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DIVISIONAL COURT.

DECEMBER 24TH, 1912.

GAST v. MOORE.

4 O. W. N. 525.

Assessment and Taxes—Tax Sale—Action to Set Aside — Want of Notice—4 Edw. VII., ch. 23, sec. 165 (2)—Address of Non-resident — Knowledge of Treasurer — Consolidation of Municipalities.

Action by the former owner of certain lands sold for taxes against the purchaser at the tax sale for the right to redeem the lands so sold on payment of the charges paid by him, and for possession of the lands. The lands in question were situate in the town of Toronto Junction, later the city of West Toronto, which was finally annexed to the city of Toronto. Plaintiff bought the lands in 1892, and moved to New York city in 1894. He notified the town officials of his New York address, received assessment notices from 1894 up to 1911, and paid taxes up to 1905. He made default in 1906 and 1907, and the lands were sold for taxes in November, 1908, by virtue of 61 Vict., ch. 55, sec. 16, which allowed the lands of non-residents in Toronto Junction to be sold on twelve months' default. The sale was made by the city of West Toronto, and when it came necessary to give the notice required by 4 Edw. VII., ch. 23, sec. 165 (2), the duty fell upon the officials of the city of Toronto. The officials charged with that duty made enquiries of the former treasurer of West Toronto, was informed that two unofficial letters sent to plaintiff at his New York address by the treasurer, had been returned unopened, and thereupon sent the statutory notice to the address appearing in the registry office in the deed to plaintiff, which notice, of course, he never received.

RIDDELL, J., *held*, that as plaintiff's address was unknown to the city treasurer, the course taken was proper, and in accordance with the statutory requirements.

Action dismissed with costs.

DIVISIONAL COURT, *held*, that as plaintiff had notified the town officials of his non-resident address, that remained his address until new notice was given by him, and unless a notice, as provided by sec. 165 (2) of the Assessment Act, was sent to this address, the tax deed was invalid.

Appeal allowed and judgment given allowing plaintiff to redeem, both with costs.

[See *Beatty* v. *McConnell*, C. R., [1908] A. C. 166, and *Russell* v. *Toronto*, C. R., [1908] A. C. 455.—*Ed.*]

An appeal by the plaintiff from a judgment of HON. MR. JUSTICE RIDDELL, dated 21st October, 1912, dismissing an action to set aside a tax sale of certain lots by the city of Toronto, and for an injunction restraining the defendant from selling or otherwise disposing of said lots.

The appeal to Divisional Court was heard by HON. SIR JOHN BOYD, C., HON. MR. JUSTICE LATCHFORD and HON. MR. JUSTICE KELLY.

J. M. Ferguson, for the appellant.

A. J. Anderson, for the respondent.

HON. SIR JOHN BOYD, C.:—The scheme of the Municipal and Assessment Acts contemplates and provides for a continuity of official life in the finance department. This scheme provides for the raising of money for municipal purposes and is administered by various officers; treasurer, collector, assessor and the like; each has his own functions yet all are to work together for one and same end. Pains is taken in the Acts to provide for the proper discharge of the fundamental work of assessment and all of its incidents to make sure of the identification of the ratepayer by name and address. This is to safeguard him in regard to all notices and demands requiring personal service or in the case of a non-resident service by post and registered letter. As to non-residents they can notify the department of their post office address and this is to be the continuing place of address till a change is made by the person himself. The address so communicated to the department is applicable to and is meant to apply to all stages of the proceedings in the imposing and collection of taxes even till the ultimate act comes when the lands are being disposed of to pay the arrears. This preamble is applicable to the case in hand.

This land was sold for taxes under the special power given by the statute of 1898, 61 Vict. ch. 55, sec. 16, by which lands of non-residents in the town of Toronto Junction might be sold if the taxes were in arrear for twelve months; as against the three years' grace given by the general Assessment Act.

The plaintiff had bought the lands in 1892 and had paid taxes for 15 years but made default in 1906 and 1907 and the sale took place in November, 1908. He did not know

of the time being shortened by statute; as he had left Toronto for New York about 1894. Before leaving he notified the assessment department and the treasurer, of his New York address, "136 Liberty St.," and this was never changed by him, although he some time after had the address "80 John St., N.Y." The situation is correctly summed up by him in a letter addressed to the purchaser in March, 1910, when he found out that the land had been sold; he says: "I could hardly believe this as I had never been notified that this sale was going to take place, although my address had been with the tax collector all these years and he had always sent me assessment notices and the tax assessment."

He puts in as addressed to and received by him at 136 Liberty St., New York, assessment notices and demands for payment of taxes in a continuous series from 1906 to 1911, the last being in a registered letter postmarked in April, 1911. The only exception which appears in the evidence is two friendly letters sent by the treasurer after the sale and calling attention to it sometime in the year 1909 prior to the expiration of twelve months from the sale. These were addressed to Liberty St.; were, I suppose, not registered and both came back to the treasurer, Jackson. No copies were kept and no such letters were received by the plaintiff. But the others, all of official character and I suppose registered, were duly received by him up to 1911.

The land was originally situate in the town of Toronto Junction; in 1908 its location was changed to the city of West Toronto, and in 1909 that city was annexed to and became a part of the city of Toronto. Jackson was the last treasurer who conducted the sale and after the absorption he was placed in a prominent position in the office of the city treasurer. After the sale the tax deed had to be given by the city of Toronto, and this was the first and only time that the city officials had to do with that West Toronto tax sale. The officer charged with the collection of arrears, Mr. Fleming, says he consulted Mr. Jackson the (former) treasurer, "in all these matters." Mr. Jackson told of his experience with the two unofficial letters and as a result without further investigation so far as appears the all-important notice required by the statute of 1909, 4 Edw. VII. ch. 23, sec. 165 (2), was posted to the address derived from the Land Titles Office which was T. J. Gast, manufacturer, Toronto." This notice of course came back to

the treasurer and the last chance for redemption disappeared.

Jackson when asked as to the letters he sent being addressed to Liberty St., answered "The only address I ever knew," p. 39.

Such is the precise fact; that is the only address he knew and that was the address lodged with the department by the plaintiff as his address and that direction the plaintiff never revoked.

The learned Judge finally held that the address of the plaintiff was not known to the treasurer (for the time being). That conclusion on this evidence I am unable to follow. The statutory notice called for by sec. 165, which is an essential pre-requisite before the right of redemption can be extinguished by a tax deed, says it is to be sent to the owner's address "if known to the treasurer." What is the meaning of that? Not his personal knowledge as an individual but the knowledge which he has or is required to have as an official. Here the new treasurer knew nothing *per se* of the address of a West Toronto taxpayer, but he was required to possess himself of the knowledge held by the department which was taken over by the city. The evidence is simply overwhelming that to the municipality of Toronto Junction, later West Toronto and the treasurer, assessors and collectors and clerks of that place the address and the only address they would regard was that given by the plaintiff and known to them all and acted on by them all for nearly 20 years. None of the official notices in all these years had miscarried or been returned to the senders. Why was there a break as to this most important of all the statutory notices required? A lame excuse is given; granting the truth of all said by Jackson, at most it is that two private letters did not get to the address given by the plaintiff. That did not import a revocation; it may have given rise to a doubt as to whether the address was a right one and such a doubt may exculpate the officer or the treasurer from a charge of culpable mistake, but it does not exonerate either from fulfilling the statutory requirement. They knew the address given by the plaintiff and they should have acted as theretofore in sending the official notice to that and no other address. It would then have been received by the plaintiff and his land would have been redeemed. The mandate of the plaintiff was to send to that address—that was, as con-

templated by the statute—the then current address and whatever the doubt may have been as to its reaching him that did not justify the ignoring of it and making search after a formal address in the records of the land titles office which was applicable to the whereabouts of the plaintiff in 1892. Had they exercised any reflection it would have been obvious that such a manner of picking and choosing could only serve to frustrate the real intention of the law, namely, to bring the exigence of affairs home to the person most interested.

The judgment should be reversed; the plaintiff's right to recover the land established on payment of the proper statutory charges claimable by the purchaser and other taxes paid by him, which may be settled by the Registrar if the parties do not agree—and then be deducted from the costs of action and appeal to be paid by the defendant.

I agree with my brother Latchford and take advantage of the detailed account of the law which he has given and thereby avoid repetition.

HON. MR. JUSTICE LATCHFORD:—The plaintiff purchased the lands in question in 1892, when he resided in Toronto. They were unoccupied lands; and at the time were comprised within the limits of the town of Toronto Junction, which became in 1908, by 8 Edw. VII. ch. 118, the city of West Toronto. About 1894 Gast went to the city of New York where he has since resided. The assessor for both municipalities was aware that Gast was a "non-resident;" and had notice that his address was "136 Liberty St., New York."

Under the Assessment Act of 1892 (sec. 47), the assessor was obliged "before the completion of his roll to transmit by post to every non-resident who has required his name to be entered thereon a notice of the sum at which his property has been assessed." A similar provision is contained in sec. 51 of the revision of 1897. In the Assessment Act of 1904, 4 Edw. VII. ch. 23, the notice is required—sec. 46, sub-sec. 3—to be transmitted by post to the non-resident's address, "if known." Each of the acts of 1892 and 1897 provides that the owner of unoccupied land may give the clerk of the municipality notice of his address, and require his name to be entered on the assessment roll for the land of which he is the owner; 55 Vict. ch. 48, sec.

3; and R. S. O. ch. 224, sub-sec. 3. Sec. 46 of the consolidation of 1904 provides (sub-sec. 6) that in case any person furnishes the assessment commissioner, or if none the clerk, with a notice in writing giving the address to which the notice of assessment may be transmitted to him, requesting the same to be so transmitted to him by registered letter, the notice of assessment shall be so transmitted. Then the last cited enactment proceeds; "and any notice so given to the assessment commissioner or clerk as the case may be shall stand until revoked by writing." The provision in sec. 3 and sec. 46 of the earlier Acts is "It shall not be necessary to renew such notice from year to year but the notice shall stand until revoked or until the ownership of the property shall be changed."

It is in evidence and uncontradicted that the plaintiff notified the treasurer of the town of Toronto Junction that his address was 136 Liberty St., New York. Upon the collector's rolls of each of the three municipalities which had in succession the right to impose and collect taxes on the lands of the plaintiff that address appears unrevoked. To him at that address, as required, "if known," were sent the statutory notices of his assessment. To him at that address were also transmitted from time to time the "statement and demand of the taxes charged against him in the collector's roll," necessary to be "addressed in accordance with the notice given by such non-resident, if such notice has been given: sec. 101 of 4 Edw. VII. ch. 23. Here I venture to express the opinion that the plaintiff was not required by sec. 101 to file a new notice of his address. His address stood unrevoked upon the assessor's and collector's rolls and the statement and demand called for by the statute were required to be sent to him there. They were in fact so sent. The plaintiff produced at the trial statutory notices from the town of Toronto Junction for 1906 and 1907; from the city of West Toronto for 1908, and from the city of Toronto for 1909, 1910 and 1911, each and all addressed to him at the address standing unrevoked upon the assessment and collector's rolls of the several municipalities as the address and the only address of the plaintiff.

That he had in fact a different address in New York I regard as wholly immaterial. His address as formally made known to the municipality—as known and recognised

by them except in one instance—was 136 Liberty St., New York, and all the statutory notices there addressed to him were duly received by him.

The exception referred to was made when, a year after the sale for taxes, the defendant applied to the city of Toronto for a deed of the lands which he had purchased. It then became the duty of the treasurer, under sec. 165, before executing the deed, to search in the registry office and in the sheriff's office and ascertain whether or not there were mortgages or other incumbrances affecting the lands and who was the registered owner of the land.

The treasurer had the prescribed searches made. It appears there were no incumbrances. The plaintiff was registered as owner of the lands. Sub-sec. 2 of sec. 165 requires the treasurer to send to the registered owner by registered letter mailed to the address of such owner . . . if known to the treasurer, and if such address is not known to the treasurer, then to any address of such . . . owner appearing in the . . . deed, a notice stating that the . . . owner is at liberty within thirty days from the date of the notice to redeem the estate sold."

Mr. Fleming of the city treasurer's office, Toronto, has charge of the collection of all arrears of taxes. He made inquiry of James T. Jackson who had been treasurer of Toronto Junction and West Toronto regarding the plaintiff's address. Why he should have so inquired when the plaintiff's address appeared upon the assessment rolls of the city of Toronto at the time is not clear. Jackson told Fleming that he had written in the year following the sale two letters to the plaintiff at 136 Liberty St., New York, and that these letters were returned as undelivered. Jackson did not make copies of the letters, or a record of their dates, nor did he preserve them when returned. His evidence regarding them is accepted as true by the learned trial Judge. It is not pretended, however, that these letters were more than friendly intimations to the owner that his lands had been sold, nor is it suggested that they were sent in conformity to the requirements of sec. 165.

Fleming's evidence is, as to his interview with Jackson, brief and may be quoted in full.

"His Lordship: Who is Mr. Jackson? A. He was treasurer of West Toronto, and when we came to search through the lands in default the next year we consulted

him with reference to them to see if he could give us any information and he told me that the two years he had sent it to—

His Lordship: Subject to objection.

Witness: They had been returned from that address 136 Liberty St., New York, so all we could do was to send them according to what information was there.

His Lordship in his reasons for judgment summarizes the conversation. "Jackson told Fleming what was the truth, as I find, that he had sent on notices (the letters) himself to Mr. Gast at this address, 136 Liberty St., New York, and that they had been returned to the post-office not having been called for. That being so the address of the owner was not known to the treasurer."

With great respect, I am of a different opinion. It seems clear to me Fleming was informed that, (1) the owner's address was 136 Liberty St.; (2) two letters so addressed to him were received back by the sender.

Mr. Fleming had knowledge that certain letters addressed to the plaintiff at 136 Liberty St., New York, had not reached the plaintiff; but he also had knowledge that 136 Liberty St., New York, was the address of the plaintiff. With that knowledge in his mind, he chose not to transmit to the plaintiff at that address the notice required to be sent under sec. 165, and addressed it instead to Toronto—a course he could properly pursue only when the address was not known to him.

The whole salutary purposes of sec. 165—the last opportunity for redemption "betwixt the stirrup and the ground" *inter pontem et fontem* would, in my opinion, be rendered nugatory if municipal treasurers were permitted in cases like this to disregard the unrevoked address of a non-resident, owner of record under the statute upon the books of the municipality—merely because they have information that letters or notices so addressed have failed to reach their destination.

The notice addressed to the plaintiff at Toronto was not in my humble judgment a compliance with the requirements of sec. 165. The plaintiff should be allowed in to redeem on the usual terms.

I would allow his appeal with costs here and below.

HON. MR. JUSTICE KELLY:—I agree with the conclusions arrived at by my learned brothers. The failure of the city treasurer to recognise the New York address of the plaintiff, as it appeared in the books of the assessment office and in the books of the city of West Toronto, in use before its annexation to the city of Toronto, was fatal to the completion of a valid tax sale in the defendant.

The Assessment Act meets just such a case as this. The material parts of the Act as well as the facts of this case are sufficiently set forth in the reasons for judgment of my brother Latchford, and I need not repeat them.

The false step made in the treasurer's department was in ignoring the address of the plaintiff—136 Liberty St., Now York,—as it appeared in the books of the municipality, and in relying on information received from James T. Jackson that two letters written by him to plaintiff at that address had been returned to the writer undelivered to the plaintiff.

These letters were written within a year after the time the tax sale was held. At the time of the sale the lands were within the city of West Toronto, of which Jackson was the treasurer. He says that 136 Liberty St., New York, was the only address of plaintiff that he knew, and that he received no letter notifying him of any change of address.

Subsequent to the sending of the letters by Jackson, statutory notices of assessment and demands of taxes were sent by the city to this same address, of the plaintiff and none of them were returned. With this is to be considered the fact that the books of the city of West Toronto and of the city of Toronto contained this address of the plaintiff, which the city recognised and made use of in sending these notices and demands, and that no written notice of change of address had been given, as required by 4 Edw. VII. ch. 23, sec. 46, sub-sec. 6.

The treasurer attaching this importance to the return of the letters sent by Jackson and ignoring the address shewn in the books, assumed that plaintiff's address was unknown and proceeded to carry to completion the tax sale on that assumption.

The plaintiff had a right to expect that until he gave the notice changing his address in compliance with the requirements of the Act, the address appearing on the books

would be recognised, and that he would not be put in peril of losing his right to redeem his property until the thirty days' notice required by sub-sec. 2 of sec. 165 of the Assessment Act would be given to him at that address.

That the notice was not so given is, in my opinion, fatal.

The appeal should be allowed and the plaintiff be given the right to redeem the property in the manner and on the terms set out by the learned Chancellor.

Annotation by Editor.

See *Beatty* v. *McConnell*, C. R. [1908] A. C. 166, and *Russell* v. *Toronto*, C. R. [1908] A. C. 455.

HON. MR. JUSTICE CLUTE. DECEMBER 17TH, 1912.

