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REPORTS OF CASES

OF PRACTICAL VALUE IN THE

PROVINCE OF ONTARIO

SUTHERLAND, J. (TRIAL.) 4TH AUGUST, 1916.

CLARKSON v. DOMINION BANK.

Banks and Banking—Bank Act, R. S. C. (1906), c. 29, s. 88, and Schedule C.—Validity of Securities taken by Bank from Manufacturer—Sufficiency of Description of Goods Hypothecated—Right of Bank to take Security on Goods Bought from Other Manufacturers to be Sold as Jobbers — Mortgages on Real Estate.

Land security:—Where a customer agrees to give a bank as collateral security, a mortgage on real estate on or before a date named, there is nothing improper or illegal in the bank, in pursuance to such previous agreement, in insisting upon and obtaining the security on such real estate, more than a year subsequent to that date.

Jobbers hypothecation:—While a bank has, under s. 88 of the Bank Act, the right to advance a wholesale manufacturer, upon the security of the goods, wares and merchandise manufactured by him, or procured for such manufacture, still, it has no authority to take security on goods purchased by him from other manufacturers for the purpose of carrying on a jobbing business as a side line.

Description of goods hypothecated:—Where goods are hypothecated to a bank according to form "C" and particular warehouses are mentioned in which the goods are said to be and the description covers all the goods, it is sufficient.

Renewing security:—Where a bank, from time to time, makes advances and takes security, under s. 88 of the Bank Act, on new goods which come into a customer's business to replace old stock sold out, and for each advance a separate note and security is taken, and at the same time a general security is taken which covers all outstanding notes for which a previous individual note has been taken, it is not a renewal of the security, but is a valid consolidation of securities not prohibited by the Bank Act.

Action by the liquidator of Thomas Brothers, Limited, an insolvent company, being wound up under the Dominion Winding-up

Act, and by the National Match Co. (of Illinois), suing on behalf of themselves and all other creditors of the insolvent company, for a declaration that certain securities and mortgages taken by the defendant bank from the insolvent company were invalid, for an account of the assets, goods, wares, and merchandise of the insolvent company held by the defendant bank and of the proceeds of the sale of any part thereof sold, and for delivery of the securities to the plaintiff liquidator.

The action was tried without a jury at St. Thomas.

Sir George Gibbons, K.C., and *J. B. Davidson*, for the plaintiffs.

D. L. McCarthy, K.C., and *A. W. Langmuir*, for the defendant bank.

SUTHERLAND, J.—The Thomas Brothers, Limited, an incorporated company, was engaged in business at the city of St. Thomas as wholesale manufacturers of various kinds of woodenware. They were customers of the Dominion Bank at its branch in that city and had a line of credit. Having got into financial difficulties, a petition was on the 28th March, 1914, filed by the defendant bank, and a winding-up order was made on the 1st May following. The plaintiff G. T. Clarkson was appointed liquidator, and the company is in course of liquidation.

The National Match Company is incorporated under the laws of the State of Illinois, and is a creditor of the insolvent company to the extent of about $14,000.

In the course of the dealings between the bank and its customer certain securities and mortgages were taken by the former from the latter. In this action the plaintiffs are the said liquidator and the National Match Company, which latter sues on behalf of themselves and all other creditors of the insolvent company, and the plaintiffs' claim is that said securities and mortgages be set aside and declared void as against the plaintiffs and the other creditors of the insolvent company, for an account of the assets, goods, wares and merchandise of the said insolvent company held by the bank, and the proceeds of the sale of any part sold and received by it, and for an order for delivery and payment to the liquidator.

Thomas Brothers, Limited, manufactured certain lines, such as woodenware, screen doors, brushes and the like, and dealt as buyers and jobbers in certain other lines, such as baskets, matches,

tooth picks, coat hangers and the like. The line of credit in the year 1907 was $150,000, which was increased in 1909 to $175,000, and in 1910 to $200,000. Securities were taken under ss. 74 and 75 of the Bank Act of 1890, 53 Vict. c. 31, as amended in 1900, 63 & 64 Vict. c. 26, ss. 17 and 18, and in 1913, 3 & 4 Geo. V. c. 9, s. 88, which is to be read as subject to s. 90.

Every year apparently in January a written request for a line of credit during the current season was executed by Thomas Brothers, Limited, in favour of the bank in the following terms:

"We hereby request you to grant and continue during the current season a line of credit for our business of . . . dollars, and to make us advances thereunder on the security of all goods, wares and merchandise, raw, manufactured and in process of manufacture (which are referred to below as goods), which we now have, and which we may from time to time during the use of such credit have in the buildings, yards and the cellars thereof, known as Thomas Brothers, Limited, factory property in the city of St. Thomas, Ontario, and Thomas Brothers, Limited, warehouse, 2580 St. Lawrence Boulevard, in the city of Montreal, Quebec, in the . . . and we agree to give from time to time to you security for said advances under s. 88 of the Bank Act, covering all the said goods, or by warehouse receipts or bills of lading covering the same or part thereof.

"This agreement is to apply to all advances made to us under the said line of credit, the intention being that all said goods which we may from time to time have in said buildings or cellars shall be assigned from time to time to you as security for all advances."

From 1908 to 1913 the company executed and delivered to the bank securities under said sections of the Bank Act in the following form:—

"To the Dominion Bank: In consideration of an advance of . . . dollars made by the Dominion Bank to Thomas Bros., Limited, for which the said bank holds the following bills or notes (see other side), the goods, wares and merchandise mentioned below are hereby assigned to the said bank as security for the payment of the said bills or notes, or renewals thereof or substitutions therefor, and interest thereon. This security is given under the provisions of section eighty-eight of 'The Bank Act,' and is subject to the provisions of the said Act. The said goods, wares and merchandise are now owned by Thomas Brothers,

Limited, and are now in the possession of Thomas Brothers, Limited, and are free from any mortgage, lien, or charge thereon and are in the yards and buildings of Thomas Brothers, Limited, factory property St. Thomas, in their warehouse 2580 St. Lawrence Boulevard, Montreal, and in their warehouse 113 Queen St. W., Ottawa, and are the following: all goods, wares and merchandise, raw, manufactured or in the process of manufacture."

The amount mentioned therein was in each case the entire existing indebtedness, approximating $200,000, inclusive of a small sum then being dealt with by way of advance or renewal and for which a new note was being given. On the back of these contract forms was endorsed a list of all the outstanding notes, including that just referred to. A separate contract form of even date was also taken for the amount of the small sum then being dealt with. By way of illustration I may quote in part this separate form dealing with an alleged loan on September 20th, 1913, which reads thus:

"The Dominion Bank having this day loaned to us on demand note $4,000 payable with interest at 6 per cent. per annum, and having at the time of making the said loan required collateral security therefor, we agree to give and have given, as such collateral security, the following property, namely, all goods, wares, etc." (following description in the general form already referred to). Similar forms were used until January, 1914.

On the 4th day of May, 1912, a written agreement was entered into between Thomas Brothers, Limited, and the bank, reciting that the customers were indebted to the bank in about $200,000 contracted in the course of its business, that the bank had demanded additional security for such indebtedness in the form of a mortgage or mortgages upon the lands and plant of their customers, that the customers had passed all the resolutions and by-laws necessary to authorize the execution of the agreement and the mortgages contemplated thereby. The agreement then proceeds to say that in consideration of the premises and terms and conditions set out in the agreement, the parties agree with one another as follows:

"1. The customers will on or before the first day of October next grant and convey by way of mortgage to the bank the lands of the customers being more particularly described" as set out in the agreement. That the agreement and mortgage or mortgages shall be by way of additional security for debts now due to the bank

or which by virtue of any changes in the customers' account may be contracted by them from time to time.

The agreement also contains a covenant on the part of the customers that during its currency and before the execution of the mortgage or mortgages they would not sell, assign, transfer, charge, mortgage, or otherwise deal with any of their assets which then were or which should thereafter be in their possession or power and which are covered by this agreement otherwise than in the ordinary course of their business. It also contains this covenant:

"6. In so far as the customers can lawfully do so without impairing the validity of any existing agreement or contract between themselves and the city of St. Thomas this agreement shall, until the execution of a more formal mortgage or mortgages or other document, constitute a charge upon the lands and plant as hereinbefore defined or any such land and plant which may be subsequently acquired prior to the fulfilment of this agreement."

Apparently there was some agreement between the company and the city of St. Thomas which would expire about the 1st of September or the 1st of October, 1912.

On the 27th November, 1913, Thomas Brothers, Limited, executed a mortgage in favour of the bank, reciting that the mortgagor is indebted to the bank for advances made and credits given by way of loans, payments, advances, discounts and otherwise in the usual course of the mortgagee's banking business; that the bank has demanded security for the indebtedness, and the mortgagor consented to give the mortgage for that purpose and in consideration of the existing indebtedness and the sum of one dollar, the company mortgaged lot No. 20 in the city of St. Thomas in the county of Elgin, according to registered plan No. 188.

On the 22nd January, 1914, what is called a deed of collateral security was executed by Thomas Brothers, Limited, in favour of the bank, reciting that the customer is indebted to the bank in $200,000, for balance of loans and advances made in the ordinary course of business, with interest accrued, that the bank has demanded additional security for payment of the indebtedness and interest and renewals and substitutions, and that the customer is willing to give such additional security by way of hypothec: on "that certain emplacement situated in the town of Outremont, fronting on Durocher Street and composed of:—

"1st. Sub-division lot number forty-eight (48) of sub-division lot number eight of official lot number thirty-two (32-8-48) on the official plan and book of reference of the Parish of Montreal.

"2nd. Part of lot subdivision number forty-seven of subdivision lot number eight of the official lot number thirty-two (32-8-47), on the official plan and book of reference of the Parish of Montreal."

It is contended by the defendants that the mortgage and deed of collateral security just referred to were given by the company to the bank in pursuance of the agreement of the 4th May, 1912, notwithstanding the statement therein that the company would give security by way of mortgage on or before the 1st October, 1912. It is also argued on behalf of the defendants, and appears to be the fact, that the deed of collateral security dated the 22nd January, 1914, had been discussed at or about the time of the mortgage of the 27th November, 1913, and that the making and execution thereof was delayed.

It is apparent that the bank was supplying the company with all the funds necessary to enable it to carry on its business. The funds necessary to purchase the supplies in the company's line of business as jobbers was also supplied by the advances of the bank.

It is apparent also from the correspondence carried on between the head office of the bank and its local manager at St. Thomas that the bank had been concerned about the condition of their customer's account in 1912 and 1913. They sent from the head office to St. Thomas in succession several employees; in December, 1913, a Mr. Macklin, later Mr. Niven, and early in February, 1914, a Mr. Joyce, to investigate, report and oversee the business. In 1913 the bank had been insisting that its manager at St. Thomas should see that nothing was paid to outside creditors that could possibly be avoided. On the 17th December, 1913, they wrote him:—

"The outstanding features in their statements are a net loss of $13,478.58 with an increase in their liabilities of $39,057, against an increase in quick assets of $10,270, and it is evident from these figures that unless they succeed in obtaining additional capital the account will require most careful watching and firm handling on your part if the bank's position is to be maintained. No more dividends must be paid without our consent, and you

must see that no payments to trade creditors or expenditures on capital account are made which will decrease their quick assets to our disadvantage."

On the 9th January, 1914, they wrote him as follows:—

"I note that the wording in the letter of promise and lien forms you have taken and are taking from Thomas Brothers, Limited, is as follows: 'All goods, wares and merchandise, raw, manufactured or in process of manufacture.' I would like to have on record a more detailed statement of the goods covered by this description."

On the 17th January, 1914, they wrote:—

"Is it absolutely necessary to pay the National Match Company acceptance for $1,461.05, maturing 23rd January? This business does not look attractive to us, and I think we should renew their paper where possible until we decide what course we are going to take in connection with their account. If this business is not profitable, what do you mean by saying that it helps their travellers and reduces their selling expenses by from two to three per cent., and in this way means a profit to them?"

On the 29th January they wrote:—

"I confirm my telephone message of to-day informing you that in view of the statement of affairs submitted by the auditors, Messrs. Clarkson, Gordon and Dilworth, we have decided not to pay any further amounts to outside creditors, and as I then advised you, you had better ask Mr. Thomas to arrange for a meeting of their creditors as soon as possible at Mr. G. T. Clarkson's office in Toronto;" and again in the same letter: "In view of the present state of affairs you should place our position fully before your solicitor to see if he has any recommendations to make. For one thing you might find out whether he thinks it would be advisable for us to place a man in charge of the stock and accounts receivable to emphasize our ownership of these, and also to insure that all proceeds will be handed to us in liquidation of the company's indebtedness to us."

On the 30th January, 1914, they wrote their local manager informing him that they were sending an employee named T. W. Joyce to look after their interest in the making up and disposing of the stock on hand. In the letter they tell him to inform Mr. Thomas that this course must not be understood as any

reflection on them, but because they felt under the circumstances it was absolutely essential they should have their representative on the ground.

On the 29th January, 1914, a new form of application for loan for the current year was obtained by the bank from their customer. It commences as follows:—

"The undersigned is a wholesale manufacturer and purchaser of broom corn, brooms, handles, brushes, screen doors and windows, step-ladders, wash boards, washing machines, matches, baskets, etc., and is a wholesale manufacturer of the products of such goods. The Dominion Bank, herein called the "bank," is hereby requested by the undersigned to make advances to the undersigned (herein called the 'customer') from time to time, and in consideration thereof, the customer doth hereby promise and agree as follows:—

"1. To give from time to time to the bank, security for every such advance and interest by way of warehouse receipts, bills of lading, or securities under ss. 86, 87, 88 and 90 of the Bank Act (or any sections of any Act or Acts which may be hereafter passed relating to the same subject matter, whether by way of amendment, substitution, revision or consolidation of the existing Bank Act or otherwise), covering all the products of agriculture, the forest, quarry and mine and the sea, lakes and rivers, and all the live stock or dead stock and the products thereof, and all the goods, wares and merchandise now or hereafter belonging to the customer, upon the security of which a bank may lawfully make advances, including all such products, stock, goods, wares, and merchandise (hereinafter called the 'goods'), now or hereafter belonging to the customer, of the classes or description following, that is to say; (d) all raw material and goods manufactured or in process of manufacture consisting principally of broom corn, brooms, handles, brushes, brush fibre, lumber, special dimension lumber, screen doors and windows, step-ladders, wash boards, washing machines, baskets, matches and general stock-in-trade, etc."

On the same day a document was signed by the customer similar to that theretofore used and stating that "the Dominion Bank having this day loaned to us on demand note six hundred dollars payable with interest at 6 per cent. per annum, and having at the time of making the said loan required collateral security therefor, we agree to give, and have given, as such collateral

security the following property, namely, all raw material," etc. (repeating the same materials and goods last quoted), "more fully described or referred to in a certain lien under s. 88 of Bank Act," etc.

On the same day they also executed a new form of security under s. 88 of the Bank Act similar to that hereinbefore quoted, but covering materials and goods described as last mentioned in place of as in the forms prior to the 29th January, 1914.

Thereafter these new forms were used between the bank and its customers. Throughout the whole period notes were given for the amount of the particular advances made at the time.

The new forms commencing with the 29th January, 1914, for the first time contained a clause to the following effect:

"This security is given pursuant to the written promise or agreement of the undersigned, and especially of the agreement dated the 29th January, 1914."

All subsequent forms contained a similar clause. All the notes outstanding were mentioned on the back of each of the general contract forms given under s. 88, each of which had been issued under a previous promise, and a security had been taken under a previous promise for each of them.

In March, 1914, a representative of the bank, one Bergmann, went into possession for the bank at St. Thomas. At this time, and shortly before the petition for the winding-up of the company was filed, the indebtedness of the customer to the bank stood at about $228,726. In the meantime the bank had realized from sales of goods about $100,000, and, including interest to the time of the trial, the debt then stood at about $135,000.

Two accounts were kept in the bank's books with the customer; one known as an advance account, and the other as a sales account. In the advance account was credited the notes, and wages and all expenditures to people outside the bank, and in the sales account: "the proceeds of all discounts were credited and all deposits made." Customer's paper was discounted and cheques given on it to take up the demand notes on which the company had received advances from time to time. In the purchase account the proceeds of the demand notes were credited, and all cheques and drafts, notes and wages, were charged up. That is to say, notes and drafts to outsiders. The two accounts had to be looked at to ascertain the exact standing of the customer with the bank from time to time, and advances were made to the company in the advance account

as they had credits in the other account. The two accounts had, of course, relation to each other, and seemed in reality to be treated as one account.

The contention of the plaintiff is that none of the securities referred to at the time of their acquisition by the bank were given in consideration of any actual present advance or the negotiation or contraction of any bill, note, debt or liability at the time of such acquisition. They also contend that the said securities were invalid inasmuch as there was no proper and definite description therein of the goods intended to be transferred, and that the goods in the factory at the time the defendant took possession were not the goods referred to in the securities nor covered thereby. They also say that at the time of making the agreement of the 4th May, 1912, the mortgage of the 27th November, 1913, and the mortgage of the 22nd January, 1914, Thomas Brothers, Limited, were insolvent and unable to pay their debts in full, and that the said securities have the effect of preferring the defendant bank to the other creditors and of hindering and delaying them and the liquidator from realizing their claims against the said corporation or a reasonable proportion thereof.

They also charge that the defendants have been in occupation and possession of the factory premises and goods, wares and merchandise of the said corporation, have sold large quantities of goods manufactured and in process of manufacture and raw material therefrom and have sold from the warehouses in Montreal and Ottawa large quantities of manufactured goods under title of the said securities and conveyances and have excluded the plaintiff company and the liquidator therefrom, and that as a result the liquidator has been and the other creditors have been and still are prevented and hindered by the said securities and conveyances from liquidating and winding-up the assets and affairs of the said corporation and realizing at least a fair part of their said claims.

They also claim that in any event there was no authority under s. 88 of the Bank Act for the bank taking security on any of the goods included in the jobbing portion of the business of the company.

It was held in the *Bank of Hamilton* v. *Halstead*, 27 O. R. 435, 24 A. R. 132, 28 S. C. R. 235, that an assignment made in the form "C." to the "Bank Act" as security for a bill or note given in renewal of a past due bill or note is not valid as a security under the seventy-fourth section of the "Bank Act." Girouard, J., at p.

241 says: "The bills or notes may be renewed, but not the security. The Act does not authorize the substitution of one assignment for another."

It is contended on the part of the plaintiffs that there was in reality the same course of dealing between the bank and its customer in this case as was held to be invalid in the *Halstead Case*. It seems to me, however, from the evidence in this case, that the bank was from time to time making advances and taking a security under s. 88 of the Bank Act on the new goods which were coming in. The goods were from time to time changing as old stock was sold and new stock brought in to replace. A separate note and security was taken for each advance. A general security was also taken referring to all outstanding notes as to each of which a previous individual security had been taken.

This, as it seems to me, could not be called a substitution, but rather a consolidation. With some difficulty and doubt in the matter I have come to the conclusion that, subject to the qualification about to be referred to, the securities taken by the bank under s. 88 of the Act must be held to be valid as against the plaintiffs. In the case of a manufacturer the bank had a right on the strength of written requests to advance on the goods, wares and merchandise, raw, manufactured and in process of manufacture, of its customer, and take security thereon in the form "C." provided in the Act. I see no authority, however, therein for the bank taking the like security on goods purchased by them from other manufacturers with which to carry on as a side line of their business a jobbing business. I am of opinion that to the extent that the securities previously taken and held by the bank at the time that the winding-up petition was filed covered goods so purchased they were invalid, and that the goods so held, or the proceeds of any since sold, by the defendants, belong to the liquidator to be utilized by him for the purpose of the liquidation of the company.

These securities were also attacked on the ground that the descriptions therein, at all events prior to the 29th of January, 1914, were not definite or specific enough. It seems to me, however, where particular warehouses are mentioned in which the goods were said to be, and the description covered all the goods, that this was sufficient under the authorities.

As to the real estate securities the position seems to be as follows: The bank had from time to time received statements from its customer in and prior to the year 1912 which seemed to shew that

the business, though carried on with too little capital and expanding too rapidly, was successful. In that year and under these circumstances the bank was asking for collateral security on the real estate of the company, as they were permitted and authorized to do. The agreement, though dated in May, provided that the security was to be given on or before the 1st October next. There was an existing agreement with the municipal corporation of the city of St. Thomas which would expire, as already mentioned, about that time. The company also was hoping to obtain further capital and feared that the placing of a mortgage upon its real estate might prejudice their efforts in this direction. The real estate securities were not given by the time mentioned in the agreement.

In 1913 a statement was prepared dealing with the company's business to the end of August, 1912, which seemed to shew a considerable profit. The bank and its local agent were watching the account carefully and anxiously during the year 1913, as the correspondence indicates and the evidence of the local manager shews.

In the fall of 1913 the bank procured an audit by Clarkson & Company, which seemed to shew that the previous statements made by the company to the bank as to profits were inaccurate. This naturally made the bank more anxious and they then became insistent as to the real estate securities, and they were given as already indicated, under the pressure of the bank upon its customer. The bank manager testifies that at the time this security was given he still thought that the business would be successful. He attributed the difficulties of the company to the absence of one member of the firm from active oversight and the illness of another. While he apparently held too sanguine an opinion, at the time, of the prospects of the company, in view of the fact that the agreement to give security had been taken long before that, and on its face purported, in so far as it could without impairing the validity of the existing agreement between the company and the city of St. Thomas and until the execution of the formal mortgage or mortgages, to give a charge upon the lands and plant, I am of opinion that there was nothing improper or illegal in the bank, at a subsequent date and pursuant to such previous arrangement, insisting upon and obtaining the real estate securities referred to.

I am of opinion, therefore, that the attack upon these securities fails, and that they are valid securities in the hands of the bank as against the plaintiffs.

There was some slight evidence that certain goods of the company in Toronto had been sold by the defendants since the liquidation proceedings began. It was not made clear whether these were or were not covered or claimed to be covered under the bank's securities. I did not gather from counsel that any question as to these goods was specifically raised in this action.

A reference as to the jobbing goods may be a difficult and intricate one. It is possible that the plaintiffs and defendants may be able to agree upon a sum which the bank can pay to the liquidator to represent these goods. If this is not possible there will be a reference to ascertain the value of the goods or the disposition made by the bank of such portion as has been sold by it.

In the circumstances further directions and costs will be reserved.

Reference to Falconbridge on Banking (1913), 2nd ed., 251, 261; *Ontario Bank* v. *O'Reilly* (1906), 8 O. W. R. 187, 12 O. L. R. 420; *Toronto Cream & Butter Co.* v. *Crown Bank* (1908), 11 O. W. R. 776, 16 O. L. R. 400; *Townsend* v. *Northern Crown Bank* (1913), 27 O. L. R. 479, 28 O. L. R. 521.

KELLY, J. (WEEKLY COURT.) 5TH AUGUST, 1916.

RE UNION SCHOOL SECTION "A," WEST FLAMBOROUGH.

Schools—Public Schools Act, R. S. O. (1914), c. 266, ss. 20, 21, 22, 30—Formation of Union School Section—Award—Appeal—Confirmation By-law—Jurisdiction of County Judge.

Limitation of action:—Where an union school section is formed out of parts of two or more townships and arbitrators accordingly appointed by the townships and an award has been made and appealed against under Public Schools Act, R. S. O. (1914), c. 266, s. 22 (1), to the County Council, which, under s. 22 (2), appointed three arbitrators and their award has been confirmed by township by-law, a County Judge has no authority, under s. 20 (3) to make any order respecting the by-law or the award, unless notice of an application to quash such by-law or to set aside such award is given to the township clerk within one month after the publication of such by-law or award, as provided by s. 30 (1).

Appeal by the trustees of Public School Section No. 7 in the township of Beverly, from an order of Monck, J.Co.C.J., of Wentworth County Court, directing that the arbitrators appointed by the County Council should "consider and adjust the claims and equities arising between Union School Section 'A' and various other sections, parts of which were detached and given to the Union Section, as a consequence of the severance of the lands necessary for the formation of the said Union Section."

The motion by way of appeal was heard in the Weekly Court at Toronto.

J. H. Spence, for the appellants.
A. L. Shaver, for the trustees of Union School Section "A."

KELLY, J.—The following are the important facts: It having been proposed that under the Public Schools Act, R. S. O. (1914), c. 266, s. 21, a Union School Section should be formed of parts of the townships of Beverly and West Flamborough, arbitrators were accordingly appointed by the township councils and an award was made. This was appealed against under s. 22 (1) to the County Council of the county of Wentworth, in which these townships are situate, and under s. 22 (2) three arbitrators were appointed by the County Council, and these gave their decision on July 20th,

1915. On September 13th, 1915, a by-law was passed by the Municipal Council of the township of Beverly confirming the award and enacting that Union School Section number "A" should consist of the parts of the lands mentioned in the award, in so far as the same relates to Beverly township. No motion was made against the by-law or the award until the application of April, 1916, on which the Junior County Judge made the above mentioned order. Leave to appeal therefrom was granted by my brother Riddell on May 6th, 1916.

The first doubt arises as to the right to appeal against the award of the arbitrators appointed by the County Council. Section 22 (2) declares that the decision of a majority of such arbitrators shall be "final and conclusive." This appears to conflict with s. 20 (3), which provides that should any question arise touching the validity of the proceedings in or in relation to the formation, alteration or dissolution of a rural school section or of a union school section, or touching the selection, adoption or change of a school site or touching any by-law of the council of any municipal corporation in any way relating to such matters or any or either of them or touching any arbitration or award heretofore or hereafter had or made under the provisions or authority of the Act, the same shall not be raised or determined by action or proceeding in the Supreme Court, but shall be raised, heard and determined upon a summary application to the Judge of the County Court or District Court of the county or district in which such school section or some part thereof is situate. Thus, in one section the decision of the majority of the arbitrators appointed by the County Council is declared to be final and conclusive, and in the other provision is made for raising, hearing and determining before the County or District Judge any question touching "any arbitration or award heretofore or hereafter had or made under the provisions or authority of this Act."

The complaint of the Trustees of the Union Section is that the arbitrators neglected to perform the part of their duties imposed upon them by s. 21(14).

But whatever may have been the intention of the Legislature on the question of finality—whether the decision referred to in s. 22 (2) is to be final and conclusive or whether the provisions of s. 20 (3) are in a case such as the present to have effect—the limitation of time imposed by s. 30 is a bar to those seeking to attack the by-law or the award. Sub-section (1) of that section declares

that a by-law of a municipal council for forming, altering or dissolving a school section, and an award made by arbitrators appointed to consider an appeal from a township council with respect to any matter authorized by this Act shall be valid and binding for a period of at least five years . . . notwithstanding any defect in substance or form or in the manner or time of passing or making the same, unless notice of an application to quash such by-law or to set aside such award is given to the township clerk within one month after the publication of such by-law or award, and the same is subsequently quashed or set aside.

It was evidently deemed desirable by the Legislature that a Union School Section when established should rest upon a definite footing, and that after the time limited by s. 30 its affairs and those of the school sections affected by its formation should not be subjected to disturbance from an attack on the award.

Assuming that there was otherwise a right to appeal, any loss or hardship resulting from a refusal at this stage to direct the award to be opened up could have been avoided by diligence in bringing the proceedings within the prescribed time.

It may be mentioned that one of the claims made by the Union Section is that certain sums of money are now or were on December 31st, 1915, in the treasuries of school section 7, school section 4 and school section 8, which were paid subsequent to the formation of the Union Section and to which it is claimed that that section is entitled. Having been paid in subsequent to the formation of the Union Section these could not have been a matter for the consideration of the arbitrators, unless at the time of the arbitration, though not paid in, they were so in existence that their adjustment could have been dealt with by the arbitrators. If, as is claimed, these moneys (or any other moneys) really belong to the Union School Section it is to be hoped that those having control of them have sufficient sense of what is right not to withhold payment on merely technical grounds.

The appeal is allowed with costs, and the order of the County Court Judge set aside.

Appeal allowed.

KELLY, J. (WEEKLY COURT.) 22ND AUGUST, 1916.

RE WALMSLEY ESTATE.

Will—Construction—Devise—Estate Tail—"Lawfully Begotten Heirs for Ever"—Election—Lands Included in Devise—Lands Acquired by Devisee—Road Allowance.

Election arises where the property given away by the testator belongs to his beneficiaries, even though their title to it is derived only as next of kin or as residuary legatees or devisees of a person dead at the time of the testator's death.

Lands acquired by devisee:—A devisee in tail of land contiguous to a road allowance, after entering into possession, acquired title to that road allowance; *held*, that his title thereto was independent of his ownership of or interest in the adjoining lands and enured to his own benefit without obligation to hold it under title similar in character to that which he had in the adjoining property, and the fact that the conveyance thereof from the municipality was not obtained by him, but by the trustees of his estate after his death, could only be treated as confirmatory of his title and not as an admission of any weakness in it.

Lands included in devise: — Where the amount of land included in a devise to a son was questioned and the evidence shewed that the son had acquired title by possession to a proposed road allowance contiguous to lands owned by his father and devised to the son and that it was not necessary as a means of access to said lands nor was it necessarily appurtenant thereto, and the form of the devise was not such as to include any part of it, *held*, that the proposed road allowance was not included in the devise.

Lawfully begotten heirs: — Where a testator devised certain lands to his daughters "to them and their heirs and assigns," and devised other lands to his sons "to have and to hold to them and their lawfully begotten heirs for ever," *held*, that the language of the devises to the sons appeared to have been used deliberately and with the intention of limiting the interests given to them, therefore, they received only an estate tail.

Motion by the executors of the will of the late Thomas Walmsley for an order determining certain questions as to the proper construction of his will and the will of his late father, John Walmsley.

H. S. White and *G. W. Mason*, for the applicants.

J. B. Clarke, K.C., for those entitled under the residuary devise in the will of the late John Walmsley.

KELLY, J.—The main question to be determined is whether in the specific devise of land made by the will of John Walmsley to

his son Thomas Walmsley there was created a fee tail. The devise is to Thomas Walmsley to have and to hold to him "and to his lawfully begotten heirs for ever." The same language is used later on in the will where after giving to his wife for her life the same lots he repeats the devise to his son Thomas "and to his lawfully begotten heirs for ever."

It will be observed also that in the devise to his son John the same words are used, and that the devise to his son James is to him "and to his heirs lawfully begotten for ever."

The languag of these devises appears to have been used deliberately and with the intention of limiting the interests given to his sons to an estate tail, there being a clear distinction between the language used in making these devises and that employed in the gifts to his daughters, where the devises are to them and their heirs and assigns.

There can, in my opinion, be no doubt that the interest acquired by Thomas Walmsley in the lands devised to him was an estate tail (Theobald on Wills, 7th ed., p. 409). That being so, other questions resulting therefrom and mentioned in the notice of motion remain to be determined.

