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HODGINS, MASTER IN ORDINARY. MARCH 1ST, 1909.

MASTER'S OFFICE.

RE DISTRIBUTORS CO.

THURSTON'S CASE.

Company — Winding-up — Contributory — Subscription for Shares by Partnership Firm — Allotment — Notice—Evidence—Liability of Special Partner—Knowledge of Firm's Subscription.

Motion by the liquidator of the company, in winding-up proceedings, for a direction confirming the placing of the name of one Thurston on the list of contributories.

J. A. Macintosh, for the liquidator.

A. C. McMaster, for Thurston.

THE MASTER:—The contributory Thurston was a member of the partnership firm of George R. Meeker & Co., fruit importers and exporters, of New York, under partnership articles made 20th May, 1904, in which he was described as a special partner, but as such special partner was to "bear, pay, and discharge equally," between the general partners, "all rents and other expenses that may be required for the support and management of the business," and that all gains, profits, and increase that shall come, grow, or arise from or by means of their said business, shall be divided between them annually in equal proportions, after provision for distribution and reservation of profits;" and that "all loss that shall happen to their said joint business

by ill commodities, bad debts, or otherwise, shall be borne and paid between them in equal proportions."

After some negotiations between George R. Meeker and some officers of the Distributors Co., an arrangement was made between the said firm and the company by which the company appointed the said firm "their exclusive agents for Great Britain and Germany," on the terms and conditions set forth in a memorandum of agreement dated 9th September, 1905, one of which was the issue by the company to the firm of "$2,500 of paid-up stock of the said Distributors Co., in consideration of the rebate of 20 per cent. commission," previously recited therein. The other condition was that the firm "agree to subscribe for $7,500 of stock in the said Distributors Co. Limited, and covenant, promise, and agree, to and with the parties of the first part" (the company) "to use their best endeavours in furthering the interests of the said parties of the first part" (the company) "and extending the business of the same."

Contemporaneously with the execution of this memorandum of agreement, the following application for shares was signed: "Application for shares. To the directors of the Distributors Company Limited. Gentlemen: Please allot us 75 shares of capital stock in your company. And I hereby agree to accept the same or any smaller number of shares that may be allotted to me, and to pay therefor as follows: $1,000 November 1st, 1905; $1,000 March 1st, 1906; $1,750 October 1st, 1906. I hereby authorise you to register me as the holder of the said shares. The balance, 50 per cent., on call; no call to exceed $1,000 per annum thereafter. Dated at New York this September 9th, A.D. 1905. Geo. R. Meeker & Co. Witness, H. Howard Shaver."

On the same occasion 3 notes of the firm were given, one for $1,000, which has been paid by the firm, and two other notes, one for $1,000 and one for $1,750, transferred to third parties, and on which Thurston was sued, and which he paid or compromised.

At a meeting of the directors of the company held on 15th February, 1906, the above mentioned memorandum of agreement with George R. Meeker & Co. was approved, and also the following resolution was adopted: "That the application of George R. Meeker & Co. for 75 shares of the capital stock of the company be accepted and approved, and that the secretary be instructed to notify the said George R. Meeker & Co." The firm's name appears entered in the

stock register for these 75 shares, and on 26th March, 1906, a certificate, No. 35, was issued for 10 paid-up shares to the firm for the first note of $1,000. And the certificate No. 36 was subsequently issued for 10 more shares, and handed to Mr. Carpenter, the president of the company.

The secretary of the company, in answer to my question as to the notice to the firm of the allotment of the stock for $7,500, said: "To the best of my recollection, and in accordance with my practice, I notified them by registered post;" and, as there was no evidence of non-receipt of such notice of allotment, I must hold that it was given as stated.

The contributory Thurston was examined as a witness on his own behalf, but his answers to questions, especially those relating to the actions against him on the two notes of $1,000 and $1,750, and those respecting his investigation of the books and dealings of his firm with the Distributors Co., were so unsatisfactory, and also indicated business carelessness and indifference, that where his evidence conflicts with that of Mr. Shaver and Mr. Carpenter, I give credence to theirs and discredit him where he differs from them.

And so, without going into a detailed criticism of his evidence, I make the following findings:—

1. That Thurston knew there was an agreement between his firm and this company (p. 65).

2. That Thurston had the agreement of 9th September, 1905, in his hand to look it over and read the terms of the agreement, and that the terms were also discussed there with him by Mr. Carpenter.

3. That, although Thurston "positively doesn't remember seeing Mr. Shaver in his office," the evidence of Messrs. Carpenter and Shaver, and the signature of Mr. Shaver as the witness to the agreement and subscription for stock, which were signed and executed in New York, on 9th September, 1905, satisfy me that Mr. Shaver was there present as he states, and his evidence of the interview with Mr. Thurston in his office, I am satisfied, is a correct statement of what occurred between the parties.

4. That the consideration for the $2,500 of stock was that stated in the memorandum of agreement, and, whether the commission on the business with this firm was large or small, it is clear that a consideration was given for these shares, and for which certificate No. 35 was issued.

Further, Thurston's evidence given before me, especially on p. 48 of his evidence, in which he stated twice, "I admit that he (Meeker) subscribed for George R. Meeker & Co.," and "I admit that it was George R. Meeker & Co. that was subscribing," taken in connection with the other evidence to which I have referred, warrant me in finding that the several partners in the firm of George R. Meeker & Co. are shareholders and contributories in respect of the balance of the $7,500 of stock in this Distributors Co., on which is due and unpaid a balance of $3,750.

The costs of these proceedings, respecting the liability of George R. Meeker & Co., will be added to this balance of liability.

JAMIESON, JUN. CO. C.J. MARCH 15TH, 1909.

SEVENTH DIVISION COURT, WELLINGTON

LYTTLE v. FOELL.

Promissory Note—Indorser Adding his Signature as Maker—Immaterial Alteration—Implied Assent of Original Maker.

Action on a promissory note.

J. C. Hamilton, Listowel, for plaintiff.

M. Wilkins, Arthur, for defendant Foell.

JAMIESON, JUN. CO. C.J.:—The facts of this case are very simple. On 21st February, 1906, the defendant Foell made the promissory note sued on, for the accommodation of the defendant Solawey, payable to his order, 3 months after date. The defendant Solawey, shortly after the making of the note and during its currency, indorsed and transferred it to the plaintiff for value. At or about the time the note became due, at the request or with the assent of the plaintiff, defendant Solawey placed his name on the face of the note below the signature of the defendant Foell. The plaintiff called on the defendant Foell several times for the payment of the note, both by letter and in person, but without result. The defendant Foell admits that on one occasion when he called upon the plaintiff to request him to collect the note from the defendant Solawey, he saw

the note and observed Solawey's signature on the face of it. He further says that he made no objection at the time, nor did he at any time make any objection, to the alteration. Some time after the maturity of the note, the defendant Solawey made one payment of interest on the note, and subsequently paid $50 on account of the principal.

I find on the evidence that there was no agreement by the plaintiff to give time to the defendant Solawey for the payment of the note.

The defendant Solawey does not defend, and judgment has been signed against him for the balance due on the note with costs. The defendant Foell now defends, on the ground that the placing by the defendant Solawey of his name on the face of the note, with the assent of the plaintiff, is a material alteration of the note by which he is discharged from liability. The question for decision is, whether the alteration, or the alleged alteration, is such a material one as to discharge the defendant. I am of the opinion that it is not.

It is the rule that an alteration which has no effect on the liability of either party will not vitiate the contract: Aldous v. Cornwall, L. R. 3 Q. B. 573. Carrique v. Beatty, 24 A. R. 302, was a case in which the name of a third party was added as an additional maker, and it was held to be such a material alteration as to discharge one of the other makers, who resisted payment on that ground; but Burton, C.J.O., laid it down clearly that it was because the addition of another maker would materially affect the right to contribution, in case one of them was called upon and compelled to pay the whole. But no such result could follow here. Should the defendant Foell be obliged to pay the note, his remedy against Solawey is quite unimpaired by the alteration. Solawey having already been a party to the note as indorser, the fact that he subsequently placed his name on the face, evidently with the intention of saving notarial fees, cannot, in my opinion, affect the rights of either as between themselves or otherwise. It can hardly be regarded as the addition of a new party.

The defendant Foell evidently did not regard it seriously, for he made no objection when he first saw it, and may reasonably be taken to have assented to it.

There will be judgment for the plaintiff against the defendant Foell for $112.65 and costs.

CARTWRIGHT, MASTER. MARCH 29TH, 1909.

CHAMBERS.

EMPIRE CREAM SEPARATOR CO. v. PETTYPIECE.

Venue—Motion to Change—County Court Action—Contract—Representations of Agent — Convenience.

Motion by defendant to change venue and transfer action from the County Court of York to the County Court of Essex.

H. M. Mowat, K.C., for defendant.

D. G. Galbraith, for plaintiffs.

THE MASTER:—The action is on a written contract, of which the execution is admitted. The defence is that it was signed on the representations and at the request of plaintiffs' travelling agent. The contract, however, expressly states that the plaintiffs will not be responsible for any variation of the same by any such verbal representations, and the orders also state that travelling agents are not authorised to make any such arrangements whatever.

In a case of Wellington v. Fraser, 12 O. W. R. 1141, a similar defence was set up, and on that account I thought the motion should succeed. But on appeal, 12 O. W. R. 1171, this order was reversed. No reasons are given there, but I was informed by counsel for the plaintiff that it was on the ground that under a similar contract no such defence was open to the defendant.

The motion must, therefore, be dismissed with costs to the plaintiffs in the cause. If the defendant has any remedy, it must be against the travelling agent of the plaintiffs. These are not cases like Dominion Bank v. Crump, 3 O. W. R. 58, where such an arrangement was within the scope of the agent's authority.

MEREDITH, C.J. MARCH 29TH, 1909.

WEEKLY COURT.

RE SPRAGGE.

Will—Construction—Devise—Church Societies—Sale of Lands Devised, Pursuant to Statute — Ademption or Extinguishment of Devise—Operation as to Proceeds of Sale—Interpretation of Statute — Lands Unsold at Death of Testator — Trusts—Power of Sale—Distribution of Proceeds.

Originating notice for the purpose of determining certain questions arising on the will of William Spragge, deceased, dated 8th December, 1866.

R. C. H. Cassels, for the executors and for the estate of Henry Spragge.

J. H. Moss, K.C., for the Synod of Toronto.

F. P. Betts, London, for the Synod of Huron.

J. B. Walkem, K.C., for the Synod of Ontario.

H. Cassels, K.C., for three daughters of the testator.

H. S. Osler, K.C., for Charles E. Spragge and the widow and only child of a deceased son of the testator.

MEREDITH, C.J.:—Joseph Bitterman Spragge by his will, dated 1st October, 1853, devised his lands in the township of Blenheim, in the county of Oxford, to trustees in trust, in the events that happened, for his brothers, the Honourable John Godfrey Spragge and William Spragge, as tenants in common, as was declared by a judgment pronounced on 27th November, 1907, in an action brought by Edward William Spragge and others against the executors of the Honourable John Godfrey Spragge and William Spragge.

