarder with him, and I cannot find that he has not been paid all that he bargained for to that date. Down to that time plaintiff kept no account against the deceased, and his evidence rather indicates that he intended to make no claim for board beyond the small sum which her father paid from time to time to plaintiff's wife.

But from the beginning of December, 1902, the intention to charge for board and services to the deceased seem tolerably clear, and there is sufficient evidence, in my opinion, to warrant a finding that the deceased . . . knew of this, and more than once intimated his recognition of a claim by plaintiff upon himself or his estate. The small irregular payments made from time to time by the deceased to his daughter . . . subsequent to December, 1902, were, in

my view, rather presents of pocket-money, intended for her own use, than payments on account of the indebtedness of William Allan to plaintiff for his board, nursing, etc.

From December, 1902, to the date of his death, January, 1905, William Allan's estate should pay for his board at the rate of $4 per week, except for the several periods when he was absent on visits to his other children, etc., such absence amounting in all to about 4 months. On this account I allow plaintiff $368.

The deceased during this period had 3 severe illnesses, during which he required special nursing and attendance, for which I allow the following sums: . . . (aggregating $204.50).

The items amounting to $54.75 claimed in the 3rd paragraph of the statement of claim cannot be allowed. I am not at all satisfied that the deceased . . . knew that plaintiff intended to charge against him any of these items, or in any way undertook to pay them.

The sums allowed total $572.50. Judgment will be entered for plaintiff for that sum with costs. The executor was justified, I think, in requiring plaintiff to establish his claim by an action, and should be allowed his costs of defence out of the estate of the deceased, on passing his accounts.

MAY 9TH, 1906.

DIVISIONAL COURT.

HAMILL v. MUSKOKA LEATHER CO.

Contract—Supply of Bark—Dispute as to Quantity—Measurements—Action—Counterclaim—Costs.

Appeal by plaintiff from judgment of FALCONBRIDGE, C.J., at the trial, in favour of defendants for $10.63 against plaintiff in an action for an alleged balance of $600 due for hemlock bark supplied to defendants, with a counterclaim for moneys overpaid. The trial Judge found that plaintiff had been overpaid by $10.63.

The appeal was heard by BOYD, C., MAGEE, J., MABEE, J.

R. D. Gunn, K.C., for plaintiff.

A. A. Mahaffy, Bracebridge, for defendants.

MABEE, J.:—The dispute upon this appeal is as to the number of cords of bark plaintiff should be paid for; the counterclaim is not in question.

The learned trial Judge adopted the measurement made in the bush and allowed for 372 cords. Plaintiff claims a much larger sum.

Under the contract plaintiff had the right to have the bark finally measured at the lake, and not in the bush. Defendants' agent had made an error in his bush measurement of 100 cords. This was known to plaintiff, and he was relying, as he had the right to do, upon a fresh and more accurate measurement at the lake. Defendants allege that no satisfactory measurement could be made there, owing to the way plaintiff's agent had piled the bark. They, however, undertook its removal to the mills, and the captain in charge of the scow made a measurement, and he says there were 388 cords taken by him from the lake to defendants' mills. At this time the parties were disputing as to the amount of bark plaintiff had taken out; the captain of the scow was directed to measure the bark removed by him; he did so, and it seems fairer to hold defendants to that measurement than to one made in the bush, which under the terms of the contract was not intended to be final, and which is called an "estimated measurement" in the contract, simply something shewing an amount of bark upon which defendants would be safe in making advances from time to time.

It was contended that the scow measurement would not be fair, as the piles would have no opportunity to settle. The difference between the scow measurement and the bush measurement is 16 cords in plaintiff's favour; allowing a liberal amount for loose piling or settling, say 6 cords, there still would be at least 10 cords that plaintiff should be paid for. This would be $50. Deduct the $10.63 allowed by the trial Judge upon the counterclaim as overpaid, but which from the foregoing would be simply money paid on account, and a balance of $39.37 remains, payable by defendants to plaintiff.

The trial Judge dismissed the remaining items of the counterclaim without costs; that we affirm.

In the result, the judgment will be varied by directing judgment in favour of plaintiff for $39.37, with costs on the County Court scale, without right of set-off to defendants. Plaintiff to have costs of this motion.

BOYD, C., gave reasons in writing for the same conclusion.

MAGEE, J., also concurred.

MAY 1ST, 1906.

DIVISIONAL COURT.

BACON v. GRAND TRUNK R. W. CO.

Railway—Animal Killed on Track—Railway Act, sec. 237—Liability—Burden of Proof—Questions for Jury—Negligence.

Motion by plaintiff to set aside nonsuit entered by the Judge of the County Court of Simcoe, after the verdict of a jury in favour of plaintiff, in an action to recover as damages the value of a horse killed by a train of defendants, and to enter judgment for plaintiff for $160, the amount agreed upon as the value of the animal.

R. D. Gunn, K.C., for plaintiff, contended that the horse being found on the track, the onus was on defendants under sec. 237 of the Railway Act to shew that it got at large through negligence of person in charge of horse, and that it was a question for the jury.

W. A. Boys, Barrie, for defendants, contra.

The judgment of the Court (MEREDITH, C.J., BRITTON, J. MAGEE, J.), was delivered by

MEREDITH, C.J.:—There is no doubt a great deal in what Mr. Boys has argued as to the unreasonableness of making the railway company liable in some of the cases which he has presented as illustrations of the application of the statute, construed as we think it ought to be.

Perhaps in this particular case the unfairness is not as apparent as in some of the illustrations which Mr. Boys gave. However that may be, we must look to the language of the statute, and when we arrive at a conclusion as to what it means, we must give effect to it, although it may in its application work hardship in particular cases.

No doubt, in arriving at a conclusion, if the language is doubtful, these considerations have weight. But it seems to me that the language of the statute is so plain that it is impossible for the Court to do otherwise than to give effect to it in the very words in which the legislature has chosen to express its view.