Doubts have been thrown upon what amount of land was covered by the devise to Thomas. It appears that he had been in possession for many years prior to his death of what was indicated on an old plan of this property (known as Drummondville) as John street, contiguous to the south side of lot 4 on the west side of the travelled roadway, and also the parcel of land (the continuation of John Street) lying between lots 3 and 4 on the east side of that roadway.

John Walmsley gave to his son Thomas "town lot No. 4 in Drummondville in the gore made by Yonge street road and the front of lot number 19 in the 3rd concession from the bay in the township of York and lot No. 4 on the west side of Yonge street road as described in the deed for the same from one Catherine Stibbins to me . . . and also lots numbered one, two and three in the said town of Drummondville as described in a deed for the same from one Jesse Ketchum to me," etc.

The lands so conveyed by Catherine Stibbins are described in the conveyance to John Walmsley as (1) Lot number four in the gore made by the present Young (sic) street road and the part of lot number nineteen in the 3rd concession aforesaid including the

allowance for road, and (2) lot number four on the west side of Young street, etc.

The question arises, did the devise to Thomas include the lands (or any part of them) shewn as John street on the copy of plan produced, either expressly or as appurtenant to lot four on the west side of the travelled road or to either lot four or lot three on the east side of that road. These parts of John street, standing by themselves, are substantial in area and were not necessary as means of access to or ingress or egress to or from the lots mentioned in the devise, nor were they necessarily appurtenant to these lots for any other reason that I can see. The form of the devise is not such as to include any part of John street, and I am opposed to the view that the devise must necessarily be taken to include the portion of John street now in question. Whatever title Thomas Walmsley had at the time of his death to these parts of John street he acquired by other means. As I understand it, it is conceded that no other conveyance or assurance of any part of, "John street" was made to him. It is in evidence by an elder brother of his, who says he was about fourteen years of age when his father died (in or about 1846), that Thomas Walmsley for more than ten years prior to his death was in exclusive and undisturbed possession of these parts of John street and that, speaking with a knowledge of the property from his earliest recollection, John street had never been opened up for use, or used, as a street, and that no public money had been expended for opening it and no statute labour had been performed upon it. There is no contradiction of this evidence, and I understand it is conceded that his possession and actual occupation and user extended back far beyond the ten years. The plan referred to has not been registered. There is no evidence of a dedication of John street. As against the other parties to these proceedings the title of Thomas Walmsley's estate to the parts of "John street" of which he was so in possession prevails.

A further question is whether Thomas Walmsley was entitled, and in what capacity, to that part of the original allowance for road lying between the easterly limit of township lot number twenty-one and the westerly limit of lot nineteen in the 3rd concession, and running from the production easterly of the southerly limit of lot one and the northerly limit of lot four on the east side of the travelled road on said unregistered plan. This involves the question whether lots one, two, three and four, granted to John

Walmsley and laid out on the unregistered plan, extend easterly to the westerly limit of township lot 19, and so include parts of the original allowance for road. The copy of plan before me does not afford sufficient data from which to reach a satisfactory conclusion; the measurements not being complete and the area of lot four on the east and lot four on the west side of the travelled road, so far as it can be calculated from the incomplete data, not corresponding with the area of these two lots as mentioned in the Stibbins deed, whether the calculation be made including or excluding the portion of the original road allowance.

This interpretation of the description does not necessarily conflict with the application of the words "including the allowance for road" (in that description), for these can as readily be read as meaning that it is the Gore "made by the present Young (sic) street road and the front of lot number nineteen," which includes the original allowance for a road as that lot four includes a part of that allowance.

Another circumstance to be noted is that in the description by metes and bounds (in the Stibbins deed) of lot four east of the travelled road, the point of commencement—the S. E. angle of lot four—is ascertained by measuring from the south-east angle of lot twenty-one (in the 3rd concession), which is on the west side of the road allowance. The reasonable inference to be drawn from this is that these lots on the east side of the travelled road were not intended to include and did not include any part of the original road allowance between township lots 19 and 21. My view is that the lots described in the conveyances to John Walmsley did not include parts of the original road allowance. But assuming that these lots and these conveyances were intended to include the parts of the road allowance contiguous to the lots, it must still be held that these parts of the road allowance did not pass to John Walmsley, it not being shewn that the grantors had any right or title to what constituted a part of the original allowance for road.

Nothing appears to have been done to alter the status of the original road allowance until July, 1882, when the municipal council of the township of York passed a by-law stopping up and closing that part of it which lies between township lots 17, 18 and 19 on its east side and lot 21 on its west side, in the 3rd concession, and authorized conveyance of specified parts thereof. On February 1st, 1883, the council of the County of York by by-law confirmed the township by-law, acting under authority of R. S. O.

(1877), c. 174, s. 525. The statutory provisions then in force relating to the closing up of original road allowances are found in that chapter of the Revised Statutes.

Section 525 gives authority to township councils to pass by-laws for the stopping up and sale of any original allowance for road or any part thereof within the municipality, and for fixing and declaring therein the terms upon which the same is to be sold and conveyed; such by-law, however, not to have any force until confirmed by a by-law of the council of the county in which the township is situate, at any ordinary session of the county council held not sooner than three months nor later than one year next after the passing thereof.

Section 486 defines common and public highways.

Section 487 declares that unless otherwise provided for, the soil and freehold of every highway or road altered, amended or laid out, according to law, shall be vested in Her Majesty, Her Heirs and Successors.

Section 488 is: "Subject to the exceptions and provisions hereinafter contained, every municipal council shall have jurisdiction over the original allowances for roads and highways and bridges within the municipality."

Without going into any lengthy discussion of the effect of these and other parts of that Act relating to the power over and right to close up road allowances, I am of opinion that the municipality had the right to close up and dispose of this road allowance.

Thomas Walmsley obtained no conveyance from the municipality of any part of the original allowance for road; the by-law did not expressly direct any conveyance to be made to him. The evidence is that for more than ten years prior to his death he was in exclusive and undisturbed possession of the parts of the original allowance for road now in question. This is not contradicted; I think it is correct to say that it is conceded. Whatever title he thereby acquired was independent of his ownership of or interest in the adjoining property, and so enured to his own benefit without obligation to hold it under title similar in character to that which he had in the adjoining property. I cannot see that the title he acquired to the parts of the original allowance for road is in any way affected by the character of his title to the adjoining lands. Nor is any significance to be attached to the conveyance made to the trustees of his estate by the municipal council of York township. If, as appears from the evidence to have been the case, he

had at the time of his death acquired title to these parts of the road allowance, the deed from the municipality, obtained not by him but by his trustees after his death, can only be treated as confirmatory of, and not as an admission of any weakness in that title.

The will of John Walmsley, Thomas Walmsley's father, contains this residuary provision:—

"Also my will is that after my decease the pottery is to be rented until my son James arrives at the age of twenty-one years (if he happens to live so long), and after he shall have attained the age of twenty-one years that then the whole of the residue of my real and personal property and effects not otherwise given, devised, sold or bequeathed be divided equally amongst all my children above mentioned, share and share alike, or amongst the survivors of them, to have and to hold the same to them, their heirs and assigns forever; but subject nevertheless to the payment of the sum of twenty-five pounds annually to my dear wife Isabella, as before is mentioned, during the term of her natural life."

The trustees of Thomas Walmsley's estate ask a declaration that, if it be held that the estate in the lands devised to Thomas by his father's will was an estate tail, on its coming to an end by the death of Thomas Walmsley without children, the residuary devise in John Walmsley's will became operative and that Thomas Walmsley's estate is entitled to share in the entailed lands. My opinion is that Thomas Walmsley was included amongst the residuary devisees under his father's will, and the estate tail having come to an end, his estate is entitled to share in such residue.

The trustees of Thomas Walmsley's estate submit that James Walmsley, Elizabeth Kirvan, Annie Loft and Richard George Loft cannot insist upon the benefits to which the will of Thomas Walmsley entitled them, and at the same time insist upon their shares in the entailed lands—which include part of the property known as Walmsley Villa—the same not having passed under the will. The four persons above mentioned contend that they are not put to their election as between their legacies under Thomas Walmsley's will and their rights to these lands under John Walmsley's will. The only part of what I refer to as the entailed lands specifically devised by Thomas Walmsley's will is the part included in Walmsley Villa, "save and except that portion thereof lying to the north of the house and bounded on the south by the driveway or hedge" —the free use and enjoyment of which was given to the testator's wife during her lifetime. Under authority to that effect given by

the will, other property and interests have been given to the widow in substitution for the interest so given her in Walmsley Villa.

The four persons above mentioned take benefits under Thomas Walmsley's will. From the affidavits filed they also appear to be amongst those entitled to share in the residuary estate of John Walmsley and thus to share in that part of Walmsley Villa included in the entailed lands.

The doctrine of election is stated in numerous authorities. In order to raise a case of election under a will there must be on the face of the will a disposition on the part of the testator of something belonging to a person who takes an interest under the will: Theobald, 5th ed., p. 96; and the interest which is taken under the will must be one in the free disposable property of the testator; Farwell on Powers, 2nd ed., 384.

In *Rogers* v. *Jones*, 3 Ch. D. 688, Jessel, M.R., said: "The doctrine of election is this, that if a person whose property a testator affects to give away takes other benefits under the same will, and at the same time elects to keep his own property, he must make compensation to the person affected by his election to an extent not exceeding the benefits he receives."

And Sir John Romilly, M.R., in *Re Fowler's Trusts*, 27 Beaven 362 (at p. 365), said: "A case of election arises where a testator, whether under a power or not, gives property which belongs to one person to another and gives to the former property of his, the testator's; in that case the former is bound to elect whether he will give effect to the disposition of his own estate in favour of the latter, and if he will not, then he cannot take any of the benefits intended for him by the will, and which are thereupon made available for compensating the disappointed legatee or devisee."

And at p. 248 of *Box* v. *Barrett*, L. R. 3 Eq. 244, the same eminent authority says to raise a case of election there must be some disposition of property which the testator had no right to dispose of. The principle is also fully explained by Lord Halsbury in his Laws of England, volume 13, p. 116 (s. 132).

But with respect to the intention, as manifested by the will itself, it is to be observed that in order to raise a case of election it must be clear and decisive, for if the testator's expressions will admit of being restricted to property belonging to or disposable by him, the inference will be that he did not mean them to apply to that over which he had no disposing power. Jarman, 6th ed., p. 543.

It is stated in the 7th ed. of Theobald on Wills, p. 103, citing *Cooper* v. *Cooper*, L. R. 6 Ch. 15; 7 H. L. 53, that a case of election arises though the property given away by the testator belongs to beneficiaries under the will, who derived title to it only as next of kin or as residuary legatees or devisees of a person dead at the testator's death. This meets the conditions of the present case.

It is clear from what has already been declared that as to the part of Walmsley Villa above referred to the testator assumed to dispose of that over which he had no power of disposition; as to their interest in that part those of the four persons already mentioned who take an interest under Thomas Walmsley's will are put to their election between such interest and their respective interests in that part of Walmsley Villa over which Thomas had not a disposing power.

One other matter remains to be considered: the dower interest of the testator's widow in the entailed lands. She was entitled to dower in these lands; for a consideration provided from the estate she has released these lands to the trustees. Those entitled to the residue of John Walmsley's estate are entitled to these lands, subject to the dower. By virtue of the assignment by the widow to the trustees the latter are entitled to the benefit of the dower interest. The value of this interest cannot on the material before me be ascertained, and there will be a reference to the Master in Ordinary for that purpose. So that a proper apportionment and distribution may be made, in accordance with the foregoing findings, of the proceeds of the lands in question, the reference will also include (1) an ascertainment of the relative values of the part of the lands in question which are declared to have been the property of Thomas Walmsley, and of the parts declared to have been held by him in fee tail; (2) the relative value of that part of the entailed property included in the devise for the widow's life of Walmsley Villa, and of the remaining part of said entailed land.

I understand all parties concerned have agreed that the proceeds of the sales by the trustees of the lands herein involved are to be taken and treated in lieu of the lands themselves. On ascertainment of the matters referred distribution can be made accordingly.

For the purposes of the present proceedings, all parties interested under Thomas Walmsley's will and not interested in contending that under John Walmsley's will Thomas Walmsley acquired an estate tail, are sufficiently represented by the trustees, and there may be a declaration to that effect.

Costs out of the estate; those of the trustees as between solicitor and client.

CLUTE, J. (TRIAL.) 22ND AUGUST, 1916.

BARRETT BROTHERS v. BANK OF TORONTO.

Banks and Banking—Principal and Agent—Instructions to Bank to pay Money over on Condition—Breach of Instructions by Bank — Knowledge of Principals — Ratification—Estoppel—Parties to Action.

Breach of instructions ratified:—Where a syndicate gave defendant bank specific instructions to pay certain money upon obtaining an assignment of an oil lease and the bank accepted a document which was not a legal assignment, the syndicate sought to recover the money paid over. *Held*, that the syndicate by organizing a company, transferring to it the property, issuing stock, etc., had ratified the acceptance by the bank of the document and were estopped from repudiating the transaction which they themselves had helped to consummate with full knowledge of the facts.

Syndicate action:—All members of a syndicate are necessary parties to an action by the syndicate and an action brought by only certain members of it is defective for want of parties.

Action by certain members of a syndicate to recover $7,000 and interest The facts of the case are fully set out in the judgment.

T. A. Beament, for the plaintiffs.
H. E. Rose, K.C., for the defendant bank.

CLUTE, J.—Action partly tried at Ottawa on December 30th, 1915, and continued at Toronto on the 3rd March, 1916, and completed at Toronto on July 18th, 1916. No pleadings.

The plaintiffs' claim as endorsed upon the writ is for the sum of $7,000 and interest thereon, being an amount paid by the

plaintiffs to the defendant as plaintiffs' agent for a specific purpose, authority for which payment was cancelled prior to the amount being paid as directed. The following are the particulars:—

"1914

July 15. Amount paid to the defendant for plaintiffs' account $7,000

Int. from Oct. 19th, 1914, to date thereof 321

$7,321."

The affidavit of merit states that the defendant is not in any way liable to the plaintiffs respecting the matters in question in this action. The moneys paid by the plaintiffs to the defendant were paid out by the defendant as directed by the plaintiffs or their duly authorized agent.

The material facts in the case are as follows:—

One Robert J. Cullen, having completed the sale of stock at Ottawa of an oil company of which he was president, and being about to leave Ottawa, intimated to one O'Reilly, and through him to the plaintiffs, that he knew of an oil lease that could be bought in a very good district, and that if the plaintiffs desired he would become interested with them providing that they would form a company and put the stock on the market immediately. A meeting was held at which the plaintiffs, George Barrett, L. A. Latour and Cullen were present, and it was then decided that they would buy the lease, and that a syndicate should be formed for that purpose, and that the money for such purpose should be paid into the defendant's branch bank at Ottawa.

Cullen left Ottawa for a day or two, and upon his return was informed that the syndicate could be formed to raise the money required to purchase the lease, and shortly after the money was raised, including the plaintiffs' contribution, and paid into the defendant's bank, amounting to $10,500.

Up to this time, beyond the general impression that they were to purchase the lease, none of the parties, including Cullen, knew anything about the nature of the title, nor had they at this time seen any of the documents relating to the same. It was suggested by Cullen that they transmit the money, get the lease through the Bank of Toronto, that he had done business

through that bank in Calgary, and that Lattimer, the local agent there, would be a satisfactory agent.

I find that all parties at this stage of the enterprise expected to purchase a lease, and that Cullen had no more knowledge than the other members of the syndicate as to the title.

The money having been paid into the bank at Ottawa, it was arranged that Cullen should proceed to Calgary, close the transaction, incorporate the company and proceed with all possible despatch to place the stock upon the market. The enterprise was wholly of a speculative character, all knew that there was no certainty that oil would be found upon the property. There was great excitement in regard to oil lands in the vicinity of Calgary, and what all the parties of the syndicate desired was not necessarily to proceed with despatch to develop the property for oil, but to get the stock upon the market as soon as possible.

A memorandum of agreement, dated 8th July, 1914, was drawn up between Cullen and the plaintiffs, which provided that Cullen "to whom has been transferred mineral lease issued by the Dominion Government," etc., is to hold the same as trustee for the parties. The company was to be formed as soon as possible under the laws of Alberta for taking over the lease in consideration of $800,000 fully paid shares of the face value of twenty-five cents each, and $64,000 in cash, and other matters affecting their interest.

Cullen started for Calgary, and Latour accompanied him to the station, and he was told by Latour that he would have to act in many minor matters according to his own judgment, get the company formed, and get back to Ottawa as quickly as possible to sell the stock, and that he and Latour would be the fiscal agents for the company.

On reaching Calgary, Cullen called on the defendant's manager there, Mr. Lattimer, who stated that the documents had not yet been turned into the bank. Lattimer telephoned (presumably to the syndicate's lawyer) and then informed Cullen that the documents would be delivered to the bank that day. He then suggested to Cullen that he should advise with a lawyer as to the sufficiency of the documents.

It was intended that the assignment should be to Latour. The document Cullen had taken with him was not in form, and as appears from the telegram, it was finally arranged that the

assignment should be directed to Cullen as trustee. As a matter of fact a formal lease by the Dominion Government had not been made to the party from whom the syndicate were purchasing.

Application had been made for a lease of certain oil lands including the portion to be transferred to the syndicate.

On the 6th July the following document was signed and delivered to the manager of the defendant's bank at Ottawa:—

"Bank of Toronto, July 6th, 1914: Please wire your Calgary branch to pay Almin Harvey the sum of $6,000 upon delivery of lease, section 7, township 29, range 5, west 5th. Transfer attached in favour of L. A. Latour in trust."

"(Sgd.) R. A. Cullen,
"L. A. Latour,
"G. R. Barrett (for Barrett Brothers.)"

The following telegrams were sent to the Bank of Toronto from Ottawa to their manager at Calgary:—

"July 7th, 1914. Notify Almin Harvey that the $6,000 has been deposited here by R. J. Cullen and others, being part of the $10,000 to be transferred to you in exchange for lease, section 7, township 29, range 5, west 5th, the money to be returned to depositors if whole ten thousand is not forthcoming."

"July 8th, 1914. Referring to our telegram, July 7th, pay Elmin Harvey $9,000 in exchange for lease described therein, lease to be in the name of L. A. Latour in trust, and held by you to the order of Latour. Wire completion."

Defendant's manager at Calgary wrote to its manager at Ottawa on the 10th July, 1914, referring to the telegram of the 8th July as to the $9,000, and further stating: "We are advised that this lease is in the name of the company who will issue an assignment of it. This is the usual procedure here in connection with this lease in case the lease should be for a larger number of acres than are concerned in the transfer."

On the 13th July, Cullen telegraphed Latour: "Advise Bank of Toronto, Ottawa, to advise Bank of Toronto, Calgary, to pay money over for assignment of lease on instructions from R. J. Cullen. (Sgd.) R. J. Cullen."

On the following day he further telegraphed Latour:—

"Assignment Latour to Cullen not legal in Alberta. Lease now covers two sections, bank must have instructions to accept

assignment in my name. Rush reply." And on the next day, July 15th, Latour formally instructed the Bank of Toronto, Ottawa: "Please instruct your Calgary branch to pay over the $9,000 transferred by telegram on the 8th July, on receipt of the lease referred to in the name of R. J. Cullen in trust, instead of in the name of L. A. Latour.

"Sgd. L. A. Latour."

And thereupon the manager of the Bank of Toronto at Ottawa telegraphed their Calgary manager: "Our telegram, July 8th, accept lease in name of R. J. Cullen in trust instead of Latour."

Upon these documents the plaintiffs contend that the instructions were specific to pay over the money upon the receipt of the assignment of the lease, and that the assignment of the lease not having been obtained the payment of the money was unauthorized, and the plaintiffs are entitled to recover it back.

Mr. Beament, in his lucid and able argument, points out that no lease had, in fact, been granted by the Dominion Government, that even assuming that application having been made a lease would have been granted in due course, the application was in fact for two parcels, only one of which the syndicate was buying, and that if application had been made to the Government for a single lease for the land in question the Government might have refused, treating the lease as one, and that this was a material defect in the title inasmuch as forfeiture of the whole lands might have been claimed in case of default of payment of rent due upon the lands other than those the plaintiffs were buying; so that the assignee to the extent of one parcel would be in the position for all time of having to see that the original landlord paid the entire amount, otherwise his property would be in jeopardy; and that the instructions being specific to pay over the money upon the delivery of the assignment of the lease upon specified lands there was no authority and there was an implied inhibition not to pay over the money of the syndicate until such lease was delivered; and the fact that long after this transaction, through the influence of the defendant in this action, the Minister of the Interior gave such instructions in this particular case that a lease might issue for each property, ought not to affect the rights of the plaintiffs.

This concession for a separate lease was obtained in January, 1915, the writ herein was issued on the 3rd September, 1915.

The right to the lease from the Dominion Government, and what was done in respect thereof, was stated in evidence by Mr. Rowatt, Controller of Mining Lands. He states that an application was made on the 28th May, 1914, for these and other lands, and the fee of $5, and the first year's rental of $260 were paid; that the application included certain other lands; that there was a great congestion of applications in that Department owing to the excitement in oil lands, there being about 13,000 applications in at that time, and that it took from three to nine months from the time the application was received before a formal lease was granted; that the lease invariably issued under the regulations unless previously granted.

In this case there was no obstacle in the way of granting the lease; that the Government considered the applicant as the owner of the rights to be granted from the day the application was put in, and that there was an assignment to Harvey, plaintiffs' vendor, of the 2nd July, 1914, although the lease had not in fact issued.

He further states that where the original application covers different parcels of land, it is not the practice of the Department to issue separate leases unless special instructions are given that a separate lease may issue, that is, no applicant is allowed to break up his location into parcels, and lease it in the separate parcels, that is not the practice of the Department; but in this particular case the Department agreed to issue a lease for the lands in question only to Cullen or Cullen's assigns. And that can be done at any time now.

On the 15th July, 1914, Harvey assigned his interest in the lease to Cullen. This document recites that application having been made to the Department of the Interior, by one Mercereau, for these and other lands pursuant to the rules and regulations of the Department, and that by various assignments the assignor is entitled in due course to the lease thereof, the assignor grants and assigns all his rights and interest to the lands in question to Cullen, and covenants for title.

On the 22nd July, a formal application was drawn up between the plaintiffs and Binden, Morrison, Harvey, Shakelton and Wright as to the manner in which the parties should share in the proceeds of the sale of the rights in question, and the number of shares each should take, and that the proceeds of the stock should be distributed *pro rata* according to the amount paid and shares

taken. This document was formally signed under seal by the plaintiffs and Binden, Morrison, Cullen, Harvey and Wright.

A company was incorporated, and the plaintiff Latour became the president, the lease was transferred to the company, and stock issued, and Cullen returned to Ottawa with a view of putting the stock upon the market. He reported to the plaintiffs and other members of the syndicate what he had done in Calgary, and brought the papers in respect to the title with him. He reported as to the formation of the company and as to obtaining leases from other parties, how these leases had to be paid for in stock, and it was then that the agreement between the parties as to their division of the shares was drawn up and signed. He also informed them of his having consulted counsel as to title. Plaintiffs and other members of the syndicate expressed themselves satisfied with what he had done. They were told that in the original application more lands were applied for than the section in question, and that they were going to try and have a separate lease granted for the land bought, and with a view to that end, that before he left Calgary he had got the promise of the original applicants that the syndicate should have a separate lease.

The prospectus was then prepared, the company was organized and the stock was put upon the market. In short, Cullen says that all that he had done in respect of the obtaining of the lease and of the organization of the company, and obtaining other lands which were to form a part and be incorporated with the lands in question in the new company, was all explained to the plaintiffs and other members of the syndicate and was satisfactory. I see no reason to doubt the statement of Cullen in this matter. I think it is entitled to credit, and I accept it.

Irrespective of the merits of the case, this action is defective for want of parties. The plaintiffs forming only a certain number of the syndicate, cannot under any circumstances be entitled to have the money paid to them in the absence of the other members of the syndicate, including Cullen. This position is, I think, unanswerable, and if it were necessary to dispose of the case on this ground I should hold without hesitation that the plaintiffs cannot succeed in the action as now formed, but the parties being desirous of having the matter disposed of on the merits, I do so in order to save further litigation. I do not think that the position of the plaintiffs can be sustained. Cullen was their agent to

close the transaction. It is true that he did not get a formal lease as was probably expected by the parties when they entered into the transaction, but I find that the plaintiffs had knowledge before the transaction was closed that application had been made for these and other lands, and that what was done subsequently in the way of organizing the company, transferring the property, issuing the prospectus and issuing stock, was a ratification of all that Cullen had done, and that the plaintiffs are estopped by their acts from repudiating the transaction which they themselves, with the full knowledge of the facts, helped to consummate.

The action should be dismissed with costs.

FALCONBRIDGE, C.J.K.B. (TRIAL.) 30TH AUGUST, 1916.

BENDER v. TORONTO GENERAL TRUSTS CORPORATION.

Payment — Attempt to Establish Payment on Mortgage—Evidence Act, R. S. O. (1914), c. 76, s. 12—Corroboration.

Claim against estate of deceased:—Where it was sought to recover from the executors of a mortgagee the amount of a promissory note alleged to have been given and paid by mortgagor on account of the mortgage, and the evidence shewed that the mortgagee had several thousand dollars invested in promissory notes, representing loans, *held*, that the giving of the note was quite as consistent with a specific loan as it was with payment on the mortgage, and the mortgagor had failed to satisfy the corroboration of his evidence required by the Evidence Act, R. S. O. (1914), c. 76, s. 12.

Action by Hiram Bender and his wife against the executors and trustees under the will of the late James A. Lowell, to recover one thousand dollars alleged to have been overpaid to the deceased upon a mortgage made by the plaintiff Hiram Bender and his brother to the deceased, covering certain lands, the title to which is now in the name of the plaintiff wife.

D. B. White (Niagara Falls), for the plaintiffs.

A. C. Kingstone (St. Catharines), for the defendants.

FALCONBRIDGE, C.J.K.B.—This is a very curious case. The defendant corporation is executor and trustee of the estate of

James A. Lowell. The plaintiffs, husband and wife, are suing, as the title of the lands is now in the name of the wife.

Their allegation is that in July, 1889, the male plaintiff and his brother made a mortgage for $4,000 to said Lowell, covering certain lands; that about the 19th September, 1895, said Lowell requested the said male plaintiff to make payment of $1,000 on account of said mortgage; that said plaintiff explained to said Lowell that he could not make such payment in cash, but that he would give him a promissory note, and that he would honour same on maturity. The note was accordingly made by plaintiff Hiram, bearing date 19th September, 1895, and payable, three months after date, to the order of said Lowell. That note was paid by plaintiff Hiram on or about its due date, *i.e.*, the 23rd December, 1895.

It is then alleged that Lowell died about the 5th April, 1900, having failed to make any credit entry in his books in respect of the said alleged payment on the mortgage.

Hiram, who during the time hereinbefore spoken of, had been what is commonly called "land poor," became able to pay, and on the 29th day of April, 1915, the defendants were paid a large sum of money in full of the claim under said mortgage as computed by the executors, no allowance being made on account of said alleged payment by way of the promissory note. Plaintiffs claim that the defendants are thus overpaid in respect of the said mortgage by the sum of $1,000 with interest at 6 per cent. half-yearly from the 23rd September, 1895, up to the 29th July, 1915.

The solicitors for the defendants agreed to hold in their hands a sufficient amount to make allowance for that sum, with interest, until plaintiffs should have an opportunity to furnish the solicitors with the necessary proofs of such payment, and upon such proofs being furnished that plaintiffs should be entitled to credit on the mortgage accordingly.

At the trial I formed an opinion favourable to Hiram Bender as to the honesty of his claim, but I reserved judgment principally to see if there was any corroboration as required by the Evidence Act, R. S. O. (1914), c. 76, s. 12. This is a case which eminently illustrates the wisdom of the provision requiring corroboration, in view of the long neglect of the plaintiff to see that he got credit for that sum in the lifetime of the testator.

The argument was principally directed to the law as to which there is no doubt; the usual cases were cited as follows: *Radford* v. *MacDonald* (1891), 18 A. R. 167; *Taylor* v. *Regis* (1895), 26 O. R. 483; *McGreggor* v. *Currie Estate* (1913), 25 O. W. R. 58; *MacDonald* v. *MacDonald* (1903), 33 S. C. R. 145; *Thompson* v. *Calder* (1903), 34 S. C. R. 261; *Schwent* v. *Roetter* (1910), 16 O. W. R. 5, 21 O. L. R. 112; *McClenaghan* v. *Perkins* (1902), 1 O. W. R. 752, 5 O. L. R. 129.

On considering the case it occurred to me that plaintiffs' counsel had not specifically pointed out to me in argument what he relied upon as corroboration, and I have caused two letters to be written to him inviting him to send to me and to the opposing counsel a memorandum of what he deemed to be corroboration. No reply has been received to this enquiry, and I assume he has no further addition to make to his argument. The fact that Lowell had several thousand dollars invested in promissory notes representing money lent, indicates that the giving of the note in question (which is produced), was quite as consistent with a specific loan then made by Lowell to Hiram Bender as it was with payment on the mortgage. I, therefore, fail to find any such corroboration of plaintiffs' claim as the statute requires either by the evidence of a witness or by the force of circumstances, and I dismiss plaintiffs' action with costs, if exacted. Perhaps if the estate is put to no further costs defendants will forego these costs.

Fifteen days' stay.

Action dismissed.

BRITTON, J. (CHAMBERS.) 5TH SEPTEMBER, 1916.

CLIFTON v. TOWERS.

Judgment — Amending and Varying — Intention of Judge not Expressed.

Correcting formal judgment: —Where the formal judgment does not express the intention of the Judge, he may order that the same be made to conform to and be in accordance with his findings.

Motion by the administratrix of the late Joseph G. Clifton, for an order varying the minutes of the judgment, so as to make it clear that the plaintiff is entitled to be paid by the defendant personally the amount of chattel mortgage in question and to reimburse himself out of the estate of Hugh D. Forgie and Mary Ann Forgie.