By an Act passed by the legislature of Ontario in 1871, 34 Vict. ch. 100, the trustees of the will of Joseph Bitterman Spragge were authorised, with the consent of Eliza Francis Lett, one of the beneficiaries under the will, to sell the Blenheim lands, and it was provided that "any deed executed by such trustees as aforesaid shall vest in the purchaser a full, clear, and absolute title to the said lands,

subject only to any leases thereof or rights therein now existing or granted by competent authority prior to such sale, and also to any mortgage that may be executed thereof to secure all or any of the purchase money thereof: sec. 1.

Section 2 provides for the manner of investing the proceeds of the sale, and that "the said trustees shall hold and apply the principal and interest represented by or derivable from such sales and investments upon the same trusts and for the same ends, intents, and purposes expressed in the will of the said testator with respect to the said Blenheim lands, and subject to the same rules and incidents, with respect to the devolution thereof and otherwise, as if the Blenheim lands still remained realty."

Section 3 provides that the trust and power of sale authorised by the Act are to be exercised within 10 years from the passing thereof.

The testator William Spragge is the same William Spragge who became entitled to an undivided one-half of the Blenheim lands under the will of Joseph Bitterman Spragge, and by his will he made provision as to these lands in the following words:—

"In the event of the Blenheim property of my late brother Joseph devolving in part upon me or becoming a part of my estate, I hereby devote any such share as follows: the nearest lot of 200 acres to the village of Ayr shall be in perpetuity a glebe for a minister of the Church of England resident in or immediately adjacent to the township of Blenheim and regularly officiating in the said township, and the residue of such share of my brother's Blenheim property shall be allotted in equal proportions, as regards value, to the Church Societies of the Dioceses of Toronto and Huron, and shall be appropriated and permanently set apart in aid of the funds for the support of the rural clergy, and for no other purpose. The glebe lot shall be under the charge and control for that object of the Church Society of the Diocese of Huron, and shall never be sold or exchanged.

"The lands in the three several cases just named to be held in perpetuity by the respective Church Societies for the objects specified, and any sale or exchange thereof, or of any part thereof, shall, so far as such whole or such part, nullify the bequests by this will, in so far as concerns such part of the said Blenheim lands."

William Spragge died on 16th April, 1874.

The whole of the Blenheim lands have been sold by the trustees of the will of Joseph Bitterman Spragge, and it is said that the sum realised from the sales was $62,637.

Some of the sales took place in the lifetime of William Spragge, but most of them after his death, and, according to a statement furnished to me since the argument, by Mr. Cassels, of the whole $62,637 only the sum of $15,900 was realised from sales made before William Spragge's death.

In the action already referred to, under the reference directed by the judgment of 27th November, 1907, it has been found that there is in the hands of the plaintiffs as trustees of the will of the late Joseph Bitterman Spragge the sum of $28,000, which, upon the material before me, must be taken to be what remains of the proceeds of the sales of the Blenheim lands.

The will of William Spragge contains a provision immediately following the provision as to the Blenheim lands, which is as follows: "Should any other property, real or personal, other than what I have indicated in this will, become attached to my estate by purchase, gift, bequest, or inheritance, it is my desire that the same be divided among our children or the surviving of them as they respectively attain the age of 23, and in the proportion of two parts to each of my sons and one part to each of my daughters."

By a later provision the testator directed that in the event of neither of his children entering the ministry of the Church of England or being educating for it when the youngest son attained the age of 18 years, which event happened, the sum of $500 should be forthwith paid over to each of the 5 dioceses of the Church of England in Canada, "that is to say, to the Church Society thereof or Synods where there be no Church Society, upon the condition, to be sure fulfilled by my executors and executrix, that the same be invested with the permanent missionary funds in each of the said dioceses and set apart towards the support of the rural clergy."

The will contains no disposition of the residue of the testator's estate, except in so far as the provision immediately following that as to the Blenheim lands has that effect.

The questions as to which, according to the originating notice, the opinion of the Court is asked are:—

(1) "Whether the devise of the Blenheim lands to the Church Societies of Huron and Toronto as set out in the will of the said William Spragge, deceased, is valid in law."

(2) "The effect upon the said devise of the sale of the said lands pursuant to the statute 34 Vict. ch. 100, as set out in the affidavit. . . ."

(3) "Whether the fund of about $28,000, referred to in the said affidavit, is available for payment of the legacies of $500 each to the Synods of the Dioceses of Huron, Toronto, Ontario, Montreal, and Quebec."

And the advice and direction of the Court is asked as to the proper disposition to be made by the executors of William Spragge of the fund of $28,000.

It was not contended by any of the counsel, and there is no reason for thinking, that the disposition made by the testator William Spragge of the Blenheim lands is not valid in law.

It was, however, contended that the effect of the Act 34 Vict. ch. 100, and the sale of the Blenheim lands under the authority of it, was to adeem or extinguish the devise of the land which the will contains; in other words, that the will did not operate to pass the proceeds of the sale of the lands.

That a specific gift is adeemed if at the testator's death the subject matter of the gift has been converted into something else by the act of the testator or by duly constituted authority, is stated to be the law in Theobald on Wills, Canadian ed., p. 164; and in In re Slater, [1906] 2 Ch. 480, [1907] 1 Ch. 665, the Master of the Rolls said ([1907] 1 Ch. p. 671): "There was a time when the Courts held that ademption was dependent on the testator's intention, on a presumed intention on his part, and it was, therefore, held in old days that when a change was effected by public authority or without the will of the testator, ademption did not follow. But for many years that has ceased to be law, and I think it is now the law that where a change has occurred in the nature of the property, even though effected by virtue of an Act of Parliament, ademption will follow, unless the case can be brought within what I may call the principle of Oakes v. Oakes," 9 Hare 666; that is to say, as the Master of the Rolls points out further on, where the property has been changed in name or form only, but is substantially the same thing. Kennedy, L.J., doubted

whether the doctrine of ademption ought to be applied where the nature of the property has been changed by Act of Parliament, and said: "For that proposition I cannot say that I have seen in any of the cases cited sufficient authority:" p. 677.

The cases in which the nature of the property of a lunatic has been changed under the authority of the Lords Justices, and it has been held that a gift of the property has been thereby adeemed, were decided on the same principle.

In Attorney-General v. Marquis of Ailesbury, 12 App. Cas. 672, the question was as to the jurisdiction of the Court to direct that land purchased with money belonging to a lunatic's estate should devolve as personal estate, and there is an interesting and learned discussion as to the power of the Court in such cases.

Jones v. Greene, L. R. 5 Eq. 555, may also be referred to. In that case a testator had bequeathed the income of certain shares specifically, and bequeathed the shares to his residuary legatee. After the date of the will he was found lunatic, and under an order in the lunacy the shares were sold and the proceeds were invested in consols, and Giffard, V.-C., held that the gift of the income was adeemed by the sale.

In order to prevent the injustice of this rule of law, it is enacted by sec. 123 (1) of the Lunacy Act, 1890, that: "123.—(1) The lunatic, his heirs, executors, administrators, next of kin, devisees, legatees, and assigns, shall have the same interest in any moneys arising from any sale, mortgage, or other disposition under the powers of this Act which may not have been applied under such powers, as he or they would have had in the property the subject of the sale, mortgage, or disposition, if no sale, mortgage, or disposition had been made, and the surplus moneys shall be of the same nature as the property sold, mortgaged, or disposed of."

The earlier Act contained a similar provision, but applied only to land.

Unless, then, there is something in the Act which authorised the sale of the Blenheim lands, which has the same effect as the provision of the Lunacy Act which I have quoted, I am bound by the decided cases to hold that as to any of the Blenheim lands which were sold during the lifetime of William Spragge the devise of them was adeemed and cannot take effect.

That the legislature intended that some consequences which would otherwise flow from the sale of the lands should be prevented, is manifest from the latter part of sec. 2, which declares how the proceeds of the sales are to be held by the trustees.

The language in which this intention is expressed is not well chosen; it is, that the proceeds of the sale, including interest, are to be held and applied "upon the same trusts and for the same ends, intents, and purposes expressed in the will of the said testator with respect to the said Blenheim lands, and subject to the same rules and incidents, with resepct to the devolution thereof and otherwise, as if the Blenheim lands still remained realty."

What was meant by the concluding words "as if the Blenheim lands still remained realty" it is difficult to say. Read literally, the words have no meaning, for the Blenheim lands would, of course, always remain realty.

The principle upon which such legislation as is embodied in this Act is to be interpreted is thus stated by an eminent Judge (James, L.J.), in In re Barker, 17 Ch. D. 241: "There seems to me to be a broad general principle underlying all these questions, which is this, that where property is taken compulsorily from any person who is not sui juris and is not competent to make the subsequent alteration in the disposition or the devolution of that property which would naturally follow such a change, the presumption is, if the words of the Act of Parliament really admit of that interpretation, that the legislature did not intend to interfere with any legal rights or any legitimate expectations of any persons whatsoever. The sole object of the change, as it was in this case, is to enable the property to be disposed of advantageously, and one can conceive a great number of very unjust consequences that would follow if any other rule were to be adopted:" p. 243.

Applying this principle to the provisions of the Act with which I have to deal, I have, with some hesitation, reached the conclusion that the effect of the latter part of sec. 2 which I have quoted is to prevent the sale of the land from having the effect of altering the position or rights or legitimate expectations of any one, and to be a legislative declaration that for every purpose, "devolution or otherwise," the proceeds of the sale were to be treated and dealt with as if they were still the Blenheim lands.

My doubt has been whether the effect of the provision must not be confined to preventing the proceeds of the sale from becoming personal property, and to giving them all the qualities of real estate, as to devolution or otherwise, but so to confine it does not, I think, give any effect to the words "as if the Blenheim lands still remained realty," which, if any meaning can be given to those words, and it is my duty to endeavour to find one, must, I think, mean "as if they (i.e., the proceeds of the sales) were the Blenheim lands."

But, if I am wrong in construing sec. 2 in this way, the Act certainly can have no effect on the lands which were unsold at the death of William Spragge. They passed by the will, subject, of course, to the power of sale, and the proceeds of the sale of them were impressed with the same trusts to which the lands themselves were subject.

The provision of the will as to any sale or exchange nullifying the "bequests" of the will, cannot, in my opinion, have the effect of "nullifying" the devise—that provision cannot have application where the act which is forbidden is not the voluntary act of the devisee, but is done under the authority of the legislature, and by some one else. What the testator was guarding against was a sale or exchange by the beneficiaries after the Blenheim lands had come to them.

It was argued that the devise of the Blenheim lands never took effect; that it was by the terms of the will to take effect only if the lands themselves "devolved" upon the testator; and that this never happened. This argument could apply only to the lands which were sold in the testator's lifetime, for the unsold lands certainly did devolve on the testator, and were subsequently sold under the powers conferred by the Act; but, even as to the lands sold in his lifetime, I am of opinion that the argument is not entitled to prevail. Such a construction would be an extremely narrow one, and the event provided was, I think, the death of Mrs. Lett without issue, and the consequent taking effect of the devise to the brothers and sister.

