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MEREDITH, C.J. MARCH 10TH, 1905.

CHAMBERS.

CITY OF TORONTO v. RAMSDEN.

CITY OF TORONTO v. McDONELL.

Dismissal of Action—Delay in Delivery of Statement of Claim —Irregular Delivery after Time Expired — Validating Order—Terms—Possession of Land—Improvements.

Appeal by plaintiffs from orders of Master in Chambers, ante 381, imposing terms upon plaintiffs as a condition of validating an irregular delivery of the statements of claim, and of allowing the actions to proceed.

F. R. MacKelcan, for plaintiffs.

J. E. Jones, for defendants.

MEREDITH, C.J., dismissed the appeal with costs to defendants in any event.

STREET, J. MARCH 11TH, 1905.

CHAMBERS.

DOULL v. DOELLE.

Attachment of Debts—Judgment against Married Woman, Payable out of Separate Estate—Proceeds of Insurance Policy on Life of Husband—Trust in Favour of Wife.

Appeal by defendant from order of Master in Chambers, ante 238, in a garnishing proceeding, ordering the garnishees

to pay to the judgment creditors money due by garnishees to defendant.

W. E. Middleton, for defendant.

F. J. Roche, for plaintiffs, judgment creditors.

STREET, J.—The action was brought against defendant, as a married woman engaged in trade, upon certain bills of exchange accepted by her for certain of her trade debts, after the passing of 60 Vict. ch. 22 (O.), assented to on 13th April, 1897. On 11th April, 1899, judgment under Rule 603 upon an order of the Master in Chambers was entered in the action against defendant as a married woman for $1,310.51, "payable out of her separate estate." The papers before me and the admissions of counsel shew that the husband of defendant in his lifetime effected an insurance with the garnishees, the Commercial Travellers Association, for $510, and that the amount was made payable, at his request, upon the face of the policy, to his wife, the defendant. After the recovery of the judgment the husband died, and the money payable under the policy became payable to defendant under the terms of the direction so given by the husband. Plaintiffs obtained an order under the garnishee Rules for the payment by the Commercial Travellers Association to them of the insurance money; and defendant appeals, upon the ground that the proceeds of the policy were never owned by defendant during her husband's lifetime, but only came to her at his death, and that, therefore, they cannot be considered as "separate estate;" that by the terms of the judgment obtained by plaintiffs the operation of it is confined to her separate estate, and that therefore the money in question cannot be seized.

I think I must hold, upon the evidence before me, that the debt upon which this judgment was recovered was contracted after the date of the passing of the Married Women's Act of 1897 on 13th April, 1897, and that the rights of the parties are governed by sec. 4 of the Act (now R. S. O. 1897 ch. 163).

Plaintiffs were entitled to a judgment payable not only out of the separate property of the wife, but also out of any property which she might, after the date of the contract sued on, while discovert, be possessed of or entitled to, with the additions and subject to the exceptions contained in sec. 21 of the Act and in sub-sec. (2) of sec. 4 of the Act: see Barnett v. Howard, [1900] 2 Q. B. 784.

The difficulty here is caused by the fact that the order of the Master in Chambers and the judgment following it adjudge "that plaintiffs recover against defendant (a married woman) $1,310.51, payable out of her separate estate, with

the costs of this action and motion to be taxed," and does not make it recoverable out of everything else. If the judgment had been in the form to which plaintiffs were entitled, there could not have been any question raised here. As it is, plaintiffs seem only entitled to retain their order if they can establish that the proceeds of this policy were separate estate.

. . .

I must hold that the money here in question is separate estate. It is perfectly true that, apart from the provisions of our Insurance Act with regard to insurances effected for the benefit of wives and children, it could not have been contended that money coming to a widow under a policy of insurance upon her husband's life, of which he had made her beneficiary, was separate estate, because, from its very nature, it was not property belonging to her during coverture.

Under sec. 159 of R. S. O. ch. 203, however, the naming of the wife as a beneficiary in a policy, or by indorsement or other writing, creates a trust in her favour of the amount secured by the policy, and leaves the assured no further rights of disposition over it, beyond a right which is in effect a right of revocation and new appointment, limited, however, strictly to certain objects.

The effect of what defendant's husband did, therefore, was to create a trust in her favour of the amount secured by this policy; it is true he might have revoked it and declared a new trust in favour of children, if he had them, but he never did in fact revoke the original trust in her favour, and the right so created and vested in her must, I think, be treated as separate estate. . . .

[King v. Lewis, 23 Ch. D. 724, and Re Shakespear, 30 Ch. D. 171, distinguished.]

In my opinion, there was a valid trust of this policy created by the statute in favour of the wife when it was issued, and the policy and its proceeds were separate estate within the meaning of R. S. O. ch. 163, and were properly seized under the judgment.

Appeal dismissed.

ANGLIN, J. MARCH 11TH, 1905.

WEEKLY COURT.

CITY OF TORONTO v. TORONTO R. W. CO.

Reference—Stay—Judgment on Special Case—Appeal—Rule 829—Terms of Special Case.

Appeal by defendants from a ruling of James S. Cartwright, official referee, to whom the taking of evidence

in this action was referred, that defendants' appeal to the Court of Appeal for Ontario from the judgment (4 O. W. R. 330, 446), pronounced upon the special case stated in this action for the opinion of the Court, had not stayed the taking of evidence upon such reference.

J. Bicknell, K.C., for defendants, contended that there was such a stay, because: (a) Rule 829 applies and has that effect; (b) the parties in stating the special case agreed that there should be such a stay.

J. S. Fullerton, K.C., for plaintiffs, contra.

ANGLIN, J.—Rule 829 reads as follows:—"Where execution of the judgment or order appealed from has become stayed, all further proceedings in the action in the Court appealed from, other than the issue of the judgment or order and the taxation of costs thereunder, shall be stayed, unless otherwise ordered by the Court appealed to or a Judge thereof; and the order may be on such terms as may seem just."

This Rule is by its terms applicable only "where execution of the judgment or order appealed from has become stayed." It does not purport to extend to all cases wherein those steps have been taken which under Rule 827 effect a stay of "the execution of the judgment or order appealed from." The judgment upon the special case, 4 O. W. R. 330 and 446, is merely an expression of the opinion of the Court upon certain questions of law submitted for its consideration. It is a judgment of which there can be no "execution" which might "become stayed." It is not to be enforced in any way. It requires nothing to be done or foreborne. Such a case as this is, in my opinion, not within the terms of Rule 829, and I am satisfied that it could not have been within the contemplation of the framers of this Rule.

The special case contains these initial words:—"The parties desire, before preceeding to take further evidence in this case, to obtain the opinion of the Court upon certain questions of law arising on the construction of the agreement on which the action is brought;" and it concludes by reserving to each party a right of appeal. The parties have had an "opinion of the Court" upon the questions submitted, and Mr. Fullerton contends that the terms of the special case which I have quoted have been thus satisfied.

The question for consideration—one of construction to be determined upon the whole document—is whether, by the introductory words of the special case, the parties intended to provide for a stay of the taking of evidence until the determination of the appeal, for the right to take which they

expressely stipulate. Were it not for this express reservation, I should agree with Mr. Fullerton's contention ; but, without express provision for it, an appeal lies as of right from the judgment pronounced upon a special case. That appeal has in this case been taken by consent to the Court of Appeal: 4 Edw. VII. ch. 11, sec. 2 (76a). Unless the reservation of the right to appeal was expressed merely ex majori cautela (and its effect should not be so restricted, if another reasonable and legitimate purpose for its presence can be ascribed to the parties), this provision must be deemed, in my opinion, to have been inserted in order to make applicable to such appeal any special terms or conditions governing the case itself. One of these is the suspension of the reference to take evidence pending the proceedings "to obtain the opinion of the Court." This term is, I think, by the insertion of the explicit reservation of the right of appeal, extended in its application to an appeal taken pursuant to that reservation. By the agreement of the parties, therefore, upon what appears to me to be its proper construction, the proceedings before the referee are stayed.

Appeal allowed with costs to defendants in the cause.

TEETZEL, J. MARCH, 11TH, 1905.

WEEKLY COURT.

RE HOPKINS.

Will—Construction—Ambiguity—Distribution of Estate—Designation of Beneficiaries—Acceleration of Distribution—Perpetuity.

Motion by executors of will of Samuel Hopkins for order declaring construction of will and for directions to trustees.

The will was dated 1st September, 1899. The testator, after directing payment of his debts and funeral expenses, gave all his personal property to his sister Mary E. Upthegrove, and gave and devised his homestead (4 acres) in Port-Colborne to the same sister, her heirs and assigns forever. He then directed his executors to keep his other real estate rented for 10 years from his death, and the rents to be applied, first, in payment of taxes, insurance, and repairs ; second, in payment of $10 a week during that time to his son Frederick Hopkins, and $10 a year to the caretaker of the

cemetery containing his tomb ; third, the balance to be paid to his adopted daughter, Ida M. Armstrong. He then directed that at the end of 10 years his executors were to sell all his real estate, and out of the proceeds thereof to pay $1,000 to Ida M. Armstrong and $500 to Joanna Story, and to invest a sufficient portion of the balance of the purchase money to yield an income of $10 a week to Frederick during his life, and to invest a further sum sufficient to yield an income of $10 a year to be paid to the caretaker of the cemetery, "and to divide the balance among Ida M. Armstrong and the surviving children of my said sister Mary E. Upthegrove, share and share alike, and on the death of my said son the principal money so invested for his benefit is to be divided in like manner among the surviving children of my said sister Mary E. Upthegrove and said Ida M. Armstrong, share and share alike. All the residue of my estate not hereinbefore disposed of, I give, devise, and bequeath unto my said sister Mary E. Upthegrove."

W. M. Douglas, K.C., for the executors and Mary E. Upthegrove.

F. W. Harcourt, for infants.

TEETZEL, J.—The provision for division among Ida M. Armstrong and the surviving children of Mary E. Upthegrove, share and share alike, directed to be made at the end of 10 years, designates the same persons only as the testator intended to benefit by the division at the death of his son. Although in speaking of the second division he transposes the names of the beneficiaries in such a way as might lend some colour to the contention that he intended to benefit the children of Ida M. Armstrong, the use of the words "in like manner," in connection with the second distribution, manifestly limits the distribution to Ida M. Armstrong and the children of Mary E. Upthegrove. The trustees are now justified in delivering to Mary E. Upthegrove and her daughter, who have acquired the interests of Ida M. Armstrong and the other beneficiaries, the remaining estate in their hands, subject to the legacies, notwithstanding that 10 years have not elapsed since the testator's death. The executors may retain a sum to provide in perpetuity for payment of $10 per annum to satisfy testator's direction in regard to care of his tomb. Costs of all parties out of the estate.

CARTWRIGHT, MASTER. MARCH 13TH, 1905.

CHAMBERS.

ADAMS v. COX.

Interest—Moneys Realized upon Execution—Repayment when Judgment Reversed—Liability for Interest—Claim by Stranger—Rate of Interest—Costs.

After the Court of Appeal (3 O. W. R. 32) had affirmed the decision of the trial Judge (2 O. W. R. 93) in favour of plaintiff, plaintiff issued execution against defendants, and received a sum of $1,358.89, being proceeds of sale of goods of defendant Alice R. Cox.

The Supreme Court of Canada on 14th December, 1904, reversed the judgment of the Court of Appeal, and plaintiff thereupon became liable to repay the $1,358.89.

Some delay arose about this, as the money was claimed by another execution creditor. The plaintiff thereupon notified the claimants that he would apply for an interpleader order, and prepared the necessary material, but did not proceed further.

Ultimately on 20th February, 1905, the money was paid by consent of all parties to the solicitors for the defendants, but without interest, though interest was asked for before payment of the principal.

Defendant Alice R. Cox moved for an order for payment by plaintiff of interest at 5 per cent. from date of payment to plaintiff to date of repayment, nearly 11 months.

J. Bicknell, K.C., for applicant.

J. J. Maclennan, for plaintiff.

THE MASTER.—The prima facie right to interest, in the circumstances of this case, is established by Rodger v. Comptoir d' Escompte de Paris, L. R. 3 P. C. 465, where the whole question is discussed by Lord Cairns.

This was folowed by Bacon, V.-C., in Merchant Banking Co. v. Maud, L. R. 18 Eq. 659, and by our own Court of Appeal in Sherk v. Evans, 22 A. R. 242 (see especially judgment of Osler, J.A., at p. 248).

Counsel for plaintiff, however, contended that, in view of the conflict as to who was entitled to the principal, interest should not be allowed. But it was open to him to have guarded himself either by an order to pay the money into Court, or by getting a waiver of any right to interest from the rival claimants. Unfortunately he did not adopt either of these necessary and yet simple precautions.

Then there was a further objection to the rate of interest asked for. It was argued that if the money had been paid into Court it would only have borne interest at 3 per cent. The answer to this is the same as to the objection that no interest should be allowed. A further answer would be that plaintiff might have put the money on special deposit with the consent of the claimants, if the expense of payment into and out of Court was to be avoided. Then no question could have been raised either as to the right to interest or to the rate.

The present lawful rate being 5 per cent., I think defendant Alice R. Cox is entitled to what she asks.

In the circumstances, I do not make any order as to costs, if the plaintiff withdraws his claim for any costs of the contemplated motion for an interpleader order. These may well be set off one against the other.

MAGEE, J. MARCH 13TH, 1905.

WEEKLY COURT.

RE SLATER v. LABEREE.

Division Courts — Jurisdiction — Ascertainment of Amount over $100—Extrinsic Evidence — Promissory Note — Indorser.

Motion by plaintiffs for an order in the nature of a mandamus to the junior Judge of the County Court of Carleton to compel him to try an action in the 1st Division Court in that county. The action was brought against the indorser of a promissory note, to recover the amount of the note, which was more than $100.

W. E. Middleton, for plaintiffs.

A. J. Russell Snow, for defendant.

MAGEE, J., held that extrinsic evidence would have to be given by plaintiffs to enable them to succeed upon their claim, namely, evidence of dishonour and notice, and that therefore the amount sued for (being over $100) was not ascertained by the signature of defendant within the meaning of sec. 72 of the Division Courts Act, as amended by 4 Edw. VII. ch. 12, sec. 1 (O.)

Motion refused with costs.

MARCH 13TH, 1905.

DIVISIONAL COURT.

WALLER v. INDEPENDENT ORDER OF FORESTERS.

Trial—Life Insurance—Contract—Validity — Suicide of Assured—Issue as to Sanity—Separate Trial — New Trial of Whole Case Directed by Appellate Court.

Appeal by defendants from judgment of MEREDITH, J., ante 16.

W. H. Hunter, for defendants.

J. C. Makins, Stratford, for plaintiff.

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

MEREDITH, C.J.—The defendants are a friendly society incorporated by special Act of the Parliament of Canada, and the action is by plaintiff, as widow and administratrix of the estate of her deceased husband, John Waller, to recover from defendants $3,000, which, as is alleged in the statement of claim, defendants, "by a benefit certificate or insurance policy issued by them, agreed to pay as upon a contract of life insurance to the administratrix of the said John Waller at his decease."