By sec. 237, which is a re-enactment of the old law, horses, sheep, swine, and other cattle are not permitted to be at large upon a highway within half a mile of the intersection of it by a railway at rail-level, unless the cattle are in charge of some competent person or persons to prevent their loitering or stopping on the highway at the intersection, or straying upon the railway; and the cases decided that where animals were killed by being there in contravention of that provision there was no right to recover. But in 1903, when the Railway Act was consolidated, a very important change was made, and by sub-sec. 4 it is provided that:

"When any cattle or other animals at large upon the highway or otherwise get upon the property of the company and are killed or injured by a train, the owner of any such animal so killed or injured shall be entitled to recover the amount of such loss or injury against the company in any action in any Court of competent jurisdiction, unless the company, in the opinion of the Court or jury trying the case, establishes that such animal got at large through the negligence or wilful act or omission of the owner or his agent, or of the custodian of such animal or his agent; but the fact that such animal was not in charge of some competent person or persons shall not, for the purposes of this sub-section, deprive the owner of his right to recover."

What then is it that the plaintiff has to prove? It seems to me that a prima facie case for the plaintiff is made if it is established that an animal got upon the property of the company, and was there killed or injured by the train, because those are the conditions which must exist to entitle the owner to recover the amount of the loss or injury. Then what is the burden upon the company? The company is bound to

shew to the satisfaction of the jury, in this case, that that animal got at large through the negligence or wilful act of the owner.

The argument of Mr. Boys, based upon the first sub-section of sec. 237, is very much weakened by the concluding words of the section, "but the fact that such animal was not in charge of some competent person or persons shall not, for the purposes of this sub-section, deprive the owner of his right to recover," that is, I would think, not in charge of some competent person within half a mile of the railway crossing.

The defendants in this case wholly failed to establish that there was any negligence on the part of the plaintiff or of any person in whose custody the horse was. According to the testimony, as I understand it, the horse was killed after getting out of the pasture in which it was, not by any negligence of the plaintiff or of anybody who was in charge of it; it got upon the highway, and, according to the view that the jury must have taken when they found, as they did, that the horse was killed upon the company's property, they must have adopted the view of the plaintiff's witnesses, that the horse being upon the highway was frightened by the train and went up the track to the place where it was struck and killed.

It seems to me it is impossible to get over the language of the statute, and that this case falls within the very words of the section.

Then it is said that the verdict as found does not entitle the plaintiff to recover. It sems to me that that is to misapprehend the full effect of the answer. Even if it were necessary for the plaintiff to establish negligence on the part of the railway company, it seems to me that reading the answer fairly, it means that the jury find negligence.

They find two things: that the horse was killed upon the property of the company, and that the company are responsible for that. Reading that in the light of the learned Judge's charge, in which they were told that defendants were not answerable unless they were negligent, it means that they were responsible because the killing was due to their negligence. That was not necessary to be found by the jury, but a finding by them that the horse was killed upon the property of the company, upon the undisputed facts of this

case, is sufficient to entitle plaintiff to recover, unless it was shewn by defendants that the negligence with which the section deals existed. Instead of finding that, the jury have negatived it by their answer.

If the law presses too hardly upon railway companies, it is for the legislature to interfere.

The appeal is allowed, the judgment reversed, and judgment is directed to be entered for plaintiff for $160. The costs of the appeal to be paid by defendants.

MAY 10TH, 1906.

DIVISIONAL COURT.

PARADIS v. NATIONAL TRUST CO.

Contract—Sale of Railway Charter—Share of Promoter in Proceeds—Remuneration for Services—Amount Fixed by Referee—Quantum Meruit—Evidence.

Appeal by plaintiff from judgment of TEETZEL, J., at the trial, dismissing the action without costs.

In 1898 plaintiff, with several others, including one Bremner, promoted and incorporated the Temagami Railway Company, and in 1900 Bremner proposed to sell the charter in England. Plaintiff alleged that he assigned his interest in the charter to Bremner, upon the latter agreeing to pay plaintiff his share of the proceeds of the sale and an additional amount, to be fixed by one L. O. Armstrong, for plaintiff's services in connection with surveys and promotion; that Bremner had sold the charter, but had not paid plaintiff as agreed. Bremner died in England in 1903. This action was brought against his executors to recover $2,000 as the amount of plaintiff's share of the proceeds of the sale, and an additional $2,000 for services as determined by Armstrong. Defendants set up that no amount had ever been realized on the charter, and that Armstrong had no authority to compute and determine what should be paid for plaintiff's services.

C. A. Moss and Featherston Aylesworth, for plaintiff.

W. H. Blake, K.C., for defendants.

The judgment of the Court (BOYD, C., MAGEE, J., MABEE, J.), was delivered by

BOYD. C.:—Apart from questions of form, plaintiff should recover from the estate of Bremner at least . . . $2,000 upon this inquiry. Bremner obtained from plaintiff a transfer of his interest in the railway charter upon the terms contained in two writings dated 3rd and 5th March 1900. Under the first plaintiff received the down payment of $100, but has not received his share of the "30 per cent. interest in the concern" mentioned therein. Under the second writing he was to receive such further compensation as should be approved of by Mr. Armstrong. For want of sufficient proof this action fails on the first head of claim; but there appears sufficient and satisfactory evidence to establish a right to recover on the second head of claim.

It is to be noticed that the letter of 5th March was supplemented by a telegram from Bremner to Armstrong: "Paradis has signed transfer; have promised put him on inside basis approved by you."

Armstrong saw and conferred with Bremner both before and after this message, and also with Paradis touching the further compensation, and it was agreed all around that Paradis was to be engaged in connection with the enterprise at a salary of not less than $1,200 a year, to begin forthwith or in a month. . . . It is succinctly put by Armstrong . . . thus: "I settled with Paradis at Montreal that he should withdraw his opposition and allow the change of route, give up (what Mr. Bremner wanted) his rights in the road, in consideration of a salary of $1,200 or $1,500, in addition to what he had." Armstrong says that he talked this particular matter all over with Mr. Bremner, and that he understood it was the thing referred to him to settle under the terms of the letter and telegram. Upon this footing Paradis should have received at least 3 years' salary before the death of Bremner, but, though repeated applications were made by letter to Bremner (who had returned to England soon after the writings in question), nothing was done in the way of making further compensation to Paradis.