There will be a declaration in accordance with the opinion I have expressed, and, unless the beneficiaries interested in the Blenheim lands agree as to the distribution of the fund of $28,000, there will be a reference to the Master in

Ordinary to determine the proportions in which they are entitled to it.

It was not disputed that the 5 dioceses, to each of whom a legacy of $500 was bequeathed, have become entitled to these legacies, but I have not before me sufficient information to enable me to determine out of what fund they are payable, though they are certainly, in the view I have taken, not payable out of the $28,000.

The costs of all parties, including the costs of the reference, will be paid out of the fund of $28,000, and the applicants will be entitled to their costs between solicitor and client.

RIDDELL, J. MARCH 29TH, 1909.

TRIAL.

CLISDELL v. LOVELL.

Vendor and Purchaser—Contract for Sale of Land and Business—Sale to Syndicate—Subsequent Sale to another Person—Rights of Members of Syndicate—Fraud—Agreement to Compromise—Authority of Agent—Right to Repudiate—Specific Performance—Vendors — Parties—Amendment—Costs—Damages.

Action for a declaration that the transfer of the Dominion Brewery property by defendant Lovell to defendants the Dominion Brewery Co. was void, and that plaintiffs were entitled under certain contracts to a one-eighth share in the property, and for damages and other relief. See 12 O. W. R. 90.

I. F. Hellmuth, K.C., and W. N. Tilley, for plaintiffs.

W. H. Blake, K.C., and Glyn Osler, for defendants Lovell, Mackenzie, and the Dominion Brewery Co.

H. Cassels, K.C., and R. S. Cassels, for defendants Case and George A. Case Limited.

J. H. Moss, K.C., for defendant Clark.

RIDDELL, J.:—In this case (reported in part in 12 O. W. R. 90) the plaintiffs and the defendant Millar have exercised the election given them of repudiating the agreement

of 29th December, paying the costs, adding Clark, the vendor, as a party defendant, and claiming specific performance of the agreement of 14th December. The evidence of Foster was taken upon commission, and the case set down for trial before me at the non-jury sittings, 9th December, 1908. Mr. Wright was examined, and Mr. Millar was again examined orally on this day.

It was arranged that written arguments should be put in; these have been put in, and I now proceed to dispose of the case.

In the disposition of the case, I begin by saying that I accept in its entirety the evidence of Mr. Millar, believing that full credence should be given to it throughout in all particulars.

It may not be wholly useless to mention some of the facts which took place before the refusal of Foster, through his solicitor, to recognise any right in Millar or his clients or associates which would prevent him selling to Mackenzie.

The "agreement" of 14th December is between Clark, as vendor, of the first part, George A. Case Limited (trustee), as purchaser, and George A. Case. It provides that "in consideration of the sum of $337,500 to be paid by the purchaser to the vendor, in manner hereinafter mentioned, the vendor shall sell and procure to be conveyed to the purchaser . . . property . . . The sum of $25,000 shall be paid by the purchaser to Walter Barwick, of Toronto, at the time of execution hereof, as an earnest to bind the bargain, and to be held by him until the completion of the sale. . . ."

Mr. Foster, being desirous of getting home to England, signed the agreement in triplicate; this document in triplicate was handed to Mr. Millar for execution by the purchaser, upon the down payment being provided for; the financial arrangement which Case and Millar hoped to make fell through; the document was not signed by the purchaser, but was, at the request of the vendor's solicitor, returned by Mr. Millar to him on 16th December (Saturday). There can be no doubt that it was contemplated that there could be no sale unless and until the down payment was made and the agreement executed by the purchaser.

So far, those for whom the purchaser was trustee were Case and Millar; but that proposed transaction fell through, and, as I have said, the documents intended to evidence the sale, if a sale should be made, were returned unsigned to

the vendor's solicitor, there to remain, and they did in fact so remain until after this action was brought. But others became interested. Foster, coming back from New York, met at the King Edward Hotel, on the evening of Monday 18th December, Millar, who told him how the failure had occurred, but added: "Now we are ready to carry it out; I have the money now." Upon Foster complaining of losing his boat, Millar agreed to make up the money loss (£100 it is said), and Foster, desiring to take Wednesday's boat, Millar said: "All right; we are ready to close this up to-morrow morning." Foster expressed his assent. Foster considered, and had a right to consider Millar simply as solicitor for the purchaser; and I cannot see that he had at any time notice that Millar under the original arrangement was anything else but solicitor, although he knew that there were other parties "behind" the nominal purchaser.

Before the interview on the Monday, however, he knew or believed that Clisdell was to be the purchaser, i.e., the person behind the nominal purchaser; though he still believed that Millar was simply solicitor.

Clisdell was present at the interview on the 18th between Foster and Millar, and his account is: "The arrangement was completed, at the table when we were dining, with Mr. Foster by Mr. Millar, that the brewery transfer would be made to me the following day. . . . It was to be placed in black and white the following morning." Orpen was not present at the interview, and it does not appear that Foster ever saw him. Case was not present at the time of the arrangement.

I think the evidence of Millar gives the true account of the transaction; and that leaves us with the facts that an agreement which had fallen through was to be taken up anew, the purchaser to pay an additional £100.

Assuming that this satisfied the Statute of Frauds, can it be enforced in view of what took place subsequently?

Before the time came for the purchaser, the George A. Case Limited, to execute the contract and pay the $25,000, under the new agreement, the manager of George A. Case Limited—to all intents and purposes the company—had repudiated the contract proposed, and had requested the vendor to sell to another. This appears from the evidence of Foster, which is to be accepted upon this point.

No one was ever intended to be bound as a purchaser except George A. Case Limited; and that company refusing to become bound—and that was the effect of Case's conduct—the vendor was released.

Assuming that Foster on the Tuesday morning should have allowed the purchase suggested to be carried through, it was to be carried through by the "purchaser," George A. Case Limited, executing the document and paying $25,000. Instead of that company executing the contract, the fact was that the company did not only not offer to execute the contract, but, through Case, went so far as to request the vendor's agent to enter into another and inconsistent contract for sale to Mackenzie. It is true that Foster knew that the purchaser behind the nominal purchaser was not Case; but he had not agreed to accept, as the purchaser bound by the contract and a party thereto, any one but George A. Case Limited. Had Clisdell or any other person offered to execute the contract, the vendor might well say "non haec in foedera veni."

It is not, perhaps, wholly without significance, moreover, that the "men behind" had changed, or at least were not the same as the person who had been represented by Case to Foster as the real purchaser. On the evening of the 18th, at the instance of Case, a document had been drawn up between George A. Case Limited, Clisdell, Orpen, and Millar, forming a syndicate, and this syndicate was, before the morning of the 19th, the beneficiary for whom George A. Case Limited was to carry out the purchase.

There can be no pretence that Millar had authority to execute the contract for George A. Case Limited; he was not even a director.

In view of the position taken by the purchaser, whose execution of the contract was, in the contemplation of all parties, necessary, I cannot now (any more than at the close of the first trial) see that there was any contract enforceable against Foster or Clark.

The action will then be dismissed against Clark, and with costs.

No higher right exists against Mackenzie than against Clark: Savereux v. Tourangeau, 16 O. L. R. 600, 11 O. W. R. 994. So too as to Lovell and the Dominion Co. The action will be dismissed against these with costs.

As against George A. Case Limited, this company, by the syndicate agreement and by the dealings of Case and its manager, acting for the company, with Millar, Clisdell, and Lovell, impliedly undertook that it should and would do all that was reasonable to procure a binding contract with Clark. Instead of so acting, the company, in breach of faith and of its duty, procured the sale of the property to another. In my opinion, this gives a cause of action to the plaintiffs and the defendant Millar. That the legitimate and proper efforts of the company would have resulted in procuring this property for the "syndicate," I think the results have proved.

The plaintiffs and Millar are, therefore, entitled to judgment against the company, with a reference to the Master as to damages. The company will also pay the plaintiffs' costs, except so far as they have been increased by adding claims which I have decided to be untenable.

As to Case, he violated his duty; his bad faith is the cause of all the difficulty; within a few hours of the execution of a formal document drawn up at his own instance, he did his best—and successfully—to render this wholly nugatory. No doubt, he thought he himself would do better financially by having the sale made to Mackenzie, but that is no valid excuse for his conduct. Some palliation may perhaps be found in what seems to have been in his mind, namely, that he could induce Mackenzie to allow the syndicate to "come in;" there seems, however, upon the evidence to be no foundation for any such belief, if such belief he had. He should also pay the costs already awarded against his company.

In what he did, however, I do not find that he committed what is in law a tort; and he had personally no contract, express or implied, with the plaintiffs. He was dealing for his company, as the documents shew. I cannot, therefore, find that he personally should be ordered to pay damages.

In respect of the transactions between Case and Millar subsequently, including the agreement of the 29th December, referred to in the report in 12 O. W. R. at pp. 93, 95, and 96, I find that the formal order taken out on Friday 8th May, 1908, after the former part trial, does not contain any reference to an election to repudiate that agreement. But that agreement was intended to be in satisfaction of all the rights of the plaintiffs and Millar under the alleged agree-

ment with Foster, and all the previous dealings in respect of the property. So that, if this agreement of 29th December were claimed to be of any validity, the sale to Mackenzie must be considered affirmed by the plaintiffs and Millar. They, claiming that the sale to Mackenzie was invalid, must ex necessitate abandon the agreement of 29th December. Notwithstanding the absence of any reference in the formal order, they could not be allowed to attack the sale to Mackenzie, and still insist upon the agreement of the 29th December. Nor could they be allowed to claim damages for breach of the implied agreement by George A. Case Limited, without a similar election; the agreement of the 29th December was intended to cover all claims of that character. And, in view of all the circumstances of the case, they cannot be allowed now to claim damages for breach of that agreement in the alternative.

There will be no personal judgment against Case except for the costs already mentioned.

The costs will include all not already disposed of over which I have any control.

All amendments to the pleadings (if any) necessary to meet the facts as found and the relief as given may be made.

MACMAHON, J. MARCH 29TH, 1909.

TRIAL.

KREUTZINGER v. STANDARD MUTUAL FIRE INSURANCE CO.

Fire Insurance—Goods Destroyed and Damaged by Fire—Appraisement—Question as to Property Included in Policy — Evidence — Coal Oil Kept on Premises — Defence not Pleaded.

Action to recover the sum of $2,000, the amount of a policy of insurance issued by the defendants to the plaintiff, dated 9th March, 1907, for the term of one year from 28th February, 1907, on lumber described in the policy as follows: "On stock of lumber in the rough, manufactured or in process, including sashes, doors, and all such goods in the course of manufacture; only while contained in the building of a

three and one-half and two storey frame shingle-roofed building, with basement and all additions thereto. while occupied only as a planing mill and sash and door factory, and in additions occupied as storeroom. Loss payable to the Molsons Bank, as their interest may appear."

A. B. McBride, Berlin, for plaintiff.

R. W. Eyre, for defendants.

MacMahon, J.:—The interest the Molsons Bank had at the time the policy issued has been paid.