McINTYRE v. STOCKDALE.

4 O. W. N. 482.

Vendor and Purchaser—Specific Performance—Part Performance—Resale of Lands—Damages—Right to—Judicature Act, sec. 41, 58 (10)—Remedies.

Action for specific performance of an agreement to sell a house and lot to plaintiff or for damages. There was no memorandum of agreement, but plaintiff paid $500 down, went into possession, and made monthly payments of $20 for 16 months. By reason of the carelessness of both parties, the deed and mortgage, though prepared, were never executed. Defendant had re-sold the property, disregarding plaintiff's claims.

CLUTE, J., *held*, that the fact that defendant had put it out of his power to give specific performance, did not deprive plaintiff of his right to damages.

Review of authorities and dictum of CHITTY, J., in *Lavery* v. *Pursell*, 39 Ch. D. 508, that where specific performance could not be given, damages could not be given since the Judicature Act, disapproved.

Judgment for plaintiff for return of moneys paid and $200 damages, with costs.

Either party to be at liberty to take a reference at their peril.

Action for specific performance of the sale of a house and lot in North Bay by the defendant to the plaintiff or for damages. Tried at North Bay, December 9th, 1912.

J. C. W. Bell, for the plaintiff.

R. McKay, K.C., and G. A. McGaughey, for the defendants.

HON. MR. JUSTICE CLUTE:—There was no memorandum in writing, but I found as a fact that plaintiff went in possession under the agreement, and is still in occupation of the house and premises.

The purchase price was $2,800, $500 was paid down and monthly payments were made for sixteen months, at the rate of $20 a month.

The deed and mortgage were prepared, but the plaintiff having attended several times and the solicitors not being in, he neglected afterwards to attend and sign the papers. They never were in fact executed. There was some question raised as to whether the title was in the defendant or not, but the evidence clearly disposed of this point, and I found as a fact at the close of the evidence, that the defendant before he resold the property, was in a position to convey to the plaintiff, and that he was the real owner at the time of the agreement for sale, although he had agreed to give a portion of the purchase money to his son as a gift, and the property stood in the son's name for a time.

The defence relied upon the case of *Lavery* v. *Pursell*, 39 Ch. D. 508, where it was held that the jurisdiction to give damages in substitution for or in addition to specific performance has not been extended to cases where specific performance could not possibly have been directed, and accordingly the contract having from lapse of time become at the hearing incapable of specific performance, the equitable doctrine of part performance did not enable the plaintiff to obtain relief in damages. The only point reserved at the trial was whether this case applied and would preclude the plaintiff from recovering damages from the defendant for re-sale of the property at an advanced price, subsequent to the sale to the plaintiff. Chitty, J., in giving judgment in the *Lavery Case*, puts the argument in this way: "Part performance was an equitable doctrine, and, putting it shortly, where there was performance under the contract it took the case out of the statute, but it was an equitable doctrine applied by the Courts of Equity, and it was applied in those cases where the Court would grant specific performance; for instance, the case of a sale of land. But if, before the Judicature Act, the Court dismissed the bill because it was not a case for specific performance, the Court of law when asked to give damages, the contract not being within the fourth section, had no alternative but to refuse, and to give judgment for the defendant in the action."

He then proceeds: "But since the various amendments which have taken place in the law with regard to equitable doctrines, it has never been decided, so far as I am aware, that the equitable doctrine of part performance can be made use of for the purpose of obtaining damages on a contract at law. I considered the question carefully in *Re Northumberland Avenue Hotel Company*, and that went to the Court of Appeal, 33 Ch. D. 16, 18; 2 T. L. R. 210. There it was impossible to give specific performance because the subject-matter of the contract had come to an end. The Metropolitan Board of Works had entered, and the claimant (it was in a winding-up) could not claim specific performance. It was in that case argued strenuously on behalf of the claimant, that he was still entitled to obtain damages, and I held that he was not, although there had been part performance by entry, and my decision was, as I understand, affirmed by the Court of Appeal. The result is that I adhere to that, and I point out that in this case, when the writ was issued, it was impossible to give specific performance. It was suggested that after Lord Cairns's Act, the Court of Equity could give damages in lieu of specific performance. Yes, but it must be in a case where specific performance could had been given. It was a substitute for specific performance."

A reference to the facts in the *Lavery Case* shews that at the time the action was tried, the time for specific performance had passed, and it was there held that as it would have been impossible to grant specific performance, the plaintiff could not recover damages in lieu thereof.

In *Re Northumberland Avenue Hotel Company*, referred to in the last citation the case was affirmed by the Court of Appeal, but not upon the ground that damages could not be given in lieu of specific performance. That question does not seem to have been referred to either in the argument or in any of the judgments in the Court of Appeal. It is true that Chitty, J., as a second ground in his judgment states, that if there had been an agreement on which specific performance could have been originally decreed on the ground of part performance, there would not be any jurisdiction to give damages after specific performance had become impossible, but this was not necessary for the decision of the case and is in no way confirmed by the Court of Appeal.

The argument upon which this view proceeds is, to my mind, wholly unsatisfactory, and at all events does not, I think, apply to the facts in the present case.

Here was a binding contract made so by admitting the purchaser into possession, where he resided for some sixteen months, and made payments upon the principal of the purchase money, and was so credited by the defendant in a book kept by himself. The transaction was repeatedly confirmed by these payments, and the defendant did not deny in the box that it was an absolute sale by him, and it was merely an accident that the plaintiff did not sign the documents which were prepared. He subsequently found an opportunity to re-sell the property at an advance and actually offered to the plaintiff $100 for his loss. I cannot understand upon what principle the man should be relieved from the effect of his contract, which is binding upon him, simply because by his own wrong he places himself in a position where he cannot carry it out. Since the Judicature Act, there was a binding contract in law as well as in equity. There is a breach of that contract by refusal to complete, and I am of opinion that the plaintiff is entitled to recover damages for the breach as well as a return of the purchase-money paid by him, with interest from the dates of payment.

The *Lavery Case* was decided apparently having exclusive reference to Lord Cairns' Act, which corresponds to our Judicature Act, sec. 58, sub-sec. 10, but the Judicature Act vested in the High Court all the jurisdiction which prior to the 22nd of August, 1881, was vested in the common law Courts and the Court of Chancery. While Mr. Justice Chitty in the *Lavery Case,* incidentally refers to the Judicature Act, he does not point out the effect of the added jurisdiction to the High Court to that possessed formerly by the Court of Chancery. The effect of this enlarged jurisdiction is clearly set forth in the case of *Elmore* v. *Pirrie,* 57 L. T. R. 333. It was there held that under the Judicature Act of 1873, the Court had complete jurisdiction, both in law and in equity, so that whether the Court could in a particular case, grant specific performance or not, it could give damages for breach of the agreement. This case does not appear to have been referred to in the *Lavery Case,* although decided the year before.

Kay, J., in the *Elmore Case* points out that Lord Cairn's Act, somewhat enlarged the jurisdiction of the Chancery

Court to grant specific performance or to give damages in lieu thereof to the extent pointed out by Lord Cairns himself in *Ferguson* v. *Wilson*, 15 L. T. R. (N.S.) 230; 2 Chy. App. 77, Lord Cairns there said, at p. 88: "There were many cases where a Court of Equity would decline to grant specific performance, and yet the plaintiff might be entitled to damages at law; and great complaints were constantly made by the public that when plaintiffs came into a Court of Equity for specific performance, the Court of Equity sent them to a Court of law in order to recover damages, so that parties were bandied about, as it was said, from one Court to the other. The object, therefore, of that Act of Parliament was to prevent parties being so sent from one Court to the other, and accordingly the Act provides that the Court may, either in addition to or in substitution for the relief which is prayed, grant that relief which would otherwise be proper to be granted by another Court. But that Act never was intended, as I conceive, to transfer the jurisdiction of a Court of law to a Court of Equity."

And again at p. 91:—

"'In all cases in which the Court of Chancery has jurisdiction to entertain an application for the specific performance of any covenant, contract, or agreement.' That, of course, means where there are, at least, at the time of bill filed, all those ingredients which would enable the Court, if it thought fit, to exercise its power and decree specific performance, among other things, where there is the subject-matter whereon the decree of the Court can Act." *Soames* v. *Edge*, John. 669.

Kay, J., after referring to the cases, points out that the Judicature Act of 1873, gave the Court a power which it did not possess before, "that is to say, it gave the Court complete jurisdiction both in law and equity; so that, whether the Court could in a particular case grant specific performance or not, it could give damages for breach of the agreement; *a fortiori*, if the contract was one as to which the Court had the right to exercise its jurisdiction to grant specific performance of it, the Court could grant damages for breach of it; so that the Court had now a much larger power than it had under Lord Cairns's Act, for under that Act the plaintiff had first to make out that he was entitled to an equitable remedy before he could get damages at all. Now, however, the plaintiff might come to the Court and say, "If

you think I am not entitled to specific performance of the whole or any part of the agreement, then give me damages.' That was the jurisdiction of the Court when the Judicature Act was passed."

This is in my opinion the true effect of the changes in the law. It is not by virtue of sec. 58, sub-sec. 10, of the Judicature Act that the jurisdiction covering the present case was determined, but sec. 41, which gives to the High Court the jurisdiction possessed by the former Court, both of law and of equity. This is the view I expressed at the close of the plaintiff's case, and it is confirmed by a further consideration of the effect of the changes of the law bearing upon the question. See also Fry on Specific Performance, 5th ed., Canadian Notes.

I think there is a distinction where the plaintiff by his own act disentitles himself to specific performance as in *Hargreaves* v. *Case,* 26 Chy. Div. 356, and where, as here, the defendant commits the wrongful act, which deprives the plaintiff of the rights arising under his contract.

The plaintiff is, therefore, entitled to a return of his purchase money and interest thereon from the date of payment, and also damages for the breach of contract.

As to the amount of damages, the evidence was not very clear or satisfactory; the plaintiff claiming too much and the defendant, I think, conceding too little. I assess the damages at $200, with a right to either party to take a reference, at his peril, as to costs to either increase or reduce this amount before the Master at North Bay. The plaintiff is entitled to full costs of action.

HON. MR. JUSTICE MIDDLETON. JANUARY 8TH. 1913.

TRIAL.

STRONG v. LONDON MACHINE TOOL COMPANY LIMITED.

4 O. W. N. 593

Principal and Agent—Commission—Concluded Agreement Repudiated by Purchaser—Alleged Misrepresentation—Agreement for Commission Based on Voided Agreement — Later Sale — "Introduction"—Necessity of—Quantum Meruit.

Action by an agent to recover commission upon the sale of the assets of defendant company to another corporation. Defendant company's officers were anxious to sell their concern and retained plaintiff to endeavour to negotiate a sale to the ultimate purchasers, a merger of a number of similar businesses in various parts of the country. It was understood that plaintiff should have a commission, but the amount was not definitely fixed. Plaintiff interested officials of the purchasers, with whom he was acquainted, and negotiations took place looking to the purchase. An agreement eminently satisfactory to defendants, based on a valuation of their assets, was proposed and a memorandum then drawn up between plaintiff and defendants' chief officer which provided for a liberal commission on this basis and a contingent interest of 20% in any price obtained above such figure. Finally an agreement was prepared and executed by both vendors and purchasers substantially along the lines proposed, and plaintiff went to England, believing the transaction consummated. Later, the purchasers repudiated the agreement, claiming that they had been deceived as to the assets, defendants were advised by counsel they could not enforce it, and, finally, owing to financial pressure, defendants were forced to sell out to the purchasers at a price greatly below that set out in the agreement executed. Plaintiff then claimed his full commission, on the ground that he was not responsible for the invalidity of the prior agreement, and defendants repudiated all liability on the ground that the conditions as set out in the memorandum between plaintiff and themselves, had not eventuated.

MIDDLETON, J., *held*, that the sale first proposed having fallen through, the agreement between the parties dependent thereon also came to an end, but that plaintiff, having set on foot the negotiations which led to the ultimate sale, was entitled to remuneration for his efforts as on a *quantum meruit*, which sum he fixed at $5,000.

"It is not necessary that an agent actually 'introduce' the parties, if he actually sets in motion the forces which later result in the sale."

Judgment for plaintiff for $5,000 and costs.

[See *Burchell* v. *Gowrie*, C. R., [1910] A. C. 250.—*Ed.*]

Action by an agent to recover commission upon the sale of the assets of the defendant company to the Canada Machinery Corporation. Tried at Toronto, January 3rd, 1913.

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

M. K. Cowan, K.C., and T. Hobson, for the defendants.

HON. MR. JUSTICE MIDDLETON:—The defendant company is largely a family concern, Mr. Yeates and his sons holding the bulk of the stock. Mr. Juhner, a salesman and director of the company, was the most prominent minority stockholder.

The Canada Machinery Corporation is a large concern, formed by the amalgamation of a number of kindred businesses carried on in different places throughout the country. It was called in the evidence "the merger." The moving spirit in bringing about this amalgamation was Mr. Grant.

Some time prior to the transactions, giving rise to this action, there had been conversations between Grant and one of the Yeates, looking to the ultimate absorption of the defendant company in the merger. Nothing definite had been done, and serious negotiations had not been undertaken. Mr. Grant had said that the corporation would take in the defendant company, if a low enough price were accepted; and Mr. Yeates had said that there could be no objection if the corporation would pay enough.

In the meantime the defendant company was not prospering. Its indebtedness was very large; the Dominion Bank alone being a creditor for considerably over a $100,000. No dividends were being paid, and some uneasiness was naturally being felt by the shareholders.

At this stage of the matter Mr. Juhner spoke to Mr. Strong, known to him as a broker engaged in negotiations of the class contemplated, and asked him to see if he could arrange a sale of the undertaking to the merger. Mr. Strong, who was personally acquainted with Mr. Grant, immediately went to him, and found that he was quite ready to take over the company if a suitable price could be arranged. Mr. Grant was then about leaving for England, and asked Mr. Strong to let him know what could be done before his departure. Strong at once saw Mr. E. G. Yeates, manager of the defendant company, and stated the proposition to him. Yeates naturally desired to know Strong's interest in the matter. Strong told him that he had no interest other than that of a broker or agent, and gave him to understand that he would expect remuneration from the vendors if the transaction was carried out. Mr. Yeates, who was given to understand that Mr. Grant would not purchase except upon terms of giving preferred stock of the merger to represent the

actual value of the assets of the company over and above its liabilities. It was thought by Yeates that a sale might be carried out upon these lines, and he immediately had a valuation made of the company's property.

Strong from time to time saw Yeates as to the progress of the valuation, endeavouring, as he says, to have everything in shape for Grant upon his return.

The figures shewn as the result of the valuation were satisfactory to Yeates and his fellow shareholders. They indicated that not only would the stockholders receive par for their stock, but a very substantial sum as representing what was called "the surplus."

During the course of these interviews, Strong's commission was from time to time discussed, and intention was expressed that if the transaction went through on the lines proposed a liberal commission would be paid to him. Strong says that this was figured out as being in the neighbourhood of $15,000.

Upon Grant's return the matter was taken up with him, and what was referred to as "a tentative agreement" was arrived at. By this agreement the company would receive $112,000 in preferred stock, as representing its then capital of $108,000, plus $4,000 which had been promised to some of the officers of the company. In addition to this it would also receive enough preferred stock to make up an amount of $175,000 or $180,000, and a further sum of $50,000 in the common stock.

At this juncture Strong thought that his position as to commission ought to be clearly defined; and as the result of an interview with Yeates a memorandum was drawn up, dated July 14th, 1911, as follows:—

"E. G. Yeates of the city of Hamilton in the county of Wentworth agrees with F. T. Strong to pay him the following commission: In the event of the London Machine Tool Company being merged with the Canada Machinery Corporation, and the London Machine Tool Company getting in preference shares the amount of their surplus and a bonus of $50,000 worth of common stock in which event F. T. Strong is to receive $10,000 worth of common stock as commission and also in the event of the London Machine Tool Company receiving preference shares in excess of $100,000 worth, twenty per cent. of such excess is to be delivered to F. T. Strong. This agreement is contingent upon E. G.

Yeates being able to retain the control of the London Machine Tool Company, and also contingent upon the deal going through."

As said in the memorandum, this agreement as to commission was contingent upon the deal going through; and it was made in view of the expected surplus above mentioned.

Thereafter, a formal agreement was drawn and executed between the company and the merger, dated July 29th, 1911. This agreement was upon the very lines of the tentative agreement, and was quite in accord with the expectation of the parties when the agreement of the 14th July was executed.

For some reason, not fully disclosed in the evidence, the merger refused to carry out the agreement of the 29th July. It was suggested that the valuation was not satisfactory, and that in fact the assets had been grossly over-valued. It was also said that the agreement had never been duly executed.

From whatever cause this refusal proceeded, the defendants were advised that they could not enforce it. After its execution and before its repudiation, Strong had gone to England, in the full belief that there was nothing to be done except to carry into effect the agreement executed. The company found itself in a very serious plight. The bank insisted on payment, and the other creditors were restless.