After the death of Bremner, and after it was ascertained that he had left some assets, application was made to Armstrong to put in writing what he considered plaintiff should be entitled to as compensation under all the circumstances,

and Armstrong then assessed $2,000 as a reasonable sum to be paid in lieu of the unrealized salary engagement. . . .

This adjustment in lieu of salary appears to be within the scope and terms of the powers committed to Mr. Armstrong, as understood by him and Bremner, in the settlement of the terms of transfer as between plaintiff and Bremner.

But, if it is not, and if it be that there is no legally effective deliverance made by Mr. Armstrong, I would accept these figures as a proper quantum meruit to be allowed to plaintiff as representing in money the further allowance and compensation which Bremner agreed to give under his signature. And all proper amendments to answer the evidence should be made in this regard.

This judgment should be with costs of action, and without prejudice to the re-agitation of any claim plaintiff may be advised he has under the agreement dated 3rd March, 1900.

MAY 10TH, 1906.

C.A.

McKAY v. VILLAGE OF PORT DOVER.

Highway—Non-repair—Injury to Pedestrian—Defect in Sidewalk—Liability of Municipality—Negligence—Contributory Negligence—Damages.

Appeal by plaintiff from order of a Divisional Court, ante 292, dismissing without costs an appeal by plaintiff from judgment of BRITTON, J., 6 O. W. R. 878, dismissing action without costs.

W. S. McBrayne, Hamilton, for plaintiff.

T. R. Slaght, K.C., for defendants.

The Court (MOSS, C.J.O., OSLER, GARROW, MACLAREN, MEREDITH, JJ.A.), dismissed the appeal with costs.

ANGLIN, J. MAY 11TH, 1906.

CHAMBERS.

RE FAULDS.

Infant—Custody—Rights of Father—Maternal Grandmother—Religious Faith—Temporal Welfare of Child—Fitness or Unfitness for Custody of Child—Desirability of Child being Brought up with Brother—Agreement as to Custody—Application by Father on Habeas Corpus—Costs—Balance Due for Maintenance—Set-off.

Motion by J. F. Faulds, the father of the infant Eva McD. Faulds, aged 10 years and 11 months, upon returns to writs of habeas corpus, for an order upon Isabella Gibbs, the maternal grandmother of the infant, for delivery of the infant into the applicant's custody.

W. E. Middleton, for the applicant.

W. A. McMaster, Toronto Junction, for the respondent.

ANGLIN, J.:—In 1898, the child being then 3 years of age, its mother, since deceased, unfortunately became insane, and her confinement in an asylum became necessary. She lived for 3 years, confined for a portion of that period in asylums at Toronto and London, and for intervals of some months living in private houses. The treatment of this unfortunate lady by her husband appears to have been kind and considerate. She died in October, 1901, in the asylum at London, where she had been placed by her mother, the respondent upon this application, during the absence of the husband in the United States. When it first became necessary to send his wife to the Toronto Asylum in June, 1898, the applicant, having no means for suitably caring for his daughter, then a mere infant, very properly arranged that she should reside with her grandmother, the respondent. The applicant at this time appears to have been somewhat addicted to drinking habits, and, whether on this account or from other causes, does not appear to have been very prosperous or successful in his profession. In 1900 he conceived the idea of leaving Canada and seeking his fortune in the United States. At this time his wife was temporarily out of the

asylum, living with a Mrs. Perry. Without apparently any very strong ground (he owed Mrs. Perry for his wife's board for 2 weeks), proceedings were instituted against the applicant at Mrs. Perry's instance, in January, 1900, charging him with neglecting and refusing to support his wife. These proceedings led to his depositing with the Crown Attorney the sum of $200 to be applied towards the support of his wife and child. He then went to the United States, and remained there until after the death of his wife. His infant son, 2 or 3 years younger than the child whose custody is now in question, he left in the care of his brother, E. A. Faulds, while absent in the United States. Returning to Canada in February, 1902, the applicant married again, in August of that year, and has since resided in London, Ontario, where he now has a comfortable home. Shortly after his return to Canada, and at intervals since, he has expressed his desire to have his daughter come to live with him, but does not appear to have definitely determined to enforce his parental rights until February, 1906, having apparently yielded until that time to the wishes of both grandmother and child that they should not be separated.

Formerly an indifferent Protestant, the applicant has comparatively recently become a Roman Catholic. His son is now living in London under his control, and is being brought up as a Catholic. The daughter, residing with her grandmother in the village of Wardsville, has been brought up as a Protestant, and seems to have some antipathy to Catholicism, for which, however, she can give no very intelligent or satisfactory reason or explanation. Her father has provided —if not altogether—very fairly for the support of his child while with her grandmother, at all events since his return to Canada.

The applicant bases his claim for an order for delivery of his daughter into his custody on: (1) his parental right; (2) his right to have his child brought up in his own religious faith; (3) the temporal welfare of the child; (4) the unfitness of the respondent to retain the custody, and her financial inability to provide adequately for the education of the child; (5) the desirability of having the child brought up with her only brother.

The motion is resisted by the grandmother: (1) on account of the welfare of the child; (2) on account of the alleged unfitness of the father to be its custodian; (3) because

of an alleged agreement by the father that the child should remain in her care as long as she (the grandmother) lives; (4) because of the religious convictions of the child. . . .

[Review of the evidence.]

I had the advantage of a personal interview with the child alone. She is bright and intelligent. She naturally expresses a strong preference to remain with the grandmother and some aversion to returning to her father's home. . . .

The fitness of the applicant to have the custody of his daughter is vouched for by a number of apparently respectable witnesses. . . . The main charge against him seems to be that he has occasionally used liquor to excess. . . The evidence falls short of shewing any such habitual drunkenness as would warrant a finding of unfitness such as would justify an interference with a father's right: Re Goldsworthy, 2 Q. B. D. 75. I must, upon the evidence before me, find that the applicant is not an unfit person to have the custody of his daughter.