The property insured was partly destroyed and partly damaged by fire on 26th October, 1907.

On 30th October an appraisement was made by R. O. Graydon, an inspector of the company, and George White, of Berlin, who signed the following certificate of their appraisement of a part of the plaintiff's loss: "We, the undersigned, having been appointed to appraise and estimate the loss and damage to the lumber, sash, doors, and other material in process of manufacture in planing mill as insured under policy 25274 of the Standard Mutual Fire Insurance Co., beg to report that we estimate the loss and damage done by the said fire and by water and any other cause incident upon said fire at the sum of $719. (This does not include washing machines or cradles). R. O. Graydon, George White."

The appraisement made, as shewn by the evidence of George White, was for lumber for the purpose of building. This amount was not disputed by the defendants. What the company disputed are the items for "cradle stock" in schedule 1, amounting to $1,282.17, and "washing machine" stock in schedule 2, amounting to $951.21.

There were no completed cradles. All the materials mentioned in exhibit 1 were pieces of "lumber in process of manufacture," and when assembled and put together would form cradles. It was originally lumber in the rough in process of manufacture, and when put together would have formed part of the goods manufactured in the planing mill.

In schedule 2, was lumber in process of manufacture for washing machines, and what I have stated regarding the lumber in process of manufacture for cradles applies to this lumber intended to be manufactured into washing machines.

There are a number of finished washing machines referred to in the schedule, the value of which is $320.88.

Evidence was given by the plaintiff that cradles and washing machines were manufactured by a planing mill in Guelph. And John F. Schultz, one of a firm of builders and contractors, owning a planing mill in Brantford, said they manufactured washing machines at their mill. But without this evidence, I consider, contrary to my impression at the trial, that the lumber mentioned in both schedules, which in no wise increased the risk, was included in the risk covered by the policy.

In the statement of defence it is not set up that the plaintiff kept coal oil on the premises, contrary to the provisions of clause 10 (f) of the statutory conditions indorsed on the policy, which provides that the company will not be liable for loss occurring for coal oil (refined coal oil for lighting purposes only, not exceeding 5 gallons in quantity, excepted).

During the plaintiff's cross-examination he stated that at the time of the application there were probably 2 gallons of coal oil in the basement of the mill. But at the time of the fire he might have had 10 gallons in the basement.

George White, who probably knew more than the plaintiff did about what was kept on the premises, said that, with the exception of a small can which contained one gallon, there was no other coal oil on the premises.

This question could not be dealt with unless the defence was raised on the record, and the plaintiff given an opportunity to properly meet it. I understand from the argument of plaintiff's counsel that he would have been prepared to meet it had that defence been pleaded.

The lumber appraised amounted to $719. Schedule 1 shews that there was in process of manufacture $1,282.17, and schedule 2, $951.20; total $2,952.37.

The plaintiff is entitled to judgment for $2,000, with interest thereon at 5 per cent. from 26th October, 1907, together with costs of suit.

MEREDITH, C.J. MARCH 29TH, 1909.

TRIAL.

TWIN CITY OIL CO. v. CHRISTIE.

Company — Shares — Subscription — Allotment — Directors —Delegation to President—Number of Directors—By-laws —Invalidity of Allotment—Withdrawal by Subscriber before Subsequent Valid Allotment — Action for Calls — Unfounded Charges of Misrepresentations—Costs.

Action for a call of 25 per cent. made on 400 shares of the capital stock of the plaintiff company, of which the defendant was alleged to be the holder; the defence was that the defendant was not and never became a shareholder.

E. E. A. DuVernet, K.C., for plaintiffs.

J. A. McAndrew, for defendant.

MEREDITH, C.J.:—Some time before 28th March, 1908, the defendant signed an undated document (exhibit 1), in the following words: "I, Charles R. Christie, hereby agree to purchase stock in the Twin City Oil Co. Limited to the amount of 400 shares, at par value of $10 per share, payments to be made as follows: 200 shares, amounting to $2,000, balance of 200 shares, amounting to $2,000, before December 31st, 1908. Charles R. Christie."

And Vernon O. Phillips on the same day signed under the words "accepted by" at the foot of this document, adding "M'g'r" after his name.

On 28th March, 1908, Phillips, as president and manager of the company, wrote a letter (exhibit 2) to the defendant in these words: "Sir: I beg to give you notice that the directors of the Twin City Oil Company Limited have made 3 calls upon the 400 shares subscribed for by you in the capital stock of this company, and which have this day been allotted to you by by-law of this company as follows: 25 per cent. thereof, being the sum of $1,000, on 1st May, 1908, another 25 per cent. thereof, being the sum of $1,000, on 1st June, 1908, and the balance of 50 per cent. thereof, being $2,000, on 31st December, 1908, and that the said sums will be payable to Henrietta M. Phillips, the treasurer of this company, at the company's office in the town of Berlin, on the respective days hereinbefore set forth."

On 10th April following, the defendant wrote a letter to the company withdrawing and cancelling his application for 400 shares of the capital stock of the company.

The sole question for decision is, whether or not there had been before this last letter was received by the plaintiffs an allotment of the shares of which the defendant had had notice, so as to bind him.

The company were incorporated under the Ontario Companies Act by letters patent dated 3rd May, 1907, and the provisional directors named in the letters patent are Vernon Osman Phillips, Joshua Alfred Phillips, Richard Richmond, Christopher Nicholas Huestis, and Elizabeth Ann Phillips.

A general meeting of the shareholders was held on 25th May, 1907, at which it was resolved that a board of 3 directors should be elected to manage the affairs of the company, and Vernon Osman Phillips, Christopher Nicholas Huestis, and Richard Richmond, 3 of the provisional directors, were elected as directors.

On the same day a meeting of the directors was held, at which V. O. Phillips was elected president and general manager, Huestis as vice-president, and Richmond as secretary, and by-laws were also adopted.

By sec. 7 of these by-laws it is provided that the affairs of the company shall be managed by a board of 5 directors, of whom 3 shall form a quorum, and by sec. 27 it is provided that stock subscriptions shall be received on the following terms: 25 per cent. payable on allotment, and 25 per cent. on the first of each month thereafter until fully paid; and that no stock certificate shall issue until the stock shall be fully paid, but that the directors shall have the right to change these terms when approved of by a majority of the board, or to accept payment in full for stock subscriptions when deemed best in the interest of the company.

At a meeting of the directors held on 27th March, 1908, a resolution was passed giving to the president full power to deal with the defendant's "application for purchase of stock in the Twin City Oil Co. Limited," and it was apparently under the authority of this resolution that the letter of the following day (exhibit 2) was written.

Nothing further was done in the way of allotting shares to the defendant, and his name does not appear in the register of shareholders.

Upon this state of facts I am of opinion that there was not a valid allotment of shares to the defendant; that he never became a shareholder; and that his withdrawal of his application was effectual.

The directors had, I think, no power to delegate to the president their authority as to the allotment of shares or to accept the offer of the defendant for the shares for which he applied: Lindley on Companies, 6th ed., p. 206, note q, and cases there cited; Buckley on Companies, 8th ed., p. 84; Re Pakenham Pork Packing Co., 12 O. L. R. 100, 7 O. W. R. 658.

Apart from this objection, which is, in my opinion, fatal to the claim of the plaintiffs, the fact that the by-laws passed on 25th May, 1907, provided that the affairs of the company should be managed by a board of 5 directors, and that a board consisting of only 3 directors assumed to manage its affairs, would be a formidable difficulty in the way of success.

I may point out that the directors on 18th April, 1907, were apparently aware that no proper allotment of the shares to the defendant had been made, for on that day a minute in the following terms is found in the minute book of the board: "The president stated that it was necessary before taking proceedings against C. R. Christie that a by-law be passed allotting stock to him. A by-law for that purpose was passed and read a first, second, and third time, and finally passed as special by-law No. 2, and the company's seal affixed thereto, with the signatures of the president and secretary."

The first section of the by-law referred to in this minute is as follows: "1. That 400 shares of the capital stock of the Twin City Oil Company Limited are hereby allotted to Charles E. Christie, of the city of Toronto, in the county of York, manufacturer."

An allotment at this date was, of course, ineffectual, as the application for the shares had been withdrawn more than a week before it was made.

The result is that, in my opinion, the action fails and must be dismissed, but I dismiss it without costs, as the defendant failed to prove the misrepresentations which he alleged were made to him to induce him to become a shareholder.

CARTWRIGHT, MASTER. MARCH 30TH, 1909.

CHAMBERS.

BAIN v. BROWN.

Summary Judgment—Rule 603—Promissory Note—Action by Indorsee — Security — Overdue Note — Partnership — Accommodation—Notice.

Motion by plaintiff for summary judgment under Rule 603 in an action on a promissory note for $1,030, given by plaintiff's debtor to her in satisfaction pro tanto of a larger debt of $1,700.

S. W. McKeown, for plaintiff.

A. Bosworth Armstrong, for defendant.

THE MASTER:—Three defences are suggested in defendant's answer:—

1. That the note was taken only as security, and not in payment. This is positively denied by plaintiff, who has been cross-examined. The receipt given for the amount to Stoddart, plaintiff's debtor, is produced. It is clear that the debt is fully paid to the amount stated in the receipt, and that Stoddart is now liable only for the balance.

2. It was suggested in defendant's affidavit that the note was overdue when indorsed to plaintiff. This is also displaced by plaintiff's cross-examination. It had still 2 or 3 days to run when accepted by her.

3. The third and more plausible ground is that the note was given by defendant to his partner, the plaintiff's debtor, merely as an accommodation: and that, as plaintiff's solicitor had acted for Stoddart in the negotiations between them looking to a settlement of their partnership matters, he must have known, when plaintiff accepted the note now in question, that there was a "serious question of partnership between Stoddart and myself" (the defendant); and that plaintiff is, therefore, affected by such notice, though she denies most positively that she knew of the partnership.

This question of notice was fully discussed in Brown v. Sweet, 7 A. R. 725, at pp. 738, 739. There it was said by Spragge, C.J.O., that in these cases if it is contended that

plaintiff had notice, because the solicitor had notice, this must be shewn affirmatively. "A party is affected with notice of that which is known to his solicitor, on the principle that it is the duty of the solicitor to inform his client of the fact, and it will be assumed that he has done his duty." But this was not shewn in that case, nor has it been shewn in this. "It might have been shewn, if the fact were so, by calling the solicitor." Here the solicitor could have been examined by defendant as a witness on the pending motion, and should have been so examined if this defence was seriously put forward. The Chief Justice concludes his remarks on this point as follows: "To carry this doctrine further than it has already been carried would lead to mischievous consequences."

The motion is, therefore, entitled to succeed, but the plaintiff is willing that the defendant may defend if the amount of the note is paid into Court within a reasonable time, say 10 days. If this is done, defendant should also consent to allow the case to be put on the peremptory list as soon as it is set down, without waiting for the 3 weeks' interval, if plaintiff so desires.

If this arrangement is carried out, the costs of the motion will be in the cause.