For some time the matter dragged along; and finally Mr. P. M. Yeates, owing to the illness of his brother, took the matter in hand, and sold out to the merger at the best price that could be obtained. Instead of there being a surplus over and above the $112,000 of stock, the company received only $55,000 in bonds and $40,000 in cash or its equivalent; $95,000 in all; and out of this had to pay some $18,000, as being the excess of actual liabilities over the scheduled liabilities. To do this, the company had to realize upon some of the bonds at a little over ninety cents on the dollar.

Strong now claims his commission; contending, in the first place, that he should receive what the agreement of the 14th of July called for, because it was the vendors' own fault if the agreement of the 29th July turned out to be unenforceable.

On the other hand, the defendants contend that Strong is entitled to nothing. They also rely upon the terms of the agreement in question, and say that inasmuch as it provides

for payment of commission out of the surplus—meaning thereby the surplus after the stockholders had received par—and there being no surplus, but a deficit, Strong gets nothing.

I do not think either of these positions sound. When Strong was employed—or rather, when the defendants accepted his services as intermediary in promoting the sale—I think he became entitled to receive a commission. No rate was stipulated at the time; but from what took place subsequently it is clear that he was ready to accept, and did accept, the position that his compensation should be—to some extent at any rate—dependent upon the result of his labours. When he thought a sale had been arranged, the memorandum of the 14th July was executed for the purpose of crystallizing the rights of the parties in the event of the sale being carried out. That sale falling through, this dependent agreement also came to an end.

It is true that Strong thereafter did nothing towards the making of the agreement which was subsequently carried out; nevertheless, I think he is entitled to something, because he set on foot the negotiations which ultimately resulted in the transaction actually carried out. He was not instrumental in the making of that particular bargain; but he was employed as agent in promoting a sale to this particular purchaser; and a sale resulted.

The defendants contend that the plaintiff is not entitled to recover upon this basis, because he did not actually introduce the contracting parties; relying for this on the use of the word "introduction" in some of the reported cases. I think this is too narrow a view. He did that for which he was employed; he induced the merger to enter upon serious negotiations for sale.

I have difficulty in determining the amount that should be recovered. When the parties thought that a very satisfactory sale had been arranged and that the plaintiff was entitled to very liberal remuneration, he was content to take $15,000. Now that a sale on a very much lower basis has been made, he must be content with much less. Some regard also must be paid to the fact that without any fault of his own, Strong was not here to take part in the final negotiations. Bearing everything in mind, I think the sum of $5,000 would be fair.

There will be judgment for the plaintiff for $5,000 and costs.

Owing to the way in which the pleadings are drawn, an amendment may be necessary. The plaintiff has leave to amend as he may be advised.

DIVISIONAL COURT.

DECEMBER 21ST, 1912.

RUFF v. McFEE.

4 O. W. N. 501.

Landlord and Tenant — Rescission of Lease — Misrepresentation — Building Permit—Infringement of By-law—Promise to Secure Invalid—Change in Status Quo — Right to Rescission Lost — Counterclaim—Costs.

Action for rescission of a lease and damages on account of defendant's wilful misrepresentation. Plaintiff was desirous of establishing a creamery in Sarnia, and defendant, the owner of an old frame building, approached him as to renting his building. The parties inspected the place with a contractor, and plaintiff came to the conclusion that the building would be suitable if extensive repairs were made. Plaintiff asked if a permit for such repairs could be obtained and defendant said he could obtain one for plaintiff. Plaintiff went into possession, commenced such alterations, was notified by the town authorities that such repairs were not permitted by the town by-laws, but continued until restrained by an injunction obtained by the town. He then brought this action, and defendant counterclaimed for material taken from the premises.

McWATT, Co.C.J., gave judgment for plaintiff for rescission, with costs.

DIVISIONAL COURT, *held*, that defendant's promise to secure a permit was void, as a promise to do an illegal thing, and that plaintiff, having altered the *status quo*, after learning of his rights, was not entitled to rescission.

Review of authorities.

Appeal allowed and action dismissed without costs. Counterclaim struck out without prejudice to defendant's rights to bring a fresh action in respect thereof.

Appeal by defendant from Judge of County Court of the county of Lambton in favour of plaintiff in an action brought to set aside a lease, and for damages for wilful misrepresentation by the defendant.

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

R. I. Towers, for the defendant.

Frank McCarthy, for the plaintiff.

HON. MR. JUSTICE BRITTON:—The plaintiff, in my opinion, is not entitled to recover in this action. So far as the facts are set out in the statement of claim these were as well known to the plaintiff as to the defendant and there is nothing that would give the plaintiff the right of action

by reason of fraud. The plaintiff entered into possession of the premises and made such alterations in them as he thought would suit his purpose; he is not now in a position to give up these premises in the same condition as when the plaintiff received them, or in a condition, without the expenditure of money, to be available for the defendant; the plaintiff therefore is not entitled to a rescission of the lease as to the alleged permit from the town. No doubt both parties acted in good faith but the plaintiff knew as much about the by-law and terms under which a permit would be granted, as did the defendant or, if the plaintiff did not know, he ought to have known as he had equal means of knowing as the defendant. The defendant did nothing to prejudice the plaintiff. The plaintiff's other alleged cause of action is upon a collateral agreement. Apart from the legal difficulty in the plaintiff's way, the agreement sought to be set up was too vague and indefinite to found an action upon. The appeal should be allowed. In the unfortunate situation which has arisen, the best disposition which can be made of the case, is to strike out the counterclaim without costs and, without prejudice to any action the defendant may take to enforce such counterclaim or any claim he may have against the plaintiff by reason of the lease, and to allow the appeal without costs and dismiss the action without costs.

HON. MR. JUSTICE RIDDELL:—The plaintiff resides in Port Huron, Michigan, and is in the creamery business—desiring to establish a plant in Sarnia, he came over in April, 1911, to secure a suitable building. Failing in this, he was seen in May by the defendant in Port Huron and asked to go over to Sarnia again to look at some places there which the defendant had. He went over twice, the second time with one Schultz, apparently a builder or architect. The defendant shewed them at length a building which was almost a total wreck but which it was proposed should be fixed up for a creamery. The repairs in contemplation were to be framed and the amount was estimated by Schultz in the presence of both plaintiff and defendant at from $500 to $600, considerably more than one-third of the value of the building. Both plaintiff and defendant knew that a permit was necessary: the plaintiff asked the defendant "How about the permit?" And the defendant

said he would see that the plaintiff got it. The defendant also said that it was a very easy matter to get a permit, he knew the officer and he knew there would be no trouble in getting a permit. Although the plaintiff was at the trial not allowed to answer categorically whether he would have taken the lease without the permit—the defendant's counsel objecting—all the circumstances shew that he was relying on the defendant's promise to see that he got a permit and believed that the defendant would have no trouble in getting one. He relied upon this representation, I think. It turned out that it was against the by-law to give a permit for this work—a less amount of frame repair might have been allowed but not enough for the purposes of a creamery.

The plaintiff went into possession and pulled the building to pieces: then finding that his efforts to get a permit a failure abandoned the premises and brought this action claiming (1) rescission (2) damages for breach of agreement and general relief—the defendant counterclaims for piping, etc., taken from the premises by the plaintiff and also for rent.

The case came on for trial before Judge McWatt of the County Court of the county of Lambton: and judgment was given for rescission with costs.

The defendant now appeals.

I think that rescission cannot be awarded: the plaintiff says that after he had applied to the engineer and been refused a permit, he had Mr. Grace, his contractor, go on and "tear away the rubbish," that this went on until the town stopped the work by an injunction. It is plain that after he found that it was no easy matter to get a permit, he went on and altered the condition of the premises.

The only thing which the plaintiff can rely upon is the express promise of the defendant to get a permit for him. (The promise made after the lease was signed is wholly without consideration.)

The promise to get a permit is a promise to do something forbidden by law—illegal. It is clear that a promise to do an illegal act may be repudiated with or without alleging a reason and the repudiation may be justified on the ground of illegality. *Cowan* v. *Milbourn*, L. R. 2 Ex. 230; Leake on Contracts, 5th ed., pp. 550, 551. No action lies for damages for breach of such a contract.

The plaintiff has himself to blame for his position—had he at once abandoned the property when he found that he had been misled, though there is no evidence that the defendant did not honestly believe all he said, that would not help him against the plaintiff. *Adam* v. *Newbigging* (1888), 13 A. C. 308. But knowing he had been misled he saw fit to keep possession of the premises and materially alter them. Such conduct, it is elementary law to say, destroyed all right of rescission.

There is no total failure of consideration to justify a refusal to enforce the defendant's counterclaim—but there is no evidence upon which we can dispose of it.

The appeal should be allowed but without costs and the action dismissed without costs—the counterclaim should be struck out—but leave given to the defendant to sue substantively for this if so advised.

HON. SIR GLENHOLME FALCONBRIDGE, C.J.K.B.:—I agree in the result.

HON. MR. JUSTICE SUTHERLAND. DECEMBER 4TH, 1912.

CHAMBERS.

RE BARLEY, DECEASED, AND FAWCETT, A LUNATIC.

4 O. W. N. 426.

Lunatic—Maintenance—Moneys in Court—Insufficiency of Material.

SUTHERLAND, J., refused to permit certain moneys in Court to be paid out for the maintenance of a lunatic upon the application of the Inspector of Prisons and Public Charities, on the ground that the material was defective.

Motion by Inspector of Prisons and Public Charities for an order for payment out of Court of certain moneys for maintenance.

G. M. Willoughby, for the Inspector of Prisons and Public Charities.

HON. MR. JUSTICE SUTHERLAND:—It is not made to appear upon the material that the amount in Court is or is not the original sum mentioned in paragraph 6 of the affidavit of the applicant, the Inspector of Prisons and Public Charities

with accumulated interest. If it is, then, I think, no order can be made in view of the terms of the trust referred to in said paragraph. If a consent were obtained from those entitled on the death of the lunatic probably an order would be made. If the fund in Court is in part other moneys to which the lunatic is entitled to that extent an order might now be made on that fact being shewn by further material.

DIVISIONAL COURT.

DECEMBER 14TH, 1912.

RE WEST NISSOURI CONTINUATION SCHOOL.

4 O. W. N. 497.

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

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

MIDDLETON, J., *held* (22 O. W. R. 842; 3 O. W. N. 1623), that the trustees in question were not *bona fide* exercising their judgment as to the ways and means of establishment of the school, but were endeavouring to prevent such establishment.

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

DIVISIONAL COURT dismissed appeal from above judgment, with costs.

Appeal from the judgment of MR. JUSTICE MIDDLETON, 22 O. W. R. 842.

The appeal to Divisional Court was heard by HON. MR. JUSTICE RIDDELL, HON. MR. JUSTICE LATCHFORD, and HON. MR. JUSTICE SUTHERLAND.

G. S. Gibbons, for trustees (appellants).

E. C. Cattanach and W. R. Meredith, for the applicants (respondents).

HON. MR. JUSTICE RIDDELL:—Upon consideration of the whole case and after a most careful and exhaustive argument, we are all of opinion that the appeal cannot succeed.

The appeal will, therefore, be dismissed with costs.

DIVISIONAL COURT.

NOVEMBER 25TH, 1912.

RICE v. SOCKETT.

4 O. W. N. 397.

Evidence—Witnesses—Expert Evidence—9 Ed. VII. c. 43, s. 10—No Application under—Objections—Meaning of Expert—Opinion Evidence—New Trial Ordered.

DIVISIONAL COURT *held* that where a County Court Judge had allowed six witnesses at a trial to give opinion evidence in spite of objections that proper application for additional experts had not been made pursuant to 9 Ed. VII. c. 43, s. 10, the provisions of the Statute had been violated and there should be a new trial.

Authorities reviewed as to meaning of term expert."

An appeal from the County Court of the county of Wellington. Plaintiff sued for $180 as balance of the contract price for the building of a silo on defendant's farm. Defendant denied the allegations in the statement of claim and set up by way of counterclaim that the plaintiff did not build or complete the silo in accordance with the terms of plaintiff's contract with defendant, and that in consequence thereof he suffered loss and damage.

The case was tried before the learned County Judge without a jury. He gave judgment dismissing the plaintiff's action with costs and adjudging that defendant should recover against plaintiff on his counterclaim $130 and costs.

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

R. L. McKinnon, for the plaintiff.

C. L. Dunbar, for the defendant.

HON. SIR GLENHOLME FALCONBRIDGE, C.J.K.B.:—From this judgment the plaintiff appeals on several grounds, only one of which, in my opinion, it is necessary to consider, viz., the refusal of the learned Judge to observe the provisions of 9 Edw. VII. ch. 43, sec. 10, which is as follows:—

"10. Where it is intended by any party to examine as witnesses persons entitled according to the law or practice to give opinion evidence not more than three of such wit-

nesses may be called upon either side without the leave of the Judge or other person presiding, to be applied for before the examination of any of such witnesses."

The first witness of this class called was A. W. Connor, who is by profession a consulting engineer, and who is admitted by defendant's counsel to be an expert. The second witness was Charles Butler whose business is that of cement construction. The third witness who is alleged by plaintiff to be of this character is Herbert Croft, whose business is concrete work in which he has been engaged about nine years. The fourth witness is Charles Strange who stated that his business was general concrete construction. At this stage the plaintiff's counsel pointed out that Mr. Dunbar, defendant's counsel, was limited to three expert witnesses. His Honour overruled the objection, saying simply, "we will take the evidence," and it was taken accordingly. The next witness called was George Day, and the same objection was raised by plaintiff's counsel. This witness is admitted by defendant's counsel to be an expert. The next witness, William Elliott, is a farmer and cattle-dealer who has a silo and professes to know what the object of a silo is, and what people should strive to obtain in order to get a perfect silo, and he passes an opinion upon this particular one.

If these six witnesses are all experts, three witnesses of that class more than the law allows have been examined. Mr. Dunbar contends that the only experts are Connor and Day, arguing, that the statute applies only to one possessed of science and skill—that is, a man of science having a school of science degree or other special technical education on the subject.

I do not find that this is a correct proposition. No authorities on this branch of the case were cited by either counsel.

It is to be observed that while the section in question is headed "expert evidence," and while the side-note says, "limit of number of expert witnesses in action," yet the word "expert" is not used in the section itself: the phrase being "persons entitled according to the law and practice to give opinion evidence."

The term "expert," from *experti*, says Bouvier, "signifies instructed by experience."

"The expert witness is one possessed of special knowledge or skill in respect of a subject upon which he is called to testify." "Words and Phrases Judicially Defined, Vol. 3, p. 2594."

Dr. John D. Lawson, in "The Law of Expert and Opinion Evidence," 2nd ed., at p. 74, lays down as Rule 22, "Mechanics, artisans and workmen are experts as to matters of technical skill in their trades, and their opinions in such cases are admissible;" citing numerous authorities and illustrations.

"The derivation of the term 'expert' implies that he is one who by experience has acquired special or peculiar knowledge of the subject of which he undertakes to testify, and it does not matter whether such knowledge has been acquired by study of scientific works or by practical observation; and one who is an old hunter, and has thus had much experience in the use of firearms, may be as well qualified to testify as to the appearance which a gun recently fired would present as a highly educated and skilled gunsmith." *State* v. *Davis*, 33 S. E. 449, 55 S. C. 339, cited in "Words and Phrases Judicially Defined, Vol. 3, p. 2595."

In *Potter* v. *Campbell*, 16 U. C. R. 109, the Court of Queen's Bench held that a person not being a licensed surveyor is a competent witness on a question of boundary.

It is quite manifest, therefore, that these six witnesses were persons "entitled according to the law or practice to give opinion evidence."

Defendant's counsel, however, contends that even admitting that the statute has been disregarded there has been no miscarriage of justice. There would of course be no question about the matter if the case had been tried with a jury, but as it is I find myself unable to accede to this view. It would be impossible to determine the exact effect which the evidence of the three witnesses whose evidence was improperly admitted had on the mind of the Judge. Day, the fifth witness of this class was admittedly an expert, and a very forcible witness; and the learned Judge seems, on both branches of the case, to have attached great importance to the evidence of Elliott, the last witness who was called.

But, leaving out these considerations altogether, the mere refusal of the learned Judge to obey the plain provisions of the statute in my opinion constitutes a mistrial,

and defendant's counsel, (while it appears to have been unnecessary for him actively to oppose the objections), accepted and profited by the rulings of the learned Judge, and therefore there must be a new trial, with costs of the last trial and of this appeal to be paid by the defendant.

HON. MR. JUSTICE BRITTON and HON. MR. JUSTICE SUTHERLAND agreed.

HON. MR. JUSTICE MIDDLETON. DECEMBER 14TH, 1912.

TRIAL.

MUSSELLWHITE v. LUCAS.

4 O. W. N. 495.

Vendor and Purchaser—Specific Performance—Conveyance to Wife—Collusion.

MIDDLETON, J., gave judgment for plaintiff in an action for specific performance, and for rescission of a conveyance by defendant to his wife, upon the ground that the wife's claim to the property was clearly made in collusion with her husband.