The letters of the respondent, produced by the applicant and admitted by her on examination, written in answer to intimations in 1902 and 1903 of his intention to take back his daughter, afford conclusive proof that there was no agreement such as is now set up that the child should remain with the grandmother always or until her death. . . .

The child's own evidence and her conversation with me have satisfied me that she has no such religious convictions as would call for consideration as a material element in dealing with this motion. She expresses a preference for Protestantism and an aversion to Catholicism. Her reasons for the one and the other are such as might be expected from a child of tender years. She knows practically very little about religion, and cannot be really said to have any serious religious convictions.

The fitness of the respondent is impugned upon two grounds. It is said that she is habitually untruthful, and that she lacks proper power of control over the child. Though the former charge is sworn to by (two witnesses), I make no finding adverse to Mrs. Gibbs upon it. That she lacks control of the child . . . is probably true, and is, no doubt, ascribable to mistaken kindness and tenderness, not

perhaps unusual in a maternal grandmother. . . . Two physicians say the change may be productive of serious effects in the health of the child. That this apprehension is well founded, I am not at all satisfied.

In the village of Wardsville educational advantages are necessarily more limited than in the city of London. . . . Moreover, the grandmother's means are very limited. . . . She is 66 years of age, and lives alone with this child of 10. This circumstance, in my opinion, detracts very seriously from the desirability of continuing the status quo. Since the Court cannot compel a father out of his own funds to educate a child in a different religion from his own—Re Violet Nevin, [1901] 2 Ch. 299, 312; Andrews v. Salt, L. R. 1 Ch. 622—to uphold the respondent's claim to permanent custody of this girl might mean that her future prospects would be limited by the comparatively meagre resources of her grandmother. In any case, if denied the control and care of his daughter, it is not improbable that her father will be less generous towards her than if their relations were closer. Neither can she, if brought up apart from her only brother, be expected to grow up with that affection and regard for and confidence in him which is most desirable. Her hostility to the religion of her father and brother, if further developed, as seems only too probable, if she remains in her grandmother's custody, will be another distinct barrier separating her from them. Of the applicant's sincerity in the present application and of the honesty of his expressed wish to do what is best for the welfare of his child, I am quite convinced.

The foregoing conclusions, drawn from the evidence, satisfy me that the father's paternal right to custody of this child stands undiminished, and that in temporal welfare she will probably gain considerably more than she will lose by returning to the home and care of the applicant. In no other course can there be any reasonable expectation of establishing between this parent and child, and between this child and her brother, those family ties which are so important in after life, and which depend so entirely upon close and intimate association and the mutual confidence and affection thus engendered and fostered. . . .

[Reference to In re Mathieu, 29 O. R. 546; In re Agar-Ellis, 10 Ch. D. at p. 71; In re Newton, [1896] 1 Ch. 740, 749; In re Agar-Ellis, 24 Ch. D. 317, 329, 334; In re Goldsworthy, 2 Q. B. D. at p. 82; Ex p. Fynn, 2 De G. & Sm. at

p. 474; Smart v. Smart, [1892] A. C. 425; The Queen v. Gyngall, [1893] 2 Q. B. 232, 243, 244, 253; In re McGrath, [1893] 1 Ch. 143; In re O'Hara, [1900] 1 Ir. Ch. 232, 240.]

Having regard to the findings of fact to which a study of the evidence has led me, and to the legal propositions which I deduce from the authorities, aided by the able arguments of counsel, which I have carefully weighed, the conclusion seems inevitable that no case has been made out which would justify a refusal to give effect to the applicant's parental right to the custody of this child. Not only is it not clear that the proposed change would be in any serious and important respect detrimental or prejudicial to the welfare of the minor, but, on the contrary, ascribing to that word the comprehensive signification indicated in In re McGrath, regard for the real welfare of the child in this case rather appears to require an order which will give effect to the natural rights and wishes of her father. . . .

The reluctance of the Courts to separate brothers and sisters is very great. In many cases the desirability of keeping families together has been insisted upon. . . . [Reference to Wellesley v. Duke of Beaufort, 2 Russ. 1; In re McGrath, [1893] 1 Ch. 143, 150; Re Young, 29 O. R. 665; Smart v. Smart, [1892] A. C. at p. 433.]

Moreover, it is the duty of the Court to enforce the wishes of the father as to the religious education of his children, unless there is strong reason for disregarding them: In re McGrath, [1893] 1 Ch. 143, 148; In re Agar-Ellis, 10 Ch. D. 49, 73-5. . . .

That the Court has jurisdiction to interfere, even against the father's wishes, to prevent the religious convictions of the child being interfered with, has been affirmed in several modern cases: In re Newton, [1896] 1 Ch. 740; In re McGrath, [1893] 1 Ch. 143; Andrews v. Salt, L. R. 1 Ch. 622. But the circumstances must be such as satisfy the Court that there has been an abandonment or abdication of the paternal right, or at least that the training of the child has imbued it with such deep religious convictions that to disturb them would be clearly dangerous to its moral welfare. . . .

[Reference to In re Grimes (1877), Ir. R. 11 Eq. at p. 171; In re Meade (1871), Ir. R. 5 Eq. at p. 106; Davis v. Davis, 10 W. R. 245; In re Chillman, 25 O. R. 268; Andrews

v. Salt, L. R. 1 Ch. 622; In re McGrath, [1893] 1 Ch. 143, 151; Hawksworth v. Hawksworth, L. R. 6 Ch. 539, 545.]

Having regard to the fact emphasized in many cases that even greater respect must be paid by the Court to the express wishes of the living father in regard to the religious education of his children than is due to his expressed or inferred views when dead, the decisions in F. v. F., [1902] 1 Ch. 688, and In re Gray, [1902] 2 Ir. R. 684, the most recent cases I have found, are instructive upon the force and application in English law of the maxim "Religio sequitur patrem."