CARTWRIGHT, MASTER. MARCH 30TH, 1909.

CHAMBERS.

KING v. KING.

Lis Pendens — Order Vacating Registry of — Vexatious Proceeding — Action for Declaration of Inchoate Right to Dower.

Motion by defendant to vacate the registry of a certificate of lis pendens.

The plaintiff sought a declaration that she was entitled to dower out of certain lands, some, if not all, being admittedly held by a trustee for her husband, the defendant.

John MacGregor, for defendant.

W. T. J. Lee, for plaintiff.

THE MASTER:—Dower is, no doubt, highly favoured by the law, and by R. S. O. 1897 ch. 164, sec. 2, a great benefit was given to a widow in extending that right to equitable estates of the husband. This, however, only attaches "where a husband *dies* beneficially entitled." During the husband's lifetime it is only a possibility coupled with an interest, liable to be defeated at any moment by his alienation. It, therefore, seems clear that this certificate is only a vexatious proceeding, and not of any real benefit to the plaintiff herself. If this is so, then the motion is entitled to proceed under the decision of Street, J., in Knapp v. Carley, 7 O. L. R. 409, 3 O. W. R. 187.

An order will therefore go vacating the registry of the certificate of lis pendens, with costs to defendant in the action.

CARTWRIGHT, MASTER. MARCH 30TH, 1909.

CHAMBERS.

SMITH v. CLERGUE.

Discovery — Examination of Agent of Party — Rule 903 — Ex Parte Order — Necessity for Notice.

Motion by defendant to set aside an ex parte order for the examination of B. J. Clergue, as agent and employé of defendant, under Rule 903.

H. S. White, for defendant.

J. D. Montgomery, for plaintiff.

THE MASTER:—The ground of the motion is that the order should not have been made except on notice.

This practice was introduced by sec. 287 of the Common Law Procedure Act, and in the notes in the 2nd ed. of Harrison's work cases are cited which shew that at the first it was decided that even a debtor should have notice. This proceeding is now regulated by Rule 900, which allows such examination "without an order." No such change has been made in Rule 903. And, as that Rule is in substance the same as sec. 287, supra, the same practice should prevail as before.

See the cases of Blakeley v. Blaase, 12 P. R. 565, and Gowans v. Barnet, 12 P. R. 330.

I am, therefore, of opinion that the motion must succeed, and the order be set aside, without prejudice to an application on notice.

The costs of this motion I reserve until it appears whether any further proceeding is taken herein.

MEREDITH, C.J. MARCH 30TH, 1909.

CHAMBERS.

RE WILSON v. DURHAM.

Division Courts—Order for Committal of Judgment Debtor—Power of Judge to Rescind—Re-trial—Mandamus.

Motion by defendant Stickney for a mandamus to the Judge of the 1st Division Court in the county of Oxford, to hear and consider an application made to him by the applicant to rescind an order made by the Judge on 9th February, 1909, by which he directed that the applicant should be committed to the common gaol of the county of Oxford for 20 days.

T. L. Monahan, for the applicant.

C. A. Moss, for the respondent.

MEREDITH, C.J.:—The order was made under sec. 247 of the Division Courts Act, and on the ground that it appeared to the Judge that the applicant had incurred the debt for which judgment had been recovered by means of fraud.

What the applicant is seeking is a re-trial of a matter upon which there has been an adjudication, and the view of the learned Judge, when the application was made to him, was that he had no jurisdiction to hear it or to rescind the order which had been made.

The provisions as to new trial are contained in sec. 152, and have relation only to the trial of an action, and there is no provision for a re-trial or a new trial where a defendant has been summoned under the provisions of sec. 243, and an order for his commitment has been made under sec. 247.

Nor is there any provision enabling the Judge to rescind an order made by him under sec. 247.

Section 251, which provides that the Judge shall order a person imprisoned under the Act to be discharged out of

custody, applies only when he "has satisfied the debt or demand or any instalment thereof payable, and the costs remaining due at the time of the order of imprisonment being made, together with the costs of obtaining the order and all subsequent costs."

Section 252 is also inapplicable; the power to rescind or alter an order conferred by it extends only to an order for payment previously made, and not to the order of commitment.

It is unnecessary to consider whether the Judge of a Division Court has inherent jurisdiction to rescind an order made by him which has been made per incuriam or obtained by fraud, for no such case is made by the applicant.

Even in the case of an ex parte order made by a Judge of the High Court, it has been held that, after it has been acted upon, the Judge has no power to rescind it: McNab v. Oppenheimer, 11 P. R. 214, and other cases cited in Holmested and Langton, 3rd ed., p. 366; and it was in consequence of these decisions that Con. Rule 358 was passed.

If there is no inherent jurisdiction to rescind an ex parte order, a fortiori there can be none to rescind an order made in the presence of the parties or after notice to them.

If Shaw v. Nickerson, 7 U. C. R. 541, is to be understood as deciding otherwise—and I think it is not—it is opposed to the present practice, and must be taken to be no longer a binding authority.

Re Nilick v. Marks, 31 O. R. 677, is, I think, conclusive against the existence of the jurisdiction which the Court is asked to require the Judge to exercise.

I therefore refuse the application without costs.

MEREDITH, C.J. MARCH 30TH, 1909.

CHAMBERS.

ROBINSON v. MILLS.

Security for Costs—Libel—Newspaper—R. S. O. 1897 ch. 68, sec. 10—Right of Sub-editor to Security.

Appeal by defendant from order of Master in Chambers, ante 606, dismissing defendant's motion for an order for security for costs.

J. King, K.C., for defendant.

Featherston Aylesworth, for plaintiff.

MEREDITH, C.J.:—The application for the order was made under sec. 10 of the Act respecting Libel and Slander, R. S. O. 1897 ch. 68.

The defendant is the sporting editor of the Hamilton "Times," and the alleged libel complained of in paragraph 2 of the statement of claim was published in that newspaper.

The only question argued before me was as to whether the appellant is a person entitled to invoke the provisions of sec. 10, which the learned Master in Chambers has held he is not, being of opinion that the section applies, in the case of an editor, only where the defendant is an "editor who is responsible for the general management of the paper and its policy in regard to matters of every kind."

In reaching this conclusion the learned Master in Chambers followed, as he said, the reasoning in Egan v. Miller, 7. C. L. T. Occ. N. 443.

That case, the decision being that of a Divisional Court, is of course binding on me. The report is a very meagre one, and is as follows:—

"The Court held that other expressions in the Act clearly shewed that the provision as to security for costs applied only to the publisher, editor, or proprietor of a newspaper. The very section in question required the defendant to swear that 'the statements complained of were published in good faith.' Appeal dismissed with costs."

From the statement of the facts it appears that the defendant was not the editor or proprietor or publisher, but a correspondent of a newspaper, and that the libel charged was in respect of a letter signed by the defendant, published in a newspaper with which he had no connection.

I am unable to find anything in the case, or in the reported reasons for the decision, that requires that the term "editor" should have given to it the limited meaning which the learned Master in Chambers has assigned to it. The defendant in that case had no connection with the newspaper in which his letter was published, and what I understand the Court to mean is, that the section was not intended for the benefit of a defendant who occupied that position, but only of those who were connected with the publishing of a newspaper, such as a publisher, editor, or proprietor.

It is unnecessary for me to say what my view as to so restricted a construction of the section would have been if

the matter were res integra, but it may not be improper to say that such a construction very much narrows the meaning of the comprehensive words with which the section opens: "In an action brought for libel contained in a newspaper, the defendant may . . . ;" and that it does not appear very clear why a correspondent who sends to a newspaper a communication which is published in it, may not, in the popular sense at all events, be properly said to have published the communication.

However that may be, in my opinion there is nothing in the Act or in the case which makes it necessary to hold that the editor of a department of a newspaper is not entitled to avail himself of the protection given by sec. 10. To narrow the section by limiting its operation to the case of a defendant who is such an editor as the Master in Chambers speaks of, and to the publisher and proprietor, would, in my judgment, take away a protection which the legislature intended should be given at all events to those who were engaged in the work of publishing the newspaper in which the alleged libel appeared, whether as publishers, proprietors, editors in chief, editors of departments, reporters, or printers.

How can it lie in the mouth of the plaintiff to say that the defendant, who, he alleges, published the libel in the Hamilton "Times," cannot properly depose that "the statements complained of were published in good faith," or why should the word "published" in the section be given a different meaning to that which it bears in the statement of claim?

There is nothing in the judgment of the learned Judge of the County Court of Perth, in Powell v. Ruskin, 35 C. L. J. 241, or in the quotation which he makes from the judgment of the Chancellor in Bennett v. Empire Printing and Publishing Co., 16 P. R. at p. 69, opposed to the view I have expressed; and indeed what is said is rather in accord with it.

In Neil v. Norman, 21 C. L. T. Occ. N. 293, all that was decided was that a country correspondent of a newspaper was not entitled to the benefit of sec. 12, and the observations I have made as to Egan v. Miller apply to what was said by Robertson, J., as to the effect of that case.

On the whole, I am of opinion that the appeal should be allowed and the order appealed from discharged, and, subject to any other question which may be open to the re-

spondent in opposing the making of the order, an order for security for costs should be made. Costs here and below in the cause.

CARTWRIGHT, MASTER. MARCH 31ST, 1909.

CHAMBERS.

BROWN v. WINDSOR ESSEX AND LAKE SHORE RAPID R. W. CO.

Venue — Motion to Change — Convenience — Expense — Witnesses.

Motion by defendants to change the venue from St. Thomas to Sandwich.

J. E. Jones, for defendants.

J. H. Spence, for plaintiff.

THE MASTER:—The accident which caused the death which has resulted in this action occurred in June last at Windsor, and the witnesses are, therefore, presumably to be found there, or in the neighbourhood. But this, of itself, is not a ground for a change of venue: see McDonald v. Dawson, 8 O. L. R. 72, 3 O. W. R. 773.

Nor can the motion succeed on the ground of convenience, i.e., of expense. The defendant swears to 5 witnesses, and a difference in favour of Sandwich of $30, though it is not shewn how this is made up. Against this is to be set the cost to plaintiff and the widow of going to Sandwich, instead of St. Thomas—at least $10—which would leave only a difference of $20 at most. It is not stated what the witnesses on either side are expected to prove.

The action was commenced on 27th November last. The statement of claim was delivered on 26th February, and the statement of defence only on 10th March. The delay in this is not explained. The Sandwich assizes began on 23rd March, and this motion, if it was expected to prevail, should have been made in time to have made a trial possible at these assizes. If a change was made now, the trial would be postponed until the autumn. This fact is sufficient, if not of itself, yet certainly in conjunction with the other

circumstances of this case, to allow the trial to take place where the plaintiff named it, though unnecessarily, in the writ, so that defendants had ample notice.

The motion is dismissed. Costs in the cause.

MARCH 31ST, 1909.

DIVISIONAL COURT.

RE MORRISON.

Executors — Compensation—Quantum of Allowance—Costs of Administration Settled by Residuary Legatees — Costs of Passing Accounts — Items not Covered by Tariff — Strict Taxation.