J. D. Bissett and *T. H. Peine*, for the plaintiff.
W. S. Brewster, K.C., for the defendant.

BRITTON, J.—Since the trial of this action, Joseph G. Clifton, the original plaintiff, has died. This motion is made on behalf of Alberta Mabel Clifton, widow of Joseph G. Clifton and administratrix of his estate. The motion is for an order varying the minutes or terms of the judgment herein at issue so as to make it clear that the plaintiff is entitled to be paid by the defendant personally the amount of the chattel mortgage as found by the trial Judge, and that upon such payment by the said defendant he is to be allowed to reimburse himself out of the estate of Hugh D. Forgie, and Mary Ann Forgie, and that there be stricken out of the second paragraph of said judgment issued herein, the words "A. S. Towers, the assignee of the estate of Hugh D. Forgie and Mary Ann Forgie," and varying the third paragraph of said judgment by providing that the said defendant may repay himself out of the estate of the said Hugh D. Forgie and Mary Ann Forgie the amount so paid by him, or, for such variation as will enable the plaintiff to have the intention of the trial Judge carried out, by payment to the plaintiff by the defendant of the

amount of the chattel mortgage on the chattels wrongfully taken and sold by the defendant A. S. Towers, and for such other variation of the said judgment as will fully and completely set out the intention of the trial Judge in granting and recovering against the defendant for the said sum; and for an order declaring the true construction of the judgment, and for such an order in the premises as under all the circumstances the justice of the case may require—and for an order pursuant to C. R. 566 and other rules, under the Judicature Act, declaring that the applicant is entitled to execution against, and may issue execution against, the defendant herein for the said sum as found by the trial Judge excepting costs, which have been paid by the defendant.

The motion is practically, in part, that the minutes of judgment and the judgment itself should conform to and be in accordance with my findings of fact as trial Judge.

Hugh Forgie and wife, being the owners of a large number of chattels of considerable value, executed two mortgages thereon; one to the Bank of Toronto and one to the plaintiff in this action. Within sixty days from the date of the mortgage to the plaintiff, the Forgies made an assignment for the benefit of their creditors to the defendant. The defendant relied upon the presumption against the chattel mortgage to the plaintiff, but took no proceedings to set that mortgage aside. After considerable delay the defendant sold all of the chattels, and realized from the sale more than sufficient to satisfy both mortgages, but he refused to pay the plaintiff, and finally this action was brought. It was tried before me, and I found in favour of the plaintiff. See 10 O. W. N. 224.

In my opinion the plaintiff's motion should prevail. The plaintiff is entitled to have the judgment against the defendant personally. The judgment as taken out is a mistake that should be rectified. The minutes of judgment as settled and the judgment as issued do not carry out my intention in giving judgment for the plaintiff on the trial of this action.

It is contended by counsel for the defendant that it is too late to correct such a mistake even if mistake has been made. I do not think it too late.

The contest in the action was as to the validity of the chattel mortgage. I found in favor of, therefore, the mortgagee. The original plaintiff was, and the administratrix is, entitled to what

follows from success in the action in reference to that property. It was the defendant's act that deprived the plaintiff of his property. The defendant treated the proceeds of the property of the mortgagees as belonging to the estate. The conversion was by defendant, so the defendant should be liable; and the defendant should not escape liability by reason of any mistake in acting upon the supposition that there were assets sufficient to pay the judgment when in fact, if it be a fact, all the assets had been so used by defendant as not to be available for payment of present judgment.

Hon. Mr. Justice Anglin, in the late case of *Frontenac Gas Co.* v. *Rex*, 51 S. C. R. 595, held that the Court appealed from could correct the formal judgment in so far as it did not express the intention of the Judge.

I have read the cases cited by Mr. Brewster, and in my opinion the present case is distinguishable.

This judgment as taken out, will work a wrong to the plaintiff that was not intended. It will leave the plaintiff in no better position—except as to costs—than if defeated in the action. It will relieve the defendant, although a wrong-doer, from liability from the result of his wrongful act. It will allow payment wrongfully made by defendant out of the proceeds of plaintiff's property.

There will be no costs of motion.

Judgment amended.

LENNOX, J. (TRIAL.) 6TH SEPTEMBER, 1916.

MENZIES v. McLEOD.

Will—Testamentary Capacity—Undue Influence.

Conditions attending preparation:—Although a person, in a decayed condition of body and mind, may, under fair conditions, with fair treatment and with, and possibly without, honest and efficient professional or other assistance, be possessed of sufficient mental capacity to make a valid will, yet probate of a document purporting to be the will of such a person will be refused, where these conditions were not attending its preparation and execution and where the alleged testator or testatrix had no correct knowledge of the value of his or her estate.

Action by Henry D. Menzies, for grant of probate of an instrument alleged to be the last will and testament of Margaret Menzies, late of Amherstburg, Ont., who died at Daytona, Florida, on 18th February, 1915, leaving an estate of $57,000 or upwards, and three documents purporting to be wills. Plaintiff was a nephew, by marriage, to the said Margaret Menzies, and he was named in the alleged will as sole executor thereof and residuary legatee and devisee of the estate.

J. H. Rodd (Windsor), for the plaintiff.
W. G. Bartlett (Windsor), for certain defendants.
A. G. F. Lawrence (Toronto), for three Hedley defendants.

LENNOX, J.—Mrs. Menzies' husband died in early manhood. They had a daughter who died a very long time ago, and a son Jack Menzies who, I think, always made his home with his mother. He died on 28th December, 1914, and the alleged will is said to have been executed before he was buried, to wit, on 31st December, 1914.

There is undisputed evidence that Mrs. Menzies never quite recovered from the sorrow and shock occasioned by her daughter's death, but it is not established that it unbalanced her mind in any way, and I may as well say right here that the references to her daughter in later years, her confusion as to when her daughter died, her references to her sister's death, her idea at times that her daughter was still with her, and instances of this kind, are only the very faintest indications, if significant at all, of loss of mentality; and I attach no weight to this part of the evidence in the conclusions to which I come.

Jack Menzies was physically infirm. He is spoken of as unmanageable. I judge that he had some of the infirmities of temper incident to bodily helplessness. He was his mother's sole companion for a great many years, her adviser, and, I think, directed and controlled her actions in many respects. At all events he was the centre of her life and aims and the supreme object of her solicitude. That he would survive her and inherit the property, or the bulk of it, would naturally be, and I think was, her expectation.

While these conditions continued, it was not necessary for Mrs. Menzies to thoroughly consider the disposal of her estate by will or otherwise, and it is not shewn that until she was confronted with the probability of Jack's death—a few hours before he died—that she even seriously contemplated or considered the making of a will, and the initial proceedings then spoken of probably amounted to no more than a plan to enable Jack, through his mother, to control the destination of the property after her death, as he seems to have been able to do to a great extent in his mother's lifetime or during their joint lives. It is of course some indication of the opinion they both entertained as to Mrs. Menzies' fitness to manage for herself.

At the time Mrs. Menzies is said to have made the will in question her next of kin were James McLeod, Emily Swain, Ida Whiting, Fannie (or Frances) McLeod, Mrs. Lett and Mrs. Hedley. Mrs. Hedley died recently. Norma, Maud and Hazel Hedley are her daughters. I judge that Mrs. Menzies was upon more intimate terms and more associated with and under greater obligations to Frances McLeod and William Menzies than any others of her relatives or connections. Her obligations to Frances McLeod were very weighty indeed, very much greater I would think than any duty she owed to Mrs. McGuire, however faithful she may have been as a paid domestic.

Upon application for probate, the estate (summarized) is sworn in as follows:—

Real and personal estate in Canada, including the Amherstburg residence valued at $4,000	$44,254 06
Real and personal estate in the U. S.	13,316 78
Total on 28th March, 1915	$57,570 84

Mr. Falls swears, and it was not contradicted, that the Amherstburg property is worth $8,000.

I think this reliable and add	4,000 00
Making a total estate of	$61,570 84

I attach no value whatever to Henry Menzies' attempt to justify his representations to Mrs. Menzies as to the extent of her property *or his self-denying acceptance of the residence,* by pledging his oath that he anticipated and anticipates a shrinkage by loss of investments; or his alleged ignorance of the extent of the estate. I find as a fact that from the day he, Jack Menzies, and Mr. Falls went over Falls' accounts and the vouchers and securities in the tin box, he was fully aware of the nature and extent of Mrs. Menzies' property and belongings, with the possible exception of $10,000 invested in bonds of the Detroit and Buffalo Steamship Company; and from the circumstance that it was Jack Menzies' temporary forgetfulness as to the existence of this bond investment that occasioned the meeting and investigation, and the undisputed fact that Henry Menzies went over all the deceased's papers on the night of his first arrival in Daytona, including no doubt the data prepared by Jack for his mother's will, I am very strongly of opinion that he was fully aware of the existence of this investment as well. Take it that he did not know of it until the 8th January, and taking such information as I have as to the differences in the 1st, 2nd and 3rd testamentary documents prepared by Mr. Pope and Henry Menzies, the guide and sole adviser of this lone and helpless woman, suddenly bereft of her only hope and stay, in the supreme moment of her life, perhaps, and the saddest—take it that he did not know of this $10,000, and still upon his own shewing by the first will Henry Menzies stood to share as follows:—

Mrs. McGuire	$ 1,000 00
Presbyterian Church	3,000 00
All the other relatives and connections	10,000 00
Henry Menzies, residuary and sole executor of the will with forfeiture clause	41,570 84
	$55,570 84

Or take the will now set up upon the facts as they actually were and as he knew them to be during forty days of silence and concealment before his aunt's death, from the 8th January to the 18th February, and it still figures out well—well for the man who "had the will made in this way so that the McLeods would not get it all," and the figures are:—

Strangers—Mrs. McGuire and Mrs. Green	$11,000 00
Presbyterian Church	3,000 00
Next of kin (the McLeods)	6,000 00
The Menzies other than Henry D.	4,000 00
Henry D. Menzies	37,570 84
Total	$61,570 84

Henry D. Menzies made an affidavit on production of documents, and swore that he never had any documents other than those produced. This was not true. He took a memorandum of the bequests. The first and second wills are not referred to. There was a large bundle of papers taken by him from Daytona. Of these he only refers to two bank books and the deed of the Daytona cottage. In this bundle there would certainly be the statement prepared by Jack and his mother as the basis of a will, just before Jack died. What became of this? Either Henry or Mrs. McGuire should be able to account for it. There is no reference in the affidavit to the list of securities produced to Mr. Falls after he came back from Daytona the first time or to the telegram sent William Menzies, a copy of which is exhibit seven. There is no reference to the list of beneficiaries prepared by Henry Menzies on the train, shewn to William Menzies. He does not deny that he produced it to his brother William. There is no reference to the power of attorney. It is hard to believe that the plaintiff's persistent silence as to first will until the trial was occasioned by forgetfulness.

These are important and significant omissions. The affidavit is remarkable for what it does not contain. I would be justified in referring to it in much stronger language.

It was suggested that the alleged testatrix was a woman of more than ordinary mental capacity. I do not recall that there is any evidence of facts or circumstances to establish this. It is also said, but without circumstances or instances to indicate a reason for saying so, that she was a person of "strong mind" or "strong will," and "not easily influenced; and this may be true of her when she was normal or at her best physically and mentally. But she was addicted to the use of codeine, and it is the testimony of several apparently truthful, although necessarily biassed, witnesses, that she had steadily degenerated physically, mentally and morally—morally in the sense of cleanliness and propriety and care of her person and appearance—for many years. If I accept the view of

these witnesses—including the expert evidence—then through the use of drugs or by reason of advancing years, or both, she became transformed, as it were, from her former self, indifferent as to her person and surroundings and to all else except Jack and an instinctive craving for physical comfort or indulgence.

These references to her mental endowments are no doubt intentionally or unintentionally exaggerated. If I accept the evidence of Mrs. McGuire on the other hand—and she ought to know—the deceased retained her mental faculties unimpaired until practically the last moment of her life. Mrs. McGuire, too, is biassed, if honest; the majority of the witnesses are probably biassed—it is almost inevitable in contests of this kind—and this witness is vitally interested, and I am quite unable to accept some of her statements of fact. The effort, of course, was to shew a sturdy, dominant and exceptionally capable woman. There was the usual wealth of opinion and bald assertion, but a notable absence of actual data upon which to base a conclusion as to the mental endowment of Margaret Menzies *at any period of her life*. Dominant she may have been in the way people are liable to become dominating, arbitrary or dictatorial who have means to dispose of, and painfully civil connections anxious to have it *unequally* divided. Assume it, and it does not help very much. It is not at all an uncommon manifestation in aged persons in Mrs. Menzies' situation, even without the backing of clear conception, fixed purpose or mental endowment of an exceptional character. But it would not surprise me to learn that more could have been shewn than was shewn. Mrs. Menzies was a widow for a great many years, and it is only reasonable to infer that, thrown upon her own resources in the early years of her widowhood, she at least acquired some knowledge of business and some capacity to manage her affairs. Later on I think Jack was a good deal in control, and for a long time Mr. Falls seems to have had charge of her investments, and this without supervision, except in the instance in which Jack and the plaintiff went over his accounts in the summer or fall of 1914.

I think perhaps more satisfactory evidence could have been obtained to shew that Mrs. Menzies in her normal state, and when free from the effect of drugs, was a capable woman, of fair ability and with more knowledge and greater capacity to deal with matters of business than a married woman with a husband to depend upon would be likely to possess. I am assuming this in favour of the will, upon the very scanty evidence before me.

Broadly speaking, there are three degrees of testamentary capacity. There is, of course, that high degree of capacity which enables the possessor to make a valid will without assistance, perhaps, other than clerical or professional—the capacity even to dispose of property intelligently, knowingly and effectively even under adverse or unfavourable conditions—the power to grasp the whole situation and overcome all difficulties, including fraud, intrigue, misrepresentation, importunity and unfair solicitation.

I will assume, and I think the circumstances will fairly support the assumption, that possibly at one time Mrs. Menzies had that high degree of testamentary capacity which enables its possessor to make a valid will, even in the face of adverse or unfavourable circumstances; but this does not take the plaintiff very far, as no one could reasonably argue that if it ever was, this was Mrs. Menzies' mental status for years and years before the date of the alleged will.

The intermediate condition, the capacity to make a will under fair conditions, with fair treatment, and with—and possibly without—honest and efficient professional or other assistance, would I think best describe Mrs. Menzies in her best days; but this again was not her condition when she left Canada in the autumn of 1914. She had then reached and permanently settled down into the very last stage for will-making—a decayed condition of body and mind, a condition in which at most it was only conditionally possible for her to make an effective disposition of property by deed or will. It is impossible to accept Mrs. McGuire's account of the quantity of codeine taken to Daytona, and the supply could be and probably was replenished there. The evidence of Mrs. Blodgett, a witness for the plaintiff, may be read in this connection.

I have very grave doubts about the over-eating. It is put forward to account for Mrs. Menzies' inability to continue her instructions to Henry Menzies, the bad night, the need of a doctor, and the nausea, otherwise attributable to the old habit. Does it help matters? A woman with a dead son, gorging herself, or who becomes utterly exhausted in ten minutes of business conversation, does not appear to me to be a person who could be safely hurried in the making of a will or capable of counteracting the wiles of an utterly unscrupulous man of the type of Henry D. Menzies.

Of course the validity or invalidity of the will does not solely depend upon the conduct of the plaintiff, but it has a great deal to do with it. He took the residue, representing there would be a

little left for him. He knew at the time that he was understating it by thousands. He says that he did not then know of the $10,000 American stock; but he "discovered" it on the 8th of January, concealed the discovery; and comes into court posing as an honest man, and, of necessity, the most important witness in support of the will. The circumstances demand the clearest evidence of competency, knowledge and approval.

I accept the medical and other evidence going to shew that Mrs. Menzies was then and thereafter a confirmed drug victim, in an advanced stage. The history of the case is conclusive that the habit continued until the time of her death.

The conclusion I have come to is that when Mrs. Menzies made her last trip to Daytona, and down to the time of her son's death, that, given ample time and being free from external disturbance, it was still possible for her, with honest, independent, well-informed and efficient help—including conscientious and competent professional advice—to make an effective legal disposition of her property by will or otherwise *if she wanted to;* but these were not the conditions attending the preparation or execution of the alleged wills nor the alleged instructions for what is called the first will. She had given up the management of her property, had lost track of it, was wholly ignorant of what it amounted to, even immediately following the preparation in which she and Jack joined, she still had no scheme of disposition in her mind, if Henry Menzies tells the truth. Part of what he says is probably true, but how much or what part it is impossible to detect. His conduct was selfish, unconscientious and dishonest throughout. I can find no fact depending upon his evidence alone. The conditions were disturbing, exceptional and unfavourable. The whole scheme of the woman's life had been suddenly wrecked, her sole adviser and stay removed, and no time was given her to adjust herself to new conditions. I do not for a moment believe that her mind was on the making of a will. She sent for somebody—anyone—to take away the body of her son. She knew nothing of the amount of her possessions, nor could she independently call up the legitimate objects of her bounty. She forgot what she and Jack had planned a few hours before he died, and forgot her instructions for the first and second will; or else Henry Menzies falsified the instruction to augment the residue. What she was told as to the amount of her estate was false, grossly and intentionally and fraudulently false, to the knowledge of Henry Menzies, whether he did or did not

then know of the $10,000 stock investment. She had no honest friendly help, but instead had misleading suggestions and statements; and she had no competent professional assistance.

There was nothing in the appearance or manner of the lawyer who drew the will, when he gave evidence, to point to a dishonest man; but he was either in fact *dishonest* or singularly unfitted for the position he took. Assume honesty, and he failed to discharge the most elementary duties of a solicitor. The introduction of the forfeiture clause was improper, and it was flagrantly improper to procure the execution of the alleged second will in the condition under the circumstances in which it is said to have been signed. He knew absolutely nothing as to the amount of her estate or connections, and he made no inquiries. He gave her very little information, and what he did give was improper.

It is not shewn that the will propounded was even read over to the deceased or that it was said to be a will when presented for execution. The only time it is said to have been named is when Mr. Pope brought it back to the deceased, and, referring to it as "the completed instrument," suggested that it be given to "Henry." Why Henry?

There was altogether too much hurry and too many interested people about. Why had it to be rushed through before the plaintiff left if it was intended to be the will of a capable testatrix, knowingly and deliberately made? Why should it be put out of sight in the plaintiff's pocket the moment it was witnessed? According to Mr. Greene and other witnesses, if Greene had not read over the second will to Mr. Menzies, after she had signed and passed it over, without objection or comment, there would have been no third will, and this second will would have been the will of "a competent testatrix, executed with full knowledge and approval of its contents and in strict accordance with the testatrix' suggestions," I suppose, and Mr. Menzies' residue would have been just $6,000 more. This circumstance in connection with the second will does not argue alertness or capacity. How would the third will have fared if read again, or rather, if read at all? Mr. Pope could not say in what respects the wills differed, and was not sure that Henry D. Menzies took the residuary estate by the first or second will. It only matters indirectly—I could never for a moment think that this part of the will could stand, and so stated at the trial. Further consideration confirms me in the opinion I then entertained, that

the alleged will ought not to be admitted to probate; and the action will be dismissed with costs, including costs of the commission, against the plaintiff.

If it should happen that by reason of his financial position these costs cannot be recovered from the plaintiff they should be borne by the estate; and if it is shewn that I have power to so direct I will make an order to that effect upon application on notice after administration has been taken out.

I have not found it necessary to consider whether the alleged will was technically well executed according to the laws of the State of Florida. I may say, incidentally, that the evidence as to the law there was given in a very hazy and unsatisfactory way. I find as a fact, however, in case it becomes important, that Mrs. Menzies was restored to a reclining position immediately after writing her name, and that having regard to her mental and bodily condition it was not physically possible for her to see the witnesses sign their names or see them when in the act of signing.

Probate refused

MIDDLETON, J. (WEEKLY COURT.) 6TH SEPTEMBER, 1916.

HEROLD v. BUDDING.

Execution—Attachment of Company Shares—Are Shares in C. P. Ry. Exigible under Ontario Writ of Execution?—Receivership.

Attachment of Co. Shares: — Shares in a company may be charged, under Ont. Jud. Act, s. 140 *et seq.*, with the payment of a judgment debt, whether the shares stand in the name of the judgment debtor or in the name of a trustee for him, but the charging order can only be obtained after an order nisi has been served upon the debtor, and no proceedings can be taken to have the benefit of the charge until after six months from the date of the order, and then only in a new action.

Appointing equitable receiver:—A judgment creditor, who, ex parte, obtains an order appointing a receiver of certain shares of stock in a company held by brokers in trust for the judgment debtor, is not entitled to have such order amended by adding a direction to the receiver to sell the stock, because a receiver by way of equitable execution cannot sell; his function is to receive and hold, and sale cannot be indirectly brought about by declaring the judgment to form a charge upon the stock, unless the case can be brought within the Jud. Act, s. 140 *et seq.*; the judgment creditor must follow the statutory provisions and obtain first the order nisi and finally the charging order. A receivership as ancillary to this is quite proper, but the ex parte order should be regarded as an interim order and there should be a motion, at the same time as the charging order is moved for, to continue the receivership until the charge is at an end.

C. P. Ry. Shares:—*Quære*, are shares in the C. P. Ry. Co., which has its head office in Montreal, Que., exigible under an Ontario writ of execution? Middleton, J., *obiter dictum*, thinks they are.

Ex parte motion by a judgment creditor for an order amending another ex parte order made by Middleton, J., on 26th June, 1916.

J. M. Ferguson, for the judgment creditor.

MIDDLETON, J.—The plaintiff has a judgment against the defendant for the recovery of a sum of money. Learning that the defendant was the beneficial owner of certain stock in the Canadian Pacific Railway, a company which has its head office at Montreal, which was standing in the name of certain brokers who held the stock certificate, a motion was made for an order for receiver, and I appointed the sheriff receiver. My intention was

that the order should be merely an interim order followed by another final order on notice to the debtors, but the order was issued as though final.

The present motion was made in vacation to my brother Britton, seeking to add to my order a direction to the receiver to sell. This my brother Britton has referred to me. The omission of any direction to sell was not, as is assumed, any clerical error or oversight.

Stock in a company was first rendered available to a judgment creditor of the stockholder by the Imperial Statute 1 & 2 Vict. c. 110, s. 14, in England and afterwards enacted here. This Act is now found in s. 140 *et seq.*, of the Judicature Act.

This statute enables the stock to be charged with the payment of the judgment debt and "shall entitle the judgment creditor to all such remedies as he would have been entitled to if such charge had been made by the judgment debtor," but no proceedings are to be taken to have the benefit of the charge until after the expiration of six months from the date of the order.

The charging order is to be obtained after an order nisi has been served upon the debtor. This interim order precluding any transfer in the meantime to the prejudice of the judgment creditor.

The statutory provisions apply, not only when the stock stands in the name of the debtor, but also when it stands "in the name of any person in trust for him."

Assuming that this stock is that of "a public company within Ontario," so far as to fall under the statute, then the judgment creditor must follow the statutory provisions and obtain first the order nisi and finally the statutory charging order.

A receivership as ancillary to this is quite proper, but the order issued should be regarded as an interim order, and there should be a motion made at the same time as the charging order is moved for to continue the receivership till the charge is at an end. The receiver will be useful to obtain the income pending sale, and also to obtain the documents of title to the shares.

When the charging order has been obtained it cannot, under the terms of the statute, be enforced for six months, and then only in a new action: *Leggott* v. *Western* (1884), 12 Q. B. D. 287; *Kolchmann* v. *Meurice*, [1903] 1 K. B. 534.

(In England a mortgage or other charge may now be enforced upon an originating notice, Rule 768 (a), but this rule has not been adopted in Ontario).

If this railway is not "a company in Ontario," so as to come under this statute, the execution creditor may find himself without remedy, for reasons which I shall mention, unless the provisions of the Execution Act aid him.

By that statute, R. S. O. c. 80, shares in an incorporated company "shall be deemed to be personal property found in the place when notice of the seizure thereof is served," and may be sold under execution in the same way as other personal property.

By s. 13 (2), notice of seizure may be given when the company has in the bailiwick of the sheriff any place where service of process may be made.

By s. 17, this procedure is made to apply to any equitable right in the shares seized.

The railway has in this bailiwick a place where process can be served, and in view of the very serious doubt as to this stock falling under the statute first mentioned, I think the execution creditor would be well advised if he makes a seizure in the mode provided by the statute.

Equitable execution, it is now well settled, is not a means of reaching assets which in their nature are not exigible, but is a means of freeing exigible assets from impediments in the way of execution and reaching them when such impediments prevent them being taken in ordinary course: *Holmes* v. *Millage*, [1893] 1 Q. B. 551, and clearly cannot be made the means of reaching assets not in the province.

Moreover a receiver by way of equitable execution cannot sell; his function is to receive and hold, and sale cannot be indirectly brought about by declaring the judgment to form a charge upon the stock, unless the case can be brought within the statute first discussed: *Flegg* v. *Prentis*, [1892] 2 Ch. 428.

The equitable relief is merely a mode of clearing the way for the operation of the execution.

If I am right in what I have suggested above, and this stock is under our Execution Act liable to seizure and sale, this execution creditor will find further difficulties to face, for the sale will

have to be recorded in the railway books at Montreal. The receivership may well be used as a means of perfecting the purchaser's title and an order authorizing the receiver to do all things necessary to perfect the title in the purchaser ought to be made.

It is clear from this that the amendment now sought to my order ought not to be made, and the execution creditor must work out the situation for himself as best he can after notice to the debtor.

Order refused.

MIDDLETON, J. (CHAMBERS.) 7TH SEPTEMBER, 1916.

REX v. THOMAS NELSON.

Criminal Law—Furious Driving—Criminal Code, ss. 285, 542—Jurisdiction of Justice of the Peace.

Injuring persons by furious driving:—In order to constitute an offence under Cr. Code, s. 285, it must be shewn that an injury was caused to some one; furious driving alone is not an offence under this section.

Overdriving horse: — One Justice of the Peace has no jurisdiction to try an offence of overdriving as provided in s. 542 Cr. Code.

Motion by the defendant, on return of *habeas corpus*, for an order discharging him from custody on conviction for overdriving his horse, and for injuring persons by furious driving, contrary to ss. 285 and 542 of the Criminal Code.

Defendant, a butcher, residing in the township of Clarke, in the county of Durham, was arrested by the constable of the village of Newcastle, and without information being laid, was taken before Mr. A. A. Colwill, Reeve of that village and a Justice of the Peace for the United Counties of Nothumberland and Durham.

The evidence of a number of witnesses was taken, then at the request of the defendant an adjournment was granted for a short time, after which further evidence was heard. The same day (seventh of August, 1916), the Justice found the defendant guilty under ss. 285 and 542 of the Criminal Code, namely, of injuring persons by furious driving, and of ill-treating his horse

by overdriving, notwithstanding that the evidence disclosed no injury to anyone, and the Justice sentenced the defendant to sixty days in Cobourg gaol with hard labour.

F. M. Field, K.C., for the defendant, moved, on return of a *habeas corpus*, for his discharge from custody.

Edward Bayly, K.C., appeared for the Crown.

MIDDLETON, J., ordered the discharge of the defendant from custody on the grounds that the evidence disclosed no offence under s. 285, there being no evidence that the alleged furious driving had "done or caused to be done any bodily harm to any person," and, in any event, being an indictable offence, the Justice of the Peace had no jurisdiction to do more than commit the defendant for trial: And that, under s. 542, summary trial could take place only before two Justices of the Peace or a Police Magistrate having similar authority.

Prisoner discharged.

MIDDLETON, J. (CHAMBERS.) 7TH SEPTEMBER, 1916.
LATCHFORD, J. (CHAMBERS.) 26TH SEPTEMBER, 1916.

LASELLE v. WHOLEHAN.

Police Magistrate—Stupid Conviction of Father for Offence of Son—Bona Fides of Magistrate.

Order for protection:—Notwithstanding that a Police Magistrate convicted a father for an offence committed by his son, he was allowed an order for protection on terms of paying costs of motion to quash the conviction.

Motion by Lemuel Laselle, on return of *habeas corpus*, for an order quashing his conviction, by Thomas Wholehan, the Police Magistrate of Chesterville, for an offence committed by his son.

The son, William Laselle, did on or about 15th April, 1916, at the said village of Cresterville, use grossly insulting language

towards one Mrs. David Bogart, contrary to By-law No. 29 of said village, and the evidence shewed that he said to the woman, "go on you devil old fool."

WHOLEHAN, P.M. (22nd April.)—I hereby adjudge on hearing the evidence that the said Lemuel Laselle, the father of the said William Laselle, shall pay a fine of $1 and costs ($6.05), for the offence charged herein, payable in 10 days, and if not paid 10 days in gaol.

Lemuel Laselle refused to pay the fine and was by order of the magistrate, confined in Cornwall gaol from third to twelfth June, 1916.

H. S. White, for the applicant's motion.

J. A. MacIntosh, for the magistrate, contended that the conviction had been made in good faith, and although it could not be supported by law, still the magistrate should be allowed the usual order for protection.

MIDDLETON, J. (7th September, v.v.)—The conviction was unutterably stupid. This is visiting the fathers with the sins of their sons. He probably deserved it, but what law authorized it?

An order will go quashing the conviction, and if the magistrate pays the costs of this motion, which I fix at forty dollars, he will be allowed the usual order for protection.

Conviction quashed.

On the 26th September, 1916, the plaintiff moved for leave to appeal.

Geo. A. Stiles (Cornwall), for plaintiff's motion.

J. A. MacIntosh (Toronto), for defendant magistrate.

LATCHFORD, J. (26th September, v.v.), granted leave to appeal from above decision of Middleton, J., to the Appellate Division of the Supreme Court of Ontario.

Leave to appeal granted.

MASTER-IN-CHAMBERS. 12TH SEPTEMBER, 1916.
MIDDLETON, J. (CHAMBERS.) 15TH SEPTEMBER, 1916.

ELECTRICAL DEVELOPMENT CO v. ATTORNEY-GENERAL FOR ONTARIO AND THE HYDRO-ELECTRIC POWER COMMISSION.

Action—Fiat of Attorney-General—Necessity of Obtaining before Bringing Action against Hydro-Electric Power Commission—Validity of Provincial Statute—Notice to Minister of Justice.

Notice to Minister of Justice:—The validity of a Provincial Statute is not open to attack in an action, until notice has been given to the Minister of Justice, as required by sec. 33 of the Judicature Act.

Validity of Provincial Statute:—While the Court is given power by section 20 of the Judicature Act to determine the validity of a Provincial Statute, at the instance of the Attorney-General, it by no means follows that the Attorney-General may, against his will, be compelled to appear as a defendant to uphold the validity of a Provincial Statute.

Fiat of Atty.-General: — The granting of a fiat to bring an action against the Hydro-Electric Power Commission is purely discretionary on the part of the Attorney-General, and where a writ is issued against the Commission after the Attorney-General has refused a fiat, the writ and service thereunder will be set aside.

Appeal by the plaintiffs, the Electrical Development Co., from an order of the Master-in-Chambers, setting aside plaintiffs' writ and service thereunder.

On 1st August, 1916, the plaintiffs applied to the Attorney-General for Ontario for a fiat to bring an action against the Hydro-Electric Power Commission. This the Attorney-General refused to grant. Then the plaintiffs, without a fiat, issued at Welland, Ontario, a writ against the Attorney-General for Ontario and the Hydro-Electric Power Commission, praying for a declaration that the Provincial Government was precluded by agreement between the plaintiffs and the Commissioners for the Queen Victoria Niagara Falls Park, from undertaking the development of power at Chippewa Creek.