Costs of plaintiff to be deducted from purchase money.

Action by the purchaser for specific performance and to set aside a conveyance made by the defendant Frederick E. Lucas to his wife Esther Lucas.

R. B. Henderson, for the plaintiff.

A. K. Goodman, for the defendant.

HON. MR. JUSTICE MIDDLETON:—After considering the matter carefully, I remain of the opinion formed at the trial, that there is no defence whatever to this action. The defence pleaded was based upon suspicion, which turns out to be totally unfounded.

There is no ground for supposing that the agent, Rowell, was in any way concerned in the purchase of the property; nor was any fraud or deception practised upon the defendants.

Lucas purchased the land some time ago. Neither he nor his wife had any money other than their earnings. What the land cost, or how much was paid upon it, was not dis-

closed at the hearing. An agreement was made by the husband to purchase upon small monthly payments. Both husband and wife were working, and the instalments were met: the wife says by her money, because she desires to attribute the expenditure for the living of both entirely to the husband's earnings. The title was conveyed to the husband; and the proper inference from the evidence is that whatever earnings the wife had were put into the common fund and were her contribution to the home intended for both.

Upon the land in question is erected a small building, described in the evidence as "a tar-paper shack," admittedly of very little value. The husband and wife, who came here from England some seven years ago, made up their minds to return if the property could be sold. The husband placed the property in the hands of Mr. Rowell—a local real estate agent—for sale, fixing the price at eleven hundred dollars. Lucas wanted all cash and desired a speedy sale. The agent told him that he probably would not secure the sum asked upon the terms suggested. The plaintiff happened at that time to be in the agent's office, making enquiry as to lands. The agent immediately suggested to him to look at this land. Together they went to the property, and Mussellwhite decided to offer a thousand dollars for it. The plaintiff was seen, and agreed to accept this sum. An offer was drawn up and executed; and on the following day or the evening of the same day the offer was accepted.

The plaintiff instructed his solicitor to carry out the transaction. The solicitor thought that the agreement was not in all respects satisfactory, as the land was not adequately described; and he prepared a new agreement, removing what he thought to be defects but not substantially changing the contract. The plaintiff took this to the agent, and went to the house of Mr. Lucas to ask him to call and execute it. Mr. Lucas was not then in, but his wife sent for him, and he went to the agent's office and signed the document.

The wife says that at this interview she told the plaintiff that she owned the property and would not sell. I cannot accept this statement. I think that she possibly made some remark indicating that she thought the price was not adequate, and that she now seeks to convert this into the much wider allegation made at the trial.

The husband and wife were on the best of terms, and his conduct speaks louder than words. He went to the agent's office without protest, signed without any objection, and received the cheque for the cash deposit.

The plaintiff did not have the whole amount of the purchase money, and arranged with the agent to procure a loan of five hundred dollars upon the property. This led Lucas to suspect that the agent had some personal interest in the purchase; and I think this was the cause of his attempt to repudiate; for on the 4th Lucas consulted a solicitor, returned the cheque, and, for the purpose of placing what he regarded as an insuperable difficulty in the plaintiff's way, he then conveyed the property to his wife.

Shortly after the agreement already referred to, a somewhat ambitious development scheme was placed on foot; the land across the road being included in what is now called Cedar Vale. It is not shewn that the agent or the plaintiff knew of this scheme at the time of the purchase. This proposition has probably somewhat inflated the value of the land in question; but there is nothing to indicate that the sale at the time it was made was for an under-value.

I can see no ground for refusing the relief sought. The plaintiff must be allowed to deduct his costs from the purchase money.

If there is any difficulty as to a conveyance, the purchase price, less the costs, may be paid into Court, and a vesting order issued.

I assume that a reference as to title is not desired.

The interest upon the purchase money may be set off against any occupation rent, and the judgment may contain a direction that the defendants do deliver possession to the plaintiff.

HON. MR. JUSTICE KELLY. DECEMBER 11TH, 1912.

DOMINION BANK v. SALMON.

4 O. W. N. 460.

Interpleader—Seizure Under Execution—Alleged Sale to Brother—Bills of Sale and Chattel Mortgage Act no Change of Possession—Colourable Transaction.

KELLY, J., in an interpleader issue between one Salmon and the Dominion Bank, who had seized certain lumber belonging to Salmon's brother under an execution, allowed the claimant $246.02, the cost of a car of lumber proven to have been purchased by him, and dismissed the remainder of his claims which was on an alleged sale not complying with the Bills of Sale Act, and as to which there had not been actual and continued change of possession.

Interpleader issue to determine whether certain lumber which was seized under an execution in an action of the Dominion Bank against A. M. Salmon, was at the time of the seizure the property of the claimant Edson Salmon, carrying on business under the name of the Salmon Lumber Company.

For some time prior to February 24th, 1911, A. M. Salmon, a brother of Edson Salmon, was in business at New Liskeard, and at times elsewhere, as a lumber dealer and saw-mill operator.

He had become considerably indebted to the Dominion Bank and other creditors. In the early part of 1910, the bank was pressing for payment, and in May of that year, having obtained judgment, it issued execution, but no seizure was then made. Other judgments were obtained against A. M. Salmon, and in addition thereto notes were due by him which he was unable to pay. In November, 1910, the sheriff proceeded to seize under the execution held by the bank, and delay was obtained by defendant paying $150 on account and making promise of further payments, which, however, were not made. It was not shewn that any of the numerous liabilities of A. M. Salmon were paid prior to April 11th, 1911. On that day a seizure was made under the execution held by the Dominion Bank; the chattels seized, the proceeds of which are now in dispute, being lumber in and around the mill and yard where A. M. Salmon had carried on his business at New Liskeard.

The Salmon Lumber Company and J. H. Campbell and S. Salmon having claimed the chattels so seized, an inter-

pleader order was issued, on May 12th, 1911, in pursuance of which the lumber in question was sold and an issue was directed between the claimants, as plaintiffs, and the Dominion Bank as defendants, to determine the question of ownership. In pursuance of this order, the lumber was sold by the sheriff, and the proceeds less the expenses of the seizure and sale were paid into Court. So far as these moneys are concerned, J. H. Campbell and S. Salmon have abandoned their claim, and the issue is now between the Salmon Lumber Company and the bank.

G. A. McGaughey and T. E. McKee, for the claimants.

C. L. Dunbar, for the bank.

HON. MR. JUSTICE KELLY.—The claimant rests its right to ownership on the ground that, on February 24th, 1911, it purchased from A. M. Salmon the lumber and saw-mill business theretofore carried on by him, including all lumber on the mill premises at New Liskeard. Claimant also contends that in the interval between February 24th, 1911, and the seizure, on April 11th, 1911, it bought from one Neely and took into the business two carloads of lumber, for one of which Edson Salmon says he paid $246.02, and for the other $288. There is no evidence that any other lumber was brought in in that interval.

The alleged sale made by A. M. Salmon to the claimant, on February 24th, 1911, did not comply with the requirements of the Bills of Sale and Chattel Mortgage Act, (1910) 10 Edw. VII. ch. 65. Edson Salmon says there was a written agreement for sale, but it was not registered, and it was not produced at the trial. It is admitted that no bill of sale or written instrument, other than the agreement mentioned, was made or registered. There is, however, evidence of payments being made by the claimant to A. M. Salmon on account of the purchase money and of notes having been given for part payment.

I find that A. M. Salmon continued to conduct the business, from the 24th February, until the seizure, just as he had conducted it before the alleged sale. This is borne out by the evidence both of the vendor (the debtor) and the purchaser (the claimant), though the vendor says he was during that interval in receipt of wages from his brother. There was not the actual and continued change of posses-

sion which is required by the Act, and I have no difficulty in finding that the sale said to have been made by A. M. Salmon was null and void as against his creditors.

Then as to the lumber which was said to have been purchased by the claimant from Neely, after February 24th, 1911, it was argued for the bank that the sale by A. M. Salmon to the claimant was not only void as against creditors, but that it was not *bona fide*, that it was colourable, that in fact what purported to have been sold was not sold but remained the property of the vendor, A. M. Salmon, that the business continued to be his, and that any purchases of lumber made prior to the seizure were made for him.

The evidence does not sufficiently support the proposition that the lumber purchased from Neely was, or became, the property of A. M. Salmon. I find that there was only one car-load purchased from Neely, namely, that for which $246.02 was paid. Though Edson Salmon swears he bought and received two carloads, I do not accept his testimony as to this. He was an unsatisfactory witness and his evidence at the trial is not to be relied upon, and only where he is corroborated to my satisfaction do I accept his testimony. His statement that he purchased two carloads is not corroborated. He, however, produced cheques and a draft shewing payment of $246.02 to Neely for one carload, but there is no corroboration such as cheques, drafts, receipts, invoices, etc., indicating a purchase of a second carload; and moreover A. M. Salmon, who was working in and around the lumber yard and mill, says he knew his brother bought one carload from Neely, but does not go further than that.

The carload which was purchased, I find was purchased by the claimant for himself and not for A. M. Salmon.

There is evidence that, in addition to the lumber in the mill and lumber yard which was seized, there was other lumber on the right of way of the Temiskaming & Northern Ontario Rw. Co.; the latter was not seized, but it was intimated during the hearing that some of the lumber purchased from Neely may have been on the railway right of way. There is no affirmative evidence that this was the case, however.

Outside of the evidence of payment of $246.02 by the claimant to Neely for the purchase of the carload, I have

not been assisted by other evidence in finding what was the value of that lumber, and I therefore allow the claimant what he paid for it, namely $246.02, with interest from April 11th, 1911, the date of the sheriff's seizure. As to the rest of the claim the claimant fails. Success being divided, there will be no costs.

MASTER IN CHAMBERS. DECEMBER 16TH, 1912.

SALTER v. McCAFFREY.

4 O. W. N. 478.

Lis Pendens—Motion to Vacate—Abuse of Process of Court—Interference with Winding-up of Estate—Endorsement on Writ—Precision—No Appeal from Order.

Motion to set aside a *lis pendens* as an abuse of the process of the Court and on the ground that its issuance embarrassed the winding-up of an estate, the lands covered by the *lis pendens* being almost the sole asset of the estate. The action was brought for a declaration that plaintiff was a joint owner of the lands in question.

MASTER-IN-CHAMBERS refused to vacate the *lis pendens* but ordered the trial expedited.

Brock v. *Crawford*, 11 O. W. R. 143, and *Sheppard* v. *Kennedy*, 10 P. R. at p. 245, followed.

[See *Jenkins* v. *McWhinney*, 23 O. W. R. 29—Ed.]

Motion by defendant to vacate a certificate of *lis pendens* in an action brought by the administratrix of Mrs. McCaffrey against the administrator of Mr. McCaffrey, both of whom were drowned on September 28th, 1912, unseen by any human eye, "for a declaration that the plaintiff is entitled to share as an heir at law of the late Wm. McCaffrey, deceased, and for a declaration that the said plaintiff is joint owner of the land hereinafter described," (setting it out by metes and bounds), "and for a *lis pendens*. The motion was made on the ground that the filing of the said *lis pendens* was an abuse of the process of the Court and embarrassed the winding-up of the estate, as its chief asset was the house in question which must be sold in order to pay off liabilities as well as for distribution.

N. F. Davidson, K.C., for the motion.

G. B. Balfour, contra.

The whole doctrine of *lis pendens* was examined and explained in *Brock* v. *Crawford*, 11 O. W. R. 143. There at p. 147, it is said: "To remove (the certificate) the defendant

must, I think shew clearly that there is and can be no valid claim in respect of the land and that the proceedings—not alone the registration of the certificate—are an abuse of the process of the Court. That can only be done by proving that under no possible circumstances can the facts as set out in the pleading give any right to the plaintiff in respect of the land in question.

No statement of claim has as yet been delivered though an appearance to the writ was entered the same day it was served, 25th November. There can therefore be nothing to consider here except the endorsement on the writ. In a similar case it was said in *Sheppard* v. *Kennedy*, 10 P. R. at p. 245, "that where a plaintiff seeks to register a *lis pendens* he should be more precise than in ordinary cases and by his endorsement he should define generally the grounds of his claiming an interest in the lands." Here it is not made clear whether the first clause of the endorsement is a personal claim by Mrs. Salter or whether it is made by her as administratrix.

Probably the latter is intended and the plaintiff is only to be taken as speaking in behalf of the deceased whom she represents. There were affidavits filed in support of the motion and these were answered by two affidavits of the plaintiff herself and a lady friend of Mrs. McCaffrey.

On cross-examination they receded very materially from the statements in their affidavits—so much so that if no stronger evidence could be had the plaintiff could not hope to succeed. But of course the action cannot be tried in that way or at this stage. Counsel on the argument stated that he was prepared to rely on the endorsement of the writ as being sufficient within the decision above cited in *Sheppard* v. *Kennedy*. He relies especially on what was said in that case at p. 244: "It may well be that nothing more happened than is detailed in their affidavits, but no suitor is obliged to submit to a preliminary trial of his case on affidavit."

While I feel very strongly the unfortunate and perhaps disastrous consequences to the estate that may ensue if this certificate is allowed to stand, yet I cannot say that I am warranted by the two authorities above cited in ordering it to be discharged, unless on such terms, if any, as plaintiff is willing to accept.

Failing this, however, the trial should be expedited in every way. For that purpose the statement of claim should be delivered this week and reply if any or joinder of issue should be delivered in two days after statement of defence is delivered. The case should be set down forthwith as soon as it is at issue—so as to be heard if possible in the first or second week of the January sittings. This is to be done notwithstanding C. R. 552.

The costs of this motion will be in the cause.

I regret that my decision is not subject to appeal. See *Hodge* v. *Hallamore*, 18 P. R. 447. While this consideration has made me consider the application very carefully, yet I am not thereby absolved from doing what seems to be a duty by refusing to decide the question raised, to adopt the language of the judgment in *Brock* v. *Crawford, supra*, at p. 148.

HON. MR. JUSTICE KELLY. DECEMBER 11TH, 1912.

TRIAL.

CLEMENT v. McFARLAND.

4 O. W. N. 448

Vendor and Purchaser—Specific Performance—Statute of Frauds—Leave to Amend at Trial—Evidence—Terms of Payment—Complete Agreement not Proven.

Action for specific performance of an alleged agreement to sell a certain house and lot in Hamilton for $1,600. At the trial defendant was permitted to amend his defence by setting up the Statute of Frauds. Plaintiff proved that defendant had offered to sell the property in question for $1,600 and his acceptance of the offer but failed to prove that there had ever been an agreement as to the terms of payment.

KELLY, J, dismissed action with costs.

Reynolds v. *Foster*, 21 O. W. R. 838; 3 O. W. N. 983, referred to.

Action for specific performance of an alleged agreement to sell a certain house and lot in Hamilton for $1,600.

J. L. Counsell, for the plaintiff.

W. A. Logie, for the defendant.

HON. MR. JUSTICE KELLY:—At the opening of the trial a motion was made by defendant's counsel for leave to amend the statement of defence by pleading the Statute of Frauds, and I allowed its amendment.

Plaintiff was for some years prior to the alleged sale the tenant of the defendant of the lands in question.

On April 5th, 1912, defendant wrote plaintiff as follows:

"I do not like to trouble you, but I think I will have to put up a house beside you. I have been trying to get one in the west for a friend of mine but property up here is almost out of reach."

Plaintiff then approached defendant about buying the property, following which defendant wrote the following to the plaintiff:—

"Hamilton, April 8th, 1912.

"Dear Sir:

"If the house and lot is worth $1,600 to you, you can have it: if not, it is all right.

"Yours truly,

"James McFarland,

"158 Canada Street."

On the face of this letter it was not addressed to any one, but it was sent to plaintiff by post in an envelope addressed to him at 33 Chestnut street. This latter document is the memorandum of agreement now relied upon by the plaintiff.

According to the plaintiff's own evidence he then wrote defendant that he thought it would do, but he would let defendant know on the following Saturday night. This letter is not produced. On the Saturday night, defendant went to plaintiff's house, when a discussion took place about the terms of payment. Plaintiff says that he informed defendant he would pay all cash, that is, that he would pay $150 at that time and that he expected some more money soon, and that defendant expressed himself as satisfied with the proposal, that he was satisfied if he got 6 per cent.

Plaintiff's wife, who was present, says $150 was mentioned.

Defendant, on the other hand, says that plaintiff proposed to pay $150 down and $50 every six months, and that if he made default in the payments he would surrender the property, but that he (defendant) expressed dissatisfaction at this proposal and said he would see his solicitor. He did see his solicitor, Mr. Chisholm, but denies having given him any instructions. Following this, defendant by letter requested plaintiff to go to Chisholm's office, which he did, and there further discussion took place between Chisholm and

plaintiff regarding the terms of payment; particularly as to what amount plaintiff would be able to pay annually on account of principal; plaintiff saying, in answer to the solicitor's inquiry if he could pay $100, that he would not like to state, but would undertake to pay at least $50 per year. The solicitor was not satisfied with this, and plaintiff says he proposed giving an undertaking to stand any loss that might be occasioned by default in keeping up the payments. Plaintiff appears to have gotten the impression that this was satisfactory to the solicitor, and that the solicitor had authority to complete the agreement on defendant's behalf. I cannot find that there was any such authority.