Defendants by their statement of defence alleged that it was a term or condition of the contract of insurance that they should not be liable for the sum insured if the assured should commit suicide, whether he should be sane or insane at the time, and that the deceased did commit suicide, but they bring into Court $200, and say that it is the whole amount for which they are liable according to the constitution and laws of the society, which, as they allege, form part of the contract of insurance.

When the case came on for trial, the parties were not ready to try the question whether the deceased was sane when he committed suicide, and the trial was proceeded with as to the other branch of the case, viz., whether the term or condition relied on by defendants formed part of the contract of insurance, and, after hearing the evidence adduced, the trial Judge reserved his judgment, and after consideration determined that the term or condition relied on by defendants did not form part of the contract of insurance, and was not, by reason of the provision of sec. 144 of the Ontario Insurance Act, R. S. O. 1897 ch. 203, binding upon the

assured. He held, however, that if the deceased committed suicide whilst sane, plaintiff was precluded at common law from recovery, and, as the question of the sanity of the deceased when he committed suicide, as apparenly it was not disputed he had done, had not been tried, it was directed that the case must go down for trial upon that isssue, unless the parties should agree as to the fact, or failing an agreement should consent to an issue being directed to try that question.

The judgment as drawn up contains an adjudication that plaintiff is entitled to recover the $3,000 sued for, unless, upon the trial of the issue which is directed, it shall be determined that the deceased was sane at the time he committed suicide ; directs that the parties proceed to the trial of an issue, and that the question to be tried shall be whether the deceased was insane at the time he committed suicide ; and further consideration of the action and all questions of costs are reserved until after the determination of the issue.

The present appeal is from that judgment.

Experience has shewn 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 his case, whichever way it had resulted, would have put an end to the controversy, or if the trial Judge had reserved to himself the further trial of the action in case a further trial should be necessary, it would have been different.

The result of the course which has been taken is that the parties may continue their appeals until one or other of them is exhausted or the final court of appeal is reached, and then, if the judgment which had been pronounced is sustained, it will be necessary to try the issue as to the sanity of the deceased when he committed suicide, and it may be that defendants will succeed upon that issue, and in that event all the costs of the appeal, as well as any additional costs occasioned by the double trial, will have been thrown away.

It is far better, I think, that the erroneous steps which have been taken should be retraced, and that the case should go down to trial again, when all the questions of law and fact will be tried at the same time, and one judgment pronounced on the whole case.

This course is the more desirable, as some matters of fact which may have a bearing on the question which was dealt with at the last trial, do not appear to have been fully investigated. I refer to the indorsement on the policy by which the member agrees to be bound by the provisions of

the constitution and laws, not being signed by the deceased, and no explanation having been given as to why it was not signed. I refer also to the circumstance that, although a change had been made in the constitution and laws on 2nd September, 1898, and before the date of the certificate, the form of application for membership and the form of certificate used were those appropriate to the constitution and laws before the amendment was made.

In my opinion, the judgment pronounced at the last trial should be vacated and a new trial had of the whole case, and the costs of the appeal and of the last trial should be costs in the cause to the party who is ultimately successful.

MARCH 13TH, 1905.

DIVISIONAL COURT.

DELAMATTER v. BROWN BROTHERS CO.

Landlord and Tenant — Lease — Surrender — Evidence of Destruction of Building by Fire—Obligation of Tenants to Rebuild—Covenants to Repair—Breaches—Short Forms Act — Assignment of Lease — Assignment of Reversion—Parties—Amendment.

Appeal by defendants from judgment of BOYD, C., in favour of plaintiffs.

The action was brought by Ira Delamatter and his wife, Emma C. Delamatter, against Brown Brothers Company and Brown Brothers Company Nurserymen Limited.

The male plaintiff, being the owner of a farm in the township of Pelham, by indenture of lease, dated 29th June, 1891, and expressed to be made in pursuance of the Act respecting short forms of leases, R. S. O. 1897 ch. 106, devised it to defendants the Brown Brothers Co. for the term of 12 years, to be computed from 1st April, 1892. The lessees covenanted "to repair," "and that the said lessor may enter and view state of repair and that the said lessee will repair according to notice," "and that they will leave the premises in good repair, ordinary wear and tear only excepted."

After the making of the lease, plaintiff Ira Delamatter conveyed the lands demised to plaintiff Emma C. Delamatter, and defendants the Brown Brothers Co. conveyed all their interest under the lease to their co-defendants, who accepted the lease and became liable to all the covenants.

In August, 1902, one of the buildings on the demised premises—a barn—was destroyed by fire, and was not rebuilt. The action was brought to recover damages for breaches of covenants on the part of the lessees.

The appeal was heard by MEREDITH, C.J., MACMAHON, J., MAGEE, J.

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

W. M. German, K.C., for plaintiffs.

MEREDITH, C.J.—The two main questions argued before us were: (1) whether under the covenants contained in the lease the lessees were bound to rebuild the barn which was destroyed by fire; and (2) whether there had been a surrender by the lessees to the landlord, immediately after the fire occurred, of the part of the farm upon which the barn had stood, and the barn yard adjacent to it.

Upon the second question the Chancellor came to the conclusion that what had taken place between the parties did not operate as a surrender, and I see no reason for differing from him.

In order that the acts of the parties may amount to a surrender by operation of law, it is necessary that there be an agreement by the landlord and the tenant that the term be put an end to, acted on by the tenant's quitting the premises, and the landlord, by some unequivocal act, taking possession. There was as to all these matters conflicting evidence, and the trial Judge having, upon a consideration of the whole of it, reached the conclusion that defendants had not proved the surrender set up by them, that conclusion ought not, in my opinion, to be disturbed.

The first question is one of very considerable difficulty, and I have come to the conclusion I have reached as to it with much hesitation and doubt.

The scheme of the Acts respecting short forms is to authorize the use of certain forms of words which are set forth in the Acts, and are the short forms, and to give to these forms of words, when the instrument in which they appear is declared to be made in pursuance of the Act, the same effect as if other forms of words which are set forth in the Act had been used.

The short forms are, or are intended to be, compendious expressions of what is contained in the corresponding long forms.

In order to provide for cases in which the long forms would not accurately express the terms which the parties to

the instrument may desire to embody in it, they are, by the Act respecting short forms of leases, permitted to substitute for the words "lessee" or "lessor" in the short form any name or names (or other designation); and they are also permitted to substitute the feminine gender for the masculine, and the plural for the singular number, and, when these things are done, corresponding substitutions are to be taken to be made in the corresponding long forms, sched. B (1 and 2).

Schedule B. also contains the following provisions: "3. Such parties may introduce into or annex to any of the forms in the first column any express exceptions from or express qualifications thereof respectively, and the like exceptions or qualifications shall be taken to be made from or in the corresponding forms in the second column. 4. Where the demised premises are of freehold tenure, the covenants 1 to 8 shall be taken to be made with, and the proviso 9 to apply to, the heirs and assigns of the lessor; and where the premises demised are of leasehold tenure, the covenants and proviso shall be taken to be made with, and apply to, the lessor, his executors, administrators, and assigns. 5. Unless the contrary is expressly stated in the lease, in all leases made after 25th March, 1886, the extended form of covenant numbered 7 shall be read as containing after the word "lessee" in the first line thereof the words "his executors, administrators, and assigns."

It seems clear from these provisions that it was intended that, in order that the Act should operate upon the words used, two things must concur: (1) that the lease should be declared to be made in pursuance of the Act, and (2) that the very words of the short forms should be used, except where deviations from them are authorized by the Act, and the provisions of the Act as to the deviations are complied with.

What then is the meaning and effect of subdivision 3 of schedule B.? . . .

What is an "express exception" from the short form, and what a "qualification" of it, and how is such an exception or qualification to be introduced into or annexed to the short form?

Applied to such a covenant as the one on which the question arises, which is numbered 8 in the forms of covenants and reads as follows, "8. And that he will leave the premises in good repair," what is such an exception or qualification?

The covenant, in its extended form, is, to leave the premises "in good and substantial repair and condition," but

this is subject to an exception which is thus expressed, "reasonable wear and tear and damage by fire only excepted."

Is the introduction into the short form of anything which extends the operation of the covenant by narrowing the extent of the exception to the generality of the obligation, an exception or qualification of the form within the meaning of the Act? . . .

It is difficult for me to see how words annexed to the short form which are designed to increase the obligation of the covenantor can properly be said to introduce into the form an exception from it, or to annex to the form a qualification of it.

What was done in the case of the lease in question shews how difficult, if not impossible, it is, if that is permitted, to make clear what is the meaning of a covenant such as No. 8, "and that he will leave the premises in good repair," when words are added to it for the purpose of narrowing the exceptions which it contains, and therefore of enlarging or amplifying the covenant, and not of qualifying it.

If the words of the long form be written out and the words added to the short form, "ordinary wear and tear only excepted," be added to it, the covenant becomes, as it appears to me, almost if not altogether unintelligible, and I am unable to find in the Act any warrant for construing the long form as if all of the exceptions to the generality of the covenant were eliminated, and the added words were substituted for the words thus eliminated.

Some light is, I think, afforded by the provisions of an Act in pari materia with the Act in question—the Act respecting short forms of conveyances. Clauses 1, 2, and 3 of schedule B. of that Act correspond with the similarly numbered clauses of the Act in question, but there is another clause which is not found in the latter Act (clause 4).

Clause 4 reads as follows: "Such parties may add the name or other designation of any person or persons or class or classes of persons, or any other words, at the end of form 2 of the first column, so as thereby to extend the words thereof to the acts of any additional person or persons or class or classes of persons or of all persons whomsoever, and in every such case the covenants 2, 3, and 4, or such of them as may be employed in such deed, shall be taken to extend to the acts of the person or persons, class or classes of persons, so named."

Form 2 referred to is: "2. That he has the right to convey the said lands to the said (covenantee) notwithstanding any act of the said (covenantor)."

This provision strengthens the argument for holding that clause 3 was not intended to authorize the introduction or annexation of words designed to enlarge the operation of the covenant to which they are added.

I am led by these considerations to the conclusion that the words added to the short form in this case make the whole covenant one that did not "take effect by virtue of the Act," and that it is to be construed and "is as effectual to bind the parties thereto as if" the Act "had not been made" (sec. 2).

The result of this view as to the effect of the covenant is that the failure of the lessees to rebuild the barn which was destroyed by fire was a breach both of the covenant to repair and of the covenant to leave the premises in good repair, and that for that breach an action lies by the female plaintiff as assignee of the reversion against her lessees.

If the appellants the Brown Brothers Company Nurserymen Limited are not assignees of the term, they are not liable to the landlord for breaches of the lessees' covenants, although they have entered into possession and paid rent to the landlord: Cox v. Bishop, 8 DeG. M. & G. 816; Friary and Breweries v. Singleton, [1899] 1 Ch. 86, and in appeal [1899] 2 Ch. 261.

It was contended by Mr. Armour that the evidence shewed that the appellants Brown Brothers Company Nurserymen Limited had never become assignees of the term, and upon its being pointed out that by their statement of defence, paragraph 1, they had admitted the allegations contained in paragraph 3 of the statement of claim that the term had been assigned to them, and that they had become liable to the plaintiffs for all damages arising from and by reason of any breach of any of the covenants mentioned in the lease, the learned counsel asked for leave to withdraw that admission; although counsel for the plaintiffs said that it was immaterial to the plaintiffs which of the defendants should be held to be liable for the damages to which the former might be found to be entitled, he did not assent to the leave to withdraw the admission being granted.

The question of amendment is important therefore only in considering a further objection urged by Mr. Armour to the constitution of the suit, his contention being that the plaintiffs were not entitled to sue in the same action the defendants the Brown Brothers Company for breaches of the covenants in the lease, and the other appellants for breaches of the agreement of the 6th April, 1904. The objection thus viewed is one of form only, and the amendment asked for should not be allowed except upon terms which will prevent both defendants from raising this formal objection.

That such a condition may be imposed is clear, I think: Hollis v. Burton, [1892] 3 Ch. 226; and that this is a proper case in which to impose it, I have no doubt.

As far as the joining of the respondents as co-plaintiffs is concerned, which was also objected to, that was not improper: Rule 234.

The result is, that, in my opinion, the defendants the Brown Brothers Company Nurserymen Limited should be allowed to withdraw the admission which they seek to withdraw, if both defendants agree to waive all objection to the manner in which the action is constituted, and if that is done, the action, as far as it relates to the breaches of the covenants in the lease, should be dismissed as against the defendants the Brown Brothers Company Nurserymen Limited without costs, and that the judgment on this branch of the case should be entered against the other defendants, with a reference as to damages, as directed by the Chancellor, with this variation, that as to all of the breaches assigned of the covenants in the lease, save only the breach assigned in respect of the barn, the action should be dismissed. The judgment on the other branch of the case should be against the appellants the Brown Brothers Company Nurserymen Limited only, and as to this branch the action should, as against the other defendants, be dismissed without costs.

In other respects the judgment appealed from should be affirmed, and there should be no costs of the appeal to either party.

If, however, the defendants do not take advantage of the leave to amend, the action will be dismissed as against the defendants the Brown Brothers Company Nurserymen Limited without costs and without prejudice to any other action which the plaintiffs or either of them may be advised to bring against them in respect of the barn, and the judgment will stand as against the other defendants with the same variation already mentioned, of dismissing the action as to all of the breaches of the covenants in the lease except the breach as to the barn, and the same disposition will be made of the costs of the appeal.

MACMAHON, J., concurred.

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

MARCH 13TH, 1905.

DIVISIONAL COURT..

OKE v. GREAT NORTHERN OIL AND GAS CO.

Bailment—Hire of Machinery—Contract for Work—Loss of Part of Outfit—Damages for Breach of Contract—Rental of Machinery—Notice Terminating—Agreement to Return Outfit—Condition—Impossibility of Performance.

Appeal by defendants from judgment of BOYD, C., in favour of plaintiff for the recovery of $460.

Action on a contract entered into between plaintiff and defendants bearing date 12th January, 1904, to recover from defendants 3 months' hire, at the rate of $12 a day for each working day, of a drilling outfit, consisting of a drilling rig and tools mentioned in the agreement, or, in the alternative, the same sum as damages for breach of the contract, which was stated in the particulars to be the loss sustained by plaintiff as the result of being deprived of the outfit for the same period.

The appeal was heard by MEREDITH, C.J., IDINGTON, J., MAGEE, J.

J. Lorn McDougall, Ottawa, for defendants.

C. J. Holman, K.C., for plaintiff.

MEREDITH, C.J.:—Plaintiff is an oil driller carrying on business at Petrolia, and defendants are an incorporated company, and were at the time of the transactions in question engaged in boring for oil or gas or both in the county of Dundas.

A contract had been entered into between the parties on 2nd November, 1903, for the boring of wells for defendants by plaintiff at a stipulated price per foot of the depth of the wells, and this contract contained provisions for the payment by defendants of the expenses of moving to the site of defendants' operations the drilling outfit from the place where it then was, which, as I understand, was Thamesville, in the county of Kent, and of returning it; and, besides other provisions not necessary to be referred to, one providing that in case the drilling of the first well undertaken did not amount to 500 feet, defendants should pay plaintiff $25 per day from the time of ceasing to drill the first well to the time of beginning to drill the second well.

By the contract sued on the nature of the arrangement between the parties was entirely changed.