Both defendants moved before the Master-in-Chambers to set aside the writ and service thereunder. The motions were heard by the Master on 12th September, 1916.

I. F. Hellmuth, K.C., for the Hydro-Electric Power Commission, contended that the Hydro-Electric Power Commission Act, R. S. O. (1914), c. 39, s. 16, required a fiat from the Attorney-General for Ontario before an action could be brought against the Commission and as the plaintiffs had obtained no fiat the writ ought to be set aside.

Edward Bayly, K.C., for the Attorney-General, contended that a fatal objection to the action against the Attorney-General was that no relief was asked on the endorsement of the writ against the Attorney-General. It was of the same effect as if the Attorney-General had been sued alone, and there had been no endorsement on the writ.

If the Attorney-General was being substituted for the King to obtain relief against the province, then the action could only be brought on a Petition of Right through the fiat of the Lieutenant-Governor.

There was another, an extra fatal objection, that the writ sought a declaratory judgment, and that was not a proper subject of a Petition of Right. Any minister might as well have been joined as the Attorney-General, if the plaintiffs sought to bind the province.

D. L. McCarthy, K.C., for the plaintiffs, contended that none of the objections were proper to be disposed of in an application in chambers. The objections raised by the defendants should be raised in the pleadings and disposed of by the trial Judge.

J. A. C. CAMERON, M.-IN-CHRS. (12th September, v.v.).—I see no object in reserving judgment. When the application was made to the Attorney-General on 1st August for a fiat, everything that could be advanced was advanced. He decided that this was not a proper case for the issue of a fiat. I have simply to decide a mere matter of practice: Can an action be brought against the Attorney-General and the Hydro-Electric Power Commission without the consent of the Attorney-General? If I should decide that this action is properly constituted, I would be reviewing the action of the Attorney-General. The granting of a fiat is purely discretionary on his part. This may seem hard on the plaintiffs, but anyone with a contract with the Hydro-Electric Power Commission could be proceeded against, I should think.

The writ is set aside with costs.

Plaintiffs appealed from the above order to Middleton, J., in Chambers, and were heard on the 14th September, 1916.

D. L. McCarthy, K.C., for the plaintiffs, contended that the above order should be set aside. The plaintiffs applied to the Attorney-General for a fiat allowing them to sue the Hydro-Electric Power Commission, merely as a matter of courtesy, and not because they were obliged to have the fiat. They were attacking the validity of s. 16 of the Hydro-Electric Power Commission Act, R. S. O. (1914), c. 39. The legislature has no power to pass an Act closing the door of the Courts, where the validity of one of their own Acts is concerned. If the legislature passed an Act which was clearly *ultra vires*, they could not prevent that legislation being attacked by adding a clause to the end of the Act, saying that this legislation shall not be attacked without the consent of the Attorney-General, because otherwise, the power of the legislature would be supreme in regard to all legislation which they passed and protected with a clause of that kind.

We are raising very big questions in this action. We say that what the province authorized is an interference with Navigation and Fisheries, and so within the jurisdiction of the Dominion Parliament. We are supplying electricity outside the province, and so it is a matter of Trade and Commerce. This is a very important matter to the plaintiffs; it is a matter of life and death of the company.

In the agreement between the plaintiffs and the Commissioners for the Queen Victoria Niagara Falls Park, the Commissioners, acting for the Government, had agreed not to enter into competition with the plaintiffs. The legislature recognized that the Acts of last session were in breach of that agreement, and it was for that reason specifically stated in 6 Geo. V., c. 20, s. 7, that the exercise of the powers conferred, by that Act, on the Hydro-Electric Power Commission should not be considered a breach of that agreement.

We applied for a fiat and were refused. We had to look some other way for redress. The Attorney-General may be sued as representing the Crown without a fiat. See *Dyson* v. *Attorney-General*, [1911] 1 K. B. 410, [1912] 1 Ch. 158, and *Burghes* v. *Attorney-General*, [1911] 2 Ch. 139.

Edward Bayly, K.C., for the defendant, the Attorney-General, contended that the order of the Master-in-Chambers should be affirmed. The specific declaration about powers conferred on the Hydro-Electric Power Commission not being a breach of any agreement were put in the Act (6 Geo. V. c. 20, s. 7), not because it was thought that there was any breach, but out of abundant caution. The contract had always been considered a narrow one, binding only on the Queen Victoria Niagara Falls Park Commission, and not upon the Government.

While the Attorney-General may be sued in a proper case, he cannot be compelled to represent the Government. A judgment against him in the present action would be futile. The relief here sought was not against the Attorney-General, but against the Lieutenant-Governor in Council, which expression is interpreted in the Interpretation Act, s. 29 (p). No reported case is to be found in this province in which the Attorney-General is a defendant without his own consent, except in cases where it is attempted to set aside a patent.

If the writ against the other defendant, the Hydro-Electric Power Commission, is set aside, the action against the Attorney-General falls to the ground, as the relief here sought is in the nature of a mandamus, and a mandamus in such a case does not lie, see *Re Massey-Harris*, 14 A. R. 446.

This case is not in the least like *Dyson* v. *Attorney-General*, [1911] 1 K. B. 410, [1912] 1 Ch. 158, for in that case the claim against the Attorney-General was treated by the Judges as entirely departmental, while here the plaintiff seeks in an indirect way to enjoin the Government. The practice in this province has been different, and although it is not necessary in this case to press the point, English cases (except decisions of the Judicial Committee of the Privy Council), although they should in general be followed here, are not binding upon Canadian Courts. See *MacDonald* v. *McDonald*, 11 O. R. 187; *McDonald* v. *Elliott*, 12 O. R. 98; *Coulson* v. *O'Connell*, 29 U. C. C. P. at 346; *Trimble* v. *Hill*, 5 A. C. at 344; *Rex* v. *Lindsey*, 36 O. L. R. 171.

I. F. Hellmuth, K.C., for the defendants, the Hydro-Electric Power Commission, contended that you must strike at the root of the action; does this action lie? If the project is within Navigation or Trade and Commerce, there was nothing more easy than to

obtain from the Dominion proper recourse. They are not likely to allow the Province of Ontario to invade their jurisdiction.

It was immaterial what might be the merits of the case, because the right to grant a fiat or to give consent to bring an action against the Commission rested absolutely with the Attorney-General. There was no way by which it could be compelled, and though there might be discussions as to the propriety of granting a fiat, it rested entirely with that officer. Mr. McCarthy thought that he should have the consent of the Attorney-General before bringing his action, and applied for it. He failed to get it, and then took the drastic step of passing by the consent and issuing a writ without it. Whether the Attorney-General was justified in refusing the plaintiffs a fiat or not, did not concern the Court.

If s. 16 of the Power Commission Act meant anything, it was an absolute bar to such an action without a fiat. He was not in Court to discuss merits, because the legislature in its wisdom had declared that this particular Commission should not be sued without the consent of the Attorney-General.

Reference to *London County Council* v. *Attorney-General*, [1902] A. C. 165; *Abraham* v. *Regina*, 6 S. C. R. 10.

MIDDLETON, J. (15th September).—This appeal fails. The Hydro-Electric Power Commission Act, R. S. O. (1914), c. 39, s. 16, provides that no action shall be brought against the Hydro-Electric Power Commission without a fiat first obtained from the Attorney-General. A fiat was refused and the writ was then issued in the face of the statute. Whatever remedy may be open to the plaintiff, I think it is clear that the statute cannot be ignored. The question of the validity of the statute as being for any reason beyond the competence of the province is not open upon this motion as notice to the Minister of Justice as required by s. 33 of the Judicature Act, R. S. O. (1914) c. 56, has not been complied with. In any event the decisions of *Smith* v. *London* (1909), 14 O. W. R. 1248, 20 O. L. R. 133, and *Beardmore* v. *Toronto* (1909-10), 14 O. W. R. 1262; 20 O. L. R. 165; 16 O. W. R. 604; 21 O. L. R. 505, will probably be found to conclude this question so far as any Court of first instance is concerned.

The writ being improperly issued I can only affirm the order setting it aside, and am not called upon to consider whether an

action will lie against the Attorney-General for the purpose of obtaining a declaration of the invalidity of the recent statute. By s. 20 of the Judicature Act, the Court is given power to determine the validity of a statute at the instance of the Attorney-General, but it by no means follows that the Attorney-General may, against his will, be compelled to appear as a defendant to uphold the validity of a provincial Act.

This question does not, in my view, require solution upon the present motion.

The appeals should be dismissed and costs follow the event.

Appeal dismissed.

Annotation by Editor.

Apparently the attention of the Court was not called to the unreported Nova Scotia case of,

ROVERTS v. ATTORNEY-GENERAL AND McKAY.

Action—Against Attorney-General as Representing the Crown—Fiat—Not Necessary in Declaratory Actions.

Petition of right:—The Court has jurisdiction to maintain an action against the Attorney-General as representing the Crown, although the immediate and sole object of the action is to affect the rights of the Crown in favour of the plaintiff, and a declaratory judgment can, under order, be made against the Attorney-General as representing the Crown, and the plaintiff is not bound in such a case to proceed by petition of right.

Fiat:—While the Attorney-General has exclusive jurisdiction to say whether he will grant a *fiat* to bring an action or not, still, neither he nor anyone else has any standing to prevent a declaratory action being maintained against him.

In this case the plaintiffs brought their action for a declaration that a certain grant from the Crown ought to be rescinded and for a declaration that certain escheat proceedings should be set aside and for a further declaration that the lands described in the grant should be vested in the plaintiffs.

RITCHIE, J. (25th October, 1911).—An application is made on behalf of the defendant McKay to set aside the writ on grounds which are stated in great detail in the notice of motion,

and it seems quite clear that if the plaintiffs without any fiat from the Attorney-General had brought their action to rescind the grant, it would have been impossible for them to succeed. The authorities cited by Mr. Lovett for the defendants establish this, I think, beyond all question, but this is not such an action. It is an action against the Attorney-General and the defendant McKay for a declaration. Now that actions can be brought merely to declare rights without consequential relief being claimed, I do not think this writ can be set aside. He has exclusive jurisdiction to say whether he will grant a fiat to bring an action or not, but I do not see that he or anyone else has any standing to prevent a declaratory action being maintained against him in this Court. The law as to this is stated, in my opinion, correctly in vol. 1 Seton on Decrees, at p. 383, as follows: "The Court has jurisdiction to maintain an action against the Attorney-General as representing the Crown, although the immediate and sole object of the action is to affect the rights of the Crown in favour of the plaintiff, and a declaratory judgment can, under order, be made against the Attorney-General as representing the Crown, and the plaintiff is not bound in such a case to proceed by petition of right. *Dyson* v. *Attorney-General*, [1911] 1 K. B. 410; *Burghes* v. *Attorney-General*, [1911] 2 Ch. 139."

It may be that the plaintiff will not be able to succeed in this action. I express no opinion as to that, but I see no reason for setting aside their writ.

The application will be dismissed with costs.

MEREDITH, C.J.C.P. (WEEKLY COURT.) 22ND SEPTEMBER, 1916.

RE MURRAY ESTATE.

Will—Construction—Testator Exchanged Shares in Company for Shares in Amalgamated Company — Revocation of Gift of Shares in Original Company.

Company shares:—Where a testator, after making his will, exchanged his shares in "W. A. Murray Co., Ltd.," for shares in "Murray-Kay Ltd.," an amalgamation of the W. A. Murray Co. and another company; *held*, that the shares in the Murray-Kay Company were substantially the same as the shares in the W. A. Murray Company, and passed under the will.

Motion by the executors of the will of the late Dr. Charles Stewart Murray, for an order construing his will.

A. E. Knox, for the executors' motion.
C. F. Ritchie, for Bertha Furlong, *et al.*
H. M. East, for Adelaide Gouinlock.
J. E. Corcoran, for Mona S. Murray, *et al.*
E. G. McMillan, for Jeanette Hunt.

MEREDITH, C.J.C.P.—At the time when the will in question was made, the testator's property consisted mainly of his shares in a company called "W. A. Murray & Company, Limited," and in another company called "The Toronto Carpet Manufacturing Company, Limited," both carrying on business in Toronto.

Subject to a life interest in these shares, given to his wife, he gave them to several of his own nieces and to a niece of his wife.

After the making of the will and before the testator's death, the Murray Company became amalgamated with another company, the amalgamation taking the form of a new company called Murray-Kay, Limited. The testator merely taking shares of this company in lieu of those he had in the Murray Company.

Under the terms of the amalgamation the new company acquired the exclusive right to use the name "W. A. Murray Company, Limited," and represent that they are continuing the business of W. A. Murray & Co., Limited, among other like rights; and the transaction so far as the testator was concerned was simply a substitution of shares of Murray-Kay, Limited, for those of W.

A Murray & Company, Limited; I mean the substance and effect of the transaction.

The question for consideration is whether this transaction in effect revoked the gifts made in the will, of the shares in W. A. Murray & Company, Limited.

The duty of the Courts is to give effect to the will of the testator. That it was not his will or intention that these gifts should be nullified, is so plain that I am sure any contention that it was would seem absurd to any intelligent business man who is not a lawyer.

From the point of view of a lawyer, it may be contended that the will speaks as of the time of the testator's death, and that at that time he had no shares of W. A. Murray & Company, Limited, so the several gifts of such shares were gifts of nothing. But if that be so, then by consenting merely to an intended betterment of his interests represented by his shares in W. A. Murray & Company, Limited, he upset the whole scheme of his will, plainly without knowing it, and died intestate as to a large, probably the larger, part of his property; with the result that it would be distributable in a manner contrary to his intentions, and in a manner of which he never dreamed.

But it is not necessary to consider that question: not necessary to say whether or not, had the will been made after the amalgamation, the shares in the new company might pass under a gift of them as shares in the old company; because as to the specific gifts the will must be taken, in the circumstances of the case, to have reference to them as existing when the will was made.

Then it may be said that even if that be so the gifts were revoked—adeemed, as it is called—by the change from W. A. Murray & Co. to Murray-Kay shares; but I cannot agree in any such view of the case. The shares are substantially the same property—the same which by his will the testator gave as shares in specied numbers to three of his nieces and to a niece of his wife.

I hold that the gifts in question are valid gifts of the shares owned by the testator at the time of his death.

Costs to all parties represented on this motion, those of the executor as between solicitor and client, out of the shares of the two companies; so that each legatee of them may pay a portion of these costs in proportion to the amount she takes in them.

SUTHERLAND, J. (CHAMBERS.) 25TH SEPTEMBER, 1916.

CITY ESTATES OF CANADA LTD. v. LOUIS BIRNBAUM.

Judgment — Summary — Action against Assignee of Purchaser's Interest in Agreement for Sale of Land—Vendor not Party to Assignment — Vendor's Right to Sue Assignee Personally Questioned.

Triable issue:—Where lands are sold under a sale agreement which prohibits the purchaser from assigning his equity without the consent of the vendor and where the purchaser does assign his equity without that consent and the assignee covenants to pay the unpaid purchase money, the vendor has no right to summary personal judgment against the assignee to recover the unpaid purchase money, because, he not being a party to the assignment, his rights at the most would be a triable issue.

Appeal by the defendant from an order made by Geo. S. Holmested, K.C., acting as Master-in-Chambers, granting the plaintiffs judgment for payment of amount specially endorsed, without prejudice to plaintiffs' right to proceed for the balance of their claim.

J. Grayson Smith, for the defendant, appellant.
Shirley Denison, K.C., for the plaintiffs, respondents.

SUTHERLAND, J.—The plaintiffs sold real estate to one Rachel Mooster under a written agreement dated 7th May, 1912. By written assignment dated 20th February, 1913, Rachel Mooster assigned said agreement to the defendant Louis Birnbaum and Abraham Manhem, and the assignment contains the following clause:—

"And we Louis Birnbaum and Abraham Manhem do hereby agree to observe all the terms contained in the said agreement for purchase and do hereby further covenant with City Estates of Canada Ltd., to pay the moneys called for by the said agreement and to observe all obligations of the vendee therein contained."

By further assignment, dated 2nd April, 1913, Manhem assigned his interest to Birnbaum. Notwithstanding that the original agreement contains clauses prohibiting the vendee from assigning without leave, there was no evidence that the vendors, the plaintiffs herein, were consulted about the assignment from Rachel Mooster or the assignment from Manhem to defendant or their

consent asked or given, or that they were made parties thereto in any way unless the reference in the first assignment to them can be treated as doing so.

The plaintiffs in this action issued a writ in which they claim from the defendant payment of $515.57, the balance of principal and interest unpaid under the said agreements, together with subsequent interest to date of judgment. They also refer in the endorsement to the covenant of the plaintiffs in the said assignment and claim the benefit thereof, a vendors' lien upon the lands, and that it might be enforced by sale or otherwise, and a declaration that the defendant has forfeited his interest therein and in the purchase money paid by him or in the alternative for damages for default.

After the writ had been served the plaintiffs moved before the Master-in-Chambers for judgment and obtained an order dated the 21st July, 1916, by which it was adjudged that the plaintiffs recover from the defendant the sum referred to without prejudice to their right to proceed for the remainder of their claim endorsed upon the writ.

The defendant now appeals from this order.

In an affidavit made by him and used before the Master on the motion for judgment, the defendant admitted that he had made certain payments under the agreement to the plaintiffs; stated that he had a good defence to the action upon the merits; claimed that he was advised and believed that the defendant "should not forfeit the moneys paid to the plaintiff," but that the defendant should be relieved from such forfeiture by the court; stated that he was advised and believed that if there was a covenant in the assignment by himself to pay the sums due or to accrue due to the plaintiff under the agreement with the original purchaser, that there was no consideration from him to the plaintiff for such covenant and stated that he was advised and believed that the plaintiff company was not entitled to judgment against him for the balance of the principal and interest due under the agreement.

The main argument on the appeal before me was directed to the claim that the plaintiff company was not in reality a party to the said assignment and had no right or status to sue the defendant personally. It was argued in answer to this that the plaintiffs were only called upon to shew that they had in their possession the assignment in question with the covenant from the defendant running in their favour, that as it was under seal it imported consider-

ation and the defendant would not be permitted to set up anything to the contrary, that the defendant had admitted his liability by making payments under the original contract in question subsequent to the date of the assignment thereof to himself and that the defendant on the original motion and in his affidavit already in part referred to made no express denial of his liability on the covenant. It was not contended on the part of the plaintiffs that what occurred at the time of the assignment of the contract by Rachel Mooster to the defendant amounted to a novation.

In my opinion the payments made by the defendant to the plaintiffs may be said to refer to his agreement with Rachel Mooster which the latter could call upon him and compel him to make. This I do not think the plaintiffs had a right to do.

I am unable to see how a company which was not in reality a party to a contract can itself enforce as against one of the contracting parties a covenant inserted therein and apparently running in its favour. I am also of the opinion that while it may be open to the other contracting party to say to the defendant "you can raise no question of want of consideration in so far as I am concerned because your covenant with me in the agreement is under seal," it is not open to the plaintiffs to do so and the defendant is not precluded from raising that question as against it.

The matter at all events is not so free from doubt that I think a summary order for judgment should have been made by the Master.

I think the appeal should be allowed and the costs thereof and of the motion before the Master should be costs in the cause.

Appeal allowed.

SUTHERLAND, J. (WEEKLY COURT.) 25TH SEPTEMBER, 1916.

BRASS v. WALL.

Vendor and Purchaser — Title — Mortgage — Power of Sale — Necessity to Notify Persons Interested in Mortgaged Property after Date of Mortgage.

Without notice:—Where a mortgagee does not notify persons appearing in the Registry Office as interested in the mortgaged property subsequent to date of mortgage, and proceeds to exercise his power of sale, the purchaser obtains a good title in so far as they are concerned, when the mortgage provides that "if default continues for two months the power of sale may be exercised without notice," and further provides that such a sale shall not be invalidated by reason of want of notice and that the vendors alone shall be responsible.

Motion, by the purchaser, under the Vendors and Purchasers Act, for an order declaring that the vendor had not satisfied the purchaser's requisitions on title, heard by Sutherland, J., in Weekly Court, on the 18th September, 1916.

Arthur Cohen, for purchaser's motion.
L. Davis, for the vendor.

SUTHERLAND, J.—A motion under the Vendors and Purchasers Act.

On the 19th December, 1889, a mortgage was given by C. S. Williams and wife to John A. Worrell on the property in question. The mortgage contains among other provisions the following:—

"Provided that the said mortgagee on default of payment for one month may on one month's notice enter on and sell or lease the said lands.

"Provided that it is hereby agreed between the parties hereto, their heirs, executors, administrators and assigns that notwithstanding anything in the power of sale hereinbefore contained no want of notice shall invalidate any sale thereunder, but the vendors alone shall be responsible, and that the mortgagee, his executors, administrators and assigns, may sell the said lands on such terms as to credit or otherwise as to them shall appear most advantageous, and if default in payment of any moneys secured

hereby continues for two months, the said power of sale may be exercised without notice."

The mortgage was assigned by Worrell to one Helen M. Crawford and subsequently re-assigned by her executors to him. By deed dated 30th October, 1903, and made under the power of sale contained in the mortgage, Mr. Worrell conveyed the lands to Charles Pasternak, through whom the vendor in question obtained title.

In the Registry Office, subsequent to the registration of said mortgage, there appear a number of instruments dealing with the property in question and shewing a transfer from the said Williams to one Hager and further dealing with the property by the parties named therein.

The vendor having sold the property to the purchaser the latter objects to the title offered by the vendor upon the grounds that the persons last referred to appear to have had an interest in the lands subsequent to the mortgage; that there is no evidence that a notice of sale was served on any of the persons interested in the lands; that there is no evidence that the mortgage was not barred by the Statute of Limitations, that proper notice was given to the parties interested, that an advertisement was posted up in the usual manner, or that there was an auction sale or the highest price obtained.

The vendor in answer submitted a declaration made by Mr. Worrell in which he states among other things that he was in possession of the lands in question and collected the rents thereof for at least five years before making said conveyance under the power of sale in the mortgage in question, and that at the time of the conveyance by him to Pasternak pursuant to the power of sale, default in payment of the moneys secured by said mortgage had continued for more than one year. It was also said during the argument that a further declaration could be furnished to the effect that moneys had been paid on the mortgage within ten years of the date of the deed under the power of sale. If this declaration is now given, it seems to me that the simple question to be determined is whether the provisos in the mortgage already referred to and authorizing the mortgagee to sell without notice if default in payment of the money secured by the mortgage continued for two months, and that in case of sale without notice such sale could not be invalidated but the remedy should be against the vendor alone, preclude the necessity of any notice to the persons appearing in the Registry Office as interested in the property subse-

quent to the date of the mortgage. It seems to me that they do, and that the purchaser in the present case can safely accept the title offered by the vendor in so far as they are concerned.

The answer to the question in the notice of motion is that the requisitions with the additional declaration referred to have been satisfied.

As nothing was said about the question of costs on the motion I make no order as to same.

SUTHERLAND, J. (CHAMBERS.) 25TH SEPTEMBER, 1916.

TORONTO GENERAL TRUSTS CORPORATION v. KINZIE.

Costs—Security for—Præcipe Order—Obtained by Third Party Against Defendant without Province.—Order Set Aside.

Third party praecipe:—Where a defendant, under R. 165 (2), served a third party notice and a copy of the writ issued by plaintiff, and the notice did not shew defendant's address as without the province, *held* that the third party was not justified in inferring that defendant had admitted that he was resident without the province because his address was so given in the writ of summons, and where such a third party obtained a præcipe order for security for costs against such a defendant, the order was set aside.

Appeal by E. W. Lippert, third party, from an order of the Local Judge of the Supreme Court of Ontario, for the County of Waterloo, dated the 7th September, 1916, setting aside a præcipe order for security for costs issued by the third party as against the defendant, and the ground set out in the notice of motion was "that the issue of the same is an abuse of the process of this Court."

J. A. Scellen (Kitchener), for the third party.
J. E. Jones (Toronto), for the defendant.

SUTHERLAND, J.—In the writ of summons the plaintiffs have stated the address of the defendant as the village of Success in the Province of Saskatchewan. The defendant served a third party notice on Lippert, claiming to be indemnified by him against his liability to the plaintiffs under the mortgage in question. In the third party notice the address of the defendant is not given or

indicated. A copy of the writ was served by the defendant with the third party notice, pursuant to rule 165 (2). The third party, treating himself as defendant in so far as the defendant was concerned, and the latter as plaintiff, and assuming that because plaintiffs in the writ had stated the defendant's address as being without the province, he could assume it to be so for that purpose, took out a præcipe order for security for costs. The defendant thereupon moved before a local Judge to set the same aside, and he made the order as asked.

It is contended on behalf of the third party that the term "plaintiff" in the Judicature Act, R. S. O. (1914), c. 56, s. 2, (r), applies to a defendant who is served with a third party notice as between him and that third party, and also that Rule 379 reading as follows: "where it appears by the writ of summons or by an endorsement thereon that the plaintiff resides out of Ontario the order may be obtained on præcipe," also applies, and that as the defendant served with the third party notice a copy of the writ in which his address is given as without the province the third party can treat that as an admission of foreign residence in the same way as the defendant could in the case of the plaintiff who issued the writ.

I am not at all clear that the word "plaintiff" can be said to apply in such a case as this to a defendant serving a third party notice. Under Rule 169 "a defendant notifying a third party may apply for directions, and the Court may order the question of liability as between the third party and the defendant giving the notice to be tried in such a manner at or after the trial of the action as may seem proper, and may give the third party liberty to defend the action upon such terms as may be just, or to appear at the trial and take part therein," etc.

It would seem appropriate that on such an application a question such as that of security for costs might well be brought up and dealt with. But if the word "plaintiff" were to be construed to cover the case of a defendant serving a third party notice, then it seems to me that the writ of summons issued by the plaintiff and not by such defendant, and in which such plaintiff stated the address of the defendant without reference to him as without the province, cannot be considered as between the defendant and the third party as the writ or initiating proceeding, but that the third party notice must be considered as such. This notice does not shew the defendant's address as without the province, and I do not think

that any admission such as the statement in the writ would imply in the case of a plaintiff, could properly be inferred by a third party as against a defendant. For this reason I think the order appealed from was rightly made and should be confirmed.

The motion is therefore dismissed with costs.

Appeal dismissed.

SUTHERLAND, J. (WEEKLY COURT.) 25TH SEPTEMBER, 1916.

EVANS v. EVANS.

Husband and Wife — Alimony — Undertaking by Husband to Receive Wife—Bar to Action—Refusal to Receive Wife—Contempt of Court.

Husband may be committed for contempt, if he refuses to carry out his undertaking, given by his counsel in Court, to receive his wife back and treat her in all things as a husband should.

Undertaking by husband, given by his counsel in Court, to receive his wife back and treat her in all things as a husband should, is a complete answer to an action for alimony.

Motion by the plaintiff wife to commit her defendant husband for contempt of Court in refusing to obey an order of the Court, made pursuant to an undertaking given by defendant's counsel, that defendant would receive his wife and children if they returned to him, and treat them in all things as a husband and father should.

J. E. Jones (Toronto), for plaintiff wife.

G. Lynch-Staunton, K.C. (Hamilton), for defendant husband.

SUTHERLAND, J.—As between the parties to this action, there was a former alimony action which was settled by the defendant paying to the plaintiff a substantial sum, $3,000. This action was tried before Britton, J., who gave judgment for the defendant, 9 O. W. N. 493. On an appeal from that judgment, 10 O. W. N. 77, by the plaintiff it was argued by her counsel that if the appellant's case could not be supported on the ground of cruelty, which was urged at the trial, it could be on the ground of desertion. Thereupon counsel for the defendant undertook that the defendant would receive the plaintiff if she would return to him. I quote from the short judgment of Meredith, C.J.C.P., on the appeal.

"But there is a complete answer to that in the undertaking of Mr. Holman that the husband will receive his wife and children if they return to him, and treat them in all things as a husband and father should. That undertaking being now given, there is an end of this appeal."

The matter was accordingly dealt with in the order of the Appellate Division disposing of the appeal, dated 29th March, 1916, as follows:—

"Upon hearing what was alleged by counsel aforesaid, and counsel for the plaintiff alleging that the defendant now refuses to receive his wife the plaintiff or allow her to return to him, thereupon the defendant by his counsel undertook that he would receive his wife and children if they returned to him, and treat them in all things as a husband should—(1) This Court doth order the said appeal to be and the same is hereby dismissed. (2) This Court does not see fit to make any order as to costs."

The present motion is for an order directing attachment or committal of the defendant for neglect or refusal to obey and carry out the said undertaking given by the defendant through his counsel.

In the material filed on behalf of the plaintiff on the motion, she urges that on two occasions she went to the farm on which the defendant resides and offered definitely to return to him, and that on each occasion he refused to receive her unless she returned the $3,000 paid by him to her in the former action. The defendant in a somewhat indirect way denies that the plaintiff made any bona fide or unconditional offer to return.

The affidavit evidence pro and con is somewhat contradictory; but I think on the whole it shews plainly that the offers to return were definitely made by the plaintiff and that the defendant refused to receive her. If there had been any doubt as to the attitude of the defendant it would have been cleared up by the candid statement of his counsel during the argument that the defendant is not prepared to receive his wife back unless she restores the $3,000; and that he will not now receive her; that is to say, he will not now carry out the undertaking.

Under these circumstances I think that an order to commit as asked in the notice of motion, should be made.

It seems to me proper, however, to delay making the order for a period of two weeks to enable the defendant to further consider the matter. If within that time he is willing either to receive his

wife pursuant to the undertaking or to consent to a decree of alimony in her favour, with a reference to the Master to determine the amount thereof having regard to the payment already made of $3,000, in case the parties cannot agree upon the amount, I may be spoken to further about the matter; otherwise the order may go with costs.

LATCHFORD, J. (CHAMBERS.) 30TH SEPTEMBER, 1916.

COOPER v. ABRAMOVITZ.

Mortgage—Foreclosure—Oral Agreement not to Take Proceedings under Mortgage—Required to be in Writing.

Oral agreement to vary mortgage: — Where mortgagee orally agreed that so long as certain monthly payments were received by way of rent he would take no proceedings under the mortgage, *held*, that the agreement was not binding as any agreement to vary the terms of a mortgage is required to be in writing.

Appeal by the defendant, Gussie Gross, from an order of the Master-in-Chambers, of the 18th September, as amended by him on the 25th September, 1916.

The plaintiff moved before the Master-in-Chambers for summary judgment in a foreclosure action.