Whether, as indicated in In re Agar-Ellis, the religious views of a child of 10 years should not be considered and no personal examination should be had, or, as indicated in Stourton v. Stourton, Davis v. Davis, and the Irish authorities, such examination may or should take place, and any deep religious impressions thus discovered should be respected notwithstanding the youth of the child (see The Queen v. Gyngall, at p. 251), the conclusion in the present case must be the same. There has been no abdication of the paternal right to control the religious training of this child. She is still of tender years. Her religious impressions appear not to be deeply rooted. No serious injury to the moral welfare or the health of the child is reasonably to be apprehended from a change in her religious training. The obstacles so often raised to the plenary exercise of the paternal right do not here present themselves.

Moreover, counsel for the applicant states it to be his client's intention not to attempt in any way to coerce the child into becoming a Roman Catholic. He wishes to remove her from surroundings where she will be further impressed with views antagonistic to Catholicism. He intends placing her in an educational institution in the city of London, where she will not only receive training, in his opinion, better suited to her future station in life than can be had in the ordinary village public school, and where she will have opportunities better than the village of Wardsville can afford to secure a thorough training in music, but where she may also acquire by observation and instruction some accurate knowledge of the religion which her father professes, and in which her only brother is being educated. Mr. Faulds avers his purpose of allowing the girl, when capable of forming a more mature judgment, to determine for herself what faith she should profess. . . .

I have reached a clear conclusion that the paternal right of the applicant and the welfare of the child both concur in requiring that the order which he seeks be pronounced.

On the argument counsel for the respondent urged that, if I should award the custody of the child to the applicant, I should require him, under R. S. O. 1897 ch. 259, sec. 12, sub-sec. 2, to pay to her an alleged balance due for the cost of bringing up the child while with her. I have no material before me upon which I could determine what such balance, if any, is due to the respondent. The applicant does not admit owing anything.

If this claim is not pressed, there will, in the circumstances, be no order as to costs of this motion. But, should the respondent desire it, she may have a reference to the Master at London to inquire and report what sum, if any, should be allowed her in respect of her claim. In that event, the applicant will have an order for his costs of this motion, to be set off pro tanto against any sum found by the Master to be due to the respondent in respect of the cost of bringing up the child. The balance due by either party to the other after such set-off is had will then be paid, and the party against whom such balance is found will pay the costs of the reference.

ANGLIN, J. MAY 11TH, 1906.

CHAMBERS.

RE PHILIPS AND CANADIAN ORDER OF CHOSEN FRIENDS.

Life Insurance—Preferred Beneficiaries—Death of One in same Accident as Insured—Presumption of Survivorship —Presumption of Pre-decease — Disposal of Insurance Fund—Construction of Insurance Act—Joint Tenancy in Fund—Tenancy in Common — Statutory Trust — Contingent Interests—Burden of Proof—Resulting Trust.

Motion by the National Trust Co., the administrators of the estate of Catherine Philips, deceased, wife of John S. Philips, deceased, for payment out of Court of one-third of

the moneys paid in by the Canadian Order of Chosen Friends in respect of an insurance upon the life of John S. Philips.

W. E. Middleton, for applicants.

F. W. Harcourt, for respondents, Marion Catherine Philips and Genevieve Helena Philips, children of John S. Philips.

ANGLIN, J.:—John S. Philips and his second wife Catherine Philips were lost with the steamer "Minnedosa," which disappeared while being towed in a snowstorm on 26th October, 1905. He left no children by his second wife, the respondents being issue of a former marriage. His life was insured by the Canadian Order of Chosen Friends in the sum of $2,000, payable to Catherine Philips, his wife, and to Marion and Genevieve Philips, two of his daughters. . . .

The doctrine finally established by Wing v. Angrave, 8 H. L. C. 183, applies to this case. In the absence of evidence, there is no presumption of survivorship between John S. Philips and his wife. It follows that a litigant upon whom is cast the onus of proving the survivorship of either must fail in his contention.

The Insurance Act, R. S. O. 1897 ch. 203, confers upon a class, known as "preferred beneficiaries," interests as cestuis que trust in policies of insurance made in their favour. Such interests the wife and children of John S. Philips enjoyed in the insurance in question. None of the events upon which the interest of the wife might be defeated under the express provisions of the statute is proved to have happened. The husband did not make a re-apportionment excluding her; there is no evidence that she predeceased him, and no such presumption arises.

It is only upon one of several designated preferred beneficiaries dying in the lifetime of the insured, i.e., predeceasing him, that, in default of appointment or re-apportionment by the insured, the statute (sec. 159, sub-sec. 8) transfers the interest of such deceased beneficiary to the surviving designated beneficiaries: see 4 Edw. VII. ch. 15, sec. 7. The burden is on the person claiming the benefit of that provision to establish the event to which it applies, viz., that the deceased preferred beneficiary died in the lifetime of the assured. That onus the respondents cannot in this case discharge. The case is, therefore, not within this section of the Insurance Act.

The application of this provision of the statute being excluded, the solution of the question under consideration depends upon the nature and extent of the interest which the wife of the deceased had in the insurance in question. This may be ascertained by determining the true construction of the terms of the statute declaring the trust under which she claims.

So far as they are contained in sub-sec. 1 of sec. 159, the terms of the statutory trust thereby created are substantially the same as those imposed by sec. 11 of the English Married Women's Property Act of 1882, 45 & 46 Vict. ch. 75. The other provisions of sec. 159 seem sufficiently inconsistent with the application to the word "beneficiary" in sub-sec. 1 of the interpretative provision contained in sec. 2, sub-sec. 34, which declares that the word "beneficiary" shall include every person entitled to such money, and the executors, administrators, and assigns of any person so entitled . . . "unless a contrary intention appears," to preclude such application. Even if this interpretation clause were applicable, the added words "executors, administrators, and assigns" would probably not in any wise affect the interest which the beneficiary would take under the statute without such words: Re Eaton, 23 O. R. 593.

Under the English statute the Courts have held that a policy such as that now being considered "amounts to a settlement on the wife and children, by creating vested interests as joint tenants in such of them as were living at the settlor's death:" per North, J., in In re Seyton, 34 Ch. D. 511, 517. It was further held that the beneficiaries all take "like shares." The decision of Chitty, J., in In re Davies, [1892] 1 Ch. 90, follows this authority, and is approved by Joyce, J., in In re Griffiths, [1903] 1 Ch. 739, 743. If the nature of the interests of designated preferred beneficiaries under our Act be the same, cadit quæstio, because, as joint tenants with her, the two children of John S. Philips would be entitled to the share of his wife, had she survived him.