According to its terms defendants, beginning on 13th January, 1904, were to "assume complete charge and control of the drilling outfit," and were to pay to plaintiff for the use of it and the services of two of his men, Bennett and McKaig, to operate it, a rental of $12 per day for each working day beginning with 13th January, 1904, that, as the agreement reads, "it" (i.e., the appellant company) "may retain the use of same."

The contract contains a further term in these words:

"It is understood that the company may surrender the said drilling rig and tools to Oke at any time it may desire, and delivery thereof shall be made on the site of the drilling operations of the last well drilled and within three months from date hereof, and the delivery shall be considered complete upon notifying either said Bennett or McKaig or Oke of the company's desire to surrender possession, and the daily rent as above named shall immediately cease upon such notice, and the said drilling rig and tools be then regarded as in the full possession of the said Oke."

And it was further provided, "that the rig and tools shall be returned to Oke in as good condition as they are in at present, ordinary wear and tear excepted."

While drilling operations were going on under this latter contract, Bennett being in charge of them and McKaig assisting, the "sinker" with which the drilling was being done dropped into the hole that was being made, and, after various ineffectual efforts to withdraw it, was left there, and the casing of the hole was withdrawn; the result of all this was that the "sinker" was practically lost, as the expense of withdrawing it, in the then condition of the hole, would have been more than it would have cost to procure a new "sinker" to replace it.

The sinker dropped on 20th or 21st January, and the efforts to withdraw it were abandoned and the casing was withdrawn on the 28th of the same month.

There was evidence that if sufficient effort had been made and the proper appliances had been used, there would have been no difficulty in rescuing the sinker from its position in the course of a few days. The proper appliances were, however, not at hand, and those that were used were not suited to the work and proved ineffective.

The evidence also established that the casing was withdrawn and the attempt to pull up the sinker from the hole abandoned by direction of the president of defendants, and against the advice of Bennett, and, as I have said, what was thus done made it commercially, at all events, impracticable to recover the sinker.

The president of defendants seems to have thought that no obligation to recover the sinker or replace it with a new one rested upon his company, and that the loss occasioned by its being left where it was was one which plaintiff must bear.

On 30th January, 1904, defendants paid $168 to Bennett for plaintiff, for 14 days' use of the the drilling outfit from 13th to 28th of that month, inclusive, and obtained from Bennett the following receipt:

"$168. Winchester, Ont., January 30, 1904.

"Received of the Great Northern Oil and Gas Co., Limited, the sum of one hundred and sixty-eight dollars in payment of fourteen days' use of C. N. Oke's drilling outfit from January 13 to January 28, inclusive, on which last mentioned date the company notified me of its decision to cease work and to surrender the drilling outfit to Oke.

"Sumner Bennett,
"for C. N. Oke."

The differences which have resulted in this action being brought then began. Defendants appear to have receded from the position taken by them at the outset, and were willing to pay for all the tools that were in the hole, as appears from telegram from Bennett to plaintiff of 29th January, 1904, but they took the position that if they did this and paid $100, which plaintiff was entitled to receive on the termination of the hiring in addition to the rent, which they were willing to do, they were under no further liability to plaintiff, because the rental had stopped absolutely on the giving of the notice on 28th January, 1904.

The position taken by plaintiff, as shewn by his telegram of the 8th February, 1904, to C. B. Williams, the secretary of the company, was that he would accept the tools delivered at the rig and hold defendants liable for the hire of the "rig" under the contract "down to date of such delivery of tools."

Defendants procured a new "sinker" and its appliances, and these were delivered upon the ground where the rest of the drilling outfit was. The exact date of the delivery does not appear in the evidence, but it must have been before 26th March, 1904, for on that day the outfit was being used by plaintiff on other work.

The first question to be determined is, whether the rental ceased on 28th January, when notice was given to Bennett of defendants' decision to cease work and surrender the drilling outfit to Oke; and I am of opinion that it did.

It is not open to doubt that if the sinker had not been left in the hole and practically lost, what happened would have put an end to the hiring from the time the notice was received by Bennett.

Does then the fact that the sinker was left in the hole and practically lost make any difference as to the effect of the notice—in other words, was it, in the circumstances of this case, impossible for defendants to exercise the right of terminating the hiring until the sinker had been replaced by a new one? I think not. There was a substantial compliance, I think, with the terms of the agreement on the happening of which the rental was to cease. The sinker is, as I understand, composed of several parts, an Oke swivel, a four inch "jars," a sinker-bar, and a drill bit, or, if not, these various articles appear to have all been down in the hole, and it cannot, I think, have been the intention of the parties that if the outfit was returned with one of these articles missing from it the rental must go on until it had been replaced.

Defendants had done all that in the circumstances it was possible for them to do towards returning the articles that had been bailed to them. The missing articles were as if they no longer existed, and literal compliance with the terms of the contract was practically impossible.

The agreement, however, protects plaintiff against loss arising from any failure of defendants to return the outfit or any part of it, if the failure to do so was a breach of their agreement as to the return of the rig and tools, and his remedy for any breach of that agreement is, of course, in damages.

The agreement to return the articles is not subject to any expressed condition, but, as was said by Blackburn, J., in Taylor v. Caldwell, 3 B. & S. at p. 838, it is "now English law that in all contracts of loan of chattels or bailments, if the performance of the promise of the borrower or bailee to return the thing lent or bailed becomes impossible because it has perished, this impossibility (if not arising from the fault of the borrower or bailee from some risk which he has taken upon himself) excuses the borrower or bailee from the performance of his promise to redeliver the chattel." See also Boswell v. Sutherland, 32 C. P. 131, and Reynolds v. Roxborough, 10 O. R. 649; and there are numerous other cases in which this rule of law has been recognized and applied.

I can see no reason why this rule of law is not applicable where one of several articles and not the whole of them, and where as in this case an integral and necessary part of one article,—treating the outfit as one article,—and not the whole of it, has ceased to exist.

Anglin v. Henderson, 21 U. C. R. 27, seems to be opposed to this view. That was an action on a charterparty of a vessel for non-payment of a sum agreed to be paid and for breach of defendants' covenant to deliver up the vessel on a day named

in the same good order as when received, reasonable wear and tear excepted, the breach of covenant assigned being that an anchor and chain belonging to the vessel had been lost by defendants and had not been replaced by them. The plea alleged, among other things, that the loss of the anchor and chain had happened, before the breach of the covenant, by tempest and casualties of the lakes and navigation, and by accident and without default or neglect of defendants. On demurrer to the plea, it was held that the loss of the anchor and chain in the circumstances mentioned in the plea afforded no answer to the action. The ground upon which the Court proceeded was, that the covenant was an unqualified one, and the existence of any such implied condition as I have mentioned was not referred to, and indeed Burns, J., based his judgment upon the proposition that, had there been a total loss of all, the hirer of the vessel would have been bound to make it good. This decision, in view of the more recent cases, must, I think, be treated as overruled, for, as it appears to me, it is directly in the teeth of the rule to which I have referred, which is now firmly established.

If, therefore, the loss of the sinker happened without fault of defendants or was within the exception as to wear and tear, their agreement as to the return of the "outfit" has not been broken.

I am of opinion that the proper conclusion upon the evidence is that the loss of the sinker was not due to any defect in the "outfit" when it came under the charge and control of defendants, even if it be assumed, but is not, I think, shewn, that the cause of the sinker having dropped was a defect in the cable, for the ultimate loss of it was not due to that cause, but to the failure of defendants to use the proper means of pulling it up, and the withdrawal of the casing by the order of their president.

This finding excludes the application of the rule as to the implied exception to which I have referred, and necessarily also the exception as to ordinary wear and tear.

It is difficult on the material before us to determine what damages plaintiff has sustained by the breach of defendants' agreement to return the outfit, but I think that they may be not unfairly assessed at $200.

I would, therefore, vary the judgment of the Chancellor by reducing the amount of plaintiff's recovery to $200, and directing that jugdment be entered for that sum with costs on the High Court scale, and I would give no costs of the appeal to either party.

MAGEE, J., concurred.

IDINGTON, J., dissented, holding that the judgment should be reduced to $100, the amount tendered by defendants before action and paid into Court, and that plaintiff should pay defendants their costs of the action and appeal.

TEETZEL, J. MARCH 14TH, 1905.

TRIAL.

GEIGER v. GRAND TRUNK R. W. CO.

Damages—Remoteness — Negligence — Nervous Shock—Impact without Outward Injury — Railway — Findings of Jury.

Action for damages for negligence. On 21st July, 1904, plaintiffs (husband and wife) were being driven in an enclosed omnibus from a wharf in the city of Toronto, and when crossing the tracks running along the Esplanade, at Yonge street, the omnibus was caught between the two parts of a freight train of defendants, which had been parted at Yonge street, and which was about to be coupled, when the driver of the omnibus was caught between the two sections of the train, and while considerable damage was done to the omnibus, neither of the plaintiffs suffered visible bodily injury, beyond a few slight bruises, but both complained of serious injury to their nervous systems as a result of fright.

The questions submitted to the jury and their answers were as follows:

1. Were defendants, through their employees, guilty of negligence? A.—Yes.

2. If yes, in what did such negligence consist? A.—In not giving proper or sufficient warning that the cut or opening in the train was for the use of the general public.

3. If you find defendants guilty of negligence, did such negligence cause the injury to plaintiffs? A.—Yes.

4. Is the injury of which plaintiff Christian Geiger complains wholly due to mental shock, or is it attributable partly to mental shock and partly to shock caused by the blow? A.—Mental shock only.

5. At what sum do you assess the damages to plaintiff Christian Geiger, (*a*) in respect of personal injury resulting exclusively from mental shock? A.—$700. (*b*) In respect of shock caused by blows? No answer

The like questions were put with regard to plaintiff Emma Marie Geiger, and were answered in the same way, except that her damages were assessed at $300.

E. E. A. DuVernet and W. M. Boultbee, for plaintiffs.

W. R. Riddell, K.C., for defendants.

TEETZEL, J.—The jury were not instructed as to any difference between nervous shock and mental shock, the words "nervous" and "mental" having been used throughout the trial as interchangeable epithets. Upon the evidence, I think it would have been more correct to have used the expression "nervous shock" in the questions submitted; but in dealing with the questions I think it is manifest that the jury, in assessing damages for mental shock and allowing no damages for shock caused by blows, had regard to the absence of any physical injury caused by the collision, and that the damages were assessed for the loss of time, inability to work, sleeplessness, and other discomforts suffered by plaintiffs as a consequence of the shock to their nervous systems attributable to the fright at the time of the collision. . . .

[Reference to and discussion of Victorian Railway Commissioners v. Coultas, 13 App. Cas. 222; Henderson v .Canada Atlantic R. W. Co., 25 A. R. 437; Dulieu v. White, [1901] 2 K. B. 669.]

It seems to me that the principle relied upon by defendants . . . must be limited to cases where there has been no physical impact, and that this case is distinguishable by the fact that here there was physical impact through the negligence of defendants, and the impact was under such conditions that it was reasonable and natural that plaintiffs would suffer in consequence thereof great nervous or mental shock.

They were rightfully travelling on a highway in an enclosed vehicle, when, without warning, their vehicle was suddenly struck by a moving car of defendants, pushed a short distance sideways, and impinged upon the end of another car. The unexpected collision, the crashing of the broken vehicle, and the imminent peril to plaintiffs of being killed or seriously injured, were just such conditions as would naturally cause them to be seized with sudden terror. . . .

There is the sequence of impact causing nervous shock which in turn causes the injuries complained of; as put by Kennedy, J., in Dulieu v. White, supra, "natural and continuous sequence uninterruptedly connecting the breach of duty with the damage, as cause and effect."

I therefore think that the finding as to remoteness of this character of damage in the Victorian Railway case cannot be held to apply where there has been direct physical impact through the negligence of defendants. The judgment in that case left entirely untouched the question of impact, or what its effect would have been in determining the question of remoteness, and for that reason . . . I think this case is distinguishable, and not governed by the Victorian Railway

case, nor by the Henderson case, in which the question of the effect of impact was also not considered; and, finding no precedent where damages resulting from mental shock in cases where impact has been present, have been disallowed, I decline to establish such a precedent in this case . . .

[Reference to The Bywell Castle, 4 P. D. 219.]

Judgment for plaintiff Christian Geiger for $700 damages and for plaintiff Emma Marie Geiger for $300 damages, together with their costs of action.

STREET, J. MARCH 15TH, 1904.

TRIAL.

FRASER v. DIAMOND.

Way—Dedication by Public User—Crown Lands—Acquiescence of Locatee and Equitable Owner—Subsequent Grant without Reservation of Way—Rights of Public—Continuous User for 70 years.

Action for trespass to land.

E. D. Armour, K.C., and A. B. Colville, Campbellford, for plaintiff.

S. C. Smoke and G. A. Payne, Campbellford, for defendant.

STREET, J.—In 1834 an order of the Quarter Sessions was made under 50 Geo. III. for the opening of a highway from the township of Percy through several lots and across several concessions in the township of Seymour. One of the lots crossed by the description of the highway was the north half of lot 3 in the 4th concession of Seymour, the title to which was still in the Crown, although it had been recently occupied under a location ticket or license from the Crown. The road described in the order of the Sessions was never opened, as I find upon the evidence, but another road, following the same general direction but at a distance varying, upon this lot, from 60 rods to 2 or 3 rods, was opened across this lot and across the other lots mentioned in the order in or about the year 1835 or 1836. This road was cut out and opened across the north half of lot 3 by John Fraser, the locatee of the lot under the Crown, and members of his family. It was fenced on the south side shortly after it was opened, and upon the north side about 1865, by members of the family of the locatee, assisted by their tenant, Benjamin Clute.

The road, from the time it was opened, was regularly travelled and used as the highway to and from grist and saw mills in the township of Percy to the south-west of the lot in question, and at Campbellford to the north-east. John Fraser, the locatee of the Crown, and his descendants, have lived upon the lot in question from 1835 to the present time, clearing and cultivating it. They, as well as their neighbours, have done statute labour on the road for upwards of 40 years; the mails have for many years been carried to and from Campbellford along it; money has been granted by the township for its improvement during 1900, 1902, and 1903. In 1900 or 1901 the road through the lot in question was regularly graded, ditched, and partly gravelled, the Frasers assisting in the work.

During all this time the title remained in the Crown. On 23rd June, 1904, however, plaintiff, Charles Fraser, claiming as the successor in title to John Fraser, the original locatee, established his right, to the satisfaction of the Crown, and a patent was issued to him, in which no reservation or mention of any road is made.

Shortly after receiving his patent, plaintiff put a fence across the road at each extremity of his lot, and put up notices forbidding the public to use it, and claiming it as his private property.

The township council passed a resolution thereupon authorizing defendant, the reeve of the township, to remove the fences, which he did, and the present action is brought against him for the alleged trespass committed by him in doing so.

In my opinion, the road in question had become established as a public highway, plaintiff had no right to close it, and defendant, as one of the public, had a right to remove the obstructions and travel upon the road, and is not liable in trespass for having done so.

Plaintiff's contention was that defendant had shewn no dedication by the Crown, and that the acts of the locatee before the patent were not binding upon him after the issue of the patent; that the origin of the road being shewn to be under the order of the Sessions, evidence of user of the public could not be received as evidence of dedication: and that the order of the Sessions was not binding upon the Crown.