Appeal by Mrs. Jane Minty and Mrs. Janet Gunn, residuary legatees, from order of Morgan, Junior Judge of Surrogate Court of York, upon the passing of the accounts of the executors of Mary Morrison, deceased, "whereby he allowed to the said executors the sum of $5,853.55 for compensation, etc., and whereby he fixed the costs of the passing of the said accounts, without taxation and without notice to the . . . residuary legatees, and whereby he allowed to R. L. Fraser, one of the said executors, the sum of $1,800 for costs, including counsel fees paid," etc.

Glyn Osler, for the appellants.

C. Millar, for the executors.

The judgment of the Court (FALCONBRIDGE, C.J., BRITTON, J., RIDDELL, J.), was delivered by

RIDDELL, J.:—In respect of the amount of compensation allowed, I see no reason to find fault with His Honour's decision. The estate was nearly $150,000; and very considerable responsibility was taken and work done.

As to the costs, these were settled by the residuary legatees themselves; and this settlement should not be interfered with.

The costs of passing the accounts require further consideration. His Honour certifies as follows: "I taxed, by myself, without interference from either party, the solicitors' bill for passing the accounts, which was taxed strictly according to the tariff, except that I allowed certain items not covered by the tariff, and which, under the circumstances of this case, could not have been contemplated by the tariff, but in respect to which certain allowances were properly made to the solicitor, one item being a copy of these two long bills of costs which I had directed Fraser to furnish to the residuary legatees for their information. I allowed to Mr. Millar for attending on the original argument as to Fraser's right to any costs, and also on the long argument both by Mr. Blake and Mr. Osler as to the amount of commission to be allowed, having deemed it advisable to take evidence upon the question of the proper amount to be allowed, and I fixed the counsel fee for Mr. Millar, and for his attendance upon the various occasions, at the sum of $150, which I deemed to be only a reasonable allowance for the number of times he attended and the size of the estate involved, and the nice questions that had been raised by the residuary legatees. I also allowed the Blake firm the sum of $200 for their attendance on all these occasions on behalf of the residuary legatees, and this item, as well as the allowance to Millar, I think was by no means excessive, and is, in my opinion, in accordance with the Surrogate tariff relating to contentious business."

I do not quarrel at all with the statement of the learned Judge that the amounts allowed are reasonable; but I think that the costs in the Surrogate Court must be those found in the tariffs.

In Boyle v. Rothschild, 16 O. L. R. 424, at p. 426, 11 O. W. R. 648, 650, it is pointed out that at the common law there is no right to costs—the right to costs is wholly statutory. Section 86 of the Surrogate Courts Act, R. S. O. 1897 ch. 59, provides that the table of fees and costs framed by the Board of County Court Judges, and approved by the Judges of the Supreme Court of Judicature, 6th February, 1892, is still to prevail, "and no other fees than those specified and allowed in the tables . . . shall be taken or received by . . . solicitors and counsel." See also Rule 71. Not only is there the negative prohibition against the allowance of anything which is not in the tariffs, but there is the positive prohibition in the statute.

A taxation which admittedly contains "items not covered by the tariff" cannot stand.

The appeal upon this ground must be allowed, and the bill complained of referred back to be taxed by the registrar in strict accordance with the tariff. See Rule 72.

Success being divided, there should be no costs of the appeal.

MULOCK, C.J. APRIL 1ST, 1909.

CHAMBERS.

REX v. IRISH.

Liquor License Act—Conviction for Permitting Liquor to be Consumed on Unlicensed Premises — Owner, not being "Occupant," not Liable — Section 50 of Act — Lease of Premises — Owner Remaining as Boarder —"Permit"— Mens Rea — No Evidence of Authorisation or Connivance.

Application to quash the conviction of the defendant for that he did, "at the town of Orillia, unlawfully permit liquor to be consumed upon the premises of the Simcoe House, being a house of public entertainment and kept by him, without the license therefor by law required."

J. Haverson, K.C., for defendant.

J. R. Cartwright, K.C., for the Crown.

MULOCK, C.J.:—The conviction is made under that portion of sec. 50 of the Liquor License Act which enacts as follows: "Nor shall the occupant of any such shop, eating-house, saloon, or house of public entertainment, unless duly licensed, permit any liquor, whether sold by him or not, to be consumed upon the premises by any person other than the members of his family, or employees, or guests not being customers."

The evidence is to the following effect:—

Robert Johnson swore that on 28th November last he drove to the stable of the Simcoe House with his team; that either Megahy or Warner was in charge of the stable; that "they both worked for Irish;" that Johnson found a bottle of whisky in the manger when he went to feed his horses;

that he drank from the bottle and offered a drink from it to Megahy and Warner, who refused to drink; that Johnson gave drink to two or three other fellows; that he did not pay for the whisky nor know who placed it there, and "hardly thinks that they" (Megahy and Warner) saw him drinking.

John C. Dunn, another witness, testified that he was with Johnson on 26th January in the stable; that Megahy was working in the stable; but the witness was unable to say whether Megahy saw him drinking.

Thomas Thompson, another witness, swore that he was with Robert Johnson and Dunn in the stable on the occasion in question, and had a drink of whisky; that, so far as he knew, the defendant had no knowledge of his getting a drink.

For the defence it appears from the evidence of the defendant that he is the owner of the Simcoe House; that on 24th November last he leased the premises to his son; and that since that date the defendant and his wife have resided on the premises, paying their board.

A person to be liable under sec. 50 for permitting liquors to be consumed on unlicensed premises must be the occupant thereof, within the meaning of the section. He must not only be such occupant, but his occupancy must be of a nature that clothes him with authority to permit, and inferentially not to permit, liquor to be consumed thereon. The "occupant," within the meaning of this section, must be a person enjoying such possession or control over the premises as entitles him to regulate the use which is being made of them. Explicit language would be necessary in order to make criminally liable for acts committed on the premises a person not having the legal control thereof, or not in a position to prevent the commission of such acts. If, here, the person charged is not in such occupation of the premises as entitles him to prevent consumption of liquor thereon, it follows that he is not such an occupant as can permit the same within the meaning of the statute. The defendant is the owner of the premises, but the owner is not necessarily the occupant. Ownership is a matter of title; occupancy here means legal possession or control.

The matters complained of occurred since the defendant leased the premises. There is no evidence that he ever was "occupant" except as boarder. Under the Act the owner, unless he is also an occupant, is not liable. Here the defendant, in the capacity of boarder, may be an occupant of the portion of the premises assigned for the personal use of

himself and his wife, but presumably this did not include the stable, where the act complained of was committed. A mere boarder in a house of public entertainment is not in such possession or control of the whole premises as to be liable criminally for the illegal consumption of liquor, without his knowledge, consent, or connivance, on a portion of the premises not under his control.

Being of opinion that the defendant was not an "occupant" of the Simcoe House within the meaning of the statute, the conviction cannot, I think, be sustained.

But, even if the defendant were such occupant, there is a fatal objection to the conviction. The prohibition of the statute is that the occupant shall not "permit" liquor to be consumed upon the premises. The word "permit" is here used as indicating authorisation, either expressly or tacitly, proceeding from the occupant personally, and involves moral guilt, a mens rea. To hold otherwise would be to misinterpret the statute. A person cannot be morally guilty in respect of an act committed without his knowledge, consent, or connivance. The legislature has not said that the occupant should be liable under all circumstances, but only in the event of his permitting; i.e., there may be a consumption of liquor on the premises with his permission, in which event he is liable; but, impliedly, he is not liable if the drinking is not with hs permission.

There is no evidence that the defendant permitted or knew of the drinking in question, or in any way authorised or connived at the same. If Megahy or Warner knew of it—which is left in doubt—there is nothing to shew their connection with the defendant, except that "they both worked for Irish." Assuming that they were stablemen, the defendant did not authorise them to permit drinking in the stable, nor in fact did they permit the same, although it may have occurred in their presence. They having no authority from the defendant to permit such drinking, the defendant is not affected by their conduct: Sommerset v. Hart, 12 Q. B. D. 360; Sommerset v. Wade, [1894] 1 Q. B. 574.

For these reasons, I think the conviction should be quashed with costs.

APRIL 1ST, 1909.

DIVISIONAL COURT.

RE LESTER.

Life Insurance — Benefit Certificate — Allotment by Insured among Preferred Class — Variation by Will — Power to Provide that Allotment to Widow be in Lieu of Dower— Election—Reapportionment.

Appeal by Mabel Fluker, the executrix of Richard Lester, deceased, from the judgment of BRITTON, J., ante 343, declaring that Annie Lester, widow of Richard Lester, deceased, was entitled to a one-fourth part of the moneys in Court, being the produce of a mortuary benefit certificate in the Independent Order of Foresters, on the life of the said Richard Lester, and also to dower in his estate.

The appeal was heard by MULOCK, C.J., ANGLIN, J., CLUTE, J.

W. E. Middleton, K.C., for the appellant.

L. A. Smith, Ottawa, for Annie Lester, the widow of Richard Lester.

MULOCK, C.J.:—The facts are as follows. The insurance money in question was, by the mortuary benefit certificate, made payable to the "widow or orphans" of Richard Lester. Thereafter, by indorsement on the certificate, the assured made the whole amount payable to his widow. Subsequently he made his will, the residuary clause of which reads as follows: "All the rest, residue, and remainder of my property, of whatsoever nature and kind or quality and wheresoever situate . . . including my life insurance policy in the Independent Order of Foresters for $1,000 . . . I give, devise, and bequeath unto the use of my said executrix and trustee hereinafter named, upon trust to sell and convert the same into money and to divide the proceeds into 4 equal parts or one-fourth part each, and to pay and hand over to my daughter Edith May Brethour, one of such one-fourth parts, and to pay and hand over to my daughter Gertrude Garrett one of such one-fourth parts, and to pay and hand over to my daughter Mabel Wallace Lester (in

addition to the specific devise of real estate hereinafter devised) one of such one-fourth parts, for her own sole, separate, and exclusive use, absolutely and forever, and to pay and hand over to my wife Annie Lester the remaining one of such one-fourth parts. I hereby direct and declare that the said devise and bequest in favour of my said wife is in lieu of dower or thirds, and of all other estate and interest which she, my said wife, may or might have in my property, both real and personal, in the event of her surviving me."

By this residuary clause the testator gives to his wife one-fourth of the insurance moneys, on condition of her accepting the same in lieu of dower. This she declines to do, and, therefore, under the will takes nothing. The will, not providing for the contingency of the widow electing against it, is, in respect of the said one-fourth, wholly inoperative to vary the declaration in the widow's favour indorsed upon the beneficiary certificate, which, therefore, stands, and by virtue thereof she is entitled to the said one-fourth of the insurance moneys. She is also entitled to dower in the testator's real estate.

This appeal fails and should be dismissed with costs.

ANGLIN, J.:—The testator had some life insurance payable to his wife. By his will he sought to deal with this insurance as part of his residuary estate, which he bequeathed to his executrix on trust to sell and convert and to pay one-fourth of the proceeds to his widow, and the remaining three-fourths, one-fourth each, to his 3 children. He then declares that this bequest to his widow shall be in lieu of dower.