Sub-section 7 of sec. 159 of our statute provides that "where two or more beneficiaries are designated or ascertained, but no apportionment among them is made, all the said beneficiaries shall be held to share equally in the same" (i.e., the insurance fund). Section 8, as amended by 4 Edw. VII. ch. 15, sec. 7, provides for re-apportionment by the assured in the event of the death of one or more of several pre-

ferred beneficiaries during the lifetime of the assured, and the survivorship in default of such re-apportionment. Section 160 provides for re-apportionment by the assured amongst preferred beneficiaries while all such beneficiaries designated are still alive. There being no corresponding statutory provisions in England, the question for determination is whether, by reason of the presence of these clauses in our Act, the interests of the wife and children designated as beneficiaries should be held to be other than those of joint tenants.

This question presents many difficulties. If there were an apportionment in other than equal shares, joint tenancy would seem impossible, equal interest in joint tenancy being of its essence. Perhaps any actual apportionment made by the assured, though in equal shares, would require that the beneficiaries should take in severalty and not jointly. But that the presence in the statute of provisions enabling the assured to apportion suffices to prevent an unapportioned insurance in favour of two or more preferred beneficiaries coming to them as joint tenants, is, I think, doubtful. The insured has refrained from exercising any power conferred upon him by express apportionment to make the interests of the beneficiaries several instead of joint. The clause declaring that, in the absence of apportionment, designated beneficiaries "shall be held to share equally" does not necessarily mean more than that the interest of each shall be the same, and is therefore consistent with the subsistence of the joint tenancy which, upon the provisions of sub-sec. 1 of sec. 159, if standing alone, the policy now dealt with must, upon the English authorities, have been held to create. The Ontario legislature adopted the provisions now found in sub-sec. 1 of sec. 159 from the English statute, and has more than once re-enacted them since it has been decided that these provisions make several beneficiaries under the same policy to whom they apply joint tenants of the insurance fund. Such re-enactment usually imports an adoption by the legislature of the construction already put upon the statute by the Courts. Can it be said that the other provisions of the Ontario Act suffice to exclude that implication, in such circumstances as exist in the present case? Having regard to the strong leaning against joint tenancies, and to the eagerness with which expressions in the least indicative of an intention that there should be a division, are seized upon to create tenancies in

common, it may be that the interests should be deemed those of tenants in common: Robertson v. Fraser, L. R. 6 Ch. at p. 696; Re Yates, [1891] 3 Ch. 53; Re Wooley, [1903] 2 Ch. 206.

But, whatever question there may be as to the joint or several character of the interests to be taken by the beneficiaries named in this policy, had they all survived the insured, can there be any as to the contingent nature of such interests? . . .

[Reference to In re Seyton, 34 Ch. D. at p. 517; In re Adams, 23 Ch. D. 525; Cleaver v. Mutual Reserve Fund Life Assn., [1892] 1 Q. B. 147, 154, 158, 160.]

It therefore seems reasonably clear that, apart entirely from the operation of sub-sec. 8 of sec. 159 (sec. 7 of 4 Edw. VII. ch. 15), a preferred beneficiary under a policy within sub-sec. 1 of sec. 159 does not acquire an absolute interest, but merely an interest contingent upon his being alive when the insured dies. Therefore, although the surviving children cannot invoke sub-sec. 8 of sec. 159 of the Insurance Act (4 Edw. VII. ch. 15, sec. 7), because unable to shew that the wife predeceased her husband, neither can the representatives of the wife prove that her contingent interest as cestui que trust became absolute and passed to them, because they in turn cannot prove that she was living at the death of her husband.

Upon the present motion the onus is, in my opinion, clearly upon the applicants, who seek payment out of Court of what they allege to be Mrs. Philips's share of the insurance fund. This fact would suffice to prevent their success. But, had the motion been on behalf of the children for payment out of the entire fund to them, the result must, in my opinion, have been the same. The representatives of the deceased wife, opposing such a motion upon the ground that her interest had become absolute, and had as such devolved upon them, must still assert the affirmative, that the wife was alive at the time of the death of the husband, and the onus of proof, as determined in Wing v. Angrave, 8 H. L. C. 187, is on the person asserting the affirmative. There is no presumption of the survivorship of the wife or of the husband. Neither will the law presume that most improbable thing, that the cesser of the two lives was simultaneous: Best on Evidence, 9th ed., p. 348. In the absence of evidence, therefore, the persons asserting that the wife was

alive at the time of the death of the husband, must be held to fail, in whatever form the question arises. They cannot prove the event upon which the contingent interest of the wife would have become absolute and transmissible.

I have been referred to an interesting and instructive article, discussing these problems, to be found in vol. 16 of the "Green Bag," p. 237.

Had Mrs. Philips been sole beneficiary, a resulting trust in favour of the estate of the husband would arise. But the provision of the statute that "so long as any object of the trust remains, the money payable under the contract shall not be subject to the control of the assured or of his or her creditors, or form part of his estate when the sum secured by the contract becomes payable," precludes any such resulting trust arising, and imports that the lapse of the share of one of several preferred beneficiaries enures to the benefit of the surviving beneficiaries, independently of the operation of sub-sec. 8 of sec. 159 of the Insurance Act.

If such lapse should give rise to a resulting trust in favour of the estate of the insured, no advantage to the applicant could ensue. In that event the fund would pass two-thirds to the named beneficiaries under the policy, and the remaining third to the three daughters of the insured as his next of kin.

An order will issue declaring the entire fund in Court to be the property in equal shares of the two infant children of John S. Philips, deceased, and directing that, subject to further order, it remain in Court until they respectively attain the age of 21 years, and be then paid out to them with accrued interest. In the circumstances, costs of all parties of this motion should be paid out of the fund, and the order may so provide.

MEREDITH, C.J. MAY 11TH, 1906.

CHAMBERS.

BARRY v. TORONTO AND NIAGARA POWER CO.