I think that the road as laid out by the Sessions appears to have been found unsuitable; at all events, that order was not acted upon; but the present road was laid out upon a different line . . . The whole neighbourhood seems to have concurred in the change, and from the time it was laid out, between 60 and 70 years ago, it has been a recognized, well travelled public highway, connecting locally important

centres, fenced off from the farm in question, improved from time to time by statute labour and public money, and treated by plaintiff and his predecessors in the equitable title to the farm as being an undoubted public highway.

In these circumstances, in my opinion, there is evidence of dedication by the equitable owner, acquiesced in by the Crown; and the fact that a Sessions order was made for the establishing of a highway, but never acted upon, and abandoned at once, is no reason why the establishment and user of a road parallel to it should not be treated as evidence of a dedication.

I have referred to Regina v. Wismer, 6 U. C. R. 293 ; Regina v. Plunkett, 21 U. C. R. 536; Regina v. Sanderson, 3 O. S. 103; Regina v. Great Western R. W. Co., 32 U. C. R. 517; Ray v. Trim, 27 Gr. 374; Beveridge v. Creelman, 42 U. C. R. 29.

In Turner v. Walsh, 6 App. Cas. 636, which is a decision of the Privy Council, later in date than any of the above cases, and in an appeal from one of the Australian colonies, it is broadly laid down that from long continued user of a way by the public over Crown land, dedication from the Crown, in the absence of anything to rebut the presumption, may and ought to be presumed, following in this respect Regina v. East Mark, 11 Q. B. 877. These cases are cited and followed in Regina v. Moss, 26 S. C. R. 322.

In my opinion, this action must be dismissed with costs.

CARTWRIGHT, MASTER. MARCH 16TH, 1905.

CHAMBERS.

SANGSTER v. AIKENHEAD.

Defamation — Discovery — Examination of Defendant—Admission of Publication—Refusal to Give Name of Informant.

Action for libel. Defendant was asked on his examination for discovery to give the name of the person who had told him of the alleged misconduct with which (as he admitted) he charged plaintiff. On advice of counsel he declined to answer.

Plaintiff moved for an order requiring him to answer.

W. E. Middleton, for plaintiff.

J. W. McCullough, for defendant.

THE MASTER.—Defendant has not justified. He pleads privilege, and says he acted without malice toward plaintiff, and that any words "which he may be proved to have used were uttered honestly and in a bona fide belief of their truth."

In Williamson v. Merrill, 4 O. W. R. 528, the defendant justified simply. In that case the learned Chief Justice of the King's Bench thought the point was covered by Marriott v. Chamberlain, 17 Q. B. D. 154. As pointed out by Lord Coleridge, C.J., in Gibson v. Evans, 23 Q. B. D. 384, "the circumstances of that case were very peculiar." Lord Bowen (at p. 165) points out that Eade v. Jacobs, 3 Ex. D. 335, is not inconsistent with the decision in Marriott v. Chamberlain, as what was asked in Eade v. Jacobs "was only evidence, not information as to material facts which could be proved at the trial, but mere evidence by which material facts were to be proved." As bearing on this question, it is important to notice the decision in Hennessy v. Wright (No. 2), 24 Q. B. D. 446. This case was decided in 1888, two years later than Marriott v. Chamberlain. In both the principal judgment was given by Lord Esher, M. R. So it may be assumed they do not conflict.

In Hennessy's case Marriott's case was cited by counsel, but not referred to in the judgments. Lord Esher, giving the judgment of the Court of Appeal, in which Lindley and Lopes, L.JJ., concurred, refused to allow interrogatories similar to the question which is here under consideration. He puts it on the ground that "the interrogatories in question cannot disclose anything which can be fairly said to be material to enable the plaintiff either to maintain his own case or to destroy the case of his adversary." It was because the questions asked in Marriott v. Chamberlain were judged to be very material as bearing on the question whether the plaintiff had reasonable ground for supposing that the letter (which he had stated the defendant had written) really existed, even though the fact was that it did not, that the plaintiff was required to answer: see judgment especially of Lord Bowen at p. 164, and that of Fry, L.J., at p. 165. There being in the present case no plea other than privilege, I cannot see how the disclosure of the name of defendant's informant will enable the plaintiff "either to maintain his own case or to destroy the case of his adversary."

The motion is dismissed. Costs in cause to defendant.

CARTWRIGHT, MASTER. MARCH 16TH, 1905.

CHAMBERS.

MACLEAN v. JAMES BAY R. W. CO.

Discovery—Examination of Plaintiff—Absence of Plaintiff from Province—Right to Have Examination at Plaintiff's Place of Residence — Offer to Submit to Examination abroad—Stay of Proceedings till Plaintiff's Return.

Motion by defendants to stay the action until certain proceedings under the Railway Act to ascertain the amount of compensation to which plaintiff is entitled, have been concluded, or until plaintiff attend for examination for discovery.

R. B. Henderson, for defendants.

J. P. Mabee, K.C., for plaintiff.

THE MASTER.—At the argument I was of opinion that the motion could not succeed on the first ground.

This is not like the case of City of Toronto v. Canadian Pacific R. W. Co., 18 P. R. 374; that was decided on the ground that the whole matter in controversy was being dealt with in another proceeding in the High Court.

Here it is alleged by plaintiff that defendants have committed wrongs which cannot be taken into account in the arbitration proceedings. I did not understand that this was seriously disputed. It was suggested by Mr. Henderson that by consent this question could be referred to the arbitrators, but counsel for plaintiff would not, in the absence of any instructions, accede to this suggestion.

If plaintiff has sustained damage by the acts of defendants before the initiation of proceedings for expropriation, I do not see how the Court can interfere to prevent her from taking such action as she may be advised.

The plaintiff is now and has been for some time in England. This was well known to defendants. On 3rd March instant defendants' solicitors served a notice for the examination of plaintiff for discovery under Rule 447, requiring her to attend in Toronto on 11th March instant, and paid conduct money. No objection seems to have been made that this sum was too little.

Plaintiff's solicitor and her husband both depose that plaintiff is wholly ignorant of the matters in question, and they tender the husband for examination, and agree to be bound by his evidence as fully as plaintiff would be by her own.

This defendants will not accept, and now move to stay the action until plaintiff herself is examined.

It was objected by counsel for plaintiff that the appointment issued under Rule 447 was irregular, as plaintiff was absent from the province, and therefore could not have been served personally. He referred to Rules 439 and 481, and cases cited in Holmested & Langton, as shewing that these Rules as to discovery only applied in the case of parties resident within the jurisdiction, and that defendants must proceed under Rule 477.

The question, therefore, of regularity must turn upon whether the party absent at the time is to be deemed to be "residing out of Ontario."

What is the residence of a party within the meaning of Rule 443 (then Rule 490) was considered in Dryden v. Smith, 17 P. R. 500. That case shews that plaintiff's residence in Ontario is certainly at Toronto, and no appointment for her examination could be sustained if taken for any other county.

There is nothing to shew that plaintiff's absence is more than temporary. I do not think, *e.g.*, she is now residing out of Ontario so as to enable defendants, if otherwise entitled, to have security for costs. It follows that she is therefore resident in Ontario. And the only question is: Can the action be stayed until her examination is had, either here or abroad?

Plaintiff's solicitors are willing to produce her for examination in London. But defendants do not agree to this, on the ground of expense. They offer to let her examination and the trial stand until her return.

To this plaintiff's solicitors will not agree, and both parties now stand on their strict rights, which must therefore be determined here or elsewhere.

According to the best opinion I can form, defendants are entitled to examine plaintiff before the trial; and she is entitled to have this examination in Toronto. If the examination is to be other than formal, it would seem almost necessary that it should be had at Toronto for effective discovery, as pointed out in Dryden v. Smith, at p. 502.

On the other hand, I do not think that defendants are bound to proceed under Rule 477. They are entitled to have the examination at Toronto, and if necessary to a stay for a reasonable time until plaintiff returns and has been examined.

Rule 477 cannot be extended to the case of a party temporarily absent. Parties are in a very different position from witnesses, who are not under the control of the parties or of the Court. They cannot be allowed to use the machinery of the Court for their own ends, and refuse obedience to its rules.

An order will go as above indicated.

The questions are new, and success has been divided, so that costs may be in the cause.

TEETZEL, J. MARCH 16TH, 1905.

WEEKLY COURT.

RE BELL.

Will—Construction—Power of Sale—Exercise by Substituted Trustee—Application to Particular Property—Release of Trustee—New Trustee.

Motion by the trustees of the will of John Bell, late of the city of Toronto, barrister-at-law, who died on 11th December, 1875, for an order declaring the construction of the will, and allowing H. L. Herring, one of the trustees, to retire, and appointing the Toronto General Trusts Corporation trustee in his place.

J. H. Moss, for trustees.

E. D. Armour, K.C., for the Nagle beneficiaries.

C. A. Moss, for the Herring beneficiaries.

A. Bruce, K.C., for the Canada Life Assurance Co.

TEETZEL, J.—The questions of construction are: (1) whether power of sale given to trustees in the will is personal to the trustees therein named, or is attached to the office of trustee, and whether the same may be exercised by any trustee or trustees for the time being performing the duties of the office; and (2) whether the trustees under the will have power to sell the lands and premises known as Nos. 8 and 10 King street east and 83 Yonge street.

Upon the first question I am of opinion that all the powers given by the will to the trustees therein named may be exercised by any trustee or trustees for the time being performing the duties of the office, and that such powers are not personal only to trustees named in the will.

By the first clause of his will the testator gives all the property he may die possessed of to his "executors and trustees hereinafter named, in trust to enable them or the survivors or survivor of them to carry into effect this my will," and by the last clause of his will he appoints his wife Catherine Bell (since deceased) and his daughter Susan Maria Nagle and his son-in-law Henry L'Estrange Herring to be executors and trustees of his will.

The only portions of the will in which the executors are expressly authorized to sell is in these words: "My will

further is that if it shall in the opinion of my trustees hereinafter named be for the benefit of my granddaughters to sell and dispose of the properties named to them, they shall have power to do so," etc.

To my mind there is nothing either in the language appointing the trustees or in the language of the power above given, or elsewhere in the will, to shew an intention of the testator to confine either the exercise of the opinion or the power to the persons only who are in the will named as trustees, to the exclusion of their substitutes or successors in office.

In order to so confine the power there must be an indication that it can only be exercised by the individuals named; in other words, the personal confidence in the individual must be expressed by clear and apt language, and cannot be inferred from the mere nature of the power. In the absence of language indicating that the power does not attach to the office, I take it to be well settled that it must be assumed that the power should be attached to the office to be exercised by the one who for the time being filled the office of trustee: see Crawford v. Forshaw, [1891] 2 Ch. at p. 261; In re Smith, [1904] 1 Ch. at p. 139. . . .

The second question involves the determination of how far the power of sale given by the will to the trustees, as above quoted, applies to the two properties in question. In my opinion, it applies to only one of them, namely, the Yonge street property, but not to the other, for the following reasons:—

1. The power in question has specific reference to his two granddaughters, to whom, in a previous part of the will, specific properties had been devised. One of these properties is the Yonge street property, which he devised to his granddaughter Alice Nagle; and the other property on College avenue, to his granddaughter Clara Nagle. The King street property is covered by a general devise of all other property enumerated in schedule 1 to his will, under which the testator directs the same to be disposed of by his daughter amongst her legitimate children in such a manner as she may by her last will direct and appoint, and failing such will then equally among her children share and share alike. The King street property, therefore, is not "named to any granddaughter," but is, with other properties, given in remainder to all the legitimate children of his daughter Mrs. Nagle, who at the date of the will had 3 children . . . I think it is, therefore, quite clear that this power to be exercised by the trustees, if in their opinion it should be for the benefit of his granddaughters to sell the properties "named to them" cannot apply to this general devise, in which they and others may

be interested, and that this special power is limited to the two properties specifically devised to the granddaughters, and cannot be exercised so as to give the trustees power to sell the King street property without the consent of all parties interested therein.

The order will also contain a provision for the release of Mr. Herring as trustee upon passing his accounts, and the appointment of the Toronto General Trusts Corporation in his place. Costs of all parties out of the estate.

FALCONBRIDGE, C.J. MARCH 16TH, 1905.

WEEKLY COURT.

RE LAUR.

Will—Construction—Devise—Estate for Life—Legacy—Annuity—Abatement on Deficiency of Assets.

Motion by James McKenzie, the executor of the will of Mary C. Laur, for an order declaring the construction of the will of the testatrix, and also of the will of her husband, John H. Laur, who predeceased her, and for the determination of the following questions :—

1. Did Mary C. Laur take an estate in the lands of John C. Laur of such a nature as to pass to the applicant as her executor, or did the lands vest in Thomas G. Laur under the will of John H. Laur?

2. If the land vested in the applicant, is it, under the Devolution of Estates Act, liable to valuation and contribution, or abatement, the estate not being sufficient to pay all legatees in full, and is it liable to contribute to payment of debts, testamentary expenses, costs of administration, etc.?

3. Does the legacy to Martha Elizabeth Smith abate as to each yearly payment, or is the deficiency to be entirely thrown on the last payments, or is it liable to abatement at all, and should interest be allowed on the overdue payments?

4. Should the applicant proceed and incur expense in trying to realize on the judgment recovered by deceased against C. B. and W. D. Laur?

Mary Catharine Laur died on 13th October, 1903. Her will was dated 24th October, 1901, and was as follows:—

1st. I give and bequeath to Catherine May Smith and Grace Smith, daughters of my nephew Thomas D. Smith, $100 each.

2nd. I give and bequeath to my niece Catherine Laur Darling, daughter of my brother Samuel Darling, $100.

3rd. I give and bequeath to George Bell, . . . $600, and to his daughters Ella May Bell and Lilian Grace Bell, $100 each.

4th. I give and bequeath to my sister Martha Elizabeth Smith $600 to be deposited at interest in some chartered bank, out of which she is to be paid $100 a year with interest on the remaining principal money until the fund is exhausted, and in case of her death before the fund is exhausted the balance to form part of my residuary estate.

5th. I give, devise, and bequeath all my real estate in the said township of Yarmouth of which I shall die possessed to my stepson Thomas H. Laur, his heirs and assigns forever.

6th. All the residue of my estate, after payment of my debts and funeral expenses, I give and bequeath to the person or persons with whom I am living, and who is or are taking care of me at the time of my death.

John H. Laur died on 28th April, 1892. His will was dated 28th March, 1892, and was as follows:—

1st. I hereby constitute and appoint my wife Catherine Laur to be executrix and my son Thomas G. Laur . . . and Thomas Olde . . . to be executors of this my last will, directing my said executrix and executors to pay my just debts and funeral expenses, and the legacies hereinafter given out of my estate.

2nd. After the payment of my said debts and funeral expenses, I give, devise, and bequeath to my said wife Catherine Laur all my real estate, mortgages, notes, money in bank, securities for money, goods, chattels, household furniture, and all other my real and personal estate and effects whatsoever and wheresoever, with power to sell my farm, being the north half of lot number 5 in the 3rd concession of the said township of Yarmouth, if she shall deem it best to do so.

3rd. After the decease of my said wife, I give, devise, and bequeath all the rest and residue of my real and personal estate and effects whatsoever and wheresoever unto my said son Thomas G. Laur or his children in case of his death, to and for his and their own absolute use and benefit.