I do find, however, that on the Saturday night mentioned the plaintiff and defendant agreed upon $1,600 as the purchase price, but that the terms of payment were not then agreed upon, and that down to the time that plaintiff and the solicitor met in the latter's office, these terms were still open.

On the evidence, and especially in view of defendant's denial of instructions to the solicitor, I do not find that there was any agreement on the part of the defendant as to the terms of payment.

The manner and time of payment were a material part of the agreement, which, in order to satisfy the requirements of the Statute of Frauds, should have been set out with such particularity and certainty as would enable the Court to ascertain and define first, whether or not payment was to be in cash, and secondly, if not in cash, on what dates and in what amounts the payments would be made.

What happened in this case falls short of supplying these terms.

As was said Mr. Justice Teetzel, in *Reynolds* v. *Foster*, 21 O. W. R. 838, 3 O. W. N. 983, at pp. 985-986, while the Court will carry into effect a contract framed in general terms where the law will supply details, it is also well settled that if any detail is to be supplied in modes which cannot be adopted by the Court there is then no concluded contract capable of being enforced.

Here it was necessary for the parties to have gone a step further than they did and definitely to have agreed upon the terms of payment; that not having been done, the plaintiff cannot succeed.

The negotiations were carried on somewhat loosely, and to hold that an enforceable contract was made would mean going further than the facts warrant.

The action will therefore be dismissed with costs.

I have come to this conclusion somewhat reluctantly, for, though in my opinion, the defendant did not render himself legally liable to the plaintiff, the evidence indicates that at the very time he led plaintiff to believe he would be given the opportunity of purchasing, he was negotiating with other parties, with whom he did eventually enter into an agreement for the sale of this same property.

HON. MR. JUSTICE LATCHFORD. DECEMBER 13TH, 1912.

RE MITCHELL.

4 O. W. N. 465.

Will—Construction—Gift to Legatee—Words Imposing Absolute Gift—Whole Clause to be Given Effect to—Reconciliation of Varying Directions—Assignment by Legatee—Executor's Duty.

LATCHFORD, J. *held* that the following clause in a will "I give and bequeath to my daughter L. C. M. H. ....., the sum of five thousand dollars for her own separate use but free from the control of her husband and without right to her to anticipate the same in his favor, such sum to be invested by my executor and trustee and the interest thereon only paid to my said daughter each six months but with power to my said executor and trustee in case my said daughter shall need and be in want, or in case of sickness and distress to pay her out of the capital sum such sum or sums from time to time as my said executor ..... shall consider right for her under the circumstances . . . The said principal sum or such part as shall not have been paid to my said daughter shall, upon her death be paid to her children then living, share and share alike and in case she should die without children living at her death the said sum, or such part thereof as shall be left as above provided, I bequeath to my sisters Estelle and Bonnie" . . . . . did not confer upon her an absolute interest in the sum bequeathed, but only a life interest in the income except under the exceptional circumstances detailed in the clause in question.

Motion by the executors to determine questions arising between them and Mr. C. W. Mitchell, the husband of the testatrix, claiming as assignee of his daughter, Mrs. Hawkens, to be entitled to five thousand dollars bequeathed to Mrs. Hawkens under the will of her mother.

A. E. Lussier, for the executors the Royal Trust Company.

W. C. McCarthy, for C. W. Mitchell.

Travers Lewis, for the Official Guardian.

HON. MR. JUSTICE LATCHFORD:—The application I considered too wide to be disposed of summarily, and it was accordingly restricted to the contruction of the will of the deceased, so far as the will affects the rights of Mrs. Hawkens and her children.

Mrs. Mitchell, who died on the 17th of January, 1912, left an estate of $112,000. After leaving to her children certain specific bequests and legacies—only one of which it is necessary to consider—she bequeathed the residue of her property to her husband. He, after her death, procured an assignment from the legatees of all their interest under the will, and claims that under this assignment he is entitled to $5,000 bequeathed to Mr. Hawkens in the terms following:—

"I give and bequeath to my daughter Louise Caroline Mitchell Hawkens, wife of George J. Hawkens, of Ottawa, insurance agent, the sum of five thousand dollars for her own separate use but free from the control of her husband, and without right to her to anticipate the same in his favour, such sum to be invested by my executor and trustee and the interest thereon only paid to my said daughter each six months, but with power to my said executor and trustee in case my said daughter shall need and be in want, or in case of sickness and distress to pay her out of the capital sum such sum or sums from time to time as my said executor in the discretion of their manager at Ottawa for the time being shall consider right for her under the circumstances to satisfy her said need or want or expenses in case of sickness and distress for herself and children and family. The said principal sum or such part as shall not have been paid to my said daughter as above provided shall upon her death be paid to her children then living share and share alike and in case she should die without children living at her death, the said sum or such part thereof as shall be left as above provided, I bequeath to her sisters Estelle and Bonnie or the survivor of them, share and share alike."

Mrs. Hawkens had two children living at her mother's death; and these children are still living. Both are infants, and are represented by the Official Guardian, who also represents under an order of the Court any now unborn children of Mrs. Hawkens who may be living at the time of her death.

Effect cannot be given to the claim of Mr. Mitchell if any interest in the five thousand dollars is given by the will to the children of Mrs. Hawkens who may survive her. Quite clearly, such an interest is, I think, conferred. Upon principles not open to question, the whole clause must be considered—not the words which standing alone would constitute an absolute gift—and effect must be given, if possible, to all its provisions. The general words bequeathing to Mrs. Hawkens the five thousand dollars cannot alone be regarded. They are expressly connected with the subsequent directions as to investment and the payment of interest only to the legatee during her lifetime, except in circumstances of need, illness, or distress.

The further direction as to what is to become of the residue of the fund upon the death of Mrs. Hawkens again establishes that the intention of the testatrix was that her daughter should have only the interest of the fund, in all but exceptional circumstances, and that what remained, should inure upon her daughter's death to the children of her daughter then living.

There is in addition the further gift over in case Mrs. Hawkens should leave no children surviving her at her death.

It is impossible to disregard, as I am asked to do, all the limitations which are placed upon the gift, in clear and unambiguous words, and to hold that Mrs. Hawkens took the five thousand dollars absolutely. This is not a case of inconsistent words engrafted upon a clear and express bequest. There is no inconsistency or repugnancy between the general words bequeathing the five thousand dollars and the specific directions which are given for the investment of it, and for the disposal of the remainder of the fund after the death of Mrs. Hawkens. Nor is it a case where mere directions as to enjoyment are attached to an absolute gift. It is simply a case where general words are clearly governed by restrictions unequivocally expressing the intention of the testatrix to limit the bequests in a particular and proper manner.

Mrs. Mitchell in the clause under construction plainly stated her intention that Mrs. Hawkens should enjoy for life the interest only of the five thousand dollars, with a right to part of the fund itself in certain circumstances, and then only to the extent the manager of the Royal Trust

Company might in his discretion deem proper. Upon the death of Mrs. Hawkens her children, if any survive her, take the fund or so much of it as may remain in the hands of the executor. Should Mrs. Hawkens leave no issue, the fund will pass to her sisters Estelle and Bonnie. There will be judgment accordingly.

It may be added—though the point may not properly be one for determination here—that as a consequence of the interpretation I have given, the assignment from Mrs. Hawkens to her father cannot affect the rights of her children, and the executors cannot safely transfer to him the fund which he has claimed.

Costs of all parties out of the estate of the deceased.

HON. MR. JUSTICE RIDDELL. DECEMBER 17TH, 1912.

UNITED NICKEL CO. v. DOMINION NICKEL CO.

4 O. W. N. 480.

Injunction—Motion to Continue—Mining Claim—Working of—License—Assignability—Exclusiveness—Resolution of Company—Effect of—Balance of Convenience—Proving of Property.

Motion to continue injunction herein restraining defendants from entering upon or working a certain mining claim on the ground that plaintiffs were the assignees of the exclusive licensees from the owners. Defendants had been granted a subsequent license from the owners who claimed the prior license had been forfeited.

RIDDELL, J. *held* on the balance of convenience the injunction should be dissolved as the work might establish the value but not the want of value of the claim and in any event there was serious doubt as to the validity of plaintiffs' title from a legal point of view.

Costs to defendants in cause.

Motion by plaintiffs to continue an injunction granted on November 22nd, 1912, by the District Court Judge at Sudbury, restraining defendants from drilling and working a certain mining location on the ground that plaintiffs had an exclusive license to work the same.

J. T. White, for the motion.

R. McKay, K.C., contra.

On January 28th, 1911, B. H. Coffin and his associates entered into an agreement with S. G. Wightman whereby they granted him, "the right of entry upon the property

. . . owned by them and known as the Mount Nickel Mine . . . for the purpose of operating the same in such manner and by such methods together with the right to mine and use ore therefrom and in such quantities as the party of the second part may elect." The final clause read thus: "The party of the second part as a part of his duties herein, in order to hold the parties of the first part agrees to have the . . . Nickel Alloys Company legally bind itself to the parties of the first part to have all the duties of the second part herein fully performed."

The party of the second part sold all his interest in this agreement to the plaintiffs February 14th, 1912: about the same time it is sworn "the Nickel Alloys Company by resolution of its executive committee, fully and duly authorised and empowered thereto by its by-laws ratified and approved the aforesaid agreement." Before this and January 27th, 1912, the parties of the first part wrote Wightman notifying him that the requirements of the agreement to have the Nickel Alloys Company bind itself had not been complied with and declaring the agreement null and void. A conference took place which does not seem to have resulted in anything; and again in May, 1912, Coffin and his associates repudiated the agreement.

The Nickel Alloys Company has not bound itself to the syndicate or even communicated with it. Coffin and his associates entered into a contract with the defendants under which they are entitled to enter upon the property, etc. The defendants have sent men with a diamond drill upon the claim: and these have made all arrangements to drill and intend to do so.

HON. MR. JUSTICE RIDDELL.—The points relied upon in answer to the motion are three in number: (1) The agreement is not an exclusive license; (2) it is not assignable but personal; (3) the grantee, Wightman, has not performed the contract in its last clause.

In view of the long line of cases beginning with *Lord Mountjoy's Case*, Anderson 307, through *Duke of Sutherland* v. *Heathcote*, [1891] 3 Ch. 504, [1892] 1 Ch. 475, and culminating in *McLeod* v. *Lawson*, 8 O. W. R. 213, it is in my view impossible to say that the right of the plaintiffs is so clear that the Court should interfere before trial.

Passing over the second, it is clear that a resolution of the Nickel Alloys Company is not a binding of that company to the grantors. At all events if it be so, the plaintiffs must establish their right at a trial, and shew they do not come within the rule laid down in *Re Northumberland Avenue Hotel Co.*, 33 Ch. D. 16, and other cases in Lindley on Companies, 6th ed., p. 232. I think it more for the advantage of the plaintiffs that I do not absolutely decide against them here and now.

But in any event, I do not think on a balance of convenience the order should stand. The only damage which it is claimed might ensue to the plaintiffs is that of the value or want of value of the claim. To one who is desirous of selling a pig in a poke, it may no doubt be a damage for anyone to cut a slit in the bag and shew that the supposed pig is really a dog—but it is common knowledge that a diamond drill does not establish the fact that a claim is worthless—while it may establish that a claim is valuable. I pointed this out and the reasons in *Sharper* v. *White*, vol. 189 Court of Appeal cases, pp. 269, 270 (the word "leaked" on line 41 should be "leached.") An angler may fail to catch trout at one place in a pond without proving that there are none in the pond, while, of course, if he can catch fish anywhere it is certain that fish there are or have been to be caught. It would be, in my view, unjust to prevent the plaintiffs finding out if they have anything, or even realising on their venture in the facts of this case.

The injunction will be dissolved, costs here and below to the defendants only in the cause.

MASTER IN CHAMBERS. DECEMBER 11TH, 1912.

RE SOLICITOR.

4 O. W. N. 461.

Costs—Præcipe Order for Taxation—Irregularity of—Order Acted on by Applicants—Application too late—Con. Rules 1187, 1311.

MASTER-IN-CHAMBERS refused to set aside an irregular præcipe order for taxation on the ground that it had been acted upon by the applicants and objections brought in and filed thereunder.

Motion on behalf of clients, the town of Ridgetown, to set aside a *præcipe* order referring a solicitor's bill for taxation to one of the Taxing Officers at Toronto.

The solicitor and counsel employed by the town in an arbitration respecting a certain electric lighting plant, rendered his bill for services, and when same was not paid on 18th November, took out a *præcipe* order from the central office, referring the bill to one of the Taxing Officers at Toronto.

This order was taken before Mr. McNamara, who on 21st November, gave an appointment for the 22nd, and directed any objections to the bill to be delivered on or before the 21st. This time was by consent of the solicitor enlarged until 25th, on which day objections to 30 items of the bill were filed. The taxation had been adjourned to the 27th on the consent above mentioned. After one, if not more, further enlargements, and no taxation having been had, on 6th December a motion was made on behalf of the clients to set aside the order of 18th November and all proceedings thereunder, and was argued on 9th inst. "The ground taken in support of the motion was that under Consolidated Rule 1187, the taxation should be before the proper Taxing Officer for the county of Kent, being the county in which the solicitor resides.

F. Aylesworth, for the clients.

S. S. Mills, for the solicitor.

CARTWRIGHT, K.C., MASTER:—It may be admitted that *præcipe* order in this case was irregular, and if this motion had been made before anything had been done under it by the clients, it would have been set aside with costs.

But the case as it now stands is very different. The order though irregular, was not a nullity, and when that order was obeyed without any objection, and an enlargement asked for and granted and objections to the bill were brought in and an enlargement obtained for the taxation to proceed, it is altogether too late to raise any question of irregularity. Such an objection can only be successfully taken if "made within a reasonable time and shall not be allowed if the party applying has taken a fresh step after knowledge of the irregularity," C. R. 311.

Justice will be done in this case by dismissing the motion without costs.

MASTER IN CHAMBERS. DECEMBER 17TH, 1912.

CURRY v. WETTLAUFER MINING CO.

4 O. W. N. 500.

Discovery—Further Examination—Better Affidavit on Production—Trespass to Mining Lands—Production of Daily Records Ordered.

Motion by plaintiff for further examination of defendant company and for further production in an action for illegal use of plaintiff's mining claim, which defendants denied.

MASTER-IN-CHAMBERS ordered defendants' engineer to attend again and produce the daily reports of work done. Motion for further production to stand in meantime.

Costs of motion in cause.

Motion by plaintiff for further examination of engineer of defendant company and for further affidavit on production.

Britton Osler, for the motion.

W. M. Douglas, K.C., contra.

The plaintiff owns nine-tenths of mining claim H. R. 105, and the defendant company owns the undivided tenth, which it acquired on or about 1st January, 1912. It also owns claim H. R. 85, which diagonally adjoins claim H. R. 105. And it is alleged in the statement of claim that by reason of a right of entry on the Silver Eagle Mining Co., lying between the southerly boundary of H. R. 85 and the easterly boundary of H. R. 105, the defendant company wrongfully entered on and worked claim H. R. 105 before it had acquired the undivided one-tenth therein. The 4th paragraph of the statement of defence says that prior to the acquisition of that tenth, the defendant company did not enter upon the plaintiffs' property and did not work the same or remove any ore therefrom. The engineer has been examined twice—and the depositions are very bulky. This arises not wholly from the number of questions, though that ran to 415, but is largely due to the lengthy and frequent discussions between the counsel on the question of relevancy of the questions asked, and as to the right to have certain documentary evidence produced. The chief point for consideration is as to certain time sheets or reports which plaintiffs' counsel says will shew if the allegation in paragraph 4 of the statement of defence is correct or not. Counsel for the defendant company did not either refuse to produce, or agree to do so, with-

out qualification. He was willing to let them be seen, but not to produce them as being relevant. This may have been done to avoid being obliged to file a further affidavit in discovery. He is willing to produce the engineer for further examination, if such is ordered, without further payment.

As at present advised, I think, the engineer should attend again and produce the time sheets or daily reports of work done—mentioned in question 684 *et seq.*

The matter can rest there for the present, and the question of a further affidavit on production can be left for further consideration in the light of what may then be disclosed, if plaintiff is still dissatisfied. The motion was heard on 22nd November, at which time I suggested that some arrangement might profitably be made. I was informed a day or two later by the defendants' office, that such a settlement was being considered and that the motion could stand in the meantime. I heard nothing more until yesterday, when plaintiff's counsel informed me that nothing had been done, and asked for judgment. The delay is attributable to this fact.

The costs of this motion will be in the cause.

HON. MR. JUSTICE SUTHERLAND. DECEMBER 14TH, 1912.