Discovery—Examination of Officer of Company—Senior Assistant Engineer.

Appeal by defendants from order of Master in Chambers, ante 700, refusing to set aside an appointment for the ex-

amination for discovery of Julian Thornley as an officer of defendant companies.

J. H. Moss, for defendants.

W. E. Middleton, for plaintiff.

MEREDITH, C.J., held that plaintiff had a right to examine Thornley, and dismissed the appeal. Costs to be costs in the cause, unless the Judge at the trial otherwise orders.

MEREDITH, C.J. MAY 11TH, 1906.

CHAMBERS.

McPHEE v. McPHEE AUTOMATIC CO.

Discovery—Production of Books of Company — Affidavit on Production—Privilege—Relevancy.

Appeal by defendants from order of Master in Chambers, ante 609, directing them to file a further affidavit on production.

G. M. Clark, for defendants.

G. B. Strathy, for plaintiff.

MEREDITH, C.J., directed that defendants should file an affidavit setting out entries relating to matters in question, and produce books for inspection and at the trial.

Costs in the cause.

MAY 11TH, 1906.

DIVISIONAL COURT.

NEWELL v. CANADIAN PACIFIC R. W. CO.

Railway — Injury to Child Playing in Yard — Consequent Death—Liability of Railway Company—Neglect to Fence —Proximate Cause of Injury—Negligence—Trespasser.

Motion by plaintiffs to set aside nonsuit entered by FALCONBRIDGE, C.J., at the trial at Toronto of an action by the father and mother of a boy who was killed in defendants' yard by a shunting train, to recover damages for his death.

R. S. Robertson, Stratford, for plaintiffs.

Angus MacMurchy, for defendants.

The judgment of the Court (BOYD, C., MAGEE, J., MABEE, J.), was delivered by

BOYD, C.:—Williams v. Great Western R. W. Co., L. R. 9 Ex. 158, is, perhaps, an extreme case (Pollock on Torts,

7th ed., p. 42), and is in any event quite distinguishable from the case in hand . . . ; in that case the child hurt was lawfully on the railway track on a level road-crossing, which should have been protected by a gate or stile for the special protection of people using the footpath, and the child was found injured at the very spot where the path and the rails intersected; and the child in the Exchequer case was but 4 years of age, while in this case the lad, over 8, was old enough to care for himself.

Here the lad was wrongfully trespassing in the yard of defendants, where he had no business or invitation to be, and he was killed over 400 feet from the place where he came upon the property of defendants. There seems to be no reasonable connection between the absence of a fence (even assuming that the statute requires this) and the death of the boy. He came upon the yards and strayed all over, picking up coal, and finally getting himself under or alongside the wheels of a freight car—which, being slightly moved in the operating of the railway, caused his death. He was old enough to know and understood he was in a place where he ought not to be, and where he had been admonished by his parents not to go.

It is not necessary to decide as to the statutory duty of the company at this place, but my strong impression is that there has been no violation of the law on their part, as against people trespassing.

The nonsuit was right, on the ground that no negligence is attributable to defendants which was the proximate cause of the accident.

It is necessary for the plaintiff to establish by evidence circumstances from which it may fairly be inferred that there is reasonable probability that the accident resulted from the absence of a fence at the place where the boy entered on defendants' property. This rule laid down . . . in Daniel v. Metropolitan R. W. Co., L. R. 3 C. P. 216, stands affirmed by the House of Lords: S. C., L. R. 5 H. L. 45. . . . The plaintiffs have not satisfied the onus cast upon them, and the judgment should be affirmed.

Cases shewing that the failure to fence (if it was evidence of negligence) was not the effective cause of the accident, may be here noted: Mayer v. Atterton, L. R. 1 Ex. 238; Hughes v. McDonald, 2 H. & C. 774; Harrold v. Wahning, [1898] 2 Q. B. 322; and McDonell v. Great Western R. W. Co., [1903] 2 K. B. 331.

BRITTON, J. MAY 12TH, 1906.

TRIAL.

SHURIE v. WHITE.

Vendor and Purchaser—Sale of Land—Executed Contract—Delivery of Deed—Action by Purchaser to Rescind—Defective Title — Reliance on Representations — Absence of Fraud—Reformation of Deed—Other Relief—Costs.

In the statement of claim plaintiff alleged that defendant represented that she was the owner of lot 127 and the westerly part of lot 129 in the village of Wellington, which land plaintiff desired to purchase, and thought he was purchasing, when, in fact, defendant did not own the westerly part of lot 129, and her title to lot 127 was, at the most, a reversion expectant upon a life estate. Plaintiff asked that the conveyance to him and the mortgage given by him to defendant be set aside, and $500 paid by him returned.

At the trial plaintiff was allowed to amend by alleging: (1) that Ellen B. Fones was, and defendant was not, the owner of lot 127; (2) that there was a mutual mistake of fact, (a) as to defendant's ownership of these lands, and (b) as to the land plaintiff supposed he was buying and defendant supposed she was selling; (3) that, as defendant had no estate or interest to convey, there was a total failure of consideration, and so plaintiff was entitled to a rescission of the transaction; (4) that it was expressly agreed, at the time of the execution and delivery of the deed and mortgage, that defendant would shew and give to plaintiff a good title to lot 127, and that defendant was to have security only upon the land conveyed to plaintiff; (5) that the deed and mortgage were the only contract between the parties; (6) that defendant led plaintiff to enter into the transaction, and induced plaintiff to pay the $500, and to give a mortgage with full covenants for title, upon the understanding that defendant would be bound to give such covenant in the conveyance from her as would ensure to plaintiff a good title in the land he was purchasing; and (7) that plaintiff was entitled to have the deed reformed in accordance with the true agreement.

No fraud was in terms alleged against defendant.