J. S. Robertson, St. Thomas, for executor.

J. A. Robinson, St. Thomas, for Martha E. Smith.

W. B. Doherty, S. Thomas, for George Bell and others.

T. G. Meredith, K.C., for T. G. Laur.

F. P. Betts, London, for the infants and for Grace Miller.

FALCONBRIDGE, C.J.—At the argument I held that the effect of the devise in the will of John H. Laur was to give a

life estate to Mary Catherine Laur with remainder to Thomas G. Laur in fee. This decision obviated the necessity of deciding whether the legatees of Mary C. Laur could marshall the assets against Thomas.

The remaining question is as to whether the legacy or annuity to Martha Elizabeth Smith (cl. 4 of the will of Mary C. Laur) abates with the other legacies, and if so how such abatement should be worked out.

It seems clear to me that this provision is not an annuity, but an ordinary pecuniary legacy, with a direction as to the mode of payment. Even if it were an annuity, it would abate equally with general legacies: Miller v. Huddlestone, 3 Macn. & G. 513.

It, therefore, abates with the other legacies, and the deficiency is not wholly applicable to the later payments, but the yearly payments must be ratably and proportionately reduced.

Costs to all parties out of estate.

I have referred to the following cases: In re Hiscoe, 71 L. J. Ch. 347; King v. Yorston, 27 O. R. 1; Wright v. Callender, 2 De G. M. & G. 652; Michell v. Wilton, L. R. 20 Eq. 269; Koch v. Heisey, 26 O. R. 87; Carmichael v. Gee, 5 App. Cas. 588; Miller v. Huddlestone, 3 Macn. & G. 513; Todd v. Bielty, 27 Beav. 353.

MARCH 16TH, 1905.

DIVISIONAL COURT.

HEATON v. SAUVÉ.

Sale of Goods—Contract — Fulfilment — Non-payment of Price—Exercise of Vendor's Lien—Changing Character of Goods.

Appeal by plaintiff from judgment of IDINGTON, J., dismissing action to recover $500 paid by plaintiff to defendant on account of barked pulpwood got out by defendant for plaintiff pursuant to a contract. The balance of the price not being paid, defendant sold the wood which remained.

W. H. Barry, Ottawa, for plaintiff.

W. R. Smyth, for defendant.

The judgment of the Court (FALCONBRIDGE, C.J., STREET, J., ANGLIN, J.), was delivered by

ANGLIN, J.— . . . A careful perusal of the evidence satisfies me, not only that there is abundant testimony to warrant the findings of the Judge, but that no other conclusions

than those which he reached could be upheld. The fulfilment of his contract by defendant was clearly established. It is equally certain that plaintiff was long in default in paying the balance due and shipping away a large portion of the pulpwood which he had purchased, against which, after ample notice, defendant enforced his vendor's lien. Plaintiff's complaint that, in doing so, defendant, before selling the wood, changed its character, is not well founded. Nature had already operated whatever change there was. The hemlock included in the contract never was saleable as pulpwood. The other wood had so deteriorated that as pulpwood it had ceased to be merchantable. It could only be sold as firewood. Defendant's course of action was well within his rights, and . . . if his conduct is open to any criticism, it is that he should sooner have resorted to the remedy which the law gave him and of which he ultimately availed himself.

Appeal dismissed with costs.

STREET, J. MARCH 17TH, 1905.

TRIAL.

PUFFER v. IRELAND.

Landlord and Tenant—Distress for Rent—Payment by Tenant after Distress to Mortgagee of Landlord—Distress Lawfully Begun—Continuation after Payment—Validity of Payment—Bailiff—Counterclaim—Costs of Distress—Costs of Action for Illegal Distress.

Action by tenant against landlord and bailiff for an injunction restraining defendants proceeding with a distress for rent, and for damages.

F. L. Webb, Colborne, and A. J. Armstrong, Cobourg, for plaintiff.

W. L. Payne, Colborne, for defendants.

STREET, J.—. . . On 23rd January, 1884, the defendant Ireland, being the owner of a farm of 90 acres in the township of Brighton, conveyed it by way of mortgage to C. R. W. Biggar and others, trustees, to secure $1,600 and interest, the principal being due on 23rd January, 1889, and the interest yearly meantime.

On 12th March, 1903, defendant Ireland demised the same premises, by lease under seal, to plaintiff for 5 years, at an annual rent of $150, payable on 1st October in each year, the first payment to be made on 1st October, 1903.

At the time this lease was made, the mortgage remained unpaid. Plaintiff paid to defendant Ireland the rent due on 1st October, 1903.

On 29th September, 1904, the mortgage still remaining unpaid and being in arrear, the mortgagees gave notice to plaintiff that they were mortgagees, claiming payment of all rents due or accruing due from him, and threatening him with proceedings if he did not pay to them.

On 22nd November, 1904, defendant Sweet, as bailiff for defendant Ireland, acting under a distress warrant, seized a quantity of property of plaintiff on the premises, and remained in possession for 17 days.

On 26th November, 1904, plaintiff paid to the mortgagees the rent which had become due on 1st October, 1904, with interest, and gave notice to defendants that he had done so.

On 28th November, 1904, plaintiff brought this action. . .

Defendant Ireland claimed the rent, alleged that he was entitled to distrain and hold the distress for it, and counterclaimed for it.

Upon the application of plaintiff, an injunction was granted on 30th November, 1904, restraining defendants from proceeding under the warrant; and this injunction was, by order of 8th December, 1904, continued to the hearing, plaintiff's solicitor, who was solicitor also for the mortgagees, agreeing to hold the $150 and interest paid him by plaintiff until it should be determined whether the mortgagees or defendant Ireland were entitled to it.

Plaintiff, having, under compulsion of the mortgagees, and after notice from them claiming the rent due from him under the lease, paid it to them, was entitled to be relieved from the distress and from further liability to his landlord Ireland: Corbett v. Plowden, 25 Ch. D. 678; Underhay v. Read, 20 Q. B. D. 209; Sm. L. C., 11th ed., pp. 522-4.

The only circumstance in which the present case differs from the authorities I have referred to is in the fact that here the landlord distrained before plaintiff had paid his rent to any one. This fact made the distress lawful when it was made, but did not disentitle plaintiff to protect himself in his holding by paying it to the mortgagees, who had claimed it and threatened him with proceedings if he did not pay it. Whether the payment to the mortgagees is to be treated as an attornment to them and the creation of a new tenancy, or as a payment compelled by the holder of a paramount title and made to avoid eviction by him, I think it can be set

up as an answer to the claim of the landlord: Johnson v. Jones, 9 A. & E. 809, 813; Forse v. Sovereen, 14 A. R. 482.

The position is the same as if plaintiff, after defendant had distrained his goods, had paid the rent to the landlord himself. The distress was originally lawful, and the landlord was entitled to retain it until, not only the rent, but the costs of the distress, should be paid. Until payment of these plaintiff was not entitled to any relief.

The contest between the parties (other than defendant Sweet) appears to have turned upon the question whether plaintiff was entitled to pay his rent to the mortgagees or not; upon this defendant Ireland has failed. On the other hand defendants were entitled to be paid their costs of distress before a replevin or injunction could properly be granted, because the seizure and proceedings down to the time plaintiff paid his rent to the mortgagees were proper and regular; and they were entitled to retain a sufficient quantity of the goods until the costs of distress were paid.

In these circumstances, there was no cause of action against the bailiff, and the action should be dismissed as against him with costs. There should be no other costs awarded to either party. Plaintiff must pay to defendant Ireland, upon the counterclaim, $12 for the costs of the distress and possession. No costs of the counterclaim, because the full rent was claimed under it.

MARCH 17TH, 1905.

DIVISIONAL COURT.

SASKATCHEWAN LAND AND HOMESTEAD CO. v. LEADLEY.

Venue — Change — Preponderance of Convenience — Rule 529 (b)—Cause of Action—Residence of Parties—Defendants out of the Jurisdiction.

Appeal by defendants from order of MEREDITH, J., reversing order of Master in Chambers changing venue from Kingston to Toronto.

A. J. Russell Snow, for defendant John T. Moore.

J. W. St. John, for defendants the Leadleys.

J. J. Maclennan, for plaintiffs.

The judgment of the Court (FALCONBRIDGE, C.J., GARROW, J.A., STREET, J.), was delivered by

STREET, J.—The writ of summons was issued on 8th June, 1903, by plaintiffs (an incorporated company) against two persons named Leadley. At that time the head office of plaintiff was at Toronto, defendants the Leadleys lived there, and the cause of action arose there. On 30th July, 1903, plaintiffs obtained an order amending the writ by adding as defendants two persons named Moore living out of the jurisdiction . . . The statement of claim was filed on 30th September, 1903, the venue being laid at Kingston. On 11th December, 1903, a meeting of the shareholders of plaintiff company was held at Toronto, and a by-law was passed changing the head office to the city of Kingston. The validity of this meeting and by-law are in question in this action. On 13th January, 1905, the statement of claim was amended materially, and new allegations added.

On 13th February, 1905, an order was made by the Master in Chambers changing the place of trial from Kingston to Toronto, upon the ground of great preponderance of convenience, and upon the authority of McDonald v. Park, 2 O. W. R. 972. . . . On 17th February, 1905, Meredith, J., reversed the Master's order. . . .

The undoubted balance of convenience is greatly in favour of a trial at Toronto. Had this been the only argument, however, in favour of a reversal of the decision of my brother Meredith and a restoration of the order of the Master, I should have felt much hesitation in giving effect to it, in the present state of the authorities.

Under Rule 529 (*b*), however, it is provided that when the cause of action arose and the parties reside in the same county, the place to be named as the place of trial shall be the county town of that county. This sub-sec. (*b*) creates an exception to the general rule laid down in sub-sec. (*a*), which gives plaintiff the right to name the place of trial at his will, and lays down the rule that a case ought to be tried, if possible, where it arose and where the parties to it live. I think that the equity of the Rule should be held to govern a case in which the cause of action has arisen in a county in which all the parties to it who are within the jurisdiction reside, as is the case here . . . As to those who are not within the jurisdiction at all, the place of trial must be comparatively unimportant.

In my opinion, therefore, plaintiff should originally have named Toronto as the place of trial, and the order of the Master . . . should not have been interfered with.

My views in this respect are very much strengthened by what I consider to be a great preponderance of convenience in favour of Toronto as the place of trial.

Appeal allowed with costs here and below to defendants in any event.

MARCH 17TH, 1905.

C.A.

REX v. MULLEN.

Criminal Law—Attempt to Commit Rape—Failure of Crown to Shew that Prosecutrix not Wife of Prisoner—Objection —Leave to Appeal.

Motion by Daniel Mullen, one of the prisoners, for leave to appeal from the refusal of BRITTON, J., at the trial, to reserve a case.

The prisoners were indicted for an assault upon one Minnie Sunderland with intent to commit rape.

Section 266 of the Code defines rape as the act of a man having carnal knowledge of a woman who is not his wife without her consent or with a consent extorted by threats or fear of bodily harm or obtained by personating the woman's husband or by false and fraudulent representations as to the nature and quality of the act.

The indictment alleged that the prisoners on 20th May, 1904, did unlawfully assault one Minnie Sunderland, who was not the wife of either of the prisoners (naming them) with intent then and there to have carnal knowledge of her, the said Minnie Sutherland, without her consent, against the form of the statute, etc.

After the jury had retired it was objected by counsel for Mullen that the Crown had not proved that the prosecutrix was not Mullen's wife as alleged in the indictment, and that for all that appeared she was his wife, and therefore that no offence was proved.

The question whether the prosecutrix was the wife of either of the prisoners was not actually asked her.

The trial Judge refused to reserve a case upon this objection.

A. E. Fripp, Ottawa, for Mullen, cited Taylor on Evidence, 9th ed., sec. 371.

The judgment of the Court (MOSS, C.J.O., OSLER, MACLENNAN, GARROW, MACLAREN, JJ.A.), was delivered by

OSLER, J.A.— . . . The prisoner was arraigned by the name of Daniel Mullen, and pleaded to the indictment by that name. He was, therefore, identified as a person bearing

that name : Arch. Crim. Pldg. & Ev., 22nd ed. (1900), p. 165 ; Ex p. Corrigan, 2 Can. Crim. Cas. 591 (Ouimet, J.)

The prosecutrix was sworn, and identified herself as a person bearing the name of Sunderland, which, prima facie at all events, she could not properly have done had she been the wife of the prisoner. Had she been married to the prisoner, her actual surname would have been the same as his was. In Camden's Remaines Concerning Brittaine the author says, p. 125, tit. "Surnames": "Here I might note that women with us at their marriage do change their surnames and pass into their husbands' names, and justly, for that they non sunt duo sed caro una." . . .

[Reference to Fendall v. Goldsmid, 2 P. D. 263; Conley v. Conley, [1901] A. C. 450; Bishop on Marriage and Divorce, 6th ed., sec. 704 (a); Am. & Eng. Encyc. of Law, 2nd ed., vol. 2, p. 312.]

Then also, as appears from a memorandum of the learned trial Judge attached to the indictment, the evidence shewed that the prosecutrix was a girl of 17, living at home with her mother and stepfather, and that she did not know Mullen by name, but recognized him as one of the persons who had assaulted her.

The objection is evidently . . . purely technical. Had the name of the prosecutrix and the prisoner been the same, it is possible that there might have been some difficulty, but, as it stands, I think the usual prima facie case was made out, which called upon the prisoner for an answer.

Leave to appeal should be refused.

MARCH 17TH, 1905.

C.A.

RE ATLAS LOAN CO.

(RESERVE FUND.)

Company—Winding-up—Creditors—Shareholders Contributing to Reserve Fund—Position of—Voluntary Payments.

Appeal by contributors to the reserve fund of the company from order of BRITTON, J., 3 O. W. R. 688, 7 O. L. R. 706, allowing appeal from certificate of Master in Ordinary, and holding that appellants were not entitled to rank, in respect of their voluntary contributions to the reserve fund, pari

passu with depositors and debenture-holders, upon the assets of the company in liquidation under a winding-up order.

J. A. Robinson, St. Thomas, for appellants.

W. M. Douglas, K.C., and Casey Wood, for debenture-holders.

I. F. Hellmuth, K.C., for depositors.

H. L. Drayton, for liquidator.

The judgment of the Court (MOSS, C.J.O., OSLER, MACLENNAN, GARROW, MACLAREN, JJ.A.), was delivered by

MACLENNAN, J.A.—This is a contest between classes of persons claiming to prove as creditors against the assests of the company now in course of being wound up under the Winding-up Act of Canada.

The one class is composed of holders of debentures issued and sold by the company, and persons who had made deposits with the company at interest; and the other class is composed of a large number of the shareholders of the company who had paid large sums to the company as a reserve.

The Master held that the latter class were creditors of the company, and had a right to prove for the sums advanced by them, just as depositors and debenture-holders, and to be paid pari passu with them.

On appeal the Master's decision was reversed by Britton, J., and it was declared that the contributors to the reserve fund were not entitled to prove their claims as creditors or to share pari passu with the depositors and debenture-holders in the distribution of the company's assets.

This is an appeal from that judgment . . .