S. M. Mehr, for the plaintiff's motion.

C. Black, for the defendant, Gussie Gross, opposed the motion on the ground that before the writ of summons was issued, the plaintiff orally agreed with the defendant, Gussie Gross, that so long as certain monthly payments were made by way of rent he would take no proceedings against her under the mortgage.

J. A. C. CAMERON, M.-in-Chrs., held, that if such an agreement was made it was not binding on the plaintiff, because it varied the terms of the mortgage, and was required to be in writing. Order granted directing that judgment be entered in favour of the plaintiff, but not to issue until the 22nd September, 1916.

Defendant, Gussie Gross, appealed from the above order to Latchford, J., in Chambers, and was heard on 29th September, 1916.

L. F. Heyd, K.C., for the appellant.

S. M. Mehr, for the respondent.

LATCHFORD, J.—This is an appeal by the defendant Gussie Gross from the order of the Master-in-Chambers in a foreclosure action, directing that judgment be entered in favour of the plaintiff.

The ground upon which the application is based is that, before the writ of summons was issued, the plaintiff orally agreed with the defendant Gussie Gross that so long as he received certain monthly payments from her by way of rent he would take no proceedings against her under the mortgage.

The fact that such an agreement was made, and the terms of it, if made, were in question before the learned Master.

His decision as I understand from the argument of counsel was that, if such an agreement was made it is not binding upon the plaintiff, because, as it varies the terms of the mortgage, it is required to be in writing.

In this determination I agree. See *Vezey* v. *Rashleigh*, [1904] 1 Ch. 634. There are many cases to the same effect.

The appeal fails and is dismissed with costs.

Appeal dismissed.

LATCHFORD, J. (CHAMBERS.) 2ND OCTOBER, 1916.

FLANAGAN v. FRANCE.

Process—Third Party Notice—Issued by One of Two Defendants — Ineffective Service — Irregularity — Exhibiting Original Order.

Ineffective service:—Any irregularity in regard to service is waived by entering an unconditional appearance.

Exhibiting original order:—There is no rule requiring the original of an order to be exhibited at the time of the service of a copy of it.

Right to invoke third party procedure:—The right to invoke third party procedure exists whenever the plaintiff's claim against the defendant, if successful, will result in the defendant having a claim against the third party to recover from him the damage which he has been compelled to pay to the plaintiff. *Per* MIDDLETON, J., in *Swale* v. *C. P. Ry.* (1912), 21 O. W. R. 225 at 234; 25 O. L. R. 492 at 504.

Issued by one of two defendants:—Where it was urged that the issue of a third party notice was irregular because only one of two parties interested in any relief over applied for the notice, *held*, that as the party who applied for the notice was liable to the plaintiff, if at all, for the whole sum claimed, and entitled, if at all, to claim indemnity in regard to that sum, he was obviously not bound to seek or obtain the co-operation of his co-defendant before issuing a third party notice.

Appeal by third parties from an order of John McKay, local Judge, at Port Arthur, for the District of Thunder Bay, refusing to set aside the service of a third party order.

D. L. McCarthy, K.C., for the third parties.

S. C. Wood, for the defendant Walker.

LATCHFORD, J.—Application on behalf of the third parties in this action, by way of appeal from the order of John McKay, Esquire, local Judge for the District of Thunder Bay, refusing to set aside the service of a third party order, for an order directing that the third party notice to set aside, or, in the alternative, that leave be granted to enter conditional appearance on behalf of the third parties.

The main ground for the application is that the circumstances did not warrant the issue of a third party notice.

The action is against Walker and his co-defendant France for the payment of principal and interest upon a covenant contained in a mortgage of certain lands purchased in 1913 by the defendants from the plaintiffs, and then mortgaged for the balance of the purchase money.

It appears that in March, 1914, a caution under the Land Titles Act, referring to the lands so purchased and mortgaged, was filed in Land Titles office for the district of Thunder Bay by Fred. Babe, of Fort William, a member of the firm of Morris & Babe, solicitors. The caution was filed on behalf of William Mathieson, of the city of Leeds, England, and asserts that he is interested in the lands in question; that Daniel Walker (one of the defendants) has executed to the cautioner a transfer of all his interest in the lands, and that a transfer from France is in course of execution, "having been signed by his wife in Calgary, Alberta, and sent to England for signature by the said France." The caution proceeds: "All the moneys advanced in this matter were not the moneys of the said Walker or of the said France when they purchased the said lands; but the said France and Walker were really trustees for the said Mathieson, and the transfers for the said Mathieson now in the course of execution as aforesaid are being executed to carry out the said trust."

Whether France executed the transfer to Mathieson is not disclosed. Mr. McComber, the solicitor for Walker, deposes that it was executed by Walker and his wife.

It further appears from affidavits made by Mr. McComber that in October, 1914, Mathieson, acting on behalf of himself and his associates and the defendant France, made a new agreement with the plaintiffs, changing the terms of the mortgage and entered into possession of the property—paying upon account of the mortgage the sum of £2,000.

It is also stated upon oath by Mr. McComber that at the time the transfer was made it was agreed between Walker and Mathieson "and his associates, that they, the said Mathieson and his associates, would assume the said mortgage and indemnify and save harmless the said defendant Daniel Walker from any liability under the same."

Upon the application for leave to serve the third party notice a circular relating to the lands referred to was in evidence which disclosed as the associates of William Mathieson—there are two

of that name, one distinguished by the abbreviation "Jr."—the persons who in addition to him were allowed to be served with a third party notice.

I think it undoubted that so far as "William Mathieson, Esq." is concerned the third party procedure was properly invoked. The Rule (165) provides that "where a defendant claims to be entitled to . . . indemnity . . . from . . . any person . . . not a party to the action . . . he may issue a notice . . . called the third party notice."

As to Mathieson, Walker was clearly within the rule in issuing the third party notice. Mathieson's associates may or may not be properly joined with him as third parties. The matter can be determined only by a trial. In the meantime Walker claims that they also are entitled to indemnify him against the liability which he and France incurred for their and Mathieson's benefit. "The right to invoke the third party procedure exists whenever the plaintiff's claim against the defendant, if successful, will result in the defendant having a claim against the third party to recover from him the damages which he has been compelled to pay to the plaintiff." Per Middleton, J., in *Swale* v. *C. P. Ry.* (1912), 21 O. W. R. 225 at 234; 25 O. L. R. 492 at 504.

It is urged that the issue of the notice was irregular because only one of the two parties interested in any relief over applied for the notice. As Walker is liable to the plaintiffs—if at all—for the whole sum claimed by them, and entitled—if at all—to claim indemnity in regard to that sum, he is obviously not bound to seek or obtain the co-operation of his co-defendant before issuing the third party notice.

The service is said to be ineffective because the affidavit of service does not disclose that the original order was exhibited to the third parties when they were served with it. There is no rule requiring the original of an order to be exhibited at the time of the service of a copy of it. Moreover, any irregularity in regard to service was waived by the unconditional appearance to the third party notice entered on behalf of the third parties on the 7th August by their solicitors, Messrs. McCarthy & McCarthy.

On all the grounds urged in the notice of motion and in the argument, the appeal fails and is dismissed with costs.

Appeal dismissed.

MASTEN, J. (TRIAL.) 2ND OCTOBER, 1916.

CRAWFORD v. BATHURST LAND & DEVELOPMENT CO.

Company—Action against Directors—Breach of Trust by Directors—Non-disclosure by Vendor-promoter—Illegal Payments to Directors—Payment of Dividend Impairing Capital—Approval of Illegal Acts of Directors—Secret Commissions Act, 8 & 9 Edw. VII. (Dom.), c. 33—Ontario Companies Act, R. S. O. (1914), c. 178, s. 92—Defence Arising after Action—Rule 159.

Approval of directors' irregular acts:—The rule that "if an act, not *ultra vires* of the corporation, and which therefore might be done with the approval of a majority, be done irregularly and without such approval, then the majority are the only persons who can complain, and the Court will not entertain the complaint except at the instance of the majority, and in which the corporation is plaintiff," applies only where the approval of the majority depends simply on the passing of a resolution or by-law which the shareholders are competent to meet and pass, and does not apply where the shareholders must, as a condition precedent to approval, themselves acquire some further qualification or status which they may or may not be able to attain, therefore, a single shareholder, either alone or on behalf of himself and others, may make the company a co-defendant and may sue in respect of an act which is *ultra vires* of the corporation and which a majority are consequently unable to affirm.

Breach of trust by directors:—A director commits a breach of trust if he accepts, or is a party to the acceptance by his co-directors of, any money or property as a gift or bribe from persons dealing with the company, and is liable to repay to the company such money, or to account to the company for such property or its full value if parted with by the director.

Defence arising after action:—Rule 159 provides that any ground of defence, which has arisen after action, but before delivery of statement of defence, may be pleaded. *Held*, that directors of a company, in an action against them, could set up in their defence, a by-law which they had passed after the writ had been issued.

Disclosure by vendor-promoter: — A vendor-promoter of a company is bound to make the fullest disclosure as to the price he paid and the profit he is taking, otherwise he is liable to the company for damages for non-disclosure.

Impairment of capital: — Where directors illegally declare and pay out a dividend which impairs the capital of the company, the directors may be compelled, by the company, to repay the dividend to the company, or so much of it as may have impaired the capital of the company; but any person who receives and *retains* a dividend which impairs the capital of a company cannot maintain an action against the directors for the return to the company of the dividend, and neither is his action maintainable because he sues on behalf of himself and all other shareholders of the company.

Payments to directors illegal: —Ont. Co. Act, R. S. O. (1914), c. 178, s. 92, prohibits a director from receiving any payments from the company, either in his capacity as a director or for services rendered by him to the company in another capacity (in this case a commission for sale of lands of the company), unless such payments are first authorized by a by-law and subsequently confirmed at a general meeting of shareholders.

Presents to directors: — The shareholders, at a meeting duly convened for that purpose, can, if they think proper, remunerate directors for their trouble or make presents to them, for their services, out of assets properly divisible amongst the shareholders themselves. Further, if the company is a going concern, the majority can bind the minority in such a matter, but to make presents out of profits is one thing and to make them out of capital or out of money borrowed by the company is a very different matter. Such money cannot be lawfully divided amongst the shareholders themselves, nor can it be given away by them to their directors so as to bind the company in its corporate capacity.

Action against a company and the directors thereof personally to compel repayment to the company of large sums for profits, commission and dividends alleged to have been illegally paid out by the directors.

A. C. McMaster and *J. H. Fraser*, for the plaintiff.

D. Urquhart, for the defendant company and for the defendants, Murray, Gibson, Bryan and Ruckle.

N. W. Rowell, K.C. and *H. J. Macdonald*, for the defendant Fullerton.

H. H. Dewart, K.C., for the defendant Doran.

MASTEN, J.—This is an action which was tried before me at the non-jury sittings in Toronto on the 20th, 21st and 22nd days of December, 1915, and on the 13th, 14th and 15th days of January, 1916.

The plaintiff is a barrister and solicitor formerly practising his profession at the City of Toronto, now an officer in His Majesty's forces. The defendant Fullerton is one of His Majsty's counsel learned in the law, and the plaintiff and the defendant Fullerton formerly carried on business as barristers and solicitors. The partnership was dissolved in or about the month of January, 1914.

The defendant company is a company incorporated under the Ontario Companies Act by the letters patent of incorporation dated 17th March, 1913. The defendant Fullerton and his individual co-defendants, except C. J. Gibson, were elected directors of the company at its organization meeting on the 7th April, 1913,

and have since continued to act in that capacity. The defendant C. J. Gibson was appointed a director at a subsequent date under circumstances which were discussed at the trial but which in the view I take are unimportant. He was a de facto director and acted as such. The occurrences which give rise to the present action were the purchase in the early part of 1913 of a certain farm property situate in the township of York, comprising about 156 acres of land; the formation of a preliminary syndicate and the acquisition by it of said lands; the incorporation and organization of the defendant company for the purpose of acquiring from the syndicate, holding and reselling the above property; the subsequent re-sale of the farm and the course of action of the individual defendants in connection with these various transactions.

At the trial the plaintiff put forward three claims: first, for a judgment declaring that a sum of $11,601.75, or in the alternative two-thirds of it, being profits made by one Wallace in connection with the purchase and sale of the lands to the preliminary syndicate, really belonged to the company, having been received by Wallace and the defendants Fullerton and Doran while they were promoters of and trustees for the defendant company or its shareholders the members of the syndicate; secondly, that a sum of $8,122.22 paid to the defendant Doran by way of commission for his services as agent of the company in re-selling the land in question should be repaid to the company, because it was a secret commission and because, Doran being a director, the preliminary by-law required in such a case by the Ontario Companies Act was not passed; thirdly, that the individual defendants, as directors of the company, illegally declared and paid out a dividend of 57 per cent., thereby impairing the capital of the company and claiming that the individual defendants should be required to repay to the company the said sum to the extent to which it was paid out of the capital of the company.

Other claims set up in the statement of claim were not pressed at the trial, and I understand plaintiffs' claim, as now asserted, to be confined to these three claims now enumerated.

The series of occurrences in question, so far as the evidence shews, began on the 24th of February, 1913, when one Edwin Wallace called upon the defendant Fullerton at his office, stating that he was in negotiation for the acquisition of the above land, and desiring Mr. Fullerton as his solicitor to draft for him an agreement of purchase.

Wallace's first offer was not accepted; negotiations with the vendor's agent continued; and at some later date not accurately fixed a price was agreed at $725 per acre, and a written agreement of sale to Wallace was duly executed. Though dated the 24th day of March, 1913, it appears from the evidence to have been signed on March 1st, but did not, according to its terms and the evidence, become effective until the payment to the vendor of a cash payment of $2,500 was made. This payment was, I think, made on March 4th. When the agreement was delivered does not appear.

The willingness of Wallace and his associates to risk the putting up and possible forfeiture of this sum of $2,500 was, I think, dependent upon their being reasonably assured that an application for a charter incorporating the Forest Hill Electric Railway, then pending in the Legislature of Ontario, would be granted.

This electric railway was a proposed suburban line which was to have served the district where the land in question lay. The bill for its incorporation passed in the Legislature on the 4th day of March, 1913. The payment of the $2,500 deposit to the vendor was made by a cheque signed by Edwin Wallace dated March 1st, 1913, payable to the order of James Bicknell, the vendor, which cheque was marked "good" at the Bank of Ottawa on March 3rd, and appears to have been deposited by the vendor in the Imperial Bank of Canada on March 4th, and to have been cleared on March 5th. It does not appear whether it was delivered to Bicknell on the 3rd or 4th. Probably on the 4th. On the 1st of March Wallace had not any account in the Bank of Ottawa to answer the above cheque, as appears by a copy of his bank account in the Bank of Ottawa, which was produced at the trial and which shews that the account was only opened on the 3rd March by a deposit of $2,566.66, consisting of nine one-hundred dollar bills, a cheque on the Bank of Montreal, Yonge Street, for $833.33, and a cheque on the Imperial Bank for $833.33.

The cheque on the Bank of Montreal above referred to, appears to be a cheque dated 1st March, 1913, made by J. J. Doran in favour of Edwin Wallace, which cheque was marked "good" on 3rd of March by the Bank of Montreal, and on the same date deposited in the Bank of Ottawa at Toronto. From the evidence given at the trial regarding the subsequent repayment of these sums it appears that the $2,500 paid to Bicknell was made up of this cheque last mentioned given by Doran, a cheque for the like amount, $833.33, given by M. S. Boehm & Company (who were the

selling agents for the vendor Bicknell) and $900 cash deposited by Edwin Wallace himself. From what source he acquired the $900 deposited by him does not, so far as I am aware, appear.

Under the agreement of purchase between Bicknell and Wallace the purchase price was $725 per acre and the terms of payment were as follows: Two thousand five hundred dollars as a deposit on the execution of the agreement; thirty-two thousand five hundred dollars in cash on the 14th day of March, 1913; forty-seven thousand three hundred and forty-five dollars by the assumption of the existing first mortgage on the said property; and the balance to be secured by second mortgage.

On 4th March, 1913, an agreement was entered into between Edwin Wallace as vendor and the defendant Fullerton as trustee and purchaser, whereby Wallace agreed to sell and Fullerton agreed to purchase the land in question at $800 per acre. The terms of payment are set out as follows:—

$2,500 as a deposit on the execution of the agreement (the receipt whereof was acknowledged), $44,271.75 on the 14th day of March following, $47,345 by the assumption of an existing first mortgage on the property, and the balance by assuming the second mortgage given by Wallace to Bicknell.

It is further provided in the agreement as follows:—

"It is understood and agreed by the parties hereto that the purchaser herein is a trustee for and on behalf of a certain syndicate formed to purchase the said property herein and sell the same for profit, and the vendor agrees to accept liability of the said syndicate and the members thereof in lieu of any personal liability which might otherwise be incurred by the purchaser herein, and the vendor hereby agrees to release the purchaser from any personal liability in respect of this agreement or carry out the same."

The agreement was to extend to and to be binding upon the assigns of the parties.

A draft of this agreement prepared in the office of Fullerton & Crawford is produced, but its contents call for special reference only in respect to a recital contained in it, which reads as follows:

"And whereas the party of the first part (Wallace) is a nominal purchaser of the said land for a syndicate to be formed as hereinafter mentioned in which said syndicate he is to have an interest."

In revision this recital was excised. The evidence is conflicting as to the authorship of this draft; but whether dictated by the

plaintiff or by the defendant Fullerton it shews a view which at that time was held by some one in the office of the solicitors for the purchaser. It does not prove the fact stated in the recital, but it affords some indirect indication of the situation as understood by solicitors acting on instructions presumably received from the purchasers, though on the other hand the excision of the recital in the subsequent drafts may indicate that it did not correspond with the fact.

On the same day (March 4th), a syndicate agreement was drafted by the defendant Fullerton or was prepared in his office. This syndicate agreement is made between Edwin Wallace of the first part, James S. Fullerton, as trustee, of the second part, and the subscribers whose names are signed to the agreement, of the third part. It witnesses that a syndicate is thereby formed for the purpose of acquiring the land in question, mentions the total capitalization of the syndicate, refers to the agreement by which Fullerton became trustee, provides that the manager of the syndicate shall be the defendant Doran, and the treasurer shall be the defendant Fullerton, and the last clause is as follows:—

"It is intended to organize a joint-stock company and in the company each subscriber hereto shall be entitled to shares in proportion to the number of shares held by him in the syndicate and the trustee shall on request convey the said land to the company when so formed. The details of the formation of such company to be decided at any regular meeting of the shareholders."

The agreement is signed by Wallace and Fullerton as vendor and trustee respectively, and by seventeen subscribers for shares in the syndicate, including the plaintiff Wallace, Fullerton and Doran. Subscriptions and payments pursuant to this agreement aggregated on the 14th March, 1913, $57,700.

On the 5th day of March the defendants Fullerton and Doran began actively canvassing subscriptions to the syndicate agreement. On that date the following entry appears in Mr. Fullerton's docket:—

"March 5th/13.

"Attending C. J. Hohl and obtaining his signature for $5,000.00.

"Attending Morgan and laid the matter before him.

"Attending Black and laid the matter before him.

"Attending J. W. Graham, St. Mary's, and laid the matter before him and sent him long letter. $10 00."

And letters by Fullerton to J. W. Graham of St. Mary's and Matthew Ruckle of Thamesville are also put in as exhibits. It is manifest on the evidence, and indeed, is not contested, that from this date forward both the defendant Doran and the defendant Fullerton were actively engaged in the securing of subscribers to the syndicate. In this they were successful and at the time when the first payment was due, namely, the 14th March, they had secured sufficient subscriptions and sufficient payments of money so that it was possible to carry out the transaction.

The organization of this syndicate appeared to have been not only the contemplated, but also to have been the necessary means of carrying through the transaction, because it is stated in the evidence and but very faintly contested, that Edwin Wallace was not a man of such financial means as to have rendered it possible for him to carry out such a transaction as the one in question. He is described by the plaintiff as a client who did not pay, and appears from time to time to have borrowed small sums for his immediate personal necessities from his friend the defendant Fullerton. There is no suggestion that he did not repay these, nor any imputation on his honesty; but I am convinced, from the whole of the evidence given, that he was in fact not a man of such financial means or possessing such credit as to have been capable of carrying through any transaction such as is here under consideration.

On the 13th of March, the firm of Bicknell, Bain and Strathy, acting as solicitors for James Bicknell the vendor, and Fullerton and Crawford, acting as solicitors for the purchasers, were contemplating the completion of the transaction on the next day, and in anticipation were preparing the requisite statements of adjustments and allowance on which to close the transaction. On the night of the 13th, Bicknell, Bain and Strathy borrowed from the plaintiff Crawford the agreement between Bicknell and Wallace, and gave a receipt for same. On the morning of the 14th this receipt was returned.

On the 14th day of March the purchase of the lands in question from Bicknell was closed. Bicknell conveyed to Wallace, who expressly assumed the existing mortgage of $47,345 and gave back a second mortgage containing his covenant to pay $28,647, and Wallace on the same day conveyed to Fullerton pursuant to the agreements above mentioned. On this day, and in connection with

the closing of the transaction as above outlined, the following instruments passed between the parties concerned.

(1) Cheque for $32,353.30 from Fullerton in trust to Edwin Wallace. This cheque is endorsed by Wallace to Bicknell, Bain and Strathy, and forms the cash payment made on closing the purchase.

(2) Cheque from Fullerton in trust to Edwin Wallace for $11,601.75, being the difference between $725 per acre, at which price Wallace bought, and $800 per acre, at which he transferred to Fullerton in trust. This cheque was marked "good" at the Dominion Bank on the 14th, and stamped "paid" on the 17th. It appears to have been deposited in Wallace's account in the Bank of Ottawa on March 14th.

(3) Cheque Edwin Wallace to Fullerton for $3,867.25, being one-third of the amount of the cheque last mentioned. This cheque appears to have been deposited by Fullerton to the credit of his personal account in the Dominion Bank on the 15th March.

(4) Cheque of Edwin Wallace to the defendant Doran for $3,867.25, was marked "good" by the Bank of Ottawa on March 14th, deposited on the same date in the Bank of Montreal and cashed on March 15th. This cheque also is one-third of the amount received by Wallace from the syndicate as a profit on the lands sold.

(5) Cheque of "Fullerton in trust" to John J. Doran for $2,500. From the evidence it appears that this cheque is a return to Doran of the deposit which had been paid to Bicknell when the agreement was delivered on or about the 4th March.

From the recital of the facts as stated above it appears that Doran did not put up the whole of this $2,500, and why the cheque was made to him does not very clearly appear upon the testimony. However, that was the way in which it was done, and forthwith out of this cheque of $2,500 Doran pays to Wallace one-third, being $833.33, and to M. S. Boehm & Company $833.33.

On the 17th March following, the petition for the incorporation of the defendant company under the Ontario Companies Act was filed, and on the 22nd a charter issued.

The departmental file, including the petition for incorporation, was produced at the trial, and certified copies have now been put in. The charter recites the petition and then proceeds to constitute the defendants Murray, Fullerton, Doran and Gibson, along with the plaintiff, a corporation under the provisions of the Ontario Companies Act, and names the same five persons as provi-

sional directors. There is nothing in the charter constituting the company a private company within the meaning of s. 2 (c) of the Ontario Companies Act.

On the 7th April a meeting of the members of the syndicate was held at which meeting the plaintiff and all the individual defendants were present. At this meeting the substance of the action taken is recorded as follows:—

"Mr. Fullerton then reported that as treasurer of the syndicate he had received subscriptions amounting to the sum of $57,700, and read a statement of the account to the syndicate.

"Mr. Fullerton then explained that the deal for the purchase of the property from Edwin Wallace to himself as trustee of the syndicate had been closed on the 14th day of March, 1913, and explained the whole transaction to the syndicate.

"Mr. Doran then addressed the meeting and stated that a plan of subdivision had been selected from a number of plans and that the property was now being surveyed.

"Mr. Fullerton produced the Letters Patent of the Bathurst Land and Development Company, Limited, and explained that these had been obtained by the provisional directors therein named for the purpose of the syndicate, and on motion of Mr. Doran, seconded by Mr. Hohl, it was unanimously resolved that the syndicate should form itself into the said company and that the members of the syndicate should take stock in the said company in proportion to the amount of their shares in the syndicate."

On the same date the usual organization meetings of the company were held, beginning with the meeting of the provisional directors, then a meeting of the shareholders of the company, at which meeting of the shareholders the defendants Murray, Fullerton, Doran, Bryan and Ruckle were appointed permanent directors of the company. In the record of this meeting the following minute appears:—

"A report was read by the secretary shewing the number of shares subscribed and underwritten, the names of the subscribers and underwriters, the amount paid thereon, the amount of preliminary expenses and a financial statement of the affairs of the company."

Neither the minute book nor any other record of the company submitted in evidence shews this report of the financial statement said to be embodied in it, and it is very doubtful whether any such

report was submitted to the meeting. If required to find on that point I would find that no financial statement was presented to the meeting so as to be apprehended by those present or even brought to their notice.

A meeting of the permanent board of directors was also held, the substance of the proceedings taken at that meeting being as follows:—

"The election of officers was then proceeded with, and the following were duly elected:—

"President—Major J. A. Murray,

"Vice-President and General Manager—J. J. Doran,

"Secretary and Treasurer—J. S. Fullerton.

"Mr. Fullerton then read the syndicate agreement dated the 4th day of March, 1913, and explained that subscriptions to the amount of $57,700 thereunder had been received. He then read the agreement of sale, from Edwin Wallace to himself as trustee for the syndicate of the property known as the Armstrong Farm, comprising about 155 acres and situated at the south-west corners of Bathurst Street and Wilson Avenue; he then explained that this deal had been closed and a deed of the property taken to himself as trustee on the 14th day of March, 1913, and that all adjustments, solicitors' charges, etc., in respect thereof were set out in financial statement of the affairs of the company."

By-laws numbers 2 and 3 referred to in the foregoing minutes are as follows:—

"By-law No. 2. Mr. Doran moved, seconded by Mr. Ruckle, as by-law number 2, that the agreement made between Mr. Wallace and Mr. Fullerton be adopted as the agreement made on behalf of this company and that the directors be instructed to accept and execute a deed from Mr. Fullerton to the company of the said property, containing a covenant by the company to indemnify Mr. Fullerton from any contracts or covenants which he may have entered into as trustee of the company. Carried unanimously.

"By-law No. 3. By-law number 3 being a by-law allotting 5,770 shares of the capital stock of the company, was read and adopted as by-law number 3 of the company."

Nothing appears in the minute book or in any other record of the company produced in evidence shewing any account approved or directed to be paid, or any statement of preliminary expenses.

At an adjourned meeting of the shareholders held immediately after the meeting of permanent directors the various by-laws and acts of the permanent directors were confirmed.

While somewhat informal in form, I am of opinion that the result of the action taken was to transfer to the company all the property, real and personal, of the syndicate, including any claim which the syndicate might have against Fullerton and Doran in respect of the sums received by them from Wallace.

On the organization of the company Doran was elected a director and was appointed on the 7th April, 1913, vice-president and general manager, which position he had continuously retained until the time of the trial. The lands in question having been acquired by the company on the 7th April, 1913, the next object was to resell them at a profit; and various real estate agents had been employed by the company from time to time, and efforts made to effect such sale, but nothing had resulted. Early in the year 1914 the condition of the real estate market began to occasion concern to the directors. I find nowhere, either in the minute book of the company or elsewhere, any record of an authorization to Doran to act on behalf of the company in procuring a sale of the lands; but no doubt in pursuance of his duties as general manager it was his duty to accomplish that which was the chief purpose of the company. There is no by-law of the company specifically prescribing the duties of the general manager, though by-law number 14 indicates in a general way his powers and duties of general oversight of the affairs of the company.

The first and only reference anywhere in the minutes of the company to this payment is to be found on the 29th May, 1914, of a meeting described as "meeting of the Bathurst Land and Development Company Limited;" and I take it, from the character of the business transacted, that it was a meeting of directors and not a meeting of shareholders. Those present at this meeting were the president (J. A. Murray) and Messrs. Bryan, Gibson, Doran and Fullerton.

In the minutes of this meeting the following item occurs:—

"The following statement of liabilities were put in by the secretary-treasurer," . . . "commission Doran $8,121.22."

No motion with reference to this statement was brought before this meeting, and no resolution was passed. From the cash book it appears that this sum was paid to Doran on the 29th May; and the cheque in payment appears in the cheque book as number 27,

"commission re sale B. L. & D. Co." It is signed by the Bathurst Land and Development Company, Limited, by J. A. Murray, president, and James S. Fullerton, secretary-treasurer.

From the evidence given at the trial it appears that Doran did act as the agent of the company in procuring the sale of these lands to Robins, Limited. He claims that he was instructed to this effect on 27th March, 1914; but from a perusal of the minutes of the Board meeting held on that day there does not appear to be any record of an authorization to him to act in that capacity. According to his own testimony, Doran understood from the beginning that he was to have the opportunity of acting as agent for the company in selling the property, though there is nowhere any record of such arrangement. The payment of commission to him was not submitted to or approved by shareholders until November, 1914.

In the month of April, 1914, an option on the lands in question was given by the defendant company to Robins, Limited. This option provides for a cash payment in all, if the option is accepted, of $50,000. It also provides for the assumption by the purchaser of the two other mortgages then outstanding on the property, and the giving back by Robins, Limited, or its nominee, to the vendor, the defendant company, of a third mortgage for the balance of the purchase price; this mortgage amounting, when the adjustments were made, to $50,851.13.

The option was accepted by Robins, Limited, and a cash payment of forty-five thousand made on May 28th, 1914. Previous to that a cash payment at the time of the taking of the option had been made of five thousand dollars, but this had been exhausted in the payment of interest on the outstanding mortgages.

On the 29th of May, 1914, the day after the receipt from Robins, Limited, of this large sum, a meeting of directors of the company was held; and the following note appears in the minutes:

"The amount at present in the bank is $45,014.48. The disbursements as above are $8,829.22; which will enable us to pay a dividend of fifty-seven per cent. and leave a balance in the bank of $161.76 to the credit of the company."

It was "moved by Mr. Fullerton, seconded by Mr. Gibson, that a dividend of fifty-seven per cent. be declared and be paid to the shareholders forthwith. Carried."

On the same day cheques were issued to each of the shareholders, including the plaintiff, for a dividend of fifty-seven per

cent. The cheque to the plaintiff is signed by the Bathurst Land and Development Company, per J. A. Murray, President, and James S. Fullerton, Secretary-Treasurer. It is marked "fifty-seven per cent. dividend B. L. & D. Co." All the other payments appear to be made in exactly the same way.