COMMISSIONERS OF THE TRANSCONTINENTAL RW. v. GRAND TRUNK PACIFIC RW. CO. AND COMMISSIONERS OF THE TEMISKAMING AND NORTHERN ONTARIO RW.

4 O. W. N. 495.

Injunction—Motion to Continue—Non-Removal of Machinery—Terms of Contract—Plaintiffs Establishing Prima Facie Right—Order Made.

SUTHERLAND, J. continued to the trial an injunction restraining defendants the Grand Trunk Pacific Rw. Co. removing certain engines, etc., from certain works, holding that as the contract between the parties apparently provided specifically for their non-removal, plaintiffs should not be left solely to their rights in damages.

Motion dismissed as against other defendants with costs.

Motion for an order that an injunction granted by a local Judge of the High Court of Justice at Ottawa, dated 5th November, 1912, and restraining the defendants, their servants, workmen or agents from removing the machinery

and other plant, material, and things used by the defendants, the railway company, in the construction of a section of the Transcontinental Railway be continued until the trial of the action.

A. E. Knox, for the plaintiff.

F. McCarthy, for the defendants.

Hon. Mr. Justice Sutherland:—Under clause 19 of the written contract between the defendant railway company and the plaintiffs, it is provided that "all machinery and other plant, material and things whatsoever provided by the contractor" (the defendant railway company) "for the works hereby contracted for, not rejected under the provisions of the last preceding clause, shall from the time of their being so provided become, and until the final completion of the said work, shall be the property of the commissioners for the purpose of the said works, and the same shall on no account be taken away," etc.

The engines and other plant and material in question are, I think, material under that clause, and any attempt on the part of the defendant railway company to remove them is a breach of that clause of the contract. The railway company says that in previous years it has been permitted, without objection by the plaintiffs, to remove engines during the winter, as it is proposing to do now.

In the present instance the plaintiffs are objecting and standing upon the contract.

The local Judge, who made the order, was, I think, quite right in not permitting one of two contracting parties to depart from a definite clause of an agreement at its own pleasure, and force the other contracting party to obtain his relief, if any, by way of damages. I think the injunction should be continued to the trial.

There does not appear to have been any good reason for making the Commissioners of the Temiskaming and Northern Ontario Railway Company defendants, so far as the material discloses. As against them the motion will be dismissed with costs. As against the defendant railway company the order will go continuing the injunction to the trial and reserving costs of the application to be disposed of by the trial Judge.

DIVISIONAL COURT.

DECEMBER 14TH, 1912.

FORAN v. MARTEL.

4 O. W. N. 496.

Vendor and Purchaser—Specific Performance—Authority of Solicitor—Agency.

DIVISIONAL COURT dismissed with costs an action of specific performance of an agreement to sell certain lands where the acts of defendant's solicitor on which plaintiff relied were shewn to be beyond his authority.

Judgment of Sutherland, J. at trial affirmed with costs.

Appeal by plaintiff from the judgment of MR. JUSTICE SUTHERLAND, at the trial, dismissing an action for specific performance of a contract to purchase certain lands.

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

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

W. L. Scott, for the defendant.

HON. MR. JUSTICE RIDDELL:—A careful perusal of the evidence fails entirely to shew any ratification by the defendant of the action of the solicitor; that he had any antecedent or implied authority is not apparent. The defendant would no doubt have ratified what was done for her had she not received a better offer; but so far as I can see she did not so ratify. It is simply a case of solicitor and plaintiff taking a chance, and the chance turning out against them, the plaintiff is helpless.

The law of agency is very strict and often creates much hardship, but it is well settled and well understood.

I think the appeal must be dismissed, and with costs. We should not interfere with the disposition of costs in the Court below.

HON. SIR GLENHOLME FALCONBRIDGE, C.J.K.B.:—I concur.

HON. MR. JUSTICE BRITTON:—I agree in the result.

HON. MR. JUSTICE CLUTE. DECEMBER 3RD, 1912.

WOOD v. HAMILTON.

4 O. W. N. 427.

Negligence—Occupant of Stall in Market—Damages for Ill-Health—Damp and Unsanitary Conditions—Notice of—Plaintiff Licensee not Lessee—Duty to—Acquiescence by Plaintiff in Conditions—Expected Relief.

Action by plaintiff, a huckster, occupying a market stall by the leave and license of defendants, a municipal corporation, for damages for ill-health and sickness caused by the alleged negligence of defendants in not keeping the stall occupied by her in proper repair. The evidence shewed that water leaked into the stall rendering it damp and unsanitary, and that defendants permitted these conditions to continue after due notification of their existence. Plaintiff occupied the stall in question for certain hours three days a week and paid $1.50 per week therefor, under a by-law of defendants, providing that the market clerk could allot stalls to applicants for periods not longer than one week. Defendants contended that even if plaintiff's claims were correct, she was not entitled to recover.

CLUTE, J., found in favour of plaintiff on all the facts, and held that plaintiff was not a lessee but a mere licensee of defendants, that there was no contractual relationship established between them, and that therefore plaintiff had a legal right to recover, as defendants had neglected to perform the plain duty they owed her to keep the stall in a proper state of repair.

Brown v. *Trustees of Toronto General Hospital*, 23 O. R. 599, distinguished.

Marshall v. *Industrial Exhibition*, 1 O. L. R. 319; 2 O. L. R. 62, followed.

Review of authorities.

Judgment for plaintiff for $550 and costs.

Action by plaintiff, an occupier of a market stall of defendants, for injury to health, caused by defendants' negligence in not keeping the stall in a proper condition of repair. Tried at Hamilton on the 19th November, 1912.

W. M. MacClemont, for the plaintiff.

F. R. Waddell, K.C., for the defendants.

HON. MR. JUSTICE CLUTE:—The plaintiff for some 12 or 14 years carried on the business of a huckster in the market at Hamilton. During about half that period she occupied a covered place or stand outside the market buildings. About seven years ago a number of stalls were made for those carrying the like business, but there was not a sufficient number of stalls to supply each huckster with one. However, at the request of the plaintiff she was allotted a stall next

adjoining the one she now occupies, and which she occupied at the time of the grievances complained of.

The first stall which she occupied was dry and as far as she knew sanitary. In 1910, she moved into the stall now occupied by her, and for about a year there was nothing noticeable in the way of wanted repair. In the fall of 1911, the stall became unsanitary, the roof leaked, the water ran in and upon the floor, and kept the place in such a condition that it was continually unhealthy and objectionable on account of its being wet and damp. I find that she gave notice verbally to the chairman of the market committee, and to Mr. Hill, who was overseer of the market under the chairman. Some repairs were made during the fall, but they did not remove the defects as when it rained the waters still continued to come in. She again notified the chairman of the market committee in the spring, and also Mr. Hill, but nothing was done for sometime. The plaintiff says that finally and about the end of March, and sometime after she had notified the parties, she was taken ill, and she attributes her illness to the unsanitary condition of the stall.

At the close of the evidence I reserved my decision in order to consider the authorities. I found the facts as follows: That the premises in the fall of 1911, did become unfit and unsanitary for the use for which they were given to the plaintiff; I find that she notified the parties of the condition of the stall, and that the repairs were not effective in remedying the condition of the premises; I find that notice was given after that, and that the repairs were not immediately done, or until after the plaintiff became ill, and from her own evidence, and that of the medical witness called, I think the strong probability is that her illness was caused by reason of the unsanitary condition of the stall which she occupied. I further find that irrespective of the notice given by the plaintiff, the defendants reserved to themselves the duty of keeping the premises in repair, and that they appointed a person for that purpose (Mr. Hill), and that it was part of his duty to inspect and see that the premises were kept in repair, and that in this regard he neglected his duty, and that the premises were not kept in repair, from which neglect the plaintiff suffered the injuries complained of.

Under these facts and circumstances the defendants contend under the authority of *Brown* v. *Trustees of Toronto General Hospital*, 23 O. R. 599, that they are not liable. If the plaintiff was a lessee of the stall and the liability, if

any, arose from that contractual relationship, the authority relied upon seems to be conclusive against the plaintiff's right to recover. But it was strongly urged by plaintiff's counsel that the plaintiff was a mere licensee. She occupied the stall at certain hours of three days in the week under a by-law. The by-law in substance provides: that the market clerk shall, under the control and supervision of the property committee, have superintendence of the market grounds and market buildings and all other buildings, stands, etc. Section 24: huckster, dealers, etc., and all persons frequenting the market, and not being lessees of the market's stalls or sheds, shall have places assigned to them by the market clerk, subject to the control and direction of the property committee, and to the general regulations contained in this by-law. Sub-section 2: the stands for hucksters shall be located and numbered by the market clerk and be under his control and supervision, and shall be assigned by him to the several applicants according to his discretion, but not such stand shall be assigned to any person for a longer period than one week. These are the provisions applicable to the plaintiff.

Flynn v. *Toronto Industrial Exhibition*, 9 O. L. R. 582, is, I think, applicable to the present case. Osler, J.A., in that case points out that except for the use permitted the possession and control of the premises remained in the owner, and there was nothing to prevent the defendants, by their officers or servants, from entering or going over the ground, so assigned, when not in actual use by the lessee, and his judgment proceeds on the ground that by the express terms of the agreement the owners retained the right of supervision. The judgment of Garrow, J.A., is to the same effect.

On each Saturday the market clerk collected the dues, $1.50 for the week, punching out the price on a ticket, which he then handed to the plaintiff. It was not pretended that the plaintiff had other right than that indicated by this transaction.

Marshall v. *Industrial Exhibition*, 1 O. L. R. 319, affirmed 2 O. L. R. 62. The plaintiffs purchased from the association the privilege of selling refreshments under a certain building during the holding of the exhibition. This right was held to be a license not a lease, following *Randall* v. *Roman*, 9 T. L. R. 192. In that case it was held that a stall let at an exhibition at a weekly rent, but was not to be used before 10 a.m. or after 11 p.m., was a mere license. In that case *Selby* v. *Greaves*, Law Reports 3 C. P. 594, was relied upon as

shewing that the instrument in question was a lease, but Lord Coleridge pointed out that in that case the tenant was entitled to possession at all times.

In the *Marshall Case*, it was held that the plaintiff not being a lessee, but a mere licensee, was there upon the invitation of the association who owed a duty to the person whom they induced to go there to keep the place in proper repair and that the association, who had by their negligence caused the accident, were liable. I am of opinion that the plaintiff was a licensee, and not a lessee of the stall in question, but not a mere licensee.

The distinction is pointed out by Channell, B., in *Holmes* v. *North Eastern Rw. Co.*, L. R. 4 Ex. 258, and Bevan on Negligence, Canadian edition, 452, N. 6. Here the license was paid for with the intention that the plaintiff on certain days of the week should occupy the stall in question, where persons coming to the market might buy produce from her. There was, therefore, in my opinion, a duty owing from the defendants to the plaintiff, that the stall should be fit for the purpose for which it was intended to be used.

In *Lax* v. *Darlington*, L. R. 5 Ex. Div. 28, it was held that the defendants having received toll from the plaintiffs and invited them to come to the market with their cattle, a duty was imposed upon them to keep the market in a safe condition. Referring to the position of the defendants, Brett, L.J., is reported as saying: "I cannot doubt myself upon the most ordinary principles of law that inasmuch as they received payment for that standing (for cattle) they are *prima facie* under the liability of affording a place which is not dangerous for the purpose for which the payment is made. Bramwell, L.J., agreeing in the judgment said: "I am not influenced by the consideration of this being a market; it might have been a cattle shed, or a place opened by the defendants as a speculation of their own. Market, or no market, the ground upon which I proceed is that the defendants received the plaintiffs' money; they took toll from the plaintiffs, and they make a profit; they invite the plaintiffs to come and make use of their market for profit to themselves. The defendants are, therefore, liable; as my brother Brett has said, they are bound to have the place in a non-dangerous condition for those who come there for any lawful purpose on certain occasions." It was there argued that the plaintiffs incurred their loss by their own fault, and that the

danger was obvious, or that they knew it. Bramwell, L.J., said: "If that question had been before us I should have had very great misgivings whether the plaintiffs were entitled to recover because if they knew the danger and chose to risk it, it is their own fault; they are volunteers, and in my opinion the defendants ought not to have been made liable to them in that case."

Although this was *obiter* yet it touches the point upon which I have the chief difficulty in the present case. The plaintiff had paid for the right of selling her produce in the market. She was entitled, I think, to have the stall in a reasonably fit and sanitary condition for that purpose. This I find it was not, and upon the evidence, the strong probability is, and I find as a fact, that her sickness was caused by this unsanitary condition. The question then remains, ought the plaintiff to recover inasmuch as she knew of this condition and remained there? Her answer to this question in her evidence was that she gave notice of the unsanitary conditions to the defendants, who promised from time to time to repair them, and this she fully expected they would do, and so remained on, not realizing her danger.

In the present case the principal trouble arose from the fact that a gutter and down-pipe was clogged, causing an over-flow of the water, and also tending to destroy the roof. Under the facts in this case, it was, I think, clearly the duty of the defendants to make repairs, including this gutter. This indeed, was admitted by the officer in charge of the market place. There was no inspection and apparently no repairs made until they did receive notice. *Hargraves* v. *Hartopp*, [1895] 1 K. B. 472, has a certain bearing upon this branch of the case, although that was a case between landlord and tenant. The plaintiffs were tenants of a floor in a building of which the defendants were the landlords. A rain-water gutter in the roof, the possession and control of which was retained by the defendants, became stopped up. Notice of the stoppage was given by the plaintiffs to the defendants, but the defendants neglected to have the gutter cleared out until after the lapse of four or five days from the receipt of the notice, and in the meantime the plaintiffs had suffered damage by reason of rain-water having found its way into their premises in consequence of the stoppage. It was held that the fact of the gutter being under the control of the defendants imposed on them a duty to take care that it was not in such a condition as to cause damage to the plain-

tiffs, and that as they had notice of its being stopped up and neglected to clear it out within a reasonable time after the receipt of the notice they were guilty of a want of due care, and were, consequently, responsible for the damage done. It was held by the County Court Judge that the defendants had never inspected the gutters at any time, and under those circumstances he held that the defendants were liable for negligence in not periodically inspecting the gutters, and in not acting sufficiently quickly after the receipt of the plaintiffs' notice. Lord Alverstone, C.J., is reported as saying: "Here the gutter was not demised, and the question is whether under those circumstances the landlord is not under a duty to take reasonable care to prevent a gutter which is under his control from becoming stopped up, whereby damage may happen to the occupants of the floors below. I think there is, and that there being evidence of a failure to discharge that duty inasmuch as the defendants never inspected the gutters and delayed repairs even after receipt of the notice, they are liable for the damage which ensued."

In the present case whether the plaintiff was lessee or licensee it is quite clear from the evidence that the control of the gutter and down-pipe did not pass to the plaintiff, and that the duty to see that it was kept in repair devolves exclusively upon the defendants. The defendants neglected to discharge this duty which they owed to the plaintiff, and the injuries complained of resulted from such neglect. The action does not arise out of the relation of landlord and tenant, or any covenant, express or implied, to repair, but it arises by reason of the duty raised from the defendants to the plaintiff by the license and payment for the right to occupy the stall. In this regard, I think, the case is distinguished from the *Brown Case*, and I find that the plaintiff, under the circumstances, was not guilty of any contributory negligence in respect of the neglect which caused the injury. She had no right as licensee to make the repairs. Even in the case where it is the duty of a tenant to repair, it has been held that in case the repairing would be so large as to be out of proportion to the tenant's interest in the premises (as it would be in this case), he would not be justified in repairing and treating the costs of such repairs as damages. *Cole* v. *Buckle*, 18 U. C. R. 286. Nor is he, it would seem, in such case bound to make repairs under the penalty of a denial of a recovery for injuries which would have been obviated thereby, 18 Am. & Eng. Encyc., 2nd ed., 235.

The fact that the plaintiff continued to occupy the premises after she had given notice, and while they were unsanitary, was not unreasonable under the circumstances, from the fact that she was in constant expectancy of the repairs being made, and repairs were in fact made some weeks prior to her illness, but so negligently done that the premises still continued in an unsanitary condition. I do not think such continuance, under the circumstances, constituted contributory negligence upon her part. She was seriously ill for some weeks, was put to a considerable expense and suffered great pain and was otherwise put to loss and damage in connection with her business. I assess the damages at $550, with full costs of the action.

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

LEVITT v. WEBSTER.

4 O. W. N. 554.

Vendor and Purchaser—Specific Performance—Authority of Agent—Variation from Authorised Terms—Sale for all Cash Instead of Part on Mortgage—Dismissal of Action.

Action for specific performance of an alleged agreement to sell certain property in Hamilton. One Whipple, a real estate agent in Hamilton, had corresponded with defendant, who resided in Toronto, in reference to the sale of the property in question, and had received from her a letter stating she would sell for $5,000—one-half cash and balance on mortgage at 6 per cent. payable half-yearly. Later he submitted an offer of $4,500, to which defendants replied that she would not accept less than $5,000, and pointing out the revenue she derived from the property in question. Finally he telegraphed her that the property had been sold to plaintiff for $5,000 all cash. Defendant repudiated Whipple's right to close the sale without further consulting her.