The opinion contains a very full, and I think an adequate, statement of the material facts, except that it might be inferred from that statement that the authorized capital of the company was $1,000,000, with $500,000 subscribed, and $300,000 paid up; whereas by the Act of 1898 the capital was declared to be $2,000,000, and the fact was that $1,000,000 had been subscribed, and $300,000 paid up.

Before the year 1901 the management had year by year been setting apart a reserve fund out of profits earned, and on one occasion, after declaring and paying a dividend, that dividend was by arrangement paid back to the company and added to the reserve. By the end of the year 1900 the reserve had become $78,000 or equal to 26 per cent. of the paid up capital.

In the beginning of 1901 a new plan of adding to the reserve, not out of the earnings of the company, but by means of payments to be made by the shareholders, was put in oper-

ation. The nature and advantages of that plan are fully explained by the circulars sent out to the shareholders by the management, the first prior to the annual meeting in February, 1901, another immediately after the meeting, and a third on 30th April following.

In these circulars it was pointed out that each shareholder was the owner of a share of the existing reserve of $78,000 in proportion to the amount of capital paid up by him or 26 per cent., and if and when he paid in a further sum equal to 74 per cent., of his paid-up capital, he would be the owner of a share of the reserve equal to his paid-up capital. There was a sense in which each shareholder was the owner of a proportionate part of the reserve, namely, the sense in which all the assets of a company belong to the shareholders in that proportion, subject to the payment of debts.

The inducement held out to the shareholders, and what they expected to receive as the consideration for their payments, was an increased premium on their shares and an increased dividend. The circulars suggested that when the reserve was fully paid up and became equal to the paid-up capital, the shares would command a sale at 250 or 260 per cent., and all the net profits would then be divided, and, at present rate of earnings, might be as much as 15 per cent. per annum.

I think it is a proper inference that all the payments which followed the issue of these circulars, were made in response thereto, and in compliance therewith, and were made in the sense and for the purposes therein set forth, and also that the rights of the respective parties must be measured and governed thereby.

The payments invited were to the amount of 74 per cent. of the paid-up capital, and were intended to be additions to, and to have the same character as, the existing reserve of 26 per cent., so as to make it 100 or equal to the paid up capital. It was not a loan at interest. It was not to be paid back. It was to be in the nature of capital, except that no doubt the company might distribute it to the shareholders just as they might distribute the 26 per cent. in dividends, so long as the paid-up capital was kept intact.

That such was the intention and purpose of the payments, and the sense or agreement in which they were made, is apparent not only from the circulars inviting them, but from the language of the receipt taken when payments were made.

That receipt was as follows:—

The Atlas Loan Co., St. Thomas, Ont.

Received from * * * * * * * * * dollars for credit of 74 per cent. reserve fund.

$———— A. E. Wallace,
Manager.

Now there is nothing to prevent a person from paying money to another or to a company either absolutely as a gift, or on any other qualified terms not contrary to law, and if he do he must abide by the terms on which he has paid it. I therefore think that these appellants can only claim a return of the sums which they have paid on the same terms exactly on which they can claim the benefit of the 26 per cent. which composed the reserve before the additions were made to it, that is to say, subject to the payment of the debts of the company. If the 26 per cent. has been lost, that is their loss, and if the additions which they have made to it have been lost, that also must be their loss, and they may not compete with creditors for reimbursement. On the other hand, if the money has not been lost, they will get it back in the winding-up in proportion to their payments after creditors have been paid.

It was argued that these payments were made upon condition that all the shareholders should make the invited payments, and that, inasmuch as some did not pay anything, the appellants have a right to recover back what they have paid. There is no evidence of any such condition. The shareholders were dealt with individually, and not collectively, and each made his payment voluntarily, which was to be added to his share of the existing reserve.

A number of cases were cited on the one side and on the other, but none of them afford much if any assistance in determining the question. The case of the Great Berlin Steamship Co., 26 Ch. D. 616, was the case of money paid to a company for a fraudulent purpose, and it was held that the person making the payment could not prove for it in the winding-up, although he might have recovered it before the insolvency.

For these reasons, and for the reasons stated by the learned Judge, I think the judgment right and that the appeal should be dismissed.

MARCH 17TH, 1905.

C. A.

RE CANADA WOOLLEN MILLS, LIMITED.

Company—Winding-up—Sale of Assets—Acceptance of Tender of Inspector of Estate—Trustee—Powers of Referee—Sale not Made by Liquidator.

Appeal by W. D. Long from order of MACMAHON, J., 4 O. W. R. 265, 8 O. L. R. 581, allowing an appeal by W. T.

Benson & Co. from an order of James S. Cartwright, official referee, under whose supervision the company's affairs were being wound up, approving a sale of the company's assets to W. D. Long for $253,000.

The appeal was heard by Moss, C.J.O., Osler, Maclennan, Garrow, Maclaren, JJ.A.

I. F. Hellmuth, K.C., and P. D. Crerar, K.C., for the appellant.

W. H. Blake, K.C., for W. T. Benson & Co.

H. Cassels, K.C., for the liquidator.

Moss, C.J.O. (after setting out the facts):—On 6th May, 1904, the referee, acting under the authority given to the Court by 62 & 63 Vict. ch. 42, sec. 1, appointed Mr. Long one of the inspectors of the estate. An inspector's duty, as declared by the Act, is to assist and advise the liquidator in the liquidation of the company. And provision is made (sec. 2) for remunerating him for his services.

It cannot be denied that a person who has been appointed to the position of inspector is disqualified, so long as he holds the office, from becoming the purchaser of the assets. His duty being to assist and advise the liquidator in the liquidation, and one important—if not the most important—act in the liquidation being the disposition of the assets, an inspector is bound to see that the very best sale is made and the very best price obtained. He is in the position of a trustee for sale, and he is unable to discharge himself from that position without the consent of his cestui que trust, or at all events without an order of the Court after notice to all concerned: see Ex p. Berks, 3 M. D. & DeG. 385.

Down to the moment of his discharge, he owes to the creditors and the liquidator all the knowledge he possesses and all the assistance and advice his knowledge and information concerning the assets and the manner of their disposition places within his power to give. And, as was determined in Ex p. Lacey, 6 Ves. 625, and Ex p. James, 8 Ves. 337, it is not sufficient for the trustee to divest himself of the character of trustee, he must shake off the character altogether. He will not be allowed to purchase if he continue to act as trustee up to the point of the sale, getting during that period all the information that may be useful to him, then discharging himself from the character and buying the property: 2 W. & T., L. C., 7th ed., p. 729, and cases cited.

It is argued that Mr. Long had been in effect discharged from his office of inspector before the making and acceptance of his offer. But it is plain that this was not the case. There

was no suggestion on 22nd September, when he first intimated his intention of making an offer, that he be then discharged. But, even if the suggestion had been made, it could not have been then given effect to without notice to all the parties interested. Then, during the time which elapsed between that date and the date of his offer, he remained in his office of inspector, and of all the information which he obtained while he was engaged in seeing what he could do, he was bound to make full disclosure, and give the benefit of it to the liquidator and the creditors. Then and only then would he have entitled himself to be discharged and placed in a position to make an offer. As it was, his offer was burdened with the condition that it must be dealt with at once and without giving others an opportunity of making higher offers.

There was by no means a consensus of opinion that it was for the benefit of the estate that the offer should be accepted. And there is no pretence that any order discharging him from his office of inspector was agreed to. The purchase being thus made by him while he still occupied a fiduciary position towards the estate, it was one which he was not competent to make, and which was open to be set aside at the instance of the liquidator or any creditor interested in the estate: Morrison v. Watts, 19 A. R. 622; Segsworth v. Anderson, 23 O. R. 573, 21 A. R. 242, 24 S. C. R. 699; Gastonguay v. Savoie, 29 S. C. R. 613. The principle enforced by these and other cases, that one occupying a fiduciary position shall not, while the relation continues, be entitled to deal for his own benefit, has long been recognized as a well founded and salutary rule resting on solid reasons, and it is not desirable that it should be weakened to any degree.

It is not necessary to impugn Mr. Long's good faith. It may be taken for granted that he acted in good faith and without any improper motive or any intention to obtain an undue advantage. But his position disqualified him from dealing as he attempted to do with the assets of the estate, and on this ground alone the transaction ought not to be permitted to stand as a purchase by him.

But, assuming that he had been in a position to purchase, there would still be the difficulty that there was no sale by which the liquidator was bound. The language of secs. 31 and 33 of R. S. C. ch. 129, and the decisions upon the section of the Imperial Act corresponding to sec. 33, shew that the sale must be the result of the action of the liquidator, approved of by the Court. And in order to enforce a sale to him a purchaser must have an agreement with the liquidator, approved by the Court. Such a sale cannot be likened to a sale by the Court acting under its ordinary jurisdiction, as in mortgage or partition actions, where the proceedings are by

the direction of the Court, and the matter is within its sole control. In this case the liquidator made no agreement. The steps which were being taken to that end, and which, if completed, would have bound him to the terms of an agreement, were intercepted by the proceedings to question what had been done. The matter remained in fieri so far as the liquidator was concerned. And while in that condition the transaction has been avoided. It, therefore, never reached the point of a sale by the liquidator, within the terms of sec. 31 of the Winding-up Act.

Appeal dismissed.

OSLER, J.A., gave reasons in writing for the same conclusion.

MACLENNAN, GARROW, and MACLAREN, JJ.A., concurred.

MARCH 17TH, 1905.

C. A.

GALLOWAY v. TOWN OF SARNIA.

Way—Non-repair—Injury to Watchman—Negligence—Contributory Negligence—Breach of Duty—Knowledge of Non-repair — Reasonable Care — Questions of Fact—Appeal.

Appeal by defendants from judgment of TEETZEL, J., 3 O. W. R. 361, in favour of plaintiff for $650 damages in an action for negligence in failing to keep in repair a sidewalk on Campbell street in the town of Sarnia, whereby plaintiff was injured by falling into a hole in such sidewalk.

I. F. Hellmuth, K.C., for appellants.

W. E. Middleton and J. R. Logan, Sarnia, for plaintiff.

The judgment of the Court (MOSS, C.J.O., OSLER, MACLENNAN, GARROW, MACLAREN, JJ.A.), was delivered by

GARROW, J.A.:—The injury took place on 11th September, 1903. At that time and for some time previous thereto plaintiff was in defendants' employment as night watchman over certain sewers which were then in course of construction.

It was apparently established by the evidence that a part of plaintiff's duty as night watchman was to see, where sewers or laterals in course of construction crossed the streets, that they were, while open, properly barricaded at night, and a light placed, and the sidewalk approaching them put in repair to prevent accidents, although I incline to think that his

duty with respect to sidewalks extended to repairs made necessary by the disturbance of the sidewalks by the works then going on, and did not extend to the repair of holes such as those in question, which had existed for some time, and were in no way due to the sewer construction then in progress.

The Judge found that the sidewalk was in a bad state of repair and dangerous to pedestrians to the knowledge of defendants' officer whose duty it was to repair the same, and that it had been in such condition for several weeks; that plaintiff knew of the condition of the sidewalk, but was not guilty of contributory negligence in using it at the time of the accident; and that there was an open lateral sewer in the immediate vicinity, as contended by defendants; and gave judgment for plaintiff.

The accident occurred at about 1.30 a.m. The night was dark and cloudy—no moon. The plaintiff was at the time proceeding to a shanty in which he had placed his supper. There were 4 holes in the sidewalk, all near each other. The hole in which he actually received his injury was caused by the removal of the centre plank, some 8 feet long, but he was precipitated into this hole by his foot catching in a smaller hole, 3 or 4 inches wide and about 2 feet long, thus throwing him forward into the larger hole, where he fell upon his left arm, and in consequence his wrist was severely injured. Plaintiff admits that he knew of the condition of the sidewalk, but says he was walking carefully at the time, and there is no evidence to the contrary. He had a legal right to use the sidewalk, although it was not, to his knowledge, in good repair, as long as he acted prudently and carefully in doing so, and I think, upon the evidence, we should not be justified in reversing the Judge's finding upon the issue of contributory negligence.

The only remaining defence of any importance . . . involves the question of whether there was in fact an open lateral sewer across Campbell street, within a few feet of the place of injury, which should have been barricaded and lighted, and the sidewalk on each side made safe, by plaintiff. If there was such a sewer, there was certainly no barricade and no light, and plaintiff's injury might in such case well be ascribed to his own breach of duty.

This issue is purely one of fact, and it clearly depends upon, if not the credibility, at least the reliability, of the witnesses called on each side. The Judge who saw them and heard their evidence in open Court has not believed the foreman Milne and his fellow workmen, or at all events has not accepted their statements . . . and he has believed and accepted the statement of plaintiff, corroborative by that of the apparently respectable citizens called by him.

In these circumstances, we ought not, in my opinion, to interfere with the finding that there was in fact no such open sewer at or near the place of the accident, nor with his judgment accordingly in plaintiff's favour.

The damages are not, I think, excessive, or so excessive as to justify any interference by this Court.

Appeal dismissed with costs.

MARCH 17TH, 1905.

C. A.

SLOANE v. TORONTO HOTEL CO.

Contract—Work and Labour—Damages for Preventing Contractor from Executing and for Cancelling Contract—Conduct Justifying Cancellation—Refusal to Proceed—Architect's Certificate—Delay—Evidence—Questions of Fact—Appeal.

Appeal by defendants from judgment of IDINGTON, J., in favour of plaintiffs for the recovery of $13,480 in an action to recover damages from defendants for preventing plaintiffs from executing a contract with the defendants for the decoration of the walls and ceilings of certain portions of the King Edward hotel in the city of Toronto, and for cancelling the contract and discharging plaintiffs from doing the work under it.

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

W. R. Riddell, K.C., and T. P. Galt, for defendants.

J. H. Moss and C. A. Moss, for plaintiffs.

MOSS, C.J.O.:—The agreement was set forth in a letter written by or on behalf of defendants, dated 8th May, 1902, and was subsequently embodied in a formal instrument under seal. Briefly plaintiffs undertook the work of decoration of the rooms, lobbies, and corridors of the 3rd, 4th, 5th, 6th, 7th, and 8th flats or floors of the hotel, supplying the material and doing the labour in accordance with the plans and specifications and to the satisfaction of the architect, in such manner and with such expedition as the architect might direct, and all to be completed on or before 15th August, 1902. The term as to the date of completion proved impossible by reason of defendants not being ready to admit plaintiffs to proceed with their work until long after that date. For the work thus contracted for, plaintiffs were to be paid $41,000. The formal contract, which was not executed until November,

1902, contained a provision that in case plaintiffs failed to proceed with the work with such expedition or in such manner as the architect might direct and to his satisfaction, defendants might cancel the contract. It also provided that, in case of dispute with regard to the performance of the work or from any cause in connection with the work, the same was referred to the architect, whose decision should be final.

The defence made to the action was, that the above mentioned terms applied and that plaintiffs neglected and refused to proceed with the work as directed by the architect, and, although repeatedly requested by him to proceed, neglected and refused to do so, whereupon defendants cancelled the contract, and that plaintiffs' conduct in refusing to proceed was such as to amply justify the cancellation.

They also set up the want of a certificate from the architect as to the work done, and they counterclaimed for damages for breach of the contract, but neither of these claims seems to have been seriously pressed, and they were not noticed in the reasons for appeal or in the argument.