The appellant contends that the widow is thus put to her election, and that, unless she relinquishes her dower, she cannot claim any part of the insurance.

I am of opinion that this contention cannot prevail.

The attempt to require the widow to forego her dower rights as a condition of receiving a portion of the insurance is, in effect, an attempt of the insured to exercise his right of reapportionment between beneficiaries of the preferred class, in part for the benefit of his estate, and is, in my view, in contravention of the proviso to sub-sec. 2 of sec. 160 of the Insurance Act, R. S. O. 1897 ch. 203. I would, therefore, deem the condition as to relinquishment of dower void as to the insurance moneys bequeathed to the widow, though

good as to what was in reality residuary estate of the testator. Election by the widow to take dower does not, therefore, in my opinion, preclude her from also claiming her one-fourth of the insurance moneys under the reapportionment effected by the will.

But, if the widow is put to her election also as to the insurance moneys, having elected against the will, she is, in my view, nevertheless entitled to claim one-quarter of the insurance moneys. The right of the insured is not to revoke, but merely to reapportion. It is only by and to the extent of an inconsistent reapportionment that he is empowered to cut out a preferred beneficiary. In electing against the will, the widow renders ineffectual the attempted reapportionment, so far as it affects one-fourth of the insurance moneys. It follows that as to this one-fourth there never has been an effectual revocation of the original designation of the wife as beneficiary.

Upon either view, the widow is entitled to claim one-fourth of the insurance moneys in addition to her dower, which she has elected to take.

I would, therefore, dismiss this appeal with costs.

CLUTE, J., concurred.

APRIL 1ST, 1909.

DIVISIONAL COURT.

COLE v. SMITH.

Building Contract — Condition Precedent — Performance of Work in "Good and Workmanlike Manner" — Faulty Workmanship — Acceptance — Taking and Retaining Possession — Quantum Valebat — Waiver.

Appeal by the defendants the Smiths from the judgment of the local Master at St. Thomas finding the sum of $298.31 due to the plaintiff by the defendant W. B. Smith; and cross-appeal by the plaintiff to increase the amount to $437.31, upon the ground that the defendants the Smiths had accepted the work.

The action was brought under the Mechanics' and Wage-Earners' Lien Act to recover the sum of $430 claimed to be owing under a contract for the remodelling of a house situate on the lands of the defendants Smith, and also a sum for extras.

By the contract the plaintiff agreed to perform the work in a "good and workmanlike manner and according to the best skill and art," and the defendant W. B. Smith agreed to pay therefor the sum of $250 "when roof is on, and $430 when completed." The sum of $250 was paid, and the $430 sued for was the sum payable when the work should be completed.

The Master found "that the plaintiff proceeded to do the work of remodelling, and finally turned it over to the defendants as completed; but, although the defendants were daily on the premises while the work was going on, that they did not accept the contract, and are entitled to a reduction in the balance claimed by the plaintiff by reason of faulty workmanship displayed in the work and inferior materials." The amount of such reduction he fixed at the sum of $142, which, being deducted from the stipulated sum of $430, and the sum of $10.31, allowed for extras, left $298.31, and for this amount and costs the Master gave judgment in favour of the plaintiff.

T. W. Crothers, K.C., for defendants.

J. M. Ferguson, for plaintiff.

The judgment of the Court (MULOCK, C.J., ANGLIN, J., CLUTE, J.), was delivered by

MULOCK, C.J.:—For the defendants it was urged that the plaintiff had not completed his contract, and was, therefore, not entitled to recover the contract price, and could not recover upon a quantum valebat, because such was not the agreement between the parties. Here the plaintiff agreed to perform the work in a "good and workmanlike manner," and the Master has found faulty workmanship. This finding has not been appealed from. The performance of the work in a "good and workmanlike manner" was a condition precedent to the plaintiff's right to recover the contract price. Not having performed the work in a manner entitling him to recover the contract price, the plaintiff is not entitled to

payment thereof: Ellis v. Hamlen, 3 Taunt. 53. Nor can he recover on a quantum valebat, for there is no evidence of a contract to pay upon that basis.

The plaintiff's counsel argued that the defendants had accepted the work, and that the inference should be drawn that he had waived the conditions of the contract and had agreed to pay the value of the work. Such waiver is a question of fact. Here the work was to be performed on a house situate on the defendants' land, and the plaintiff, having, as he alleged, completed the work, sued for the contract price. The contractor having thus withdrawn from the premises, the owner is left in exclusive possession. His retention of possession is not an act necessarily referable to the contract, and, therefore, does not warrant the inference that it was intended as a waiver of the terms of the contract, and as evidence of a new agreement to pay upon a quantum valebat: Munroe v. Butt, 8 E. & B. 738; Sherlock v. Powell, 26 A. R. 407.

The cross-appeal fails, and the defendants' appeal is allowed to the extent of $288, being that portion of the contract price of $430 in question allowed by the Master. The plaintiff is entitled to payment of the $10.31 allowed for extras, and this amount should be credited on the costs payable to the defendants the Smiths. Except as to this sum, the plaintiff's action should be dismissed with costs, including costs of this appeal.

TEETZEL, J. MARCH 30TH, 1909.

CHAMBERS.

KINNEAR v. CLYNE.

Receiver—Equitable Execution—Judgment more than Twenty Years Old—Statute of Limitations—Effect on Receivership Order of Expiry of Judgment — Operation of Order—Injunction.

Motion by defendant, a judgment debtor, for an order discharging a receiver appointed at the instance of the plaintiff, an execution creditor, to receive the defendant's

share of an estate under his father's will to satisfy plaintiff's judgment.

F. Arnoldi, K.C., for defendant.

N. Sommerville, for plaintiff.

Featherston Aylesworth, for J. J. Travers.

TEETZEL, J.:—The judgment was obtained on 27th June, 1883. The receivership order was made on 9th December, 1892. Nothing has been paid on the judgment; and the ground of the motion is, that, the judgment being barred under the Statute of Limitations, all rights under the receivership order are also barred.

The defendant's interest in his father's estate was not payable to him until after his mother's death, which did not occur until December last, and his interest was contingent upon his surviving her; it could not therefore have been realised under a writ of fi. fa. The appointment of a receiver was in the nature of equitable execution. The order authorises the receiver to receive the interest of the defendant in his father's estate to the extent of the judgment.

While the appointment of a receiver creates no lien or charge upon the property which he is to receive, and is not equivalent to a seizure in execution (Crowshaw v. Lyndhurst, [1897] 2 Ch. 154), it is a proceeding in execution of the judgment and operates as an injunction to restrain the debtor from dealing with the property to the prejudice of the judgment creditor. See Tyrrell v. Painton, [1895] 1 Q. B. 252; In re Marquis of Anglesey, Countess d' Galve v. Gardner, [1893] 2 Ch. 727.

In Ideal Co. v. Holland, [1897] 2 Ch. 157, Kekewich, J., at p. 170, in adopting the view that the effect of the order is to restrain the judgment debtor from doing anything to prejudice the claim of the judgment creditor, says: "I do not myself see how the Court, after restraining the defendant from himself receiving the property, can stop short of granting whatever injunction is necessary to prevent its being received by others."

Assuming then that the receivership order is, in effect, an injunction in aid of the realisation of the judgment, how can its life be affected by the Statute of Limitations?

The receiver is an instrumentality appointed by the Court, and is sometimes styled "the hand of the Court," to receive funds within its control.

The order appointing the receiver is, in effect, a judgment whose vitality can only be coterminous with the full accomplishment of the purpose for which it was pronounced. While the judgment recording the debt may expire by lapse of time, so that no new action or process in execution may be based upon it, it does not follow that a judgment in the nature of a receivership order which had its origin from it must also die with it. If this were so, a receivership order made on the last day before the expiration of a judgment would only have force for that day.

Upon the death of the life tenant no further process in execution is necessary to enable the receiver to be paid by the trustees of the father's will the share of the judgment debtor, or sufficient thereof to satisfy the judgment debt—a right which the receiver had at the date of the order, subject only to the removal of the legal impediment to execution: Levasseur v. Mason, [1891] 2 Q. B. 73.

The application must, therefore, be dismissed with costs.

MEREDITH, C.J. APRIL 2ND, 1909.

WEEKLY COURT.

RE TAYLOR AND VILLAGE OF BELLE RIVER.

Highway — Jurisdiction of Village Council to Close Part of Highway Extending into other Municipalities—Municipal Act, 1903, sec. 637—"Wholly within the Jurisdiction of the Council."

Motion by a ratepayer and land-owner of the village of Belle River to quash by-law number 6 of the council of that municipality, passed on 27th August, 1908, and intituled "A by-law to close part of the Tecumseh road in the village of Belle River."

A. H. Clarke, K.C., for the applicant.

F. E. Hodgins, K.C., for the village corporation.

MEREDITH, C.J.:—The only question not disposed of upon the argument was that as to the jurisdiction of the

council to close part of a continuous highway, extending into other municipalities, which the Tecumseh road is.

The section of the Consolidated Municipal Act, 1903, under the authority of which the by-law was passed, is sec. 637, which reads as fololws:—

"637. The council of every county, township, city, town, and village may pass by-laws—

"1. For . . . stopping up roads, streets, squares, alleys, lands, bridges, or other public communications wholly within the jurisdiction of the council."

It was contended by Mr. Clarke that the use of the word "wholly," which was introduced into paragraph 1 by 3 Edw. VII. ch. 18, sec. 134, especially when read in connection with sec. 658, which confers on county councils power to pass by-laws for stopping up original allowances for roads and in terms provides for the stopping up of the road "or any part thereof," has the effect of limiting the powers conferred by paragraph 1 of sec. 637 to the stopping up of the whole of a road, and then only roads lying wholly within the municipality.

I am unable to agree with this contention. The word "wholly" is used, as I read paragraph 1 of sec. 637, with reference not to the locality of the road but to the jurisdiction of the council over it, and that there is jurisdiction to close part of a road has been settled by a decision binding on me. It was so decided in In re Falle and Town of Tilsonburg, 23 C. P. 167, Gwynne, J., who delivered the judgment of the Court, saying: "We have no doubt as to the jurisdiction of the town municipality to close the piece of road in question, providing, as they appear to have done, other roads in substitution . . ." p. 171. Section 320 in the Act under consideration in that case (29 & 30 Vict. ch. 51) is substantially the same as paragraph 1 of sec. 637 of the Act of 1903, omitting the word "wholly," and the section of that Act which corresponds with sec. 658 (sec. 344) contains the words "or parts thereof" where the words "or any part thereof" are used in sec. 658; so that an argument based on the provisions of sec. 344 was as open to the applicant in that case as is the argument of the applicant based on the provisions of sec. 658 in this case.