KELLY, J., dismissed action with costs on the ground that plaintiff's offer inasmuch as it was all cash, instead of one-half on mortgage, was not in accordance with the authorized terms of sale given by defendant to Whipple, and that the latter had no authority to conclude a sale on any other basis, especially as defendant had intimated that the securing of a revenue was of great importance to her.

Action by the plaintiff, Sarah Levitt, against the defendant for specific performance of an alleged agreement for sale to the plaintiff of property known as 111 King street west, in the city of Hamilton, tried without a jury at Hamilton on October 17th, 1912.

Lewis & Treleaven, for the plaintiffs.

Hobson & Telford, for the defendant.

HON. MR. JUSTICE KELLY:—At the opening of the trial, an application was made to add, as a party plaintiff, Harry Levitt, the husband of Sarah Levitt, and the application was granted.

The defendant, in March, 1912, was a resident of Toronto. On March 11th, H. B. Whipple, a real estate agent in Hamilton, wrote to the defendant asking her to let him know if she would sell her store, 111 King street west, and if so what was her lowest cash price, stating that he thought he had a purchaser for it, and also mentioning that in case of a sale his commission would be 2½%.

Defendant replied, on March 12th, acknowledging that letter, and stating that she had not considered selling the property, but that she might do so if a good offer were made for it. She also stated that she did not know how property was selling in the locality, and so she could not put a price on it, but "if your client will make an offer, I shall consider it. Of course I shall expect to allow your commission."

This was followed by a letter of March 13th, from Whipple to defendant, acknowledging her letter and saying that he had seen his client about buying the store and that the client wished him to get some particulars as to the length of the lease of the present tenant of the store and the rental, and also if the stairway was to be used in common with the tenant in the store adjoining to the east.

On March 14th, defendant wrote Whipple giving these particulars, the rent she stated she was then receiving being $25 a month for the store and $13 a month for the upstairs.

Whipple wrote defendant, on March 15th, sending a copy of an offer he had received, and stating if she would not accept it to name her lowest price and best terms. This brought from defendant the following reply, dated March 16th:—

"Yours of 15th to hand this morning with enclosed offer. I cannot accept this offer at all. You see my income from the store is now, three hundred dollars a year clear of expenses. I would accept five thousand dollars, one-half, namely, two thousand five hundred, cash, and the balance on mortgage at 6% payable half-yearly, and the other terms as usual."

Whipple, on March 19th, wrote defendant that he had received an offer of $4,500 cash and said he was submitting

the offer to her as it was the best he had received up to that time; and he mentioned that he understood that the store just west of the defendant's was sold three or four weeks previously for $4,200.

According to the evidence of Dodson, Whipple's partner, it was not the plaintiffs who made the $4,500 offer.

On March 20th, defendant replied to this letter as follows:—

"Yours of the 19th received this morning with offer for $4,500 for the store, 111 King street west. I cannot accept less than the five thousand dollars. As I know that the income from the store merits my asking this amount as the store stands at the present time."

On the same day, Whipple sent the following telegram to defendant at Toronto:—

"Have sold King street property for five thousand dollars."

Whipple received from the plaintiff, Harry Levitt, an offer dated March 19th, 1912, for the purchase of this property at $5,000 cash on the completion of the title, and signed an acceptance of it as agent for the defendant.

All these negotiations on Whipple's part were carried on by his partner, J. E. Dodson, who signed the acceptance for Whipple.

By assignment, dated March 21st, 1912, plaintiff, Harry Levitt, assigned to his co-plaintiff all his right, title and interest in the agreement, and this assignment was registered in the registry office on March 22nd.

On this state of facts the plaintiffs make their claim against the defendant.

The defendant in her evidence admits receipt of the telegram on March 20th, 1912, and says that ten minutes afterwards she received a message by telephone from another agent in Hamilton with reference to this same property and told him that she wanted $6,000 for the property; and that then in a telephone communication with Whipple, who asked about the title deeds, she told him she would be in Hamilton the next day, but that she wanted $6,000 for the property. On going to Hamilton she objected to Whipple having signed the contract. She admits, however, that he was her agent, but repudiates any authority to him to sign for her. She also sets up that the terms on which she told him, in her letter of March 16th, she would sell were not

complied with, inasmuch as she required that one-half of the purchase money should be allowed to remain on mortgage at 6 per cent.

The inference I draw from the letters is that she was desirous of deriving an income from the investment of her money, for in her letter to Whipple, of March 14th, she points out that she is deriving a revenue of $38 per month from the property, and in her letter of March 16th, she again draws attention to the fact that she has an income from the property of $300 a year clear of expenses. Her evidence at the trial is that she did not want the whole $5,000 in cash, that she was seeking an investment for part of it.

In her examination for discovery she has this to say about Whipple's agency:—

"55. Q. Did you consider him your agent to sell the store? A. Yes, I suppose I did—

"Mr. Hobson: No.

"Witness: In a way, not a special one you understand.

"56. Q. You were going to pay Mr. Whipple two and a half per cent for selling it? A. I said so in one of my letters.

"57. Q. You agreed to do that? A. Yes."

Her further evidence indicates also, and I have no reason for disbelieving her, that she expected Whipple to have submitted to her any offer that he would receive, and that he was taking too much upon himself when he accepted the offer without further reference to her.

Were this the only point in the case I might have difficulty in coming to the conclusion that Whipple had authority to enter into the contract for the defendant, especially in view of the fact that the negotiations which led up to the alleged sale were commenced by him and as if representing a prospective purchaser; the first suggestion of sale did not come from the defendant.

I am not overlooking the admission made by the defendant in her examination of the agency or the agent's right to be paid a commission by her if a sale were made; but on another ground I think the plaintiffs must fail.

In my view, the agent did not sell on the terms on which only the defendant was willing to sell, namely, those mentioned in the letter of March 16th.

It was argued for the plaintiffs that the variation in the terms between a payment all in cash on the one hand, and one-half cash and one-half secured by mortgage at 6 per cent. on the other hand, was inconsequential, and that it would have been otherwise if the agent had given the purchaser time instead of insisting on cash if so instructed by the principal.

I cannot accept this view. The correspondence between the defendant and the agent shews that procuring an immediate investment and keeping the moneys invested in a manner that would secure her a good return of income was very material to her, and that having a substantial part of the purchase money promptly secured by mortgage on the property at a good rate of interest was an important factor in the terms she quoted.

In her letter of March 16th in which she refused to accept an offer made to her, she states her price and terms and she says: "You see my income from the store is now $300 a year clear of expenses," thus indicating that the matter of the amount of the return from the investment was important to her, so important, indeed, that a variation of her stated terms by which she would be required to accept the whole purchase money in cash instead of having one-half of it immediately secured on security satisfactory to her, at six per cent. per annum, cannot be held to be inconsequential.

Plaintiffs contend that on the evidence of agency Whipple was not only agent to sell but also to sign the agreement for sale, relying on authorities such as *Rosenbaum* v. *Belson* (1900), 2 Ch. D. 267, the head note of which is "Instructions given by an owner of real estate to an agent to sell the property for him and an agreement to pay a commission on the purchase price accepted are an authority to the agent to make a binding contract, including an authority to sign an agreement for sale."

The present case is, however, distinguishable. Here, whatever authority the defendant gave to the agent was limited to the terms set out in her letter of March 16th.

For the plaintiff, it was argued that her letter of March 20th authorised a sale of $5,000 in cash. I do not think that is so. She stated clearly in the earlier letter that $2,500 of the sale price was to be secured by mortgage at 6 per cent. payable half-yearly. The subsequent letter,

written after the agent's letter of 19th March had told her of his receipt of an offer of $4,500 cash, states that she "cannot accept less than the five thousand dollars," which, to my mind, had reference to the $5,000 named by her in the letter of March 16th and to the terms of payment therein stated.

The offer of $5,000 cash, received by the agent and which he assumed to accept for the defendant, was not what she was willing to accept or what she had stated she would accept, and, granting, for the sake of argument, that the agent had authority to sign for the defendant, which, however, I am not now conceding,—such authority was limited to making a contract in the terms named by the defendant in the letter of March 16th.

In *Gilmour* v. *Simon*, 37 S. C. R. 422, an action for specific performance, where an agent who was given a limited authority incorporated into the contract a term by which the purchaser was given the privilege of paying off at any time that part of the purchase money which was to be secured by mortgage, a term not authorised by the principal, the contract could not be enforced against the defendant.

The variation in the present instance was a more serious one than that referred to in the decision just cited, and one the terms of which should not be enforced against the defendant.

In view of all the facts of the case, the following statement of Mr. Justice Idington, in his judgment in *Gilmour* v. *Simon*, may well be applied here:—

"I do not find in this case that clear, express and unequivocal authority given by the respondent to Egan (agent) which would enable me to hold the appellant (purchaser) entitled to the specific performance claimed herein."

The action will be dismissed with costs, and the registration in the registry office of the assignment by plaintiff, Harry Levitt, to his co-plaintiff vacated.

HON. MR. JUSTICE MIDDLETON. NOVEMBER 30TH, 1912.

CHAMBERS.

POLLINGTON v. CHEESEMAN.

4 O. W. N. 410.

Parties—Third Party Notice—Motion to Strike Out—Rights of Parties to be Left to Trial—Object of Third Party Procedure—Employers Liability Insurance.

Motion to strike out a third party notice served upon an insurance company in an action for damages for the death of one of defendant's workmen.

The third parties claimed that, by the terms of their policy they could not be sued until judgment was had against defendant and that the death of the employee did not occur in the employment insured against. Defendant denied this latter statement.

MASTER-IN-CHAMBERS *held* (*ante* 40; 4 O. W. N. 92) that the rights of the parties should be left to the trial and not disposed of on an interlocutory application.

Pettigrew v. *Grand Trunk Rw. Co.*, 22 O. L. R. 23; 16 O. W. R. 989, and *Swale* v. *Can. Pac. Rw. Co.*, 25 O. L. R. 492; 20 O. W. R. 997 followed.

Motion dismissed, costs to defendant in third party issue in any event.

SUTHERLAND, J. (23 O. W. R. 242; O. W. N. 248) affirmed above judgment with costs.

MIDDLETON, J. on motion for leave to appeal from judgment of Sutherland, J. supra, prevailed upon parties to consent to the order being varied, so as to make the outcome of the issue between plaintiff and defendant binding upon the third parties; save as to this the third party notice was to be withdrawn, to be re-served later if required so as to prevent the bringing of a fresh action.

Costs to be in the discretion of the Judge trying the issue between defendant and third party.

Motion by third parties for leave to appeal from the order of Mr. Justice Sutherland in Chambers on the 4th November, dismissing an appeal from the order of the Master in Chambers refusing to set aside a third party notice. See 23 O. W. R. 40 and 242.

T. N. Phelan, for third parties.

F. McCarthy, for the defendant.

HON. MR. JUSTICE MIDDLETON:—The action is brought by an employee against the employer for damages by reason of injuries sustained, it is said, in the course of the plaintiff's employment.

The defendant is insured in the third party company against "loss by reason of the liability imposed upon him by law for damages on account of injuries sustained by his

employees." The policy contains a number of limitations and provisions; *inter alia*, a stipulation that "no action shall lie against the company to recover for any loss . . . unless it shall be brought by the assured for loss actually sustained and paid by him in money in satisfaction of a judgment after trial of the issue."

There is a *bona fide* dispute as to the liability of the defendant to the plaintiff. The third party also contends that the liability, if it exists, does not fall within the terms of the insurance, and further contends that by reason of the clause quoted no proceedings can be taken against it until after the litigation between the plaintiff and the defendant has been determined and the plaintiff has recovered and the defendant has paid.

The learned Master took the view that the clause in question could not and did not exclude the application of third party procedure, or at any rate that, having regard to the principles laid down in *Pettigrew* v. *Grand Trunk Rw. Co.*, 22 O. L. R. 23, and *Swale* v. *Canadian Pacific Rw. Co.*, 25 O. L. R. 492, this question ought not to be determined upon a summary application, but should be left to be raised by the third party as a defence at the hearing. Mr. Justice Sutherland agreed with this view.

Upon the argument of the motion I was very much impressed with the view that the third party notice ought not to be allowed to stand, in so far as that proceeding was in reality an action by the defendant against the third party; as from the contract put forward by the defendant as the foundation of his proceedings it clearly appeared that any action would be premature.

On the other hand it was quite plain that to hold that the third party procedure did not apply, where a provision such as this is inserted in the policy, would be to frustrate one of the principal objects of the practice; the securing of one trial, and one trial only, of the issue between the plaintiff and defendant. The difficulty that existed before this practice was devised, viz., the possibility that there might be discordant findings between the tribunals called upon to pronounce between the plaintiff and defendant, and as between the defendant and the third party, was a real difficulty, and the remedy has been found most beneficial.

The true solution of the matter appeared to me to be found in recognition of the dual object of the procedure.

The notice served upon the third party indicates this. He is notified, so that he may, if he wishes, dispute the plaintiff's claim against the defendant, and also that he may dispute, if he desires, his liability to indemnify the defendant; and even if it is clear that the contract with the defendant is so framed as to preclude the bringing of an action upon it before the defendant has actually paid, this does not altogether defeat the jurisdiction of the Court, and the third party procedure may well be invoked for the purpose of making the finding upon the issues as between the plaintiff and defendant binding upon the third party.

I therefore suggested to the parties the desirability of consenting to a modification of the order on the lines indicated; and I am now notified by counsel that they consent to the order being so modified. This being so, the order will simply provide for the modification suggested and that the costs of the application and of the third party proceedings be reserved to be determined in any litigation that may hereafter take place between the defendant and the third party. If there is no such litigation, then upon an application to a Judge in Chambers. I would suggest to the parties the desirability of further providing that the question of the liability of the third party to the defendant be reserved to be disposed of upon an issue to be directed in this action; this being less expensive than the bringing of a separate action.

MASTER IN CHAMBERS. NOVEMBER 22ND, 1912.

HUDSON v. SMITH'S FALLS ELECTRIC POWER CO.

4 O. W. N. 391.

Third Party—Motion to Set Aside Notice—Delay—Acquiescence—Postponement of Trial.

MASTER-IN-CHAMBERS dismissed motion of third party to set aside a third party notice and to postpone the trial of an action which had been fixed for a date three days after the date of the motion where there had been delay and acquiescence by the third party in the making of the third party order and fixing of the case for trial.

An order for leave to serve a third party notice can be made *ex parte*, even after the lapse of considerable time from the delivery of the statement of claim.

Swale v. *Can. Pac. Rw. Co.*, 25 O. L. R. 492, followed.

Motion by third parties to set aside a third party notice and for postponement of the trial of the action.

R. C. H. Cassels, for the third parties.

F. Aylesworth, for the defendant.

F. McCarthy, for the plaintiff.

CARTWRIGHT, K.C., MASTER:—This action was begun on 18th June, 1910, the statement of claim was delivered on 6th November, 1911, and statement of defence on 21st November, 1911. This delay is accounted for by the very serious condition of the female plaintiff.

On the 11th October, 1912, the usual order was made *ex parte*, allowing the defendant company to issue a third party notice, claiming indemnity from the Bell Telephone Co. On 1st November inst. the defendant moved for an order for directions all parties being represented. On application of the third party that motion was enlarged until 5th November, but trial not to be delayed."

On 5th November an order was made according to the entry in my book as follows:—

"Order that third party plead in a week, and that case go to trial at Perth sittings on 25th inst., unless otherwise ordered meantime—5 days notice of trial between defendant and third party."

All parties were represented on that motion, and no appeal was taken from that decision. On 12th November an order was made for delivery of particulars of claim of defendant against the third party in 3 days on application of the third party.

Nothing further was done until this day, when a motion was made as follows: something quite new in my experience: for an order setting aside the order giving leave to the defendants to serve third party notice herein and setting aside said notice and all proceedings subsequent thereto, and for an order postponing the trial of this action and for an order giving leave to the third parties to appeal from the order for directions made herein on the 5th day of November, 1912, notwithstanding that the time for appealing therefrom has elapsed, and for such further and other order as to the Master may seem just.

And take notice that in support of such motion will be read the affidavit of David Thorburn Symons this day filed,

a copy of which is served herewith, and the pleadings and proceedings herein."

Mr. Cassels (who appears now for the first time in the case) argued strenuously that the order owing to the lapse of time should not have been made ex parte in this case, nor in any case, if I understood him correctly. With this as an abstract proposition, I do not agree. The decision in *Swale* v. *C. P. R.*, 25 O. L. R. 492, and the explanation by Riddell, J., in that case of the case of *Parent* v. *Cook*, 2 O. L. R. 709, 3 O. L. R. 350 (see judgment of Riddell, J., at p. 500 and onward) seem adverse to Mr. Cassells' view.