At the time when this dividend was declared it appeared that after providing for all the debts and liabilities of the company there remained a net profit on the sale of the lands in question of $25,003.72. This was on the basis that the third mortgage for $50,851.13 was good. Having regard to the fact that the purchaser who was giving this mortgage had actually paid in cash, as a first payment on the purchase, fifty thousand dollars, it seemed reasonable to suppose that this mortgage was good; and I think the directors were justified in acting on that belief, and that to the extent of the profit then shewn, namely, $25,003.72, the declaration of a dividend by them was justifiable. But as a matter of fact they did distribute, in pursuance of the resolution above quoted, $36,024; and to the extent to which the sum so distributed exceeded the net profits it was a payment out of capital, reducing the capital stock of the company, and was unauthorized and unwarranted.

On the 18th day of September, 1914, a meeting of the shareholders of the defendant company was held, and this minute is entered: "After discussion in which the financial affairs of the company were generally considered from the date of its incorporation, it was moved by J. P. Crawford, seconded by T. A. Eaton, that J. P. Crawford be authorized to take such proceedings in the name and on behalf of the company as may be deemed advisable to recover from Edwin Wallace, Esq., J. J. Doran, Esq., and James S. Fullerton, K.C., the sum of $11,601.75, or any part thereof alleged to have been paid to them as promoters' secret profit. The motion was defeated upon the following vote."

The votes recorded in favour of the motion consisted of the vote of the plaintiff, Mr. J. P. Crawford, twenty-five shares, and of T. A. Eaton, twenty-five shares; total, fifty shares. Opposed to the motion, three hundred and forty-two shares, of which seventy were voted by Mr. Fullerton and fifty by Mr. Doran. The motion was therefore lost. Even assuming that Fullerton and Doran had refrained from voting there would have been two hundred and twenty-two shares against fifty, negativing the motion.

On the 4th November, 1914, at a meeting of the directors, which appears to have been regularly held, a by-law was passed reciting that a sale of the lands of the company had been effected through J. J. Doran, a director of the company, who had acted as vice-president and general manager without salary; reciting a payment to him of $8,121.22, being five per cent. of the sale price, and declaring that he is entitled to the sum in question as commission, and thereupon the by-law ratifies, approves and confirms the payment theretofore made to him. At the same meeting by-law number eight was proposed and carried. It recites that the company was incorporated and organized for the purpose of acquiring and disposing of the property known as Bathurst Centre; that the property has now been disposed of, that the company has ceased to carry on business except for the purpose of winding-up its affairs; and the by-law then proceeds to enact (1) that the assets of the company as the same are realized be distributed among the shareholders of the company pro rata according to their respective paid-up subscriptions, at such times and in such amounts as the directors may deem advisable; (2) that the payment of a dividend of fifty-seven per cent. upon the paid-up capital stock of the company heretofore made be and the same is hereby approved, confirmed and ratified as part of the said distribution; (3) that the directors be and they are hereby authorized and instructed to make application to the Lieutenant-Governor in Council for the confirmation of this by-law.

"Passed by the directors of the company the 4th day of November, 1914, and confirmed by the shareholders of the company the 4th day of November, 1914."

On the same day, the 4th of November, 1914, a meeting of shareholders was held, as appears by the minute book, at p. 99. The shareholders were nearly all represented either in person or by proxy; and the plaintiff and Mr. T. A. Eaton were present. A motion was made by Mr. Crawford and seconded by Mr. Eaton, that the meeting adjourn for two weeks or until such time as the trial of the action pending (this action) be disposed of. The motion was defeated; all the shares represented except those held by Mr. Crawford, Mr. Eaton and Mr. Noonan, voting against the resolution.

By-law number four, above referred to, and just passed at the directors' meeting, relative to the payment of commission to Doran, was approved and confirmed, no votes being recorded against it.

At the same meeting it was moved by Mr. Lawson, seconded by Mr. Ruckle, that "the by-law passed by the directors pursuant to s. 15 of the Ontario Companies Act for distribution of the assets of the company among the shareholders, be and the same is hereby confirmed, and that the distribution of the assets of the company already made by the directors be and the same is hereby approved and confirmed. Carried." No votes were recorded against the resolution; Mr. Eaton not voting, and Mr. Crawford having withdrawn.

At the same meeting of shareholders a further resolution was passed, as follows:—

"It was moved by Mr. Lawson, seconded by Mr. Ruckle, that the payment of $3,867.25 which was made by Edwin Wallace to J. J. Doran, and the like payment to J. S. Fullerton out of the profit made by the said Wallace on the sale to this company of Bathurst Centre having been explained to the satisfaction of this meeting, it is hereby resolved *and enacted as a by-law of the company*, that the company renounces all claim against the said Doran and Fullerton in respect of the moneys so paid to them and that the retention by the said Doran and Fullerton be and the same is hereby approved and confirmed, and that the whole transaction as between Wallace, Doran, Fullerton and the company be and the same is hereby confirmed, approved and ratified."

The above statement affords some consecutive account of the chief occurrences giving rise to this action, but in addition it is desirable to state my findings on certain issues of fact which were debated at the trial:—

I find that the evidence adduced fails to establish that either of the defendants Fullerton and Doran were co-owners with Wallace or co-partners with him, or that they were legally entitled in any other way to a share with Wallace in the lands in question or in the option held by him prior to the 14th day of March, 1914, and they were not vendors to the syndicate.

I find that the firm of Fullerton and Crawford acted from the beginning and throughout as solicitors for Wallace, for the syndicate, for the defendant company; that both Fullerton, Crawford and a law student named Lawson carried on this solicitor's work up till March 14th, and that the plaintiff Crawford was actively concerned in it. I find that the papers relating to the transaction were kept in the office of Fullerton and Crawford and were open and accessible to the members of that firm generally; that the

agreement of sale from Bicknell to Wallace was among these papers relating to the matter, and was lent by the plaintiff Crawford to the vendor's solicitors on the night of March 13th. Fullerton, Lawson, and the plaintiff were individually subscribers to the syndicate, the latter to the amount of five thousand dollars.

I find that these facts, coupled with the positive statements of the defendants' witnesses, outweigh the statement of the plaintiff that he was unaware of the price per acre at which the lands had been bought by Wallace from Bicknell and the price at which they had been sold and the consequent resulting profit on such sale; and I find that the plaintiff knew that a profit was being made by Wallace, and raised no question regarding it until after the dissolution of partnership in 1914. In making that finding I do not desire to suggest that the plaintiff is now intending to swear falsely, but I believe that his memory respecting the matter, which was manifestly not sharp and definite regarding many of the details, has played him false in this regard.

With respect to the members of the syndicate other than Crawford, I do not find it to be established that they were as a body or generally aware of the price at which the lands had been purchased. Fullerton and Doran, and possibly one or two others who were in the inner circle, may have known; but if it were necessary to make a finding upon that point, I should find that the syndicate did not know the price at which the property was bought by Wallace and that no statement was made to them at the syndicate meeting in April, 1913, giving them any information on that point. In this connection I am particularly impressed by the terms of the letter of 11th September, 1914, written by Fullerton to Matthew Ruckle, in which Fullerton says: "Wallace came in to me as any other client would, told me he had an option on this property at $800, that he was going to try to raise a syndicate, and asked me to act as trustee, to which I consented."

The conclusion is that there was no general disclosure by Wallace, Fullerton or Doran to the syndicate of the price at which the lands were acquired from Bicknell.

With respect to the fact that Wallace divided the $11.601.75 of profits received by him into three equal portions and handed over one-third thereof to each of the defendants Fullerton and Doran on the 14th March, I find that there was at the time no disclosure of any sort, and that neither the plaintiff nor any of the subscribers to the syndicate were aware of that circumstance. Nor

was disclosure of that fact made to the shareholders of the company until the meetings which were held in the latter part of 1914.

Considering the sequence of events as shewn by the foregoing statement of facts; considering that, if not contemporaneous, Wallace's agreement to sell to Fullerton as trustee followed immediately on the securing of the Bicknell agreement; considering Wallace's financial position; considering the sources from which were derived the deposits of $2,500 paid to Bicknell, including as it did $833.33 from Doran; considering that in both the Bicknell and Fullerton agreement the deposit is the same amount, namely, $2,500, and that its receipt by Wallace is acknowledged; considering the provision in the Bicknell agreement that $2,500 should be paid as a deposit on the execution of the agreement; considering the provision in the Bicknell agreement that $2,500 should be paid as a deposit on the execution of the agreement; considering that all the balance of cash paid to Bicknell, aggregating $34,000, was derived from the members of the syndicate, I find that when the agreement for the lands in question was taken in the name of Wallace it was so taken with the purpose and intention of immediately forming a syndicate and turning the lands over to it, and that Wallace could not, without the assistance of the syndicate or other aid, have carried through the proposed undertaking.

But I find that Wallace did not take the lands or the option to buy same impressed with any trust. He might, if financially able, himself have held the lands, or he could legally have sold them to any one whomsoever.

I find that Fullerton and Doran were each promoters of the syndicate and of the defendant company which grew out of it.

The first active step towards the formation of the syndicate appears to have been taken on March 4th, when the syndicate agreement and the agreement between Wallace and Fullerton were signed.

I find that Doran became interested in these affairs not later than the first day of March, 1913, when he put up one-third of the initial deposit, expecting to receive some part of the profits, and that Fullerton became interested as a promoter in the venture not later that the 4th day of March, 1913, when he became trustee for the proposed syndicate. He had previously been acting as solicitor. As Fullerton is a brother-in-law of Doran and introduced him to the venture, I suspect that he became interested at the same time as Doran, but I do not find this established by the evidence.

Doran acknowledges that he expected a share of the profits made by Wallace on turning over the property to the syndicate.

Fullerton's statement is as follows: Referring to the occurrences on March 14th, he is asked:—

"Q. Then did you have an interview with Mr. Wallace on the 4th of March? A. Yes.

"Q. After the deal had been closed? A. In my examination I fixed that interview on the 15th, speaking from the date a certain cheque appears in my bank book, but subsequent consideration makes me quite certain that was on the 14th. When I came back to my office, and I think it was immediately after dinner, I found Mr. Wallace sitting in my chair in my office with his crutches leaning up against the table. I do not remember what greeting I gave him. He was rather a jovial character, and I probably said something chaff to him, and waited, and he said 'Fullerton, I have come in to see what you thought you ought to get out of this.'

"Q. Yes? A. And the statement rather startled me and I said 'Mr. Wallace, before we consider that, there is something I want to say to you.' I said, "I want you to understand that I am not entitled to one dollar of this. There is no agreement or understanding between you and I that I am to be paid, and I want you to understand that,' and I stopped and he looked up and said 'Well, come into Mr. Doran's room, I would like to discuss that further.' He walked in, Mr. Doran's room was across, next to my office; and he walked in there and I followed him and I there stated in the presence of himself and Mr. Doran that he had asked me what I expected to get out of it and that I had told him that I was not legally entitled to one dollar, that that was his money, but he knew what I had done in connection with the matter and it was for him to consider if he felt like giving me anything. He asked me how would $300 strike me—I notice he says $305 in his affidavit—my recollection is $300. I said to him 'The amount is entirely for you, but I have got in at least half of the subscriptions and it is owing to my efforts this matter has gone through for you as well as it has; if under these circumstances you feel disposed to give me a bonus or gratuity I will accept it, but the amount of that or whether you give it or not is entirely for you to say.' I turned and walked out.

"Q. Then when did you next see him after that? A. My impression is it was the next morning, it was either that afternoon or the next morning, and my impression is it would be the next

morning, because I banked a cheque the next day. He came in and handed me a cheque for one-third of the amount that had been paid to him.

"Q. Yes? A. And left it with me."

I am, however, of opinion that Fullerton would have been surprised and disappointed if a fair proportion of Wallace's profits had not reached him. I think there was no definite arrangement or agreement between Fullerton and Wallace, but I think there was a general expectation on the part of both Fullerton and Doran that in some proportion they would share in Wallace's profits, and that this was the position in which Wallace, Fullerton and Doran stood on and from the 4th of March, when the trustee agreement with Fullerton and the syndicate agreement were drawn up, and that Fullerton and Doran entered upon the promotion of the syndicate with this in their minds.

I repeat that I do not think it established that they had any legal claim or thought they had any legal claim against Wallace to an interest in the lands in question, nor a legally enforceable claim to a share in his profits; but the facts above stated, coupled with the happenings on the 14th of March, convince me that from the first there was what in real estate parlance might be termed "a gentlemen's understanding" between the three, which was carried out by Wallace on the 14th March when he gave to each of them the sum of $3,867.26.

I find that on the 14th day of March, 1913, though Wallace as vendor had conveyed the lands to Fullerton as trustee for the syndicate and had received the purchase price agreed to be paid to him, yet he still remained vitally interested in the enterprise and in the success of the undertaking. I note in particular the following points:—

1. He was individually a member of the syndicate holding 25 shares.

2. He was liable on his covenant to indemnify Bicknell in respect of the first mortgage of $47,345, and on his direct covenant in the second mortgage for $28,647.

3. It was at least a debatable and open question whether Wallace was legally entitled to receive and retain the profit of $75 per acre taken by him on the sale to the syndicate. I pause here to express the opinion that Wallace was a promoter of the syndicate and of the defendant company which succeeded it; that as vendor-promoter he was bound to make to the members of the syndicate

the fullest disclosure as to the price paid by him and the profit he was taking and that having failed to make such disclosure he was personally liable in an action of damages by the company for the non-disclosure. (See the judgment of Strong, C.J., in *Re Hess Manufacturing Company, Sloan's Case,* 23 S. C. R. 644, at pp. 657, 658, and 667. References may also be made in this connection to the case of *Re Leeds & Hanley Theatre,* [1902] 2 Chy. 809 at 825, *Re Olympia Limited,* [1878] 2 Chy. at 179, and *Re Cape Breton Co.,* 29 Ch. D. 795, 12 A. C. 652.

4. Fullerton and Doran were the controlling factors in the syndicate and were in charge of the incorporation and organization of the defendant company, the allotment of its shares, the appointment of its board of directors and generally in the conduct of its affairs. In particular it would rest largely with them to say whether any proceeding should be taken against Wallace for recovery by the syndicate or by the company of the profit retained by him.

I find that prior to the payment on the 29th May, 1914, there was no disclosure to shareholders of the payment to Doran of the commission, $8,121.22. That some intimation was made regarding it in a letter dated about June 1st, 1914, and that further disclosure was afforded at the meetings of shareholders held 18th September, 1914, and 4th November, 1914.

I find that when the plaintiff on or about the 29th March, 1914, received from the defendant company a cheque for $1,425, he was aware of such facts, as shewed that this cheque consisted in some part of a return of capital and that without making an accurate computation he retained the full amount so received by him believing that it consisted in part of a return of capital. I refer in connection with this finding to the evidence of Doran and to the depositions of the plaintiff on his examination for discovery at questions 250-264 and 273-275.

Upon the above statement of facts I proceed to deal in the first instance with the third claim put forward by the plaintiff, namely, that the individual defendants, as directors of the company, illegally declared and paid out a dividend of fifty-seven per cent., thereby impairing the capital of the company; and praying that the individual defendants should be required to repay to the company the said sum to the extent to which it was paid out of the capital of the company.

It is entirely plain that the payment of this dividend to the extent of $11,020.28 was ultra vires of the directors, not only in the narrow sense of that term but in its broad and strict sense, and that the act of the directors in this respect was incapable of ratification by the shareholders. Other proceedings, either under s. 15 of the Ontario Companies Act or by way of voluntary winding-up, might have been taken so as to reach the same result in a legitimate manner; but such proceedings have not been taken; and even if taken they would not be a ratification of the distribution already made but would be entirely new and different proceedings.

The passing of the by-law which was passed on the 4th November, 1914, and confirmed by the shareholders, was entirely ineffective to produce any operative result or any condition under which the dividend might be paid unless and until it had been confirmed by the Lieutenant-Governor in Council. The fact was that on the 4th November, 1914, the defendant company had debts and obligations then outstanding which had not been provided for or protected within the meaning of s. 15; so that the fundamental condition under which that section could be brought into force and made operative did not exist. Sub-section 2 provides that the by-law shall not take effect until it is confirmed by the Lieutenant-Governor in Council; and no order in council has been passed confirming it. I am therefore of opinion that the original illegality which existed with respect to the payment of this dividend still continues, and that in an action properly constituted for that purpose the directors would be liable to have judgment pronounced against them directing them to repay to the company the sum of $11,020.28 above mentioned.

But the defendants contend that even admitting the payment of this dividend to have been illegal, and admitting that the subsequent action of the shareholders in confirming it was ineffective, the plaintiff is personally incompetent to maintain this action, he having himself received his share of the 57 per cent. dividend, being the sum of $1,425 paid to him on the 29th May, which sum he received and still retains, knowing, as I have found, that in part at least it consisted of a return of capital.

It appears to be plain, under the principle established in the case of *Towers* v. *South African Tug Co.*, [1904] 1 Ch. 558, that under these circumstances the plaintiff is personally incapacitated from maintaining this action. In that case the account of a limited company, at the commencement of their financial year, in

1900, shewed a considerable debit balance on the previous year's trading, but the directors illegally, though honestly, applied a profit made in the earlier part of 1900 in payment of an interim dividend instead of in reduction of the debit balance, thus in effect paying a dividend out of capital. The balance sheet for 1900 shewing the debit balance and also the payment of the dividend was submitted to and approved by the shareholders in general meeting. Subsequently the directors, recognizing their mistake, proposed to apply any future profits in wiping out the debit balance, and this was almost entirely accomplished out of profits in 1901 and 1902, as appeared from the balance sheets for those years submitted to and approved by the shareholders in general meeting.

In 1903 two of the shareholders who had themselves received their portions of the dividend, and concurred in passing the balance sheets, commenced an action "on behalf of themselves and all others the shareholders of the company" against the company and the directors to compel the directors to repay to the company the amount of the dividend.

On appeal from the trial judge the case was heard before a Court of Appeal, consisting of Vaughan Williams, Stirling, and Cozens-Hardy, L.JJ.

Vaughan Williams, at p. 566, after stating the facts, says:—

"In that state of things, what ought to be done with this action? There is no doubt that the payment of this interim dividend was an ultra vires payment. I start with the assumption one is bound to make, that if an act is done by a company which is ultra vires, no confirmation by shareholders—not even by every member of the company—can convert that which was ultra vires into something intra vires: it must always be ultra vires. As is pointed out in one or two of the cases, the result of that is that if the company are plaintiffs, no amount of acquiescence or resolutions by the shareholders can form an answer to the action by the company for the re-instatement of things in the position in which they would have been but for the ultra vires act complained of.

"But, to my mind, it is a different thing where the action is brought by a shareholder on behalf of himself and other shareholders. I am assuming this case to be one of those in which the facts have been such that an individual shareholder ought to be able to sue in a representative action for the purpose of preventing acts being done in reference to the company in which the shareholders are interested, and which might damnify the company by

reason of those acts being ultra vires. I assume that an action not only to prevent ultra vires acts in the future but also to remedy acts that have been done ultra vires is an action which can be brought in the form in which this action is brought. But although that is so, my own opinion is that this is a kind of action which has to be brought by a plaintiff personally. It is an action which he cannot bring unless he has an interest; it is an action which a stranger could not bring.

"Under those circumstances, what is it we have to ask ourselves here? If it be the fact, as I think it is, that these plaintiffs knew of all that had been done, received their dividend with knowledge of all the facts, and then brought this action with the money still in their pockets, ought they to be allowed to bring this action, which, as I have pointed out, is, to my mind, an action such as they can bring in consequence of their personal interest in the matter? I think not. I think that an action cannot be brought by an individual shareholder complaining of an act which is ultra vires if he himself has in his pocket at the time he brings the action some of the proceeds of that very ultra vires act. Nor, in my opinion, does it alter matters that he represents himself as suing on behalf of himself and others. I think that the reason which requires us to say he ought not to bring such an action equally requires us to say that he ought not to be the peg upon which such an action is to be hung for the benefit of others."

Stirling, L.J., after stating that he desired to rest his decision on the particular facts in the case and to abstain from laying down so far as possible any general rules respecting the questions raised, says, at p. 571: "I think, on the whole, that justice would have been done if the action had been dismissed on the ground that the personal conduct of the plaintiffs was such as to preclude them from insisting on the relief which they claim."

Cozens-Hardy, L.J., at p. 571, says:—

"I will not pause to consider under what particular circumstances such an action may be maintained, but I assume that this is one of those cases in which such an action may be maintained—I mean in point of form. But I think it is equally clear that the action cannot be maintained by a common informer. A plaintiff in an action in this form must be a person who is really interested. When you get that fact clearly established it seems to me impossible to avoid taking the next step—that all personal objections against the individual plaintiff must be gone into and considered

before relief can be granted. Here I think it is clearly proved, as it is certainly to be treated as admitted by the absence of any denial of the allegations in the counterclaim, that both the plaintiffs took this dividend with full notice of all the facts relating thereto. It is also clear that they had their dividend, which they took with full notice that they were payments out of capital, in their pockets at the date this action was commenced.

"Now, can a shareholder who has, with full notice of all the material facts, received part of the capital by way of a dividend, and who still retains that money in his pocket, maintain an action against the directors who have paid the dividend. I think the true answer to that question is, he cannot."

Further on in his judgment he says: "It seems to me that a shareholder having the money in his pocket which he knows is wrongfully there, ought not to be allowed to complain; and he cannot get any greater right of complaint because his action is, in form, an action by himself and all other shareholders in the company. In fact, he must succeed by his own merits and not by the merits of the other shareholders."

The *Towers Case* was decided by an exceedingly strong Court, and I can find no subsequent decision by which it has been in any way distinguished or modified. It, therefore, appears to me to lay down a principle of law that should be followed in our Courts; and the provisions of the Ontario Companies Act with respect to the payment of dividends make the situation here in Ontario stronger if anything than it is in England. I refer in that connection to s. 95 of the Ontario Companies Act.

In the present case the plaintiff had not as full notice or knowledge of the facts as had the plaintiffs in the *Towers Case*. Nevertheless (using the cautious language of Lord Justice Stirling), resting my decision on the particular facts in this case, and abstaining from laying down so far as possible any general rule, I am of opinion that the plaintiff has, by his action in receiving and retaining down to the present his portion of the dividend so paid out, with knowledge that it involved a repayment of capital, incapacitated himself from maintaining the claim now under consideration.

For reasons which have sufficiently appeared in the foregoing, the defendant the company will be entitled to judgment on its

counterclaim against the plaintiff and the individual defendants for the return of so much of the dividend paid to him and them as involved an impairment of capital.

I next proceed to deal with the claim for repayment to the company of the commission paid to Doran.

Having regard to the facts as found above and to the provisions of s. 92 of the Ontario Companies Act, R. S. O. (1914), c. 178, this payment to Doran appears to have been at the time it was made, entirely irregular and indefensible. See *Bartlett* v. *Bartlett Mines* (1911), 19 O. W. R. 893; 24 O. L. R. 419, and cases there cited. The section has been construed to relate to any payments made to a director either in his capacity of a director or for services rendered by him to the company in some other capacity; and it seems to me that the result of the subsequent decisions is that the judgment of Rose, J., in *Re Ontario Express Co.*, 24 O. R. 587, must be taken to be overruled. It thus appears that when this payment was made to Doran the company immediately became entitled to maintain an action to recover it back.

With respect to the claim for payment to the company of the two sums of $3,867.25 each, paid by Wallace to Fullerton and Doran out of the profits received by him, I note in the first instance that Wallace is not a party to these proceedings, and even if he was a promoter at the time when he acquired the agreement from Bicknell and even if he failed to make to the plaintiff and others such disclosures as are due from a promoter, I do not see how those circumstances give rise to a claim against Fullerton and Doran. It has never been held that such damages would form a trust fund in the hands of Wallace capable of being traced into the hands of Fullerton and Doran; and Fullerton and Doran were not in my my opinion so identified with Wallace in any legal relationship as to make them directly liable for such non-disclosure. They were not joint owners or partners with Wallace, consequently they were not vendor promoters.

But on the 14th March, 1914, there were outstanding all the various questions connected with the vendor to which I have already adverted, all of which were of great importance to Wallace and all of which were largely in the control of Fullerton and Doran. In respect to these questions Fullerton and Doran owed their first duty to the subscribers to the syndicate whom they had brought into it; and the acceptance by them from Wallace as a

gift of the sums of money now in question might render it practically impossible for them to protect the interest of the syndicate members as against Wallace.

Under these circumstances I think it was not competent for Fullerton and Doran, promoters of the company and guardians of the interests of the syndicate subscribers, to receive even as a gift from Wallace the sums respectively paid to them.

The rule respecting gifts to directors has been clearly formulated in various cases and the principle is thus summarized in Hamilton's Company Law, 3rd ed., at p. 352:—

"A director commits a breach of trust if he accepts, or is a party to the acceptance by his co-directors of, any money or property as a gift or bribe from persons dealing with the company, and is liable to repay to the company such money, or to account to the company for such property or its full value if parted with by the director."

At the time that these sums were paid by Wallace to Fullerton and Doran they were not directors of the company, which had not yet been incorporated. None the less they stood in a fiduciary relationship to the members of the syndicate who afterwards became shareholders of the company; and I can see no reason why the general principle above enunciated with respect to directors should not be applied to them. For these reasons I think that the sums received by Fullerton and Doran from Wallace were recoverable from them in an action properly framed for that purpose.

It thus appears that originally a cause of action did exist for the recovery of these moneys; but it is contended on the part of the defendants that the various by-laws and resolutions passed by the directors and shareholders of the company confirmed and validated the action taken, and that if any cause of action originally existed it has been effectively waived or cancelled by these resolutions. There can be no doubt that these various by-laws and resolutions, if within the power of the company to pass and if in other respects validly enacted, are in their terms and construction sufficiently wide and sufficiently strong to ratify and confirm the various irregularities and illegalities in connection with the two branches of the plaintiff's claim now under consideration.

Whether it would have been necessary to implement them by an instrument to which Fullerton and Doran were parties, and executed under the corporate seal of the company, I do not pause to consider, as the question is disposed of on another ground.

It is to be noted that the writ of summons in this action having issued on the 30th September, these resolutions were passed on the 4th November, more than a month after the issue of the writ. Rule 159, however, provides that any ground of defence or counterclaim which has arisen after action but before the defendant has delivered his statement of defence may be pleaded either alone or with other grounds of defence. The defendant is therefore entitled to set up by way of defence the resolution above quoted.

The plaintiff, however, contends that the resolutions in question are ineffective; and he bases that contention on various grounds which I now proceed to state.

(1) That when the resolution in question was passed on the 4th day of November, 1915, the company had, by the payment in the preceding May of a dividend of 57 per cent., encroached upon its capital to a substantial extent; consequently that it was not, under these circumstances, competent for the directors or even for the shareholders of the company to further deplete the capital by giving up and releasing without consideration a valid and legal claim which the company then possessed against Doran and against Fullerton for the recovery back of these moneys. In other words, that there was no power in the shareholders or in the directors to make a gift to a director under these circumstances, and to do so was completely ultra vires of the company.

(2) That the meeting of shareholders at which these by-laws and resolutions were passed or confirmed was irregular and incompetent, because the notice calling the meeting was insufficient, and because certain proxies in pursuance of which votes were recorded were alleged to be invalid.

(3) That these payments were *mala prohibita* within the Secret Commissions Act, 8 & 9 Edw. VII. (Dom.), c. 33. That the sums received by Doran and Fullerton constituted a secret profit; that Doran and Fullerton were agents within the meaning of the above Act, not only for the syndicate, but for the company to be formed, and that the taking of the commission being illegal it was incapable of confirmation by the shareholders in the manner attempted by them.

(4) That the commission to Doran being secret could not be ratified after he had received it in view of the provisions of s. 92 of the Ontario Companies Act.

(5) That at the time when these transactions occurred and also when they were ratified by the shareholders the company had no

power to act as such (a) because the company was not regularly organized at its inception and the board of directors had been for a long period irregularly constituted, and (b) because it had at the time of the passing of the resolutions no license to transact business.

(6) That the ratification was an attempt by those in control to benefit themselves at the expense of the minority.

I deal first with the objection that the attempted release by the company of its claim against Fullerton and Doran was ultra vires. In the case of *Re Newman & Company,* [1895] 1 Ch. 674, N. was chairman of a company in which substantially all the shares were held by himself and his family. Out of the funds of the company while it was a going concern £3,000 was applied by N. to his own use, and a further sum of £3,500 was spent by N. out of the assets of the company upon his private house. These payments were made out of the money borrowed by the company for the purpose of its business. They were sanctioned by resolutions of the directors and were approved of by the shareholders. The articles contained no power to make presents to directors. In the winding-up of the company the liquidator took out a summons against N. to compel him to repay these sums to the company. The application came up on appeal before a Court of Appeal consisting of Lord Halsbury, Lindley, L.J., and A. L. Smith, L.J. The judgment of the court was delivered by Lindley, L.J., and on p. 686 he says:—

"The shareholders, at a meeting duly convened for that purpose, can, if they think proper, remunerate directors for their trouble or make presents to them for their services out of assets properly divisible amongst the shareholders themselves. Further, if the company is a going concern, the majority can bind the minority in such a matter as this. But to make presents out of profits is one thing and to make them out of capital or out of money borrowed by the company is a very different matter. Such money cannot be lawfully divided amongst the shareholders themselves, nor can it be given away by them for nothing to their directors so as to bind the company in its corporate capacity."

The opinion expressed in that case has been followed by our Court of Appeal in the case of *Re Publishers Syndicate, Paton's Case,* 5 O. L. R. 392, at p. 406, and views looking in the same

direction have also been expressed in the case of *Hutton* v. *West Cork Railway Company* (1883), 23 Ch. D. 654, and *Stroud* v. *Royal Aquarium* (1903), 89 L. T. 243.

I think that the principle so laid down applies to this case. It is plain that at the time when the meeting of shareholders was held on November 4th, 1914, the company's capital was impaired, and I am of opinion that in consequence the shareholders of the company could not then make a gift out of its capital to any director; that such was the effect of the resolutions and by-laws then passed by them with respect to the payments made by Wallace to Fullerton and Doran in March, 1913, and with respect to the commission to Doran. Under these circumstances the attempted action of the directors and shareholders in gratuitously releasing these claims was incompetent and invalid.

It is suggested that by-law 6 of the company's general by-laws warrants the action taken. That by-law is as follows:—

"6. Except in so far as the remuneration of the directors shall be fixed by this by-law, the directors themselves shall have power to fix their remuneration either as directors or as officers of the company, and also the salaries or remuneration to be paid to all salaried officers of the company, and to vary the same when it may be expedient to do so."

But that by-law appears to relate exclusively to the remuneration to be paid to directors and to officers for their services in those respective capacities, and in my opinion has no relation to payments such as those in question. A perusal of the charter and of the provisions of the Ontario Companies Act shews that neither of them contain any specific provision which would warrant the passing of these by-laws or resolutions at a time when the capital is impaired.