F. Arnoldi, K.C., and G. O. Alcorn, K.C., for plaintiff.

A. H. Marsh, K.C., and E. G. Porter, Belleville, for defendant.

BRITTON, J.:—. . . Plaintiff, who is a druggist carrying on business in Wellington, supposed that defendant owned and was willing to sell a parcel of land in that village. This parcel was commonly called "the Fones property." Plaintiff on 1st January, 1906, sought and obtained an interview with defendant at her own residence in Trenton. Plaintiff called it "the Fones property," asked defendant if she would sell, and her price. Defendant said she would sell for $2,500. As a result of negotiation, defendant agreed to accept and plaintiff agreed to pay $2,300 for this property, $500 cash and the balance in 6 years, with interest at 6 per cent. per annum. Nothing was said about a mortgage for unpaid purchase money. Having arrived at this point, defendant said, "I suppose I can go ahead and get the necessary papers made out," and plaintiff said "Yes." All this was oral. On the following day plaintiff wrote to defendant saying that defendant could prepare the papers and send them to plaintiff, and asking if the $500 were wanted immediately, or if 1st May would be time enough, and also asking that the price be kept as a secret between them, as he did not want outsiders to know what he was paying for the property. Defendant did not agree to give time for the $500, but instructed her solicitor, Mr. Bleasdell, of Trenton, to prepare deed and mortgage. On 4th January defendant telephoned plaintiff that papers were ready, but plaintiff had then repented, and he refused to go on, but offered to pay the expense of preparation of papers. Defendant would not listen to any such proposition, but insisted upon plaintiff carrying out the purchase, and she at once took very active measures with a view to compelling plaintiff to do so. On 5th January defendant sent Bleasdell down from Trenton to Wellington with a deed which she had executed and with the mortgage to be executed by plaintiff, and she placed the matter in the hands of Porter & Carnew, solicitors in Belleville. On 5th January plaintiff refused to accept deed or to execute mortgage. On 6th January Porter & Carnew wrote to plaintiff threatening proceedings, etc. On 8th January plaintiff decided to carry out the purchase, and so wrote to Porter & Carnew and to defendant. In plaintiff's letter to Porter & Carnew he says: "I presume your client has a good title and will furnish an abstract of the same." On 9th January, notwithstanding plaintiff's letter, Porter & Carnew issued a writ for specific performance. The completion of the matter was left with Mr. Bleasdell, and from him the

deed was accepted, and to him the mortgage was delivered and money paid. Plaintiff unfortunately did not ask assistance from any solicitor. He was in conference with Mr. Ostrom, but the latter says he did not act for plaintiff, although when Mr. Bleasdell told plaintiff that Mr. Porter said plaintiff had waived his right to an abstract of title, and had accepted the title, Mr. Ostrom told plaintiff he did not think that was correct. . . . Plaintiff did not then insist upon abstract or any other evidence of title, but relied upon Mr. Bleasdell's statement that defendant had a good title.

Plaintiff was pushed, if not improperly, certainly strenuously, to completion, but he is a business man, and was within reach of all necessary legal assistance. He voluntarily went to Trenton to carry out the purchase, and chose to rely upon what Mr. Bleasdell said. I think Mr. Bleasdell acted in good faith, and did not knowingly represent anything other than as he thought it to be.

I am of opinion, and so find, that plaintiff did not at first intend to buy anything more than "the Fones property," and he had no accurate idea of just where the limits of that property were. He frankly states that he did not know its lake frontage, and, apart from Mrs. Fones, Mrs. Whittier, and defendant, no witness knew the exact eastern limit of it. Defendant did not intend to sell anything more than "the Fones property," and she did not intend to sell or to induce plaintiff to think that he was purchasing any land to the east of what was called the old "dilapidation" fence, now on the ground. . . . Plaintiff, in my opinion, at first supposed, even if he did not know, that the eastern limit of "the Fones property" was the old fence.

When plaintiff heard the description read, and when Mr. Bleasdell attempted to point out the property on the place, plaintiff appeared to think that the description included land farther east than defendant owned, and he called attention to the fact of there being a fence to the west of where this description carried the eastern limit. Bleasdell, who then knew nothing personally of defendant's holding, thought the description correct, and so stated. This description in deed and mortgage was prepared by Mr. Bleasdell under circumstances given by him at the trial, he attempting to get from the old conveyance a proper description of the land which

defendant intended to sell. There is no evidence that defendant herself knew until after examination of both deed and mortgage that there was anything wrong. I find that defendant was not guilty of any fraudulent misrepresentation or concealment in regard to this description, or the quantity of land she was selling. Defendant did not, in fact, own any of the westerly part of lot 129. As to title, defendant supposed she owned, and represented to plaintiff that she did own, land which is in fact lot 127.

I find that there was no mutual mistake of fact.

I am not able to find upon the evidence that there was any such express agreement as to title, or as to the covenants to be inserted in the deed, as is alleged by plaintiff in his amended statement of claim.

Fraud having been negatived, and the deed of conveyance having been executed, plaintiff is not entitled to a rescission or to the relief asked for. This is unquestionably a hard case for plaintiff. He has agreed to pay what, upon the evidence, is a large price for property about which there is question as to title and possession. In accepting the conveyance without investigation of title, and in consenting, merely because a law suit was threatened, to hastily complete, without legal advice, a transaction upon which he rashly entered, he made a great mistake, but in deciding thus upon the evidence I am bound by cases. . . .

[Reference to Cameron v. Cameron, 14 O. R. 561; Bell v. Macklin, 15 S. C. R. 576; Brownlee v. Campbell, 5 App. Cas. 925; McCall v. Farthorne, 10 Gr. 324; Redgrave v. Hurd, 20 Ch. D. 1; Follis v. Porter, 11 Gr. 442; Seddon v. North-Eastern Salt Co., [1905] 1 Ch. 326; Thomas v. Crooks, 11 App. Cas. 579.]

It was conceded by defendant that plaintiff might be entitled to succeed if in this case there was an entire failure of consideration, as there would be if no title in defendant to the property she assumed to sell. I cannot find that nothing passed by the conveyance to plaintiff. . . .

[Statement as to the title.]

In the view I take of the case, I am unable to give plaintiff any relief, and must dismiss the action, but, considering all the facts in regard to the sale and to the present complication, and that possession is at least claimed by Mrs. Fones, I do not allow costs.

Action dismissed without costs.