But in any case it was open to the third party to have taken this and any other objection to the order itself in the motion for directions made (after an enlargement at its request), on 5th November inst. That was the usual and proper time to object to the order. Then there would have been ample time for an appeal by any dissatisfied party. As the trial comes on at the beginning of next week this can no longer be done.

Always bearing in mind the provisions of Consolidated Rule 312 (perhaps the most beneficial of the whole series), I would have acceded to a postponement, if only the defendant and third party were in the case. Here, however, the interests of the plaintiffs if not paramount are not lightly to be prejudiced, as they must be if the trial were at this late date postponed to meet the view of the third party.

The blame for any possible inconvenience or loss to that corporation cannot be imputed to either of the other parties.

The motion so far as it asks for a postponement of the trial of the third party issue, will be referred to the trial Judge—and as to the rest of it, it will be dismissed with costs to plaintiff, payable forthwith, and fixed at $20, and the defendants as against the third party in any event in the third party issue.

MASTER IN CHAMBERS. NOVEMBER 26TH, 1912.

DELAP v. CANADIAN PACIFIC RW. CO.

4 O. W. N. 416.

Pleading—Particulars—Statement of Claim—Delay—Con. Rule 268.

MASTER-IN-CHAMBERS refused to order particulars of a statement of claim which was already full and voluminous, where plaintiff had not shewn any special need of such particulars and where plaintiff had been guilty of delay in moving.

Motion by defendants for particulars of the statement of claim.

Angus McMurchy, K.C., for the defendants.

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

CARTWRIGHT, K.C., MASTER:—The facts of this case are to be found in the previous report in 23 O. W. R. 177, 4 O. W. N. 213.

Two days before the expiration of the time for delivery of statement of defence the defendants moved for particulars of the statement of claim under 27 different heads, covering three typewritten pages. The motion was supported by an affidavit of Mr. MacMurchy, of the necessity of such particulars before pleading.

The motion was argued on the 23rd inst., when the same counsel appeared as on the previous motion for extension of time for pleading.

It is not necessary to add anything to what was said in the previous report as to the facts, except only that was a draft statement of claim substantially identical with that now on file submitted to defendant by plaintiff nearly ten months ago.

After reconsidering the matter in view of the strenuous argument of defendants' counsel, I do not see any reason for the order asked for. Many of the 27 heads of particulars were not pressed on the argument. As to those which were insisted on, I think that all the material facts on which the plaintiff relies are fully set out in the voluminous correspondence extending over a period of more than two years and are also set out in the statement of claim certainly without undue brevity. As was said long ago in *Smith* v. *Boyd*,

17 P. R. 463: "particulars are ordered with reference to pleading, and primarily with a view to have the prior pleading made sufficiently distinct to enable the applicant to frame his answer thereto properly," per Boyd, C., at p. 467.

In the present case the whole issue is on the plaintiff, which he may find some difficulty in proving unless there is some documentary evidence on which he can succeed. In that case it must either be in the defendants' possession or appear in plaintiff's affidavit of documents. In the latter event defendants would easily obtain leave to amend if desired. A further ground for refusing the order is that of delay. On the previous motion all the facts were as fully set out as they are now, especially the verbal arrangements made with Judge Clark—of this I said (at p. 178, *supra*): "It is apparently out of that verbal agreement or understanding that the action arises." It was on this point of the verbal agreement that most of the present motion was pressed. I think that if particulars of this are necessary now, they were equally necessary on 25th October, and that all particulars required for pleading should have been asked for.

It is also to be observed that pleadings are now governed by Consolidated Rule 268, which it would be wise to repeat before settling any pleading. That Rule says "Pleading shall contain a concise statement of the material facts upon which the party pleading relies, but not the evidence by which they are to be proved."

No doubt it is sometimes difficult "to decide what are the facts to be proved and what is only evidence of those facts. The question is often one of degree. The difference although not so easy to express, is perfectly easy to understand (per Brett, L.J., in *Philipps* v. *Philipps*, 4 Q. B. D. at p. 133," see Odgers on Pleadings, 5th ed., p. 103.

It is always necessary to deal with a motion for particulars as not to bring back thereby the old form of chancery pleading—a danger which a late learned Judge is said to have foreseen as possible and to be guarded against.

The motion will be dismissed with costs to plaintiff in the cause—without prejudice to any motion that defendants may consider necessary after examination of plaintiff for discovery or before the trial if plaintiff is not examined. The statement of defence was said by counsel to be ready and should be delivered not later than the 28th inst.

MASTER IN CHAMBERS. NOVEMBER 21ST, 1912.

PHILLIPS v. LAWSON.

4 O. W. N. 390.

Discovery—Further Examination—Applicant in Possession of Facts—No Answer to Demand—Solicitor as Party—Clients Co-Defendants—Privilege Lost.

MASTER-IN-CHAMBERS *held* that it is no answer to a demand for discovery that the applicant must know the true facts of the case better than his opponent for he is entitled to have the outline of the case that his adversary is going to make against him.

That where a solicitor was the primary and main defendant and had certain of his clients associated with him in the enterprise giving rise to the litigation, he was not entitled to claim privilege for communications made to him in respect thereof.

Chant v. *Brown*, 7 Hare 88, and *Lewis* v. *Pennington*, 29 L. J. Ch. 672, considered.

Motion by both plaintiff and defendant for further examination for discovery.

J. P. MacGregor, for the plaintiff.

C. A. Moss, for the defendant.

CARTWRIGHT, K.C., MASTER:—It is quite clear that defendant's motion must succeed. He is entitled to examine plaintiff as to his information and belief as well as in respect of his knowledge, so far as such enquiry is relevant to the issues in the action. It is no answer to say that defendant knows himself "It is no objection to an application for particulars that the applicant must know the true facts of the case better than his opponent. He is entitled to know the outline of the case that his adversary is going to make against him, which may be something very different from the true facts of the case." Odgers on P. C., 5th ed. 178.

This principle applies to examination for discovery under our practice.

The plaintiff's motion is not so easy to dispose of. It would seem from defendant's depositions that he was to submit to further examination if his alleged clients who are joined as defendants, would waive their claim to privilege as to his evidence. This I assume they have declined to do.

Here, however, he is the one and the only one who signed the document (which has resulted in this action)—be it an option or an agreement to buy. He is, therefore, clearly

the primary and main defendant acting either for himself or for his fellow adventurers.

That being so it would seem that he cannot set up privilege. The point is one that does not often arise. But on examination of Bray on Discovery, I have found two cases which seem to throw light on the question, see p. 427, 429 (n). There the learned author says: "In *Chant* v. *Brown*, 7 Hare 88, 1849, Wigram, V.-C., considered that the position of the solicitor in claiming privilege was not affected by his having subsequently become himself the owner of the property. It is submitted that on principle he should in such a case be regarded for the purpose of testing the extent of the privilege as the owner and not as the solicitor." The judgment there seems to have been based on the fact that the solicitor was not "absolute owner," though no doubt the Vice-Chancellor said he did not think that even if absolute owner, he would be debarred from claiming privilege.

On the other hand eleven years later Romilly, M.R., in *Lewis* v. *Pennington*, 29 L. J. Chy. 672 (not 692 as given in Bray 429), said: "The mere fact of a client having made a confidential communication to his solicitor did not protect the solicitor from giving discovery, if he had acquired the same knowledge before or after such confidential communications under such circumstances that he would be bound to discover it."

Mr. Bray thinks this "is difficult to follow."

In this state of the authorities as applied to the issues in the pleadings and the undoubted fact of the signature of the defendant as the one of the parties, if not the only party, contracting with the plaintiff, I think he should reattend for examination—and answer all questions as to facts within his own knowledge, etc., unless he has some other valid objection. In *Lewis* v. *Pennington, supra,* the solicitors claiming privilege were joint defendants with their client a judgment debtor, who has assigned to them all his assets as security for advances made to them. It was held they could not claim privilege as to facts acquired by them previously as such transferees, though they might have acquired them previously as solicitors.

The costs of the motions may be in the cause.

MASTER IN CHAMBERS. NOVEMBER 19TH, 1912.

CANADIAN WESTINGHOUSE CO., LTD. v. WATER COMMISSIONERS FOR CITY OF LONDON.

4 O. W. N. 387.

Pleading—Particulars—Counterclaim—Pleading To—Motion Enlarged Until After Discovery.

MASTER-IN-CHAMBERS enlarged a motion for particulars of a reply until after examination for discovery was had where it was apparent that the examination would give the necessary information. Costs in cause.

Motion by defendants for particulars of reply and for leave thereafter to rejoin thereto—and that plaintiffs plead to defendants' counterclaim.

E. C. Cattanach, for the motion.

F. Aylesworth, contra.

CARTWRIGHT, K.C., MASTER:—The facts as set out in the pleadings are as follows. By agreement made in April, 1910, plaintiffs undertook to do certain work for the commissioners to their satisfaction and that of their electrical engineer for the time being, the work to be completed in six months—for which plaintiffs were to be paid $25,145—that such payment was conditional on the certificate of the engineer as to the amount payable, whose decision as to any question arising on the agreement was to be final—that if the works in question were not completed by 28th October, 1910, the plaintiffs were to deduct from the contract price $100 a day as liquidated damages until the final completion of the contract—and that by reason thereof instead of plaintiffs being entitled to $5,500 and interest from 1st March, 1911, as set out in the statement of claim, they have been overpaid and defendants counterclaim for this (if it is really a counterclaim and not a set-off), though not stating any amount. It is also said that no certificate has been given by the engineer. The reply joins "issue to the allegations contained in the statement of defence and puts the defendants to the proof thereof." It further says that the delay in completion of their contract was caused by "failure of defendants to do the preliminary work required" for that purpose—that the refusal of the engineer to give the necessary certifi-

cate was fraudulent and from collusion with the defendants —that defendants suffered no damage by the delay in the completion of the work and in any case "by their action," waived their right to enforce the above-mentioned penalty or to insist on the engineer's certificate.

Particulars are asked as to the preliminary work referred to in the reply—of the fraud and collusive refusal of the engineer to give his certificate, and of the acts whereby the defendants waived their right to require such certificate or enforce the penalty of $100 a day.

The issues between the parties seem sufficiently set out in the pleadings even if the statement of defence as well as the reply are somewhat unusual in form. It scarcely seems necessary to make the reply a formal defence to the defendants' counterclaim. But it can be done if thought safer to do so.

As to the particulars they can probably be obtained on examination for discovery of the defendants' engineer, who would seem to be the proper person for that purpose (see *Smith* v. *Clarke,* 12 P. R. 217), as applied to the facts of this case as set out in the pleadings). If sufficient information is not had on discovery, the motion can be renewed. If not renewed the costs of the motion will be in the cause.

MASTER IN CHAMBERS. DECEMBER 3RD, 1912.

SMYTH v. BANDEL.

4 O. W. N. 425.

Judgment—Speedy Judgment—Motion for—Con. Rule 603—Chattel Mortgage on Licensed Hotel—Alleged Agreement as to—Prima Facie Defence Shewn.

MASTER-IN-CHAMBERS dismissed a motion for speedy judgment in an action for a balance alleged due upon a chattel mortgage upon a licensed hotel where defendant alleged a collateral agreement that the chattel mortgage was to be void if local option came into force, which event happened.

Jacobs v. *Booth's Distillery,* 50 W. R. 262, and *Codd* v. *Delap,* 92 L. T. 510, followed.

Motion for summary judgment under Con. Rule 603 in an action for a balance alleged due on a chattel mortgage.

H. S. Merton, for the plaintiff.

J. T. Loftus, for the defendant.

CARTWRIGHT, K.C., MASTER:—In May, 1908, the defendant gave to the plaintiff a chattel mortgage to secure $4,800, being balance of purchase of the "Queen's Hotel," at Collingwood.

It is admitted that there is still something due on this mortgage if plaintiff is entitled to enforce it now; and plaintiff has moved under C. R. 603 for judgment.

The defendant has made an affidavit in which she says that the contract for the purchase of the Queen's Hotel "contained a provision that in case local option would pass that the mortgage would be void and that there would not be any liability thereunder."

It is submitted that in 1910 local option was carried at Collingwood. No doubt it came into force on 1st May in that year.

The defendant has been cross-examined but does not recede from her position. Her solicitor in the matter was the late James Baird, K.C. A copy of a letter from him to plaintiff is filed on this motion and verified by Mr. Loftus. It is dated 30th May, 1908, and speaks of an agreement between plaintiff and Mary Bandel as being sent to him with the other papers. What that agreement contained does not appear on this motion. It is not produced. It may have contained the provision on which defendant relies—a provision which under the circumstances then and still existing in respect of the liquor traffic cannot be considered unlikely to have been suggested at least by defendant. See as an instance *Hessey* v. *Quinn*, 18 O. L. R. 487.

Whether or not such an agreement was made either verbally or in writing must be left to be dealt with at the trial in the ordinary way. In taking this course I am as I consider only following the judgments of the House of Lords in the two similar cases of *Jacobs* v. *Booth's Distillery Co.*, 50 W. R. 49, 85 L. T. 262, and *Codd* v. *Delap*, 92 L. T. 510, cited in *Jacob* v. *Beaver*, 17 O. L. R. 501.

In both cases the House of Lords set aside the unanimous judgments of the Courts below, giving judgment with many strong expressions of astonishment and disapproval.

There is less reason to hesitate in this case because although the action was begun and writ served on 30th May, the present motion was only launched on 31st October last.

No explanation of this was suggested on the argument. The motion will be dismissed with costs in the cause.

MASTER IN CHAMBERS. DECEMBER 7TH, 1912.

SOVEREIGN BANK v. SEVIGNY.

4 O. W. N. 459.

Judgment—Motion for—Non-Compliance with Minutes of Settlement—To be Made in Court—Costs.

MASTER-IN-CHAMBERS refused to hear a motion to set aside a statement of defence filed, for non-compliance with minutes of settlement arrived at on the ground that it was in substance a motion to enforce a settlement which must be made in Court.

Pirung v. *Dawson*, 9 O. L. R. 248; O. W. R. 499, followed.

Motion by plaintiff for an order striking out the statement of defence herein and for entry of judgment against defendant for default in complying with terms of consent minutes filed at the trial of this action on 25th June last, upon which said trial was adjourned.

H. S. White, for the plaintiff.

F. Aylesworth, for the defendant.

CARTWRIGHT, K.C., MASTER:—The motion herein was made on November 16th, and as the case was to come on before Falconbridge, C.J.K.B., on the 19th November, and defendant's counsel contended that the action had been settled, it seemed best to refer the motion to the trial Judge. On its coming before him counsel for plaintiff attended but no counsel appeared for defendant. The reasons for this are given in his affidavit. Judgment was thereupon given for plaintiff with costs, including the costs of this motion; afterwards the judgment was set aside by the learned Chief Justice, and this motion was remitted to me.

The judgment debt has since been paid. The grounds on which defendant's counsel moves to have the motion dismissed with costs were: (1) that the action had been settled, and (2) that it could not be made before me.

I agree with this latter contention. It was decided in *Pirung* v. *Dawson*, 4 O. W. R. 499, 9 O. L. R. 248, that a motion to enforce a compromise or other agreement must be made to a Judge in Court. The plaintiff's motion was in substance a motion of that kind. Under the circumstances set out in the affidavit of defendant's solicitor filed on this second argument and not in any way impeached, I think the motion must be dismissed with costs to be set off against the costs taxable against the defendant—such costs being fixed at $20.

HON. MR. JUSTICE MIDDLETON. DECEMBER 5TH, 1912.

RE PRIESTER.

4 O. W. N. 456.

Will—Construction—Devise to A. and to His Children Equally as Heirs—Estate Tail.

MIDDLETON, J. *held* that a devise of lands to an unmarried infant "as long as he may live and after his death I will that the said real estate be divided equally between his children as heirs," passed an estate tail.

Atkinson v. *Featherstone*, 1 B. and Ad. 944, and *Van Grutten* v. *Foxwell*, [1897] A. C. 664, referred to.

Motion for construction of will of Barbara Priester.

V. A. Sinclair, for the executors.

T. J. Agar, for Orville Priester.

J. R. Meredith, for the Official Guardian and also appointed to represent the unborn issue of Orville Priester.

HON. MR. JUSTICE MIDDLETON:—Orville Priester being of age the other children of Frederick Priester have no claim.

"The money there may be left" forms no part of the residuary estate and is an absolute trust for the repair of the house. The discretion given the executors is only as to the mode of user. The only question of moment is the devise of the lands to Orville Priester; these are given to him "so long as he may live and after his death I will that the said real estate be divided equally between his children as heirs." At the date of the will and death the devisee was an unmarried infant and this makes it easier to regard the word "children" as equivalent to "heirs of the body." The will using the words "as heirs" affords the key to the interpretation and Orville takes an estate tail.

The words "divided equally between" the children do not negative this. *Atkinson* v. *Featherstone*, 1 B. & Ad. 944, and *VanGrutten* v. *Foxwell*, [1897] A. C. at 664.

This being so the executors may, with the consent of Orville, spend the small sum on hand in improvements on the farm more urgently needed than repair on the house. Costs out of the estate.