The decoration of the walls and ceilings that plaintiffs undertook consisted of covering the walls (except those of clothes closets) with canvas, and the ceilings with muslin to be hung and pasted to the walls. Before this work could be entered upon, it was of course necessary that the plastering of the walls and ceilings should have been properly done so as to put them in a condition to receive the decorators' treatment. And it is obvious that, in considering the undertaking, plaintiffs would expect that the work of the other trades and the general progress of the building would be so advanced that when they entered upon their work, the condition of the parts would be such as to enable them to continue without interruption until they had completed their contract.

As it happened, the work was so delayed that plaintiffs' contract, which was originally to have been completed on or before 15th August, was not entered upon until October, and this without any default on plaintiffs' part. Even when they commenced, the condition of the various flats was unsatisfactory, but in deference to the direction of the architect the work was proceeded with as far as possible. Work was done on the 4th floor, followed by work on the 3rd floor. Then an effort was made to proceed with the 6th floor. Here the plaster was found unfit to receive plaintiffs' work; the result was that with the assent, if not by the direction of the architect, the work was suspended for some time and plaintiffs' men returned to New York. On 6th January, 1903,

the architect—wrote plaintiffs informing them that since the men had been taken off the work in connection with the decorations, great progress had been made, and, roughly speaking, it might be said that the building was about completed—"in fact the whole of the plastering and carpenter work and other trades are far enough advanced to lead any ordinary observer to say that the building is now in such a condition that the decorators could begin work at once." Much light is thrown by this and other letters on the condition of the building to receive the decorators' work at the earlier time. They seem to well justify the remark of plaintiffs in their letter of 15th December, that they did not believe it would have made such a great difference had they delayed starting until then instead of beginning on 13th October. In response to the architect's requests that they should resume the work, plaintiffs sent their representative and their assistant superintendent or foreman, Mr. Bruner, prepared to continue the work. The building was found in a condition which rendered it impossible for them to proceed. The ceilings and wall were covered thickly with soot accumulated from fires made by other workmen ; all of which would have to be removed before plaintiffs' work could be proceeded with.

This is not disputed, but the extent of it is sought to be minimized by defendants.

Then plaintiffs complained that the plastering was so defective in quality as to prevent the work from being done upon it. This was disputed by defendants. There were interviews and correspondence, resulting finally in defendants assuming to cancel the contract.

The questions are really of fact upon the evidence. It can scarcely be questioned that it was an implied term of the contract that defendants were required to hand over the premises to plaintiffs in a condition fit for the performance by them of the work which they had contracted to do. Nor can it be questioned that if the walls and ceilings were in the condition as regards soot and as regards quality of plaster alleged by plaintiffs, defendants have failed to perform their part of the contract. Now upon these questions there was much evidence, and upon the conflict the trial Judge has come to the conclusion that plaintiffs' allegations are proved. He has expressly given credit to plaintiffs' assistant superintendent or foreman in all respects, and his testimony is supported by other witnesses, who speak of the condition of the walls and ceilings and of the quality of the plaster. The testimony of Bruner, the assistant superintendent or foreman,

and of the workmen, speaks of the conditions which they observed, and amongst which they were endeavouring to work, and may well be relied upon as the experience of those actually engaged in efforts to carry out the contract. And no reason has been presented why their testimony, which was accepted and acted upon by the trial Judge, should now be set aside in favour of the testimony adduced by defendants. Without going through the mass of evidence in detail, and pointing out the relative force and weight of each piece of testimony, it is sufficient to say that the findings of the trial Judge are amply supported.

Upon the findings of fact, there was no justification for defendants' action. By their refusal to remove the soot and to take steps to put the plaster into proper condition, so as to enable plaintiffs to proceed with their contract, they prevented plaintiffs in the execution of their work. And having then, on the pretence that plaintiffs were improperly delaying the work, assumed to cancel the contract and discharge plaintiffs from the work, they are liable to pay the damages resulting from their action. As said by Lord Davey in delivering the judgment of the Judicial Committee of the Privy Council in Ladder v. Slowey, [1904] A. C. 442, at p. 452, "A party to a contract for execution of works cannot justify the exercise of a power of re-entry and seizure of the works in progress when the alleged default or delay of the contractors has been brought about by the acts or defaults of the party himself or his agent."

This being established against defendants, the judgment entered is right as regards both liability and amount. Plaintiffs lost the amount expended upon the work and the anticipated profits, and these defendants should make good.

As to the argument that the questions were matters for determination by the architect, the trial Judge properly disposed of it. It is by no means free from doubt whether questions of the kind in controversy here fall within the terms of the agreement. But, if they do, they could not be decided until they were formally and properly submitted for decision. But this was not done, and neither formally nor informally did the architect decide the matter and announce his decision to the parties. Certainly he never announced it to plaintiffs, and plaintiffs were never given an opportunity of having these questions decided even by the architect before the cancellation of the contract.

The appeal should be dismissed.

OSLER, J.A., gave reasons in writing for the same conclusion.

MACLENNAN, GARROW, and MACLAREN, JJ.A., concurred.

MARCH 17TH, 1905.

C.A.

REX v. PIERCE.

Appeal—Court of Appeal—Right of Appeal—Order of Divisional Court—Loan Corporations Act—Judicature Act—Amending Act, 4 Edw. VII. ch. 11.

Application by defendants for leave to appeal from order of a Divisional Court (4 O. W. R. 411) affirming a conviction of defendants by the police magistrate for the city of Toronto, upon an appeal to that Court under the Loan Corporations Act, R. S. O. 1897 ch. 205, sec. 117 (4).

The application was heard by MOSS, C.J.O., OSLER, MACLENNAN, GARROW, MACLAREN, JJ.A.

E. F. B. Johnston, K.C., and J. M. Godfrey, for defendants.

J. R. Cartwright, K.C., and J. W. Curry, K.C., for the Crown.

MOSS, C.J.O.—Defendants contend that an appeal now lies to this Court by virtue of the Act 4 Edw. VII. ch. 11, amending the Judicature Act. If that Act has conferred a right of appeal, which formerly did not exist in cases of this kind, it must be by reason of the provisions of secs. 50 and 75 of the Judicature Act, as enacted by sec. 2 of the amending Act.

Section 50 (1) deals with the jurisdiction of the Court of Appeal to hear and determine appeals from a Divisional Court. It provides that "the Court of Appeal shall have jurisdiction and power to hear and determine appeals from any judgment, order or decision, save as in this Act mentioned, of a Divisional Court of the High Court, subject to the provisions of this Act and to such rules and orders of the Court for regulating the terms and conditions on which appeals shall be allowed as are now in force or may be made pursuant to this Act." Section 75 provides that "the judgment, order or decision of a Divisional Court shall be final and there shall be no further appeal therefrom, save only at

the instance of the Crown in a case in which the Crown is concerned, and save as provided in sections 50 and 76."

The effect of these two provisions is, that there is to be no further appeal by a subject from any judgment, order, or decision of a Divisional Court, unless the right to such appeal is to be found either in sec. 50 or in sec. 76. The jurisdiction conferred by sec. 50 (1) is to hear and determine appeals from Divisional Court judgments, orders, or decisions, "save as in this Act mentioned;" that is, the Court is to have jurisdiction except in respect of any judgments, orders, or decisions that may be mentioned. If any are mentioned as excepted, then there is no jurisdiction in respect of them. Otherwise there is jurisdiction, but the exercise of the jurisdiction is subject to the provisions of the Act.

Then comes the declaration in sec. 75 that there shall be no further appeal from the judgment, order, or decision of a Divisional Court, save at the instance of the Crown, and as provided by secs. 50 and 76.

Turning then to sec. 50 (1), we do not find that it provides or gives a right of appeal in any case. It does not point to any case in which the judgment, order, or decision of a Divisional Court is not final, and in which there may be a further appeal. Full effect is given to its provisions by holding that it confers jurisdiction to hear and determine appeals where the right of appeal exists under the Act. Sub-section (2) is but a continuation of the jurisdiction already vested in the Court by the various statutes there specified. But it supplies instances to which the language of sec. 75 "save as provided in sections 50 and 76" is applicable.

In some of the cases mentioned the appeal is or may be from a Divisional Court, e.g., under R. S. O. ch. 83, R. S. O. ch. 91, R. S. O. ch.153, and R. S. O. ch. 245. Nevertheless, no new jurisdiction is conferred, and no new right of appeal is given. Looking at the whole section, nothing is to be found creating or conferring, either expressly or by inference, a right of appeal in any case in which there was not such a right before the enactment.

It is not disputed that before the enactment in question no appeal lay to the Court of Appeal in a case like the present. And if its provisions are applicable at all, sec. 75 distinctly shuts out an appeal on the part of the defendants, nothing to save it being found either in sec. 50 or in sec. 76.

The application should be refused.

MACLENNAN, GARROW, and MACLAREN, JJ.A., concurred.

OSLER, J.A.—I think this case raises a question of considerable importance on the point of jurisdiction, and also on that of the proper construction or meaning of the applied section of the Loan Corporations Act. If leave be necessary, I think it should be granted for the purpose of discussing both.

MARCH 17TH, 1905.

C.A.

ELGIN LOAN AND SAVINGS CO. v. NATIONAL TRUST CO.

Company — Shares — Deposit of Certificates — Bailment — Trust—Detention—Excuse—Trustee Act—Winding-up—Direction of Master—Jurisdiction—Detinue—Measure of Damages—Price of Shares.

Appeal by defendants and cross-appeal by plaintiffs from judgment of BOYD, C., 2 O. W. R. 1159, 7 O. L. R. 1.

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

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

G. C. Gibbons, K.C., and Shirley Denison, for plaintiffs.

MOSS, C.J.O.—The sole questions now in dispute are as to the liability of defendants for damages, and as to the quantum, if any.

The writ was issued on 17th July, 1903. The claim was to recover from defendants the possession of scrip certificates of the Dominion Coal Company common stock representing 525 shares, and scrip certificates of the Dominion Iron and Steel Company preferred stock representing 100 shares; also damages for the detention of the shares; and the sum of $1,050, being dividends received in respect of them. It now appears that the claim should have been for 50 and not 100 shares of the Dominion Steel and Iron Company.

Soon after service of the writ upon defendants, an application was made on their behalf for an order staying the proceedings in the action. On 28th July, 1903, the motion came on for hearing before the Chief Justice of the Common Pleas, who pronounced an order giving plaintiffs leave to amend their writ, and adjourning the motion until 4th September, but providing that upon plaintiffs and the liquidators of the Atlas Loan Company agreeing to do so, they

should be at liberty to join in the sale of the stock in question, or of any part thereof, and that the proceeds should be held by defendants, pending the disposition of the action, in the same manner and subject to the same trusts and conditions as the stock was then held under, and further that such sale, if agreed upon and made, should be made reserving the rights of all parties and without prejudice to any claim which plaintiffs might have against defendants for damages for detention of the stock or any part thereof.

On the same day defendants' solicitor wrote the solicitor for plaintiffs, referring to the order and expressing a hope that plaintiffs would consult with the "liquidator of the Atlas Loan" (i.e., the defendants) for the purpose of arriving at some arrangement whereby an order for a sale of the stock might be placed, adding that it should be possible to at least agree upon a figure the acceptance of which would be approved by both parties, when an order could then be placed for the sale at that figure.

On the 30th July a letter much to the same effect, written on behalf of defendants by Mr. Home Smith, who was in charge for defendants of the liquidation of the Atlas Loan Company, was sent to Mr. Moore, the manager of plaintiffs the London and Western Trusts Company. The plaintiffs did not respond or make any counter-proposition, and on 11th September the adjourned motion came on for hearing before the Chief Justice of the Common Pleas, when an order was made reciting the withdrawal by the National Trusts Company, Limited, the liquidators for the Atlas Loan Company, of any claim to the possession of the scrip certificates in question, and directing that upon defendants handing over the certificates to plaintiffs to be held by them subject to all the equities attaching, the action be forever stayed, save as to the claim for damages or interest.

On 12th September defendants handed over the scrip certificates, and paid the sum of $1,050, received for dividends, to plaintiffs. Plaintiffs proceeded with the claim for damages and interest. The Chancellor awarded damages on the footing of improper detention of the scrip by defendants until the end of July, 1903. From this judgment defendants appeal, contending that no damages should have been awarded. By their cross-appeal plaintiffs seek to increase the damages, contending that they should be estimated on the footing of improper detention until 12th September, 1903.

Plaintiffs, having in this action recovered possession of the scrip from defendants, are prima facie entitled to such damages as they may have sustained by reason of its detention. It was shewn that there was a great decline in the price of the shares during the period when their delivery was withheld by defendants.

Defendants, however, maintain that they should not pay any damages, and it is on them to sustain the onus of shewing that they are relieved from liability.

Their first contention is that they were acting as trustees, and that in withholding the possession of the scrip from plaintiffs they acted honestly and reasonably and are entitled to the benefit of sec. 1 of the Act 62 Vict. ch. 15. The first inquiry is, whether defendants are trustees within the scope of the Act. If so, it must be because they were constituted trustees by virtue of the instrument in writing dated 19th August, 1902, upon the terms of which they became possessors or custodians of the scrip. They were not appointed by the Court, nor can it be said that they were persons who (except in respect of that instrument) might be held to be fiduciarily responsible as trustees. In considering the description of trustees and the sort of trusts coming within the Act, regard must be had to the terms of the appointment [illegible] nature of the duties created. But in a general sense it must be obvious that the trustees meant by the Act are trustees engaged in administrative duties with regard to property confided to them for the benefit of others, and that the breaches of trusts mentioned are such as may occur in the course of the management and administration of property held in that way. It can scarcely be meant to apply to the simple case of the person having the custody for another of indicia of property upon a mere obligation to restore it to him on demand or request, and in the meantime to take care of it for him. Such a holding partakes much more of the nature of a bailment than of a trust in the ordinary and usual sense in which the word "trust" is employed in relation to property. For, while "bailment" is defined as "a delivery of a thing in trust for some special object or purpose and upon contract express or implied to conform to the object or purpose of the trust," yet the expression "in trust" is clearly not intended to have the same meaning as when technically used in connection with real property. Thus in Blackstone's Commentaries, Lewis's ed., vol. 3, pp. 431, 432, speaking of some species of trusts, it is said: "But there are other trusts

which are cognizable in a Court of law, as deposits and all manner of bailments:" Beall on Bailment, p. 6.

In the present case the instrument of 19th August, 1903, under which the defendants held the scrip, coupled with the nature of their business and the manner in which they dealt with the scrip up to the time when the difficulties arose between them and plaintiffs, shew the nature of the holding to have been that of bailment rather than of trust in the sense which would bring defendants within the provisions of 62 Vict. ch. 15.

But, if it be assumed that they came within the Act, I agree with the Chancellor that they have not shewn themselves entitled to be relieved. I do not consider that the breach of trust of which—on the hypothesis—complaint is made is one to which the Act could be made to apply. To begin with, there was a distinct refusal to perform the terms of the trust by handing over or transferring the property on demand. The inception of that attitude was the assumption tion by defendants of the position of liquidators of the Atlas Loan Co. There was nothing to prevent their becoming liquidators, but they were, nevertheless, bound to see that in their dealings they did nothing to prejudice plaintiffs' interests or to create any situation whereby plaintiffs' title to the scrip might be brought in question. Assuming that, as liquidators of the Atlas Loan Co., defendants rightly believed or supposed that they had some interest in the scrip, they were not justified in making use of the possession acquired from plaintiffs to give assertion to that claim. . . .