The first ground of objection to the validity of the resolutions and by-laws of the 4th November being, in my opinion, valid, it is unnecessary and therefore undesirable for me to express any opinion on the remaining five grounds mentioned above.

I am therefore of opinion that the defendants' reliance on a release or discharge of any claim against Fullerton or Doran, or on an approval, ratification and confirmation thereof by the shareholders, fails, and that the right of action which existed at the date when the writ was issued was not destroyed or otherwise affected by the resolutions and by-laws passed on the 4th of November.

There remains to be considered one further contention, namely, that the plaintiff is incompetent to maintain this action because it must be brought by the company itself. It is contended on the part of the defendants that if the moneys in question are recoverable from Fullerton and Doran they are the moneys of the company, and that therefore the company alone is entitled to maintain this action, while the fact is that in the action as constituted the company is a party defendant and opposes the plaintiff's claim, seeking to uphold and confirm the transactions which are attacked, and having on the 18th September, 1914, declined to sue.

It is further contended on the part of the defendant that even though the shareholders of the company could not on the 14th November, 1914, effectively make a gift to Fullerton and Doran of those assets of the company which consisted of the company's claims against them, yet none the less the shareholders could achieve the same result by declining, as they did, on the 18th September, 1914, to permit an action to be brought in the name of the company for the recovery of these sums, and that such refusal is effective, the plaintiff being incapable of prosecuting the action either on behalf of himself or on behalf of himself and the other shareholders.

The defendants seek to apply the rule that "if an act, not ultra vires of the corporation, and which therefore might be done with the approval of a majority, be done irregularly and without such approval, then the majority are the only persons who can complain, and the Court will not entertain the complaint except at the instance of the majority, and in a proceeding in which the corporation is plaintiff."

The defendants further contend that the remuneration of the promoters Fullerton and Doran for the services which they undoubtedly performed as promoters, and the remuneration of Doran as the agent who sold the company's lands, is within the powers exercisable by the company pursuant to the statute, charter and by-laws under which it operates.

The principle is well established that in an action constituted as this is no relief will be granted by the Court if the transaction is such that it could be approved by the shareholders of the company. The question therefore is: can the majority of the shareholders place themselves in a position to approve these payments?

It is suggested that the impairment of capital might be made good, and the company then being in a position to treat the claims in question as profits could legally forego and release them.

Whether or not such restoration of capital could be effected does not appear. No action to that end has been taken, and I think that the case must be determined as it stood at the time of the trial.

It seems plain to me that the rule invoked by the defendants applies only where the approval of the majority depends simply on the passing of a resolution or by-law which the shareholders are competent to meet and pass, and does not apply where the shareholders must, as a condition precedent to approval, themselves acquire some further qualification or status which they may or may not be able to attain.

I think that the principle which applies is that a single shareholder, either alone or on behalf of himself and others, may make the company a co-defendant and may sue in respect of an act which is ultra vires of the corporation and which a majority are consequently unable to affirm. I refer as apposite examples of the application of this rule to *Cockburn* v. *Newbridge,* [1915] 1 Irish 237; *Bennett* v. *Havelock Light & Power Co.* (1910), 16 O. W. R. 19; 21 O. L. R. 120; *Burland* v. *Earl,* [1902] A. C. 83; *Alexander* v. *Automatic Telephone Co.,* [1900] 2 Ch. at 69; *Hope* v. *International,* 4 Ch. D. 327; *Holmes* v. *Newcastle Abbatoirs Co.,* 1 Ch. D. 682; *Hichens* v. *Congreve* (1828), 4 Russ. 562.

The result is that the action of the plaintiff is maintained in respect of the sums paid to Fullerton and Doran by Wallace and in respect of the sum paid to Doran for commission, and these moneys will be paid to the defendant company.

In respect to the sums first mentioned, the persons liable for such repayment are Fullerton and Doran, each for the sum of $3,867.25.

No one among the other directors was responsible for the payment of these sums. The company had not in fact been incorporated, and the subsequent action of the directors in attempting ineffectively to ratify the payment does not in my opinion make them liable.

With respect to the second sum of $8,121.22 paid to Doran as commission, I think that each of the directors present at the meeting on the 29th May, 1914, namely, Doran, Fullerton, Murray, Bryan and Gibson, are liable for the payment of this sum. The

remaining defendant Ruckle, not having been present, at the meeting, nor having in any way promoted the illegal payment, is not liable.

The plaintiff's claim in respect to payment of dividends out of capital is dismissed, and the company' counterclaim against the plaintiff is allowed.

The plaintiff will recover his general costs of the action as against all the defendants except Ruckle.

Ruckle recovers his proportionate share of the costs of defence against the plaintiff.

Judgment accordingly.

LATCHFORD, J. (TRIAL.) 5TH OCTOBER, 1916.

TROMBLEY v. PETERBOROUGH.

Negligence—Sidewalk out of Repair—Bolt-head Projecting above Level of Walk—Fixing Compensation — Contributory Negligence—Wearing Rubbers.

Bolt-head in sidewalk:—It is negligence on the part of a municipality to leave in the centre of a sidewalk a cap of a water cut-off pipe projecting five-eighths of an inch above the level of the walk, where the defect was obvious, and one which should have been remedied when the walk was first put down.

Fixing compensation: — Where a woman broke her leg through the negligence of defendants, and the evidence shewed that she was unable to walk, more than seven months after the accident, except with the aid of crutches, and then only with great difficulty, that improvement was likely, but that she would continue to suffer for an indefinite time, and that one leg would be about 1½ inches shorter than the other, she was awarded $2,000 damages and her husband $600 for expenses, loss of consortium and services.

Wearing rubbers: — Failure of pedestrians to wear rubbers is not contributory negligence.

Action to recover $10,000 damages for injuries to plaintiff, Eliza Trombley, caused by falling on the sidewalk on Simcoe street, Peterborough, on 8th February, 1916, and fracturing her left leg at the hip joint. Her husband also claimed damages for expenses, and for loss of consortium and services.

D. O'Connell and *J. R. Corkery* (Peterborough), for the plaintiffs.

George N. Gordon (Peterborough), for the defendant city.

LATCHFORD, J.—On the 8th February, 1916, the plaintiff, Eliza Trombley, while walking in an easterly direction upon the concrete sidewalk on the north side of Simcoe street, in the City of Peterborough, was tripped by the cap of a water cut-off pipe, and falling, broke her left leg at the hip joint.

Mrs. Trombley is about fifty-five years of age, and prior to the accident enjoyed good health. The leg was properly set and she was given every requisite attention in a hospital at Peterborough and in her home. Union of the broken femur has, however, been slow; and at the date of the trial, more than seven months after she was injured, she was still unable to walk except with the aid of crutches, and then only with great difficulty. Her condition is said to be likely to improve, but she will continue for some time—the duration of which cannot be determined—to suffer from the effects of the accident. Her left leg will always be about one and a half inches shorter than her right.

Her husband and co-plaintiff claims damages for loss of consortium and services, and for the expenses he has incurred and will incur for surgical and medical attendance, hospital charges, etc.

After hearing the evidence, I viewed the place of the accident in the presence of counsel for the plaintiffs and the defendants. The highest part of the cap—a bolt-head or rod-head of brass—projects five-eighths or three-quarters of an inch above the general level of the sidewalk. From that level to the lower edge of the cast iron part of the cap the concrete when laid—it bears no evidence of patching—was graded up for a width of about two inches. There was thus formed a truncated cone, with a pentagonal rod or bolt-head projecting slightly above it, at or near the centre of an otherwise excellent sidewalk on a business street near the main street of the city.

It was suggested (though not proved), at the trial that the elevation of the cap was due to climatic agencies. Such caps are no doubt sometimes raised above the sidewalks by the action of water and frost acting directly on the cap itself, or by lifting the walk and the cap, with the result that when the walk subsides the cap will remain projecting above it. But nothing of the kind

happened in regard to this particular cap. The defendants' engineer admitted that there was nothing to indicate the cap over which Mrs. Trombley fell was elevated by frost. On the other hand, the grading up of the concrete to the under edge of the cap, combined with the absence of a crack or any indication of patching, demonstrates that the cap was left projecting above the level of the concrete when the sidewalk was constructed in 1914.

The evidence of the witnesses Sheedy and Hayes established what is the right practice to follow in regard to such caps when laying cement sidewalk. There was no difficulty in setting the cap at the proper level—the grade at which the walk was to be laid. The cap was either set too high or the grade of the sidewalk was made too low. As was said by the learned Chancellor in *Roach* v. *Port Colborne* (1913), 29 O. L. R. 69 at 70, "the defect was an obvious one which should have been remedied when the walk was first put down."

The city engineer of the defendants was of the opinion that the cap projects higher now than when laid, basing his view on the obliteration of the tool marks on the surface of the sidewalk near the cap. That there has been some wear is undoubted. The edge of the cap itself is worn thin in places. But the tool marks near the inner edge of the walk where it cannot be subjected to much wear are not deep, and, I think, the wear near the cap has been so slight as not materially to increase the danger it was to pedestrians. The witness Florence, whose store was opposite the cap, on several occasions saw passers-by stumble over it. He noticed this frequently from the time the walk was laid until he left the locality sometime after the accident.

I find the street was out of repair, and that such want of repair was due to negligent construction of which the defendants had or ought to have notice and knowledge.

I accept the statement of Mrs. Trombley as to how the accident happened. The attempt made to establish that she slipped when entering Florence's store utterly fails. It was her intention to go to Florence's, but only after she had made purchases at Trumbull's; and she was on her way to Trumbull's, and not to Florence's, when she was tripped by the cap.

From the position in which the woman was found after the accident, I am asked to infer, in contradiction of her version of

the matter, that she was not tripped by the cap. I am of opinion that no such inference can properly be drawn. The distance between the cap and the wall against which she was trying to lift herself up, is but seven feet two inches. She states that it was her left foot that struck the cap. Her momentum at the time would tend to rotate her body around the obstruction towards the left, and carry her in the direction of the very place she was seen in after she fell.

There was no contributory negligence on her part. She had the right to assume that no obstruction existed on the plane surface of the centre of the concrete walk not long laid, and, but for the projecting cap, in excellent repair. Whether the accident would have been avoided had she been wearing rubbers is immaterial. The fact that she was not wearing rubbers does not constitute negligence on her part.

Notice of action was duly given to the defendants.

I find upon the facts of the case that the defendants failed to make and keep in repair the sidewalk on Simcoe street, and that such failure caused damages to the plaintiffs.

Trombley's loss in money was about $470 at the date of the trial, and it was proved that he would be at additional expense. I allow him as damages $600.

I estimate the damages to which Mrs. Trombley is entitled at $2,000. There will be judgment accordingly with costs. Stay fifteen days.

Judgment for plaintiff.

CLUTE, J. (KITCHENER, N.J. SITTINGS.) 4TH OCTOBER, 1916.

RE BAUMAN ESTATE.

Will—Construction—Motion for—Vesting of Property—Division per Capita or per Stirpes—"And also to"—Children of Deceased Children of Testator's Brothers and Sisters.

Capita or stirpes: — Where a testator gave property to "be divided equally, share and share alike, among all my brothers and sisters living, *and also to* the children of those who have died when they attain the age of twenty-one years," *held*, that the words *and also to* indicated that there were two classes of beneficiaries, first, the brothers and sisters living were in one class and one relationship to the testator, and secondly, the children of those who had died were in another class and relationship to the testator, therefore they took per stirpes.

Capita or stirpes: — Where a fund is to be kept together and divided at one period there is no reason for inferring division per stirpes; but if it is divisible at different times then the distribution per stirpes is to be preferred.

Representatives of deceased beneficiaries:—A clause in a will giving property to "be divided equally share and share alike among all my brothers and sisters living, and also to the children of those who have died," vests the property at the date of the testator's death, the persons entitled are then to be ascertained, and the property will pass to the personal representatives of any deceased children, therefore, the children of deceased children of brothers and sisters of the testator do not share with the surviving children of the brothers and sisters of the testator, whether such decrease took place before or after the death of the testator.

Time of vesting: — Where a testator used the expression directing property to "be divided equally share and share among all my brothers and sisters living, and also to the children of those who have died *when they attain the age of twenty-one years*," *held*, that the vesting of property took place at the death of the testator, there being sufficiently clear intention that the beneficiaries were those living at that time, the words, *when they attain the age of twenty-one years*, having relation only to the time when payment could be made to the children of the deceased brothers and sisters, not that the gift to them was contingent upon their attaining that age.

Motion by the executors for an order construing the will of the late Abraham Bauman, who died on or about the 9th January, 1916, and for directions as to distribution. The motion was heard at Kitchener at the non-jury sittings on 19th September, 1916.

J. A. Scellen (Kitchener), for the executors.

J. C. Haight (Waterloo), for Amos Bowman; representing children of testator's brothers and sisters.

E. W. Clement (Kitchener), for A. H. Winger, representing children of deceased children of brothers and sisters of the testator.

CLUTE, J.—The widow of the testator died on the 8th November, 1915. The testator, Abraham Bauman, had eight brothers and sisters, two of whom survived the testator, but none of whom survived his widow. By the testator's will he made certain provisions for his wife. The fourth clause is as follows:—

"I also direct that after the dower for my said wife and the above mentioned legacies are provided for, all balances of money remaining in the hands of my executors, or that may from time to time come into their hands belonging to my estate shall be, and also the money invested for my wife's dower after her decease be divided equally, share and share alike, among all my brothers and sisters living, and also to the children of those who have died when they attain the age of twenty-one years."

The following questions are submitted, and the direction of the Court asked:—

1. Are the parties entitled to share in the distribution under paragraph numbered 4 of the will those who answered the description in that paragraph at the death of the testator or those who answered the description at the death of his widow?

2. In either case, is the distribution to the parties entitled to be made per stirpes or per capita?

3. In either case, do children of deceased children of the testator's brothers and sister (whether such decease took place before or after the death of the testator), share with surviving children of brothers and sisters?

Four sisters, namely, Mrs. George Lichty, Mrs. Henry Butler, Mrs. David Eby and Mrs. Peter Winger, and two brothers, Mr. Jonas Bauman and Mr. Moses Bauman, predeceased testator; leaving one sister, Mrs. Abraham Snyder, and one brother, Mr. Benjamin Bauman, him surviving. There were a large number of children of the deceased brothers and sisters still surviving.

Some of the children of the deceased brothers and sisters had attained twenty-one years of age at the death of the testator, and at the death of the widow all had arrived at the age of twenty-one years with the exception of three, namely, William Martell,

Annie Martell, and Frederick Martell, infants represented by the Official Guardian.

The widow remained in possession of the farm until about three years before her death. The legacies referred to in paragraph 3 of the will were paid, but there was no division of any part of the residuary estate prior to the death of the widow. Two children of the brothers and sisters were born after the testator's death and before the death of the widow, namely, Annie Martell, born 18th December, 1897, and Frederick Martell, born 20th January, 1900.

The will gives to the wife the household goods and furniture absolutely, and also directs that she shall have the privilege to occupy and remain on the farm during her lifetime, and be entitled to all the income that may be derived therefrom, and should she at any time "quit and surrender the homestead to the executors," it provides that they shall sell the same, and it directs that $1,500 realized from such sale may remain on mortgage or be invested, and the annual interest paid to the testator's wife during her life, and these bequests are given in lieu of dower. He also gives to his two adopted children $800 when they reach the age of 24 years respectively. Then follows the fourth clause above quoted.

Counsel for all parties agree that the persons entitled to share were to be ascertained at the death of the testator; Mr. Haight contending that they took per capita, Mr. Clement per stirpes. Mr. Haight contended further that the children of the deceased children took nothing, but that upon the death it passed to the personal representative. Mr. Clement contended that the grandchildren were entitled to take under the will.

In answer to the first question; from the wording of clause 4 I agree with the view expressed by counsel for all parties, that the persons entitled to share in the distribution under this paragraph are those who answered the description in that paragraph at the death of the testator. The will speaks in the present tense, and directs that after the dower for his wife and the above legacies are provided for, "all balances of money remaining in the hands of my executors or that may from time to time come into their hands belonging to my estate shall be, and also the money invested for my wife's dower after her decease, be divided equally, share and share alike among all my brothers and sisters living,

and also to the children of those who have died when they attain the age of twenty-one years." I think that refers to the brothers and sisters living at the time the will comes into operation, that is, at the testator's death; and that, there being no other objects to provide for when the legacies are paid and the dower of the wife arranged, the intention was that any moneys, if any, then in hand, and as it came to hand, might be divided from time to time, and after the wife's death "also the money invested for my wife's dower," should be divided. There is nothing, in my opinion, in the clause indicating that all of the moneys coming into the hands of the executors over and above the dower and the payment of the legacies, must be retained until the wife's death, but the contrary appears from the context. The closing words of the clause, "when they attain the age of twenty-one years," have relation to the time when the payment can be made to the children of the deceased brothers and sisters, but the vesting takes place at the time of the testator's death. In other words, the gift to the children of the deceased brothers and sisters was not contingent upon their attaining the age of twenty-one years. There was an immediate vesting upon the testator's death, but the date of payment was deferred.

The second question presents more difficulty—whether the parties entitled and which of them take per stirpes or per capita. The will in this case somewhat resembles the will in *Wright* v. *Bell*, 18 A. R. 25. There a testator who died in 1840, by his will, made in that year, devised all his property to certain persons as executors and trustees upon trust for the maintenance and support of his wife and unmarried daughters as long as they should continue unmarried and remain with their mother, and then directed that:—

"When my beloved wife shall have departed this life, I direct and require my trustees and executors to convert the whole of my estate into money to the best advantage by sale thereof, and to divide the same equally among those of my said sons and daughters, who may be *then* living, and the children of my said sons and daughters who may have departed this life previous thereto."

The Court of Appeal held, reversing the judgment of Ferguson, J., that the division must be per stirpes and not per capita. Hagarty, C.J., observed that:—

"I cannot conceive it possible that a testator equally dividing his property in the happening of a named event between his (say) four children, could contemplate or mean that if one should die, leaving (say) twelve children, the property should then be equally divided between fifteen persons, instead of four. He might, of course, use language causing such a result; but if so, it should be plain beyond doubt. I do not think we are driven to construe the language actually used as necessarily causing such a distribution."

Burton, J.A. (p. 48), took the same view. After stating that it was clear upon the authorities that the children of the deceased parent took a vested interest at the time of the parent's death; that he thought that the testator meant equal benefit *to each family;* and that the fund should be divided into as many portions as there were sons or daughters living at the period of distribution or who died leaving children; and that the children should take their parents' share, he says:—

"It would seem to be a most improbable construction, and one it is difficult to believe the testator ever intended to say that a son or daughter who survived, having a large family of children, and who *prima facie* would appear to be entitled to say a one-sixth share, should have that share seriously diminished by reason of the remaining brothers and sisters having died previously, each leaving a very numerous family. It could scarcely have been intended to place the children of the deceased son or daughter in a higher or more favourable position than their parents, and that too at the expense of the surviving sons and daughters who were the immediate objects of the testator's bounty." And he did not think that *Martin* v. *Holgate,* L. R. 1 H. L. 175, at all conflicted with this view. He adds:

"As I understand that case, it merely decides that although the bequest there to the nephews and nieces was contingent upon their surviving the tenant for life, that to their children was not so, but was vested and immediate upon the death of their parents."

The judgments of Osler, J.A., and Maclennan, J.A., were to the same effect.

This decision was reversed by the Supreme Court (*sub nom Houghton* v. *Bell,* 23 S. C. R. 498), Ritchie, C.J., dissenting, which held that the distribution of the estate should be per capita and not per stirpes. Strong, J., was of the view that the gift was to the testator's sons and daughters who should survive the

period of distribution, that period being the death of his widow, or of the unmarried daughter, in case she survived the widow; and he was further of the view that the gift to the sons and daughters was contingent until that event, the death of the last survivor of the life tenants, when the estate became vested in such sons and daughters as then survived. He then deals with the question of the vesting of the estate.

It will be seen that the wording of one will is quite different from that of the other. In *Houghton* v. *Bell,* it was the whole of the estate which was to be converted after the death of the wife, and it is to be divided equally among the sons and daughters who may be *then* living, which, of course, eliminated any who may have died prior to the division. The fact that no part of the estate was divisible until this period has an important bearing, and was, in the opinion of Patterson, J., in this case the turning point of the decision. I quote from his judgment on p. 511:—

"Several of the most instructive of the recent decisions are those of Lord Justice Kay when a Judge of the Chancery Division, such as *Lord* v. *Hayward,* 35 Ch. D. 558, and *Re Hutchinson's Trusts,* 21 Ch. D. 811. They are not so directly upon the point in discussion as to call for citation at present, but I find in the report of the argument of that learned Judge when at the bar, or of Lord Macnaughten who was with him, in *Swabey* v. *Goldie,* 1 Ch. D. 380, the following passage which I may adopt as apposite and as, in my opinion, borne out by the cases he cites: 'The principle of the cases is that where the fund is to be kept together and divided at one period there is no reason for inferring distribution per stirpes; but if it is divisible at different times then the distribution per stirpes is to be performed: Hawkins on Construction of Wills, p. 114; *Willes* v. *Douglas,* 10 Beav. 47; *Arrow* v. *Mellish,* 1 DeG. & S. 355; *Waldron* v. *Boulter,* 22 Beav. 284: *Turner* v. *Whittaker,* 23 Beav. 196; *Wills* v. *Wills,* L. R. 20 Eq. 342; Jarman on Wills, 3rd ed., vol. 2, pp. 181-183.'" (6th ed., vol. 2, pp. 1712-1713).

In Jarman on Wills, 6th ed., vol. 2, p. 1711, the learned author says:—

"The general rule is thus stated by Mr. Jarman: 'Where a gift is to the children of several persons, whether it be to the children of A. and B., or to the children of A. and the children of B., they take per capita, not per stirpes.' So if the gift is to A.

and the children of B. Thus, in *Kekewich* v. *Barker,* 88 L. T. 130, the gift was to G. B., M. B., and the children now living of R. H., who shall attain twenty-one, etc., and if more than one in equal shares; there were four children of R. H., who had all attained twenty-one: it was held that the fund was divisible in equal sixths between G. B., M. B., and the four children of R. H.

"'The same rule applies, where a devise or bequest is made to a person described as standing in a certain relation to the testator, and the children of another person described as standing in the same relation, as to "my brother A. and the children of my brother B.;" in which case A. takes only a share equal to that of one of the children of B., though it may be conjectured that the testator had a distribution according to the statute in his view. And, of course, it is immaterial that the objects of gift are the testator's own children and grandchildren; as where (*Williams* v. *Yates,* 1 C. P. Coop. 177), a legacy was bequeathed "equally between my son David and the children of my son Robert."' So if the gift be to A. and B. and their children, or to a class and their children, etc."

"'But this mode of construction,' as Mr. Jarman remarks, 'will yield to a very faint glimpse of a different intention in the context. Thus the mere fact that the annual income, until the distribution of the capital, is applicable per stirpes, has been held to constitute a sufficient ground for presuming that a like principle was to govern the gift of the capital.' *Brett* v. *Horton,* 4 Beav. 239; *Shand* v. *Kidd,* 19 Beav. 310." *Crane* v. *Odell.* 1 Ba. & Be. 449, 3 Dow. 61; *Overton* v. *Bannister,* 4 Beav. 205.

Brett v. *Horton, supra,* was followed by Stirling, J., in *Re Stone,* [1895] 2 Ch. 196, but his decision was reversed by the Court of Appeal. There a testator gave real and personal estate to his wife for life and directed that after her death the income should be equally divided between his brothers and sisters therein named:—

"At the death of either of my before named brothers or sisters, their interest herein to be equally divided amongst their children, and after the decease of all I desire the whole of my property to be sold, moneys called in, etc., and to be equally divided between the children of the aforesaid, share and share alike."

The Judges in appeal took the view that the obvious meaning of the words is that the division is to be per capita, and the

language is not open to ambiguity. Lindley, L. J., said: "I cannot see how he could more clearly have expressed a division of the capital per capita without going on to use the expression 'per capita,' which would have been surplusage. I do not enter into an examination of the cases: when I see an intention clearly expressed in a will, and find no rule of law opposed to giving effect to it, I disregard previous cases."

Kay, L.J., said the meaning was unmistakably clear: "'I desire the whole of my property to be sold, moneys called in, etc., etc., and to be equally divided between the children of the aforesaid' (*i.e.*, of my brothers and sisters) 'share and share alike.' . . . Until the brothers and sisters are all dead there is a division of the income per stirpes. It does not at all follow from that that the testator did not intend a division of capital per capita. . . . We ought to abide by the language of a testator, and not alter it on conjecture. Stirling, J., seems to have felt himself bound by the decisions; but I am against construing one will by another where the language of the two is not identical."

I can find no case where the language of the will is identical with that contained in the clause referred to.

A very constructive case is that of *Capes* v. *Dalton*, 86 L. T. R. 129, reversed in the House of Lords (*sub nom Kekewich* v. *Barker*), 88 L. T. R. 130. There a testator by his will bequeathed his residuary personal estate to trustees upon trust for the benefit of his daughter for life and for her issue, and in the event of the failure of issue "in trust for G. B., his sister M. B., and the children now living of R. H., who being male shall live to attain the age of twenty-one years, or being female shall live to attain that age or marry, and if more than one in equal shares."

The daughter died unmarried. At the date of the death of the testator there were four children of R. H. living, who all attained the age of twenty-one years. Held by the House of Lords, reversing the judgment of the Court below, that the gift was a gift to a class, and that the fund was divisible in equal sixths between G. B., M. B., and the four children of R. H. The case differs in several particulars from the present. I refer to it for the observation made by the Lord Chancellor (Halsbury), who said:—

"For myself I disclaim the intention of laying down any canon of construction here, except that of taking the ordinary

meaning of the English language as applied to the subject-matter."

See Theobald on Wills, 7th ed., Canadian Notes, 300-301; 28 Hals. L. of E., ss. 1426, 1427 and 1429.

The expression in clause 4, "be divided equally, share and share alike among all my brothers and sisters living," shews equality of division among this class. He does not say that it shall be divided equally share and share alike among all my brothers and sisters living and the children of those who have died, but, after stating that it is to be divided share and share alike among his brothers and sisters, he uses the expression "*and also* to the children of those who have died." I take that to indicate and mean that the funds which come to the hands of the executors from time to time should be divided into as many shares as he had brothers and sisters living, and to the children of those that had predeceased testator, taking the portions between them equally per capita. Contemplating, as I think this clause does, the division of the money not required for the dower and legacies from time to time as it came to the hands of the executors and finally the money invested for the dower, after the widow's death, it indicated sufficiently clearly an intention that the beneficiaries were those living at the time of the death, which were brothers and sisters then living or the children of those who had died. There is not here, as in the *Houghton Case,* a period fixed for distribution subsequent to the wife's death, although as a matter of fact no division was made before the wife's death, nor is it limited as there to the sons and daughters who may *then* be living. The language throughout is quite different, and, as is pointed out in some of the cases, it cannot be thought that the testator while contemplating a division of his funds from time to time as they came into the hands of the executors, intended that the persons who would benefit might change from time to time until the final disposition. As pointed out by Patterson, J., in the *Houghton Case*: "If the fund is not to be kept together and divided at one period, there is no reason for inferring division per stirpes, but if it is divisible at different times then the division per stirpes is to be preferred."

Having regard to the facts of the case and the wording in the will, I think there are two classes indicated in clause 4; that is, first, the brothers and sisters living, and, secondly, the children of those who have died. This is indicated by the words "and

also to." The brothers and sisters living are in one class and one relationship to the testator. The children of those who have died are also in the same relationship to the testator.

The result at which I have arrived is that the brother and sister take a one-eighth share each and that the children of the brothers and sisters who have died take the remaining six-eighth shares per capita.

In answer to the third question—do children of deceased children, children of the testator's brothers and sisters (whether such decease took place before or after the death of testator), share with the surviving children of the brothers and sisters—the answer is "no." The property having vested at the date of the testator's death, persons entitled are then to be ascertained, and the property would pass to the personal representatives of such deceased children.

Costs, as usual, out of the estate.

SECOND APPELLATE DIVISION, S. C. O. 19TH SEPTEMBER, 1916.

ALTMAN v. MAJURY.

Trial—New Trial—Action against Police Constable for Forcible Entry and Arrest—Amendment Setting up Defence under Criminal Code, s. 30—Justification and Reasonable Grounds—Refusal of Trial Judge to Allow Amendment—Arrest Without Warrant.

Defence under Cr. Code:—In an action against a police constable, for forcible entry and arrest, he has a right to rely upon the provisions of the Cr. Code as a defence and where the trial Judge refused the defendant leave to amend his pleadings at trial and base his defence upon s. 30 of the Code, a new trial was ordered.

Appeal by the defendant from a judgment of Clute, J., entered on the 28th April, 1916, after the trial before a jury, of an action brought against a police constable to recover $3,000 damages for alleged forcible entry and trespass upon the plaintiff's premises, for assault, arrest and slander.

At the trial certain questions were submitted to the jury and their answers were as follows:—

(1) Did the defendant enter into the house of the plaintiff at 70 Beverley street, in Toronto, on the 23rd day of October, 1915, by force? A. Yes.

(2) Did the defendant arrest the plaintiff on the occasion in question? A. Yes.

(3) Did the defendant assault the plaintiff on the occasion in question? A. No answer.

(4) Was the plaintiff keeping a common bawdy house on the occasion in question, when the defendant entered the house of the plaintiff? A. No.

(5) At what sum do you assess the damages? A. $1,500.

CLUTE, J., on these findings of the jury, entered judgment for the plaintiff for $1,500 and costs.

Defendant appealed to the Appellate Division of the Supreme Court of Ontario and moved for a new trial. The appeal was heard by Meredith, C.J.C.P., Magee, J.A., Hodgins, J.A., and Lennox, J., on the 19th September, 1916.

H. H. Dewart, K.C., for the defendant, contended that a new trial should be granted on the ground that an amendment to the statement of defence, which the defendant desired to make at the trial, was wrongfully refused by the trial Judge. The proposed amendment was to plead that the defendant was a police constable, and had reasonable and probable grounds for his act.

Section 30 of the Criminal Code provides that, "Every peace officer who, on reasonable and probable grounds, believes that an offence for which the offender may be arrested without warrant has been committed, whether it has been committed or not, and who, on reasonable and probable grounds, believes that any person has committed that offence, is justified in arresting such person without warrant, whether such person is guilty or not."

It was contended that under this section the defendant was entitled to set out that he had reasonable and probable grounds for believing that the plaintiff was keeping a common bawdy house.

E. G. Morris and *G. R. Roach,* for the plaintiff, contended that even though the defendant had reasonable and probable grounds for believing that the plaintiff was keeping a common bawdy house, a defence could not be maintained under s. 30 of the Criminal Code, because that section applied only to cases where the offender can be arrested without a warrant, and the offence of keeping a common bawdy house is one for which a warrant is necessary, unless the person who keeps it is found keeping, or has kept, and neither of these circumstances existed in this case.