It is true that in Hewison v. Township of Pembroke, 6 O. R. 170, Rose, J., said: "As the road runs from Ottawa

to Pembroke, and is, therefore, not within the limits of the municipality, I am unable to satisfy myself that the township council has any power to close or divert it at all. And it may be that there is no power given to any municipal body to interfere with a section of road running through more than one municipality. Section 524 (565 of 1883) provides for a county council 'opening . . . stopping up roads . . . running or being within one or more townships.' 'One or more' possibly should be read 'more than one.' Unless this section gives power to stop up a section of a continuous road running say through more than one county, no express language can be found giving such power. It would seem anomalous that a section of a road such as the Kingston road, running from Kingston to London under various names, and possibly farther both east and west, could be closed or diverted by a township council. If such power has not been given to township councils, then this by-law is ultra vires of the council of Pembroke. I do not find it necessary to determine this point. Had I found it necessary, I would have requested counsel to further argue it, as, it being suggested to counsel on the argument, they were unable to argue it fully without consideration. Had it been fully considered by them, probably I should not feel any difficulty as to it, judging from the very careful and finished arguments addressed to me on the other points of the case:" pp. 171, 172.

It is to be observed that the Falle case was not cited and is not referred to , and in any case what was said by Rose, J., would not justify me in refusing to follow that case.

Re Platt and City of Toronto, 33 U. C. R. 53, may also be referred to.

The part of the Tecumseh road which lies within Belle River, is, I doubt not, vested in the corporation of that municipality by sec. 601, and it is wholly under the jurisdiction of its council, because no other council is given jurisdiction over it, either alone or concurrently with the council of Belle River.

If the contention of the applicant were to prevail, it would seem to follow that the duties imposed on corporations as to the repair of highways would not apply to the part of the Tecumseh road which lies within the municipality of Belle River, and there would be no power in its

council to pass by-laws for preserving, improving, or repairing it.

A construction which would lead to such a result ought not to be given to the enactment, unless its language admits of none other, which, in my opinion, is not the case.

The motion is dismissed with costs.

CLUTE, J. APRIL 2ND, 1909.

TRIAL.

KELLY v. GRAND TRUNK R. W. CO.

Railway—Farm Crossing—Overhead Bridge Maintained for 50 Years—Destruction by Company without Authority from Board of Railway Commissioners—Neglect to Provide any Crossing for Short Period—Construction of Level Crossing—Order of Board for Construction of Overhead Bridge—Damages for Delay in Providing Proper Crossing—Injury to Land-owner—Inconvenience — Injury Caused by Construction of New Overhead Bridge—Remedy—Application to Board—Dominion Railway Act—Action—Costs.

Action for damages for injury to the plaintiff's farm caused by the defendants' railway being built through it and for delay in furnishing proper means of communication between the parts of the farm separated by the railway, and for injury by the bridge ultimately erected by defendants, etc.

The action was tried with a jury, at Woodstock.

Grayson Smith, for plaintiff.

D. L. McCarthy, K.C., for defendants.

CLUTE, J.:—The plaintiff is the owner of the west half of lot No. 4 in the 1st concession of East Oxford, through which the defendants' railway passes, dividing the farm into two portions of 15 acres on the north side of the track, upon which are situated the house and well, and 85 acres on the south side of the track with the barns and outbuildings. Since the construction of the railway, about 50 years ago, there has been an overhead bridge for the convenience

of the owner of the farm, and built at the time the railway was built. The bridge has been twice rebuilt, and was kept in repair by the defendants until it was pulled down by them as hereinafter mentioned.

The defendants, desiring to construct a double track, in September, 1904, pulled down and destroyed the old bridge, without authority from the Railway Commission, or affording the plaintiff any means of access from the one portion of his farm to the other. The defendants wholly refused to provide the plaintiff with any way to get from one part of the farm to the other, which was essential to the proper management of the farm, and rendered even more than usually so by the position of the buildings and well. The plaintiff knocked down a portion of the defendants' fence, and went from one part of the farm to the other, over the railway, in this way, for 11 weeks, when the defendants made him a level crossing at the westerly side of the farm, which he continued to use for 2 years and 6 or 7 months.

During this time, the defendants neglecting and refusing to provide an overhead bridge, the plaintiff made application to the Railway Commission, and an order was made directing the defendants to build a bridge on the site of the old bridge, 28 feet wide, and thus affording accommodation for the owner of the east part of the lot, as well as for the plaintiff. Owing to the double track, the bridge and approaches required to be higher than the old bridge and approaches. The result was that, while the bridge and approaches were built under the order of the Railway Commission, the effect of raising the bridge and the approaches higher than before, was that it became dangerous, if not impossible, to enter from the approaches into the northerly door of the plaintiff's barn.

A great deal of evidence was given as to the extent to which the bridge was required as used in ordinary farm operations, and the inconvenience and loss which the plaintiff suffered by reason of the bridge being taken away. The water for watering the stock had to be carried for a long time up and down the embankment; the milk, amounting at times to 40 gallons a day, had to be carried across, and other inconveniences and loss as detailed in the evidence.

All questions of law and fact were withdrawn from the jury except the question of damages, and they were asked to assess the damages covering 3 separate periods; first, for

the 11 weeks before the level crossing was made; secondly, for the 2 years and 6 months before the bridge was erected; and, thirdly, for the deterioration in the value of the property owing to the bridge and approaches having been raised and for any loss by reason thereof which the plaintiff may have suffered.

The jury assessed $100 for the first period; $460 for the second period; and $240 for the third period.

It would appear from the evidence, and I find as a fact, that the plaintiff's predecessor in title and the plaintiff used the old bridge down from about 1854 to 1904, for the purpose of a farm crossing, with the knowledge of the defendants and their predecessors in title; and from the evidence I think it may properly be inferred, and I find as a fact, that the bridge was built and maintained by the defendants and their predecessors in title under an agreement with the plaintiff and his predecessor in title. I find that it was the agreement and intention of the parties that the said bridge should be properly maintained for the use of the farm by the defendants.

I find that the said bridge was removed by the defendants without the authority of the Railway Commission, and that it was wrongfully and improperly removed.

I further find that it was the duty of the defendants to have applied to the Railway Commission to remove the said bridge, if they so desired, and to construct another in place thereof to meet the requirements of the plaintiff.

I further find that the plaintiff is entitled to damages which naturally flowed from the wrongful act of the defendants in removing the bridge: McKenzie v. Grand Trunk R. W. Co., Dickie v. Grand Trunk R. W. Co., 14 O. L. R. 671, 9 O. W. R. 778; Jacob's Railway Law of Canada, pp. 45, 46; R. S. C. 1906 ch. 37, sec. 155; Toronto Hamilton and Buffalo R. W. Co. v. Simpson Brick Co., 17 O. L. R. 632, 13 O. W. R. 215. See also McArthur v. Northern and Pacific Junction R. W. Co., 15 O. R. 733, 17 A. R. 86.

It was urged by Mr. McCarthy that what was done was by authority of the statute which requires bridges to be of a certain height, R. S. C. 1906 ch. 37, sec. 256; that, inasmuch as the defendants were about to construct a double track, which they had the right to do, and as they were obliged to have the bridge over the double track of the height required

by the statute, they were entitled to remove the bridge in question for that purpose, and, if ordered to build a higher bridge, that what they did was by virtue of the order of the Railway Commission, citing Canadian Pacific R. W. Co. v. Roy, [1902] A. C. 220; Mayor and Councillors of East Fremantle v. Annois, ib. 213; Martin v. London County Council, 80 L. T. R. 866; Southwark and Vauxhall Water Co. v. Wadsworth District Board of Works, [1898] 2 Ch. 603.

I do not think these authorities have any application to the present case. What was done here in removing the bridge was not done under or by virtue of any statute, but was wholly wrongful, and the plaintiff is entitled, in my opinion, to recover whatever damages naturally flowed from such wrongful act.

Nor can I give effect to the objection that the damages, if any, fall within the limitation expressed in sec. 306 of the Railway Act. This section provides that "all actions or suits for indemnity for any damages or injury sustained by reason of the construction or operation of the railway shall be commenced within one year next after the time when such supposed damage is sustained, or, if there is a continuation of damage, within one year next after the doing or committing of such damages ceases, and not afterwards."

The tearing down and removal of this bridge was not done in the construction or operation of the railway, and the damages which accrue do not fall within the meaning of the section: Zimmer v. Grand Trunk R. W. Co., 19 A. R. 613; Ryckman v. Hamilton Grimsby and Beamsville Electric R. W. Co., 10 O. L. R. 419, 6 O. W. R. 271.

It was argued that, the plaintiff having made application to the Railway Commission, he was limited to relief which might be afforded by the Commission, including damages; and reference was made to secs. 59 and 155 of the Railway Act. Sub-section 2 of sec. 59 provides, in reference to works ordered by the Commission, that "the Board may order by whom, in what proportion, and when, the cost and expense of providing, constructing, reconstructing, altering, installing, and executing such structures, equipment works, renewals, or repairs, or the supervision, if any, of the continued operations, use, or maintenance thereof, or of otherwise complying with such order, shall be paid."

This, I think it clear, has no application, at all events, to the damages suffered by reason of the bridge having been

removed. Nor do I think sec. 155 has, for the reason that the damages suffered were not sustained by the exercise of the powers given to the railway company. This applies to all damages prior to the building of the new bridge, and as to this branch of the case, the plaintiff is entitled to judgment for the two sums of $100 and $460, making $560.

With reference to the damages allowed, however, for deterioration in the value of the farm and injury to the plaintiff by reason of the construction of the bridge and approaches, as provided by the order of the Railway Commission, I am of opinion that the plaintiff cannot recover in this action. What was done in pursuance of the order was, so far as appears, properly done: i.e., the bridge was of the proper height and properly constructed; the approaches were also of the proper height and properly constructed. But, by reason of the bridge having been raised, the approaches, in order to obtain a suitable and proper grade, had also to be raised, the result being that the approach to the barn was made inaccessible in part, and so offered considerable inconvenience and loss to the plaintiff. This, however, has arisen strictly out of the construction work ordered by the Board, and the Board, in my opinion, in reference to matters of that kind, has, under sec. 59 of the Railway Act, power to award compensation, and this, I think, may be done by a supplemental order. I do not think it was the intention of the Act that a distinct right should be created, giving a new right of action, simply by the fact that the necessary result of complying with the order of the Board was to create conditions which involved loss on the plaintiff. It would be expensive and unseemly that a Board having jurisdiction, not only to direct the work, but afford reasonable compensation for injury by reason of its construction, should not deal with the question of compensation where it has the power to do so, instead of remitting the applicant to another forum for redress.

It is true that in the present case it was unknown at the time whether any injury would result to the plaintiff by reason of the execution of the order of the Board, but that fact having been now ascertained, or being capable of being ascertained, I see no reason why an application should not be made to the Board for such relief as the plaintiff may think himself entitled to in the premises: R. S. C. 1906 ch. 37, secs. 29 and 54.

The result is, that there will be judgment for the plaintiff for damages down to the construction of the new bridge, which are assessed at $560, and the action is dismissed with respect to the other branch of the case, seeking to recover damages for deterioration in the value of the farm by reason of the construction of the new bridge. The plaintiff is entitled to his costs of action without set-off of any costs incurred by reason of the dismissal of a portion of the plaintiff's case.