[Reference to Attorney-General v. Munro, 2 De G. & S. 122.]

Whether the instrument of 19th August, 1902, is to be regarded as a declaration of trust or as a contract of bailment, upon its express terms it was defendants' plain duty to transfer and hand over the scrip to plaintiffs in response to their letter of 25th June, 1903. But, instead of doing so, they caused to be written to the solicitors representing them as liquidators of the Atlas Co. the letter of 26th June suggesting and inviting a claim against plaintiffs' property. From that time their attention seems to have been directed to assisting the liquidators of the Atlas Co. and impeding the delivery of the scrip to plaintiffs. Having refused to observe the terms of their trust and taken a position practically hostile to those for whom they held the scrip, it would be

neither just nor fair to the latter to say that they should bear the resulting loss.

Nor should defendants be held entitled to rely upon the orders or directions said to have been made by the Master in Ordinary, acting as referee in the proceedings for the liquidation of the Atlas Company. It is manifest that whatever directions were given were obtained at the instance of the liquidators of the Atlas Co. and with a view to their benefit as such. Defendants, as representing plaintiffs, took no steps to cause themselves to be heard before the Master in Ordinary or to prevent or rescind the orders or directions. There is no record in writing of the orders or directions, and it is proper to assume that the Master in Ordinary had no intention of binding or affecting any except those to whom his authority undoubtedly extended. That authority did not include defendants as representing plaintiffs. They were in no way before him either as creditors, claimants against the estate, or contributories. Defendants, as representatives of plaintiffs, assented too readily to the supposed embargo on their dealings with the scrip. It was not in any sense in their hands as liquidators of the Atlas Co. They took the risk of being able to set up the orders or directions as against plaintiffs. But these having been shewn to be ineffectual, it is not reasonable to ask that the consequences should fall upon plaintiffs. Defendants are not entitled to throw upon plaintiffs any loss resulting from defendants' own action in the matter. Perhaps they may obtain relief, in the form of indemnity, from the estate of the Atlas Co. Certainly the proceedings can only be regarded as taken in the interest and for the benefit of that company alone. And, throughout, defendants ignored their duty to plaintiffs, and insisted on plaintiffs taking action in matters in which it was the duty of defendants to act for them and protect their interests.

Plaintiffs did not act unreasonably or improperly in declining defendants' suggestions that the matter should be dealt with by the Master in Ordinary in the Atlas Co. liquidation. They were under no obligation to submit to the imposition of such terms by defendants. They were entitled to require the scrip to be handed over to them, and defendants had no justification for refusing to do so or for insisting upon the question being settled before a forum which had no jurisdiction in the premises. So far, therefore, as liability to damages is concerned, defendants are without any valid defence.

Then comes the question of the amount, if any, to be awarded. It is argued for defendants that it was the duty

of plaintiffs to have accepted the proposition of defendants said to have been made on 30th June, in the course of an interview between Mr. Rundle, representing defendants, and Mr. Moore, representing plaintiffs. The suggestion appears to have been made by Mr. Rundle that the shares should be sold and the money paid into Court or into some bank. Mr. Moore insisted that the scrip should be handed over so that plaintiffs might deal with it as they were entitled to do.

In the then existing circumstances, this was not an unreasonable position to take. Defendants had really no ground for refusing to answer the demand of plaintiffs, who very properly desired to have the control of their own property. Defendants were not entitled to force upon them the alternative of a sale to be conducted by defendants. Defendants' attitude amounted to a claim to deal with the scrip as if they were the owners. The only concession they seemed willing to make was that the money should be held in medio. But this was a reversal of the position and rights of the parties at that time. If there was to be a sale at that time, plaintiffs were the parties entitled to make it and to receive the moneys derived from it. Defendants had, at most, but a shadowy interest in 375 shares, and none whatever in the remainder of the scrip. And it is to be observed that the only reason then advanced by defendants was the order or direction of the Master in Ordinary, which they had sought and obtained in breach of their duty to plaintiffs. And the fact that plaintiffs, in the circumstances, chose to stand upon their rights, should not bar them of their right to damages for the refusal to accord them their rightful position. The position is not identical with that in which the parties were subsequently placed by the order of 28th July, as I shall endeavour to shew later on.

Then it is urged that plaintiffs were not in a position to sell the shares represented by the scrip, because they had not made a demand for payment of the amount payable to them by the Atlas Co., in accordance with the terms of the agreement with that company, dated 10th June, 1902. This objection could apply only to 375 share in which the Atlas Co. were interested. The remaining 150 shares of Dominion Coal stock and the 50 shares of Dominion Steel and Iron stock were plaintiffs' absolutely. But, as regards the 375 shares, there was the most temporary disability. A demand on the Atlas Co. was the merest form. The company were in liquidation, and there was no prospect of the demand being complied with by payment. Plaintiffs could have made the demand at

any moment after receiving the scrip from defendants, and they would have been in a position to sell immediately after.

Upon the evidence it is clear that there was a plain intention on the part of plaintiffs to sell. They were not intending to hold the shares as an investment. Their intention was to make sale as soon as practicable in order to being about a speedy liquidation of the assets for the creditors of the Elgin Loan Co. They were desirous of selling as soon as possible, and at all events whenever the shares reached par in the market. And they would and could have sold at the figures which were reached early in July.

I think we should conclude that, if the shares had been transferred to plaintiffs, they would have sold them during the first 10 days of July, at which time the Dominion Coal Co. stock had risen above par, and the Dominion Iron and Steel Co. stock was selling in Montreal at from 58 to 60 per share. Upon this footing, and taking 31st July, 1903, as the limit, as found by the Chancellor, the damages awarded by him appear to be a fair and reasonable compensation to plaintiffs.

But plaintiffs, by way of cross-appeal, contend that the period within which the differences are to be fixed is that between 30th June and 12th September. And but for the order made in this action on 28th July that would be the case. Plaintiffs did not receive actual delivery of the scrip until the 12th September. But, the matter having been brought into Court, an order was made which afforded an opportunity to plaintiffs to avoid further loss in a declining market. True, the order was not framed to provide for a sale under the direction of the Court, but, in view of its having been made in the action brought to settle the question of right, and of the financial standing of defendants, it would have been reasonable for plaintiffs, if they were desirous of then selling, to have accepted this proposal and allowed sales to be made in accordance with the order. The proceeds would have been secure, and the Court could have dealt with them and with all questions of damages. On the other hand, if plaintiffs were not desirous of selling, there is no reason why they should be entitled to ask damages by reason of a further decline in price. And, as the Chancellor has held, their unwillingness to agree to a sale at that time is attributable to their disinclination to sell at the then current prices. These considerations create a position entirely different to that arising upon the offer of 30th June. All parties were now in Court, and the subject matter of the action was before the Court and subject to its jurisdiction. The order made opened the way towards the prevention of further dam-

ages, and it was incumbent on plaintiffs to avail themselves of all reasonable means for the attainment of that end. In order to succeed on this branch of their claim, they must shew that the damages which accrued after that time were due to the acts of defendants. But, in my view of the circumstances, they have failed in this respect.

The appeal and cross-appeal should be dismissed with costs.

OSLER, J.A.—I agree in affirming the judgment . . . for the reasons given by the Chancellor.

GARROW and MACLAREN, JJ.A., concurred.

MACLENNAN, J.A., dissented as to defendants' appeal holding (for reasons given in writing) that it should be allowed with costs because plaintiffs were not entitled to substantial damages.

MARCH 17TH, 1905.

C. A.

CANADIAN PACIFIC R. W. CO. v. RAT PORTAGE LUMBER CO.

Execution—Seizure of Manufactured Product of Timber—Permit to Execution Debtor to Cut and Remove from Crown Lands—Partnership—Purchasers — Claimants—Interpleader—Interest of Partner.

Appeal by defendants from judgment of FALCONBRIDGE, C.J., in favour of plaintiffs in interpleader issues arising out of the seizure by the sheriff of Rainy River of certain railway ties, boom timber, and logs, under a writ of execution in his hands upon a judgment recovered by the Rat Portage Lumber Co. against E. F. Kendall.

The writ was placed in the sheriff's hands on 15th October, 1902, and the seizure was made on 16th and 23rd June, 1903.

Claims were made on behalf of the Canadian Pacific R. W. Co., of a firm of Kendall & Robinson, composed of E. F. Kendall and Thomas Robinson, and of the Bank of Ottawa, and, upon interpleader proceedings instituted by the sheriff, issues were directed. The first related to the ownership of the ties, and, as settled, was to the effect that the railway company and Kendall & Robinson affirmed and the Rat Portage Lumber Co. denied that the ties in question were at the time of the seizure the property of the claimants, or of one of them, as against the contestants, and if the property of Kendall & Robinson subject to liens and assignments held by the Bank of Ottawa. The other issue related to the ownership of the boom timber and logs, and, as settled, was to the effect that Kendall & Robinson affirmed and the Rat Portage

Lumber Co. denied that the boom timber and logs in question were, at the time of the seizure, the property of the claimants, subject to the liens and assignments held by the Bank of Ottawa as against the contestants.

The interpleader order gave the claimants possession of the property seized, upon payment by the claimants to the sheriff of $1,500 to stand as security in lieu thereof.

The money was paid to the sheriff, and the property was restored to the claimants. The order directed the sheriff to pay the money, less his costs and expenses, into Court to abide further order.

FALCONBRIDGE, C. J., found the issues in favour of the respective claimants, the plaintiffs in the issues.

N. W. Rowell, K.C., for defendants, execution creditors.

W. M. Douglas, K.C., for plaintiffs.

The judgment of the Court (MOSS, C. J. O., OSLER, MACLENNAN, GARROW, MACLAREN, J.J.A.), was delivered by

MOSS, C.J.O.—. . . From the evidence it appeared that in 1902 the execution debtor, E. F. Kendall, was the holder of a permit, issued by the Crown timber agent at Rat Portage, entitling him to cut and remove from certain lands of the Crown a quantity of railway ties between 30th April, 1902, and 30th April, 1903. In the month of October he entered into a contract with the Canadian Pacific R. W. Co. to furnish them with 30,000 ties on certain terms as to delivery and payment. To enable him to carry out the contract, he applied to the Bank of Ottawa for advances, which the bank agreed to make, on receiving an assignment of the moneys payable under the contract, and other securities.

On 12th November, 1902, E. F. Kendall and Thomas Robinson entered into partnership in the business of tie manufacturers, to be carried on upon the lands comprised in the permit, and to include the carrying out of the contract with the Canadian Pacific R. W. Co. The agreement of partnership was at first oral, but, in December or January following, it was, at the instance of the Bank of Ottawa, reduced to writing and signed by the parties, and a certificate of the partnership was duly registered.

On 15th November the partners proceeded to the lands, and Robinson was left in control, in accordance with the partnership agreement. He established the camp and commenced to cut the ties, and got them out on the ice on an arm of the Lake of the Woods. In the spring they were boomed and finally towed to Norman's Bay, where they were seized by the sheriff. The boom timber and logs were cut by the partnership for the purposes of rafting the ties, and were properly taken for that purpose. The Bank of Ottawa made

advances from time to time to enable the work to be carried on. The bank were aware of the partnership agreement, and that the ties were being got out by Robinson under its terms.

It was conceded by Mr. Rowell that the writ of execution was not a lien or charge upon any of the timber embraced in the Crown timber permit until it had been severed from the soil. But he contended that the moment there was a severance the timber cut vested in E. F. Kendall, and eo instanti the execution attached, and this notwithstanding any agreements or dealings in respect of the timber, made before the severance.

While it is quite true that the nature of the property was such that it was unaffected by a writ of execution in the hands of the sheriff, it does not follow that the execution debtor could not enter into some dealings in regard to his interest. There appears to be no objection to his forming a partnership for the production of the ties with a person willing either to put in cash as capital or to provide the plant, supplies, and other materials and chattels necessary to enable the work of production to be proceeded with. It follows upon an agreement to that effect that the product would be the property of the partnership, and not that of the individual who holds the permit. Such an agreement is not in its nature either void or voidable as against creditors. The interest transferred by the debtor is not one exigible under a writ, and not affected by any lien or charge arising therefrom. There is nothing affecting the debtor's interest, and by no process could he be compelled to use it for the benefit of his creditors : Baby v. Ross, 14 P. R. 440, at p. 446. And if an agreement is not entered into with a colourable purpose or with an intent to defeat or defraud creditors, as by a mere pretended partnership, but is entered into with the bona fide intention of forming a partnership and carrying on a business, it is not open to attack at the instance of creditors.

In the present case it is clear that there was an actual agreement for a partnership, made in entire good faith, at the instance of Robinson, with a view to his own interests, and without knowledge of any reason preventing or interfering with Kendall's entering into partnership with him. And it is not capable of argument that the agreement did not contemplate the ties and the timber necessary to their production and transport becoming the property of the partnership. It was the very object and intention of the partnership that the product of the work for the carrying on of which the timber was essential should be the property of the partnership. And there is no reason why the product to which the partnership agreement related should not, as soon as it came into existence, vest in the partnership as its property: Holroyd v.

Marshall, 10 H. L. C. 191 ; Clarke Coombe v. Carter, 36 Ch. D. 348 ; Tailby v. Official Receiver, 13 App. Cas. 523.

There is no reason for saying that the claim of the execution creditors should take effect so as to deprive the partner Robinson of his rights, or prevent him from enforcing them in the name and on behalf of the partnership.

The findings of the Chief Justice are well supported by the evidence in respect of both issues. The property in the ties was shewn to be in Kendall & Robinson and the Canadian Pacific R. W. Co., as purchasers from them, and the property in the boom timber and logs to be in Kendall & Robinson, and these findings resolved the issues in favour of the claimants.

Defendants contended that, in any event, they were entitled to execution against the partnership interest of E. F. Kendall, and that the accounts between the Bank of Ottawa and the partnership shew that some of the money in Court belongs to Kendall, and they asked that it should be so determined or that the matter be put in some train of inquiry for ascertaining the interest of the parties. But the trial was and could be only on the issues directed ; and, even if an amendment had been asked for, which the record does not shew, none could have been made in a case of this kind. Defendants are, doubtless, entitled to execution of the partnership interest of their debtor, and, if the seizure had been made of that interest, with a view only to the sale of that interest, it is not likely that any adverse claim would have been made. But the claim made and maintained throughout was that the property was that of E. F. Kendall alone, and the determination of that issue was all that could be dealt with, and all that can be done here is to decide whether or not that determination was right.

A sale of Kendall's interest in the partnership would not pass the property to the purchaser, but would give him a right to an account of the partnership transactions with a view to ascertaining and realizing the interest of the execution debtor. But there are no means by which such a proceeding can be taken in this matter. The money in Court stands as security for the ties, boom timber, and logs seized by the sheriff. It is not possible to determine in this proceeding whether Kendall is entitled to any, and, if so, how much of it. The materials for such an inquiry are not before the Court.

Defendants' remedy, if any, must be sought in some proceeding in which all questions between the partnership and the execution debtor can be properly inquired into and adjusted.

The present appeal should be dismissed.