Their Lordships' judgment was delivered by

MEREDITH, C.J.C.P. (v.v.).—The trial was conducted in a manner which is not quite satisfactory. The acts complained of by the plaintiff were the acts of the defendant, a police constable; and he desired to set up the defence that all he did was done in the belief, on reasonable and probable grounds, that the plaintiff had committed an offence against the Criminal Code, for which she might be arrested without a warrant; and, if that were so, he may have been justified in making the arrest, whether the offence had been committed or not. But such a defence was not permitted to be relied on.

There may have been some misunderstanding, or counsel for the defence may not have stated their point clearly; but that was not a sufficient reason for depriving the defendant of any defence he desired to make based upon s. 30 of the Criminal Code.

In all cases, the real matters in question between the parties should be determined, and that was not done. The defendant should have been allowed to rely upon the provisions of the Code; and leave to amend his statement of defence should, if necessary, have been given.

The application for a new trial was based, in part, on the discovery of new evidence; and, while it might not have been granted for that alone, yet it would be satisfactory to have a fuller and better trial in that respect.

The judgment and verdict should be set aside, and there should be a new trial, with leave to both parties to amend their pleadings. All costs to be costs in the action.

New trial ordered.

BOYD, C. (TRIAL.) 5TH OCTOBER, 1916.

WEESE v. WEESE.

Banks and Banking—Joint Account—Money Deposited not Subject to Disposition by Will.

Joint account in bank:—It is immaterial as to the source of money before it was deposited with a bank in a joint account, and after it is so deposited it is not subject to being disposed of by the will of either party, and the surviving joint owner is entitled to the whole unaffected by any testamentary disposition which the deceased joint owner may have made.

Action by a son and a grandson for a declaration that certain moneys deposited in the Napanee branch of the Dominion Bank were part of the estate of the late David Weese, and governed by the disposition thereof by his last will and testament.

E. Gus Porter, K.C. (Belleville), for the plaintiff.

J. L. Whiting, K.C., and *T. B. German* (Napanee), for the Dominion Bank.

U. M. Wilson (Napanee), for the defendant widow.

BOYD, C.—The controlling facts as given in evidence are these: the husband deceased was a farmer and had deposited from time to time his savings in the Dominion Bank for a number of years till they had reached the sum of $1,913 in 1912. The account was in the savings branch and stood in his own name under the No. 13022 in his pass book. This number is the means of identification of the owner, whose name does not appear on it or in it. In June of that year he was minded to change the account and to place the aggregate in the joint names of himself and his wife the defendant. This he did by going to the bank and giving directions which are demonstrated by the course of dealing between him and the bank. He signed a receipt for the whole amount in his individual account, and the bank transferred that very sum to a new account opened in the names of himself and his wife jointly under the new No. 14695, and for which the usual pass book so numbered was given to the husband and by him taken home and kept at times by himself and at other times by his wife, but always in such a way as to be open and accessible to each of them. The evidence shews

very clearly that he acted on his own motion and made this voluntary bestowment of the money with the intent to benefit his wife and bring her in as joint owner. It is enough to refer to the document which was furnished by and left with the bank. It is a printed card in these terms:—

"To the Dominion Bank Savings Department.

"All moneys deposited and that may be deposited by us and each of us to the credit of this account are our joint property, but they may be withdrawn by cheques made by either of us or the survivor of us." This is signed by husband and wife and the date stamped upon it by the bank in June 21, 1912.

On the 4th June, 1912, the husband signed a receipt to the Savings Department of having received thereout the sum of $1,913. It is earmarked as being account No. 13022.

This receipt of the money, its deposit to the new account and the card of directions and instructions given to the bank on the 21st June, 1912, form parts of one transaction. The effect of it was to lodge the money to the joint account of husband and wife and to create a joint-tenancy or ownership therein which at common law carried its own legal implications and those concordant with the contents of the card.

Thenceforth the money was held to the joint account and for the joint usufruct of the two co-owners, to which kind of ownership the law attaches the right of survivorship to the one who lives as to all that remains at the death of the one who dies.

It is immaterial as to the source of the money before its being deposited to the joint account, and being so deposited it is not subject to being disposed of by the will of either party. As put by Williams on Personal Property, p. 451, "the surviving joint owner will be entitled to the whole, unaffected by any disposition which the deceased joint-owner may have made by his will, unless the joint tenancy should have been previously severed in the lifetime of both the parties." (17th ed., 1913). See also *Vance* v. *Vance*, 1 Beav. 605.

The requirements to establish a gift *inter vivos* or a gift *donatus mortis* are distinct from those which go to create a voluntary bestowment in joint tenancy. In that case the four unities are looked for and they co-exist in this case: viz., both have one and the same interest in the deposit, with unity of title arising at one and the same time and unity of possession both being

seized *per mie et per tout*—each has an undivided moiety of the whole.

In essentials the case is not distinguishable from *Re Ryan* (1900), 32 O. R. 224, and that case has been recognized and followed as well decided in many later decisions of which the last is *Everly* v. *Dunkley*, 23 O. W. R. 415, 27 O. L. R. p. 414.

The action is dismissed with costs from the time of filing the defence of each defendant.

On the counterclaim the parties made an adjustment by which, instead of administration, the widow commutes all personal rights given by the will as to fuel and provisions, use and keep of hens and cows and use of horse and conveyance, to a block payment of $1,500 To raise this amount by mortgage on the land I give sanction, as it is in the interests of the infant, who takes the fee.

SECOND APPELLATE DIVISION, S.C.O. 6TH OCTOBER, 1916.

HARVEY TOWNSHIP v. GALVIN.

Way — Highway — Question as to Width — Dedication — Statute Labour—Repaired by Municipality for 40 Years—Neglect of Municipality to Register By-law Acquiring—Costs.

Width 20 or 66 feet?—In an action to determine whether a highway was 66 or only 20 feet in width, the evidence shewed that the owner of land adjacent to the highway had notice that the highway was a public highway, that he had done statute labour on it and had built a fence on a 66-foot line along the side thereof, *held*, that he was estopped from denying that it was a 66-foot highway, and he could not take advantage of the neglect of the municipality to register the by-law acquiring the land for the highway.

Invitation to litigation: — Where a municipality practically invited litigation by disregard of the plain words of the statute regarding the registration of a by-law, they were deprived of costs of a successful action.

Appeal by the plaintiff from a judgment of the County Court of Peterborough County of 20th April, 1916, on the claim of the plaintiff, and of 20th May, 1916, on the counterclaim of the defendant.

The appeal was heard by Meredith, C.J.C.P., Magee, J.A., Hodgins, J.A., and Clute, J.

E. Douglas Armour, K.C. (Toronto), for the plaintiff, appellant.

D. O'Connell (Peterborough), for the defendant, respondent.

Their Lordships' judgment was delivered by

MEREDITH, C.J.C.P.—It may be that the learned County Court Judge was right in considering that the plaintiffs' claim could not be supported upon the by-law in question alone. When such a question needs to be considered it should be borne in mind that the legislation respecting the validity of such a by-law was not passed for the purposes of the registry law, and was not enacted in the Registry Act, only; it was contained also in the Municipal Act, and was passed to control generally the compulsory power of municipalities in acquiring land for highways: see 31 Vic. c. 20, s. 63 (O.); 36 Vic. c. 17, s. 6 (O.); ib. c. 48, s. 445, and *Rooker* v. *Hoofstetter*, 24 S. C. R. 41. But it does not seem to me to be needful to consider that question for the purpose of determining the rights of the parties involved in this action; because it does not seem to me that the substantial question involved in it—that is, the question whether the highway which is the subject matter of the action is a way sixty-six or only twenty feet in width—can be easily determined on other grounds; and upon the defendant's testimony alone, in connection with the indisputable circumstances of the case.

Admittedly the plaintiffs purchased from the defendant's immediate predecessor in title, the land in question which was needed for a highway sixty-six feet in width, and at once dedicated it for that purpose, and for that purpose it has ever since been used, as the needs of the traffic over it required, until the defendant recently moved his fence in upon it, and so brought about this litigation.

The defendant admits the existence of the highway; he could not consistently with his use and recognition of it, including the doing of statute-labour upon it, do otherwise; but the position he takes, and has, for a few years past, taken, is: that it is a highway of twenty feet in width only, and so he moved his fence in upon it, from about the sixty-six foot line, to about the twenty foot line,

though part of the fence had been in the former position from before the time of his purchasing his land, in 1884, and had been maintained, repaired and added to by him, until it was moved in, as I have mentioned, not long before the commencement of this action.

The defendant's contention is that he knew that there was an old trail where the road now is, and that he had no notice, when he bought the land, that the way over it extended beyond the width of the trail that had been commonly used, which he says was just wide enough for two teams to pass each other upon it.

But he admits that he knew there was much more than a mere trail over his land; he admits, and by his own acts is obliged to admit, that he knew there was a highway under the control of the municipal council, a highway upon which statute labour was commonly done, and done by him as well as others; a highway which the municipality was bound by law to keep in repair and had all along, for forty years, kept in repair; a highway the freehold of which was vested in the Crown or the municipality; and a highway of that character which is generally sixty-six feet in width: see 36 Vic. c. 48, s. 423 (O.) And, as I have said, he bought with a fence built just as it would have been if the road were sixty-six feet wide and has ever since maintained it, and has added to it a fence extending from the adjoining owner's like fence, all along this road to a marsh where a fence was not needed, a distance of about 77 rods, all of which, but from 15 to 20 rods, was built by himself. The only highway ever there was that purchased by the plaintiffs and laid out, dedicated and used and repaired as I have said, and therefore the only highway of which he could have had notice or have done his statute labour upon; and a highway said to be one of the leading roads of the township.

In these circumstances, how can the defendant reasonably contend that the highway is only one of the unusual width of merely twenty feet? I have no hesitation in finding, upon all the facts of the case, that he bought with notice of the existence of a highway, dedicated to the public by the municipality, over the land purchased by it as before mentioned, for the purposes of such a highway, that is, a highway of the common width of sixty-six feet. How otherwise can his conduct ever since be accounted for—his conduct until recently, when, discovering the defect in the registration of the by-law, he hoped to be able to take advantage of it;

though that would be really no substantial gain to him but only a very substantial loss and inconvenience to the public.

The learned County Court Judge did not deal with this aspect of the case. In my opinion he should have done so, and, in so doing, have reached a conclusion the opposite of that to which he has given effect in dismissing the plaintiffs' action. His finding upon the question of registration in no sense prevented him from dealing with any other aspect of the case; nor indeed from re-opening that question at any time before formal judgment was entered upon it.

The appeal must be allowed, and judgment entered in favour of the plaintiff, enjoining the defendant from encroaching upon the highway in question, sixty-six feet in width.

The plaintiffs should have the costs of this appeal, but there should be no order as to costs of the action; such disregard of the plain words of the statute regarding the registration of the by-law as the plaintiffs were guilty of should be discouraged; it was something like an invitation to litigation, to some men in their 76 years, as the defendant is, apparently.

Magee, and Hodgins, JJ.A. and Clute, J.—We agree.

Appeal allowed.

SUPREME COURT OF CANADA. 10TH OCTOBER, 1916.

CAMPBELL v. DOUGLAS.

ON APPEAL FROM SUPREME COURT OF ONTARIO (APPELLATE DIVISION.)

Deed — Assumption of Encumbrances as Part Consideration — Conveyance not Made to Actual Purchaser — Not Excepted by Grantee who Took as Security Only — Liability to Indemnify Grantor against Encumbrances — Parol Evidence Admissible to Contract and Explain Deed.

Claim against Grantee's representatives:—Where a Grantee does not execute a conveyance, his personal representatives cannot, at common law, be held liable for breach of any of the covenants contained in the conveyance and any relief to which the grantor may be entitled must be founded upon equity.

Grantee's liability re encumbrances:—Where a mortgagor or owner of an equity of redemption, transfers his equity, as security for advances, to one person and then exchanges his equity to another person for another equity, the person holding the title simply releasing his claim in consideration of receiving a transfer of the other property to hold in lieu of the security surrendered, and where he does not execute the conveyance to him, he cannot be held to indemnify the grantor against the mortgages on the property transferred to him, as security, notwithstanding a recital in the description that "the assumption of mortgages upon the property conveyed is part of the consideration" for the transfer, his real position being that of a mortgagee and not a purchaser.

Parol evidence to contradict deed:—Notwithstanding that a conveyance purports to be made "in consideration of an exchange of lands and one dollar," parol evidence is admissible to shew that no exchange of lands were actually made and to shew what the real transaction actually was.

Appeal by the plaintiff from a judgment of the Appellate Division of the Supreme Court of Ontario, 34 O. L. R. 580 which reversed the judgment of Lennox, J., at trial, *ibid*

One Power conveyed certain equities of redemption to the late C. A. Douglas as security for advances. Later Power exchanged one of these equities to the plaintiff for another equity of redemption. Douglas conveyed to the plaintiff and the plaintiff conveyed the property in question to Douglas.

The conveyance from the plaintiff to Douglas purported to be made in consideration of an exchange of lands and one dollar and there was a recital in the description to the effect that the assumption of mortgages upon the property conveyed was part of the consideration for the transfer. Douglas never executed the conveyance to him and he simply held it as security in lieu of the equity which he had released for Power.

Power having made default in paying the mortgages on the property so received and held by Douglas, the plaintiff was called upon to pay the same under his convenant contained in the mortgages. He thereupon brought this action against the personal representatives of the late C. A. Douglas to recover $4,911.74 and interest as damages for the breach by Douglas of an alleged convenant or obligation to pay off and discharge the said mortgages.

LENNOX, J., (at trial) gave plaintiff judgment, but the Appellate Division of the Supreme Court of Ontario, 34 O. L. R. 580, reversed that judgment and dismissed the action. Plaintiff thereupon appealed to the Supreme Court of Canada.

The appeal was heard by Fitzpatrick, C. J., Davies, Idington, Anglin and Brodeur, J J., on the 9th January, 1916.

J. R. Osborne, for the plaintiff, appellant.

W. D. Hogg, K.C., for the defendants, respondents.

THE CHIEF JUSTICE—I am of opinion that this appeal should be dismissed.

In stating the nature of the claim I cannot do better than quote the words of the Master of the Rolls in the comparatively recent case of *Mills* v. *United Counties Bank, Limited*, [1912] 1 Ch. 231; 81 L. J. Ch. 213. "The claim is based on this ground. It is said that according to the settled law of the Court a purchaser of an equity of redemption is bound under an implied obligation or, as it is sometimes put, an obligation of conscience, to indemnify the vendor against the liability on the mortgage debt; and in an ordinary case, that is, I think, obviously according to justice and common sense. If a property is worth £10,000 and is subject to a mortgage of £5,000 and the purchaser only pays the vendor £5,000 and gets the property, it would be almost shocking to say in that case the vendor would be liable on the convenant to pay the full sum of £5,000 to the first mortgagee and that the purchaser was under no obligation to indemnify him."

Now I doubt whether the proposition is of so general and qualified a character as is contended for. It is to be noticed that in the example given by the Master of the Rolls he is speaking of a case where the property in the hands of the purchaser is sufficient to answer the mortgage debt. The same assumption is made in other cases where the doctrine has been discussed. But if we remember that, as the Courts hold, the

obligation is one of conscience alone, can it be said that the obligation holds equally good where the pledge has proved worthless or indeed to be worth no more than the purchaser paid.

Again Lord Justice Fletcher Moulton in the case above referred to, speaking of the doctrine of *Waring* v. *Ward*, 7 Ves-332, that there is an implied covenant says:—

"It relates, I think, to every case where you can reasonable imply that it was the intention of the parties that that should be done, but I doubt whether it applies to any other case." Now can we reasonably imply that it was the intention of the respondent who was not in reality the purchaser to indemnify the appellant against the mortgages?

This perhaps brings us to the point of the case on which the judgment appealed from proceeds, viz., that this is not a simple case as between the appellant and respondent of the relations of vendor and purchaser. I agree with the Court that the circumstances and nature of the transaction are such as to rebut the implication of an unqualified personal liability on the part of the respondent.

The Courts are not in my opinion called upon in such cases to inquire too particularly into transactions often of a complicated nature and to consider whether they establish a case in which the expressed agreements between the parties ought to be supplemented by implied ones.

It is, of course, always open to a vendor to secure himself properly on the sale of the property and though there may be cases in which it is so clearly a matter of conscience for the purchaser to indemnify him that the Court will imply a covenant where none was expressed, yet I do not think such implication of liability is to be lightly made.

The transactions out of which the claim arises, seem to have been of the usual character of speculation in inflated values during a land boom. In these there are purchases, mortgages, exchanges, re-sales, shuffling of every description, until the speculation collapses when disputes arise over the damages which the Courts are called on to unravel. Whilst the parties are entitled to the protection of any legal rights they may have, these are not cases in which the law need be strained for their relief.

DAVIES, J.—I am of opinion that this appeal should be dismissed for the reasons given by Mr. Justice Hodgins J.A., speaking for the majority of the Appellate Court of the Supreme of Ontario, in which reasons I concur.

IDINGTON, J.—The appellant conveyed certain lands to the late C. A. Douglas and claims that he is entitled to recover from his grantee's representatives, now respondents, the amount of certain mortgages which existed upon the property conveyed at the time when the grant was made, because the conveyances described the property as subject to these mortgages, and then added "the assumption of which mortgages is part of the consideration herein."

The grantee never executed the conveyance and therefore his representatives cannot be held liable at common law.

The definition of a covenant in *Comyn's Digest*, A. 2 Vol. 3, p. 263, deals with what may amount to a covenant on the assumption that the covenantor had executed the deed.

This is not the deed of an alleged covenantor. Any relief, therefore, that the appellant, whose deed it is, can have must rest upon equity.

To understand what that equity may be we find the following in the deed in question :—

> "WITNESSETH that in consideration of an exchange of lands and the sum of One Dollar of Lawful money of Canada, now paid by the said party of the Second part to the said party of the first part, the receipt whereof is hereby by him acknowledged, he the said party of the first part Doth Grant the said party of the Second part in fee simple All and Singular, * * * *."

and then follows the description of the lands and mortgages ending as already stated.

When we try to get a meaning out of this in order to do equity we find there never was any exchange of lands between the grantor and grantee and are told that the transaction referred to was one between one Power and the grantor in this deed.

How can that found any equity as against the grantee?

And when the relation of the parties is further investigated the matter becomes if possible more hopeless for it turns out that all the grantee had to do with the matter was that Power who seems to have been a speculator who had resorted to this grantee for advances on more than one occasion and had in the result transferred to him, obviously as security, a number of

properties upon such terms as if possible, to give their transaction the form of a sale or conditional sale.

It is one of these properties which the grantee was asked to release and sustitute therefor the lands now in question.

To accommodate appellant and Power he assented. Hence this conveyance to him.

At the time when this conveyance was made the time limited for Power to redeem had not expired.

I need not follow the remarkable complications that existed beyond all this, for I am unable to find any equity upon which appellant can rest and establish a claim to recover from a man who never was either a purchaser from him or convenantor bound to him.

Whether appellant might have found other equities of which something could have been made by bringing all the parties, including deceased, before the court, we need not trouble ourselves to consider, for no such claim is made.

On the case made the claim seems to me hopeless.

The contention that we must presume Power would make, or had made default, does not seem to render the appellant's case any better.

The many cases where courts of equity have enforced obligations resting upon a purchaser as against those claiming under him where obviously the prospective or subordinate purchaser (Which shall we call this man?) has claimed to enjoy the property and been held bound in such case to implement the obligations of the purchaser, do not seem to me to furnish as a precedent anything like this case. Here the property evidently was not worth holding on to or asserting any claim to.

The whole of the dealings between Power and deceased Douglas seem to have been in equities and no obligation is shown binding Douglas to Power to assume and pay the mortgages.

I think the appeal should be dismissed with costs.

ANGLIN, J.—Notwithstanding Mr. Osborne's forceful argument in support of the contrary view taken by Magee, J. A., who dissented in the Appellate Division, I agree with the learned judges who formed the majority of that Court, that, read in the light of the circumstances as disclosed by the evidence, in my opinion properly received, the recital in the description of

the property in the deed from Campbell to Douglas, that the assumption of mortgage upon the property conveyed was part of the consideration for the transfer, does not amount to a covenant by the grantee to indemnify the grantor against such mortgages. That consideration is stated elsewhere in the deed to be "an exchange of lands and the sum of $1.00." The portion of it of which the assumption of the mortgages formed part, i.e., the exchange of lands, was made between Campbell and Power. Douglas was not a party to it. He took the conveyance of the property given in exchange by Campbell merely as Power's nominee and not as a purchaser, or beneficial owner, but as security and as a mortgagee. As is pointed out by Hodgins, J. A., *Small* v. *Thompson*, 28 S. C. R. 217, cited by the learned trial Judge, was a clear case of express covenant. Having "regard to all the circumstances of the case and to all the relations subsisting between the parties" as we must, it is, I think, clear that there never was any intention of the parties that Douglas should assume liability to indemnify Campbell. No reasonable implication of such an intention can arise. In its absence the essential basis of the equitable obligation alternatively relied on by the appellant is lacking. *Mills* v. *United Counties Bank, Limited*, [1912] 1 Ch. 231; 81 L. J. Ch. 213. Resembling it very closely in its facts, the case at the bar seems to me to be not distinguishable in principle from *Walker* v. *Dickson*, 20 A. R. 96, which, I may be permitted to say with respect, was, in my opinion, well decided.

During the argument it occurred to me, that the appellant might invoke the doctrine of estoppel. But on further consideration I am satisfied that two essential elements of an estoppel are not present. The respondent neither uttered any word nor did any act inconsistent with his true position in regard to the property, or which would justify the appellant in assuming that he took the conveyance otherwise than as Power's nominee and for security. The appellant did not change his position to his prejudice in conveyance of the deed being made to Douglas. He still retains any rights against Power which the agreement for exchange gave him.

I would dismiss the appeal with costs.

BRODEUR, J.—I am of opinion that this appeal should be dismissed with costs.

Appeal dismissed.

SUPREME COURT OF CANADA. 10TH OCTOBER, 1916.

GEORGIAN BAY MILLING & POWER CO. v. GENTLES.

ON APPEAL FROM SUPREME COURT OF ONTARIO (APPELLATE DIVISION)

Contract for Sale of Timber Lands — Contravention of Free Grants and Homesteads Act, R. S. O. (1897) c. 29, now Part II of Public Lands Act, R. S. O. (1914) c, 28—Illegal Contract—Public Policy—Agent's Fraud and Misrepresentation—Inspection by Purchaser—Pretended Advances on Land—Ratification by Purchaser—Rescision — Restoration to Original Condition—Damages—Time for Assessing—Affidavit.

Agent's fraud:—A vendor is liable for misrepresentations made by his paid agent which induces a purchaser to buy his land.

Court will refuse aid:—No Court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal, if the illegality is duly brought to the notice of the Court, and if the person invoking the aid of the Court is himself implicated in the illegality. It matters not whether the defendant has pleaded the illegality or not. If the evidence adduced by the plaintiff proves the illegality, the Court ought not to assist him.

Inspection by purchaser:—It is a fraud on the purchaser to take him to inspect land which he is about to purchase and shew him only the good part and avoid the worthless part, and then assure him that the land which he has not seen is similar to what he has been shewn, when the purchaser relies on such assurance.

Pretended advance on land:— It is a fraud on the purchaser for the vendor to misrepresent to him that the vendor has loaned a sum of money on the land in question and that he was selling to get his money out.

Not an idle form:—Though the taking of an affidavit is a mere form it is not an idle form.

Public policy:—Where the evidence shewed that plaintiffs and defendants had entered into a contract for the sale of timber lands in contravention of the Free Grants & Homesteads Act, R. S. O. (1897) c. 29, now Part II Public Lands Act, R. S. O. (1914) c. 28, both an action on a promissory note given as part payment and defendants' counterclaim for damages for fraud and misrepresentation as to quantity of timber, were dismissed on the grounds of public policy.

Ratification:—Where a vendor has practiced fraud and misrepresentation on a purchaser of land, the purchaser cannot be held to have ratified the bargain by simply asking the vendor if he would renew a promissory note given as part of the purchase price.

Time for assessing damages:—Where a purchaser seeks damages from a vendor for fraud and misrepresentation in the sale of timber lands, owing to shortage of timber, the damages should be estimated according to the value of the timber on the land at the time of the sale, not according to its value at the time of the trial.

Restoration to original condition: —The proposition laid down in *Clarke* v. *Dickson* (1858) E. B. & E. 148 that "a party can never repudiate a contract after, by his own act, it has become out of his power to restore the parties to their original condition," has no application to a contract which is rescinded by the Court for fraud and misrepresentation by a vendor and no matter how difficult it may be for him to get restored to the position in which he was, by reason of any act of his own promoted in pursuit of his fraudulent purpose, he must abide by the legal consequences following therefrom.

Appeal by the defendants from a judgment of an Appellate Division of the Supreme Court of Ontario, 9 O. W. N. 382, which reversed the judgment of Clute, J., at trial, 8 O. W. N. 618.

This action was brought to recover $900, on a promissory note, dated 8th April, 1913, payable 12 months after date to the plaintiff, Charles A. Gentles, and signed by the defendant company and the defendant Sparling. The defendants set up, by way of defence, the allegation that the promissory note sued on was part of transaction for the purchase of land and was obtained by fraud and they counterclaimed for rescision of the contract, or in the alternative for damages against Charles A. Gentles, Henry E. Hurlburt, and Albert J. Gentles.

CLUTE, J., (22nd July, 1915, 8 O. W. N. 618)—Held that the charge of fraud had been proved, dismissed the plaintiff's action and decreed rescision, assessing the defendants' damages, however, should they eventually be held not entitled to rescision, at $2,725, or, if the note sued on should be delivered up, at $1,825.

THE APPELLATE DIVISION, (20th January, 1916, 9 O. W. N. 382)—Held that the defendants were not entitled to rescision because they could not reinstate the vendors in their original position, nor to damages, because, when they purchased, the timber on the property was actually worth the amount that they agreed to pay for it. It was also their Lordships' opinion that the defendants had not been misled by any party to the action, and that they had ratified the transaction with knowledge of the alleged deficiency in the quantity of timber.

The defendants appealed, from this judgment, to the Supreme Court of Canada. The appeal was heard by Fitzpatrick, C.J., Davies, Idington, Anglin and Brodeur, JJ., on the 12th June, 1916.

W. E. Raney, K. C., for the defendants, appellants.
D. L. McCarthy, K.C., for the respondents.

THE CHIEF JUSTICE, AND DAVIES, J., agreed in allowing the appeal as to the plaintiff Charles A. Gentles' claim and dismissing both his claim and defendants' counterclaim without costs to either parties.

IDINGTON, J.,—This is an action on a promissory note but the question raised herein turns on the counter-claim. John Whalen and a son owned between them five hundred acres in Conger Township and he (John) had sons and sons-in-law put down as homesteading locatees of seven hundred acres of unpatented lands in same township. Roughly speaking, these parcels formed one block of about twelve hundred acres.

John Whalen, who admittedly controlled the whole as if his own, had offered same within a year previous to the transaction now in question for $1300 and failed to get a buyer for the timber at that, and in the fall of 1912 on that offer failing, he offered the entire property for $1300, and that was declined.

It seemed to be admitted in argument that John Whalen was one of those not above procuring homestead locations and under colour thereof stripping the land so located of its timber.

It was only for the timber that might be got off it that he seemed to have tried to tempt purchasers.

The land as such, or rocks and water which represent in great part what passed under the designation of land, inaccessible as it was and inferior in quality, seemed almost worthless.

It was the chance of getting some timber that was the bait held out to the appellants, and this the defendants in the counter-claim, well knew.

These appellants were induced to buy said properties for such a purpose at the price of $4800; the defendant, Hurlburt, as a friend and guide, taking a quarter interest in such purchase.

We are asked to believe that the appellants were induced only by fair means to buy on a basis of from about two and a half to about four times what the owner held his interest in these properties to be worth.

It seems the corporate defendant in the original action, which is one of the plaintiffs in the counterclaim, carried on business as a miller at Meaford and was managed and practically owned by two brothers, named Moore, who were the actual participants on its behalf in this purchase, and Sparling,

the other plaintiff in the counterclaim, had carried on the business of a lumber dealer at the same place.

They were induced by the defendant and the respondent Hurlburt to consider the proposition of the purchase in question made by the respondents (the Gentles), who had lived at Parry Sound for some twelve years, and carried on business as hotel keepers there, about ten or twelve miles distant from the lands in question.

Whalen owed them five hundred dollars for money lent, for which they held his promissory note.

They allege that they had procured an option from Whalen to buy the property at two thousand dollars.

They pretend they knew nothing of the property. Yet they had the audacity to ask, immediately after getting this option, which they were moved to acquire as a means of realizing Whalen's indebtedness, the sum of four thousand eight hundred dollars.

How did they induce these grown up men of business to agree to pay such a price?

They engaged Whalen to accompany them from Parry Sound and shew the property to T. R. Moore, Sparling and Hurlburt on or about the 2nd of April, 1913.

The snow was in such a state as to render tramping through the woods very difficult. Hurlburt fell ill about noon. The others continued the supposed inspecting for some hours longer. They were shewn wooded property, and if the evidence which the learned trial judge accepts be correct, the old trick of shewing only good land or timbered land which the purchasing part, of the party inspecting, supposed they were buying, and avoiding the worthless part of the land, was restored to.

If that was not fraud what can be?

Whalen pretended in his evidence, which the learned trial judge discredits, that all the land was inspected except two lots. Apart from the improbalility of such a statement being true, if we regard the time spent on the inspection, there is the evidence of Albert Gentles at p. 275, 11. 20 to 23 of the case, as follows:—

"Q. Now what lots did you go over that day on the inspection? A. 5 and 6 in the Sixth, and 6 and 7 in the Seventh."

Others who inspected later demonstrate that if this be correct the worthless part of the land never was shewn on that trip.

When they got tired and found it time to return to Parry Sound they were assured by Whalen that what they had not seen was very similar to what they had seen, and Moore and Sparling relied upon his assurance.

They were induced to do so, not only by Whalen's assurance, but by the misrepresentation by Charles Gentles, repeated more than once, that they had advanced on the lands in question $2500 and were selling to get their money out.

I do not know a much better method of assuring a man that the vendor believed in the property he is offering being worth what he asked, than this sort of statement by Charles Gentles.

If he, living and carrying on hotel business within ten or twelve miles of the property, had in fact lent twenty-five hundred dollars upon it as a business transaction, it was highly probably that he had satisfied himself that the property was worth at least 50 per cent. more than he had advanced.

As an indirect statement of what he estimated and thus represented the property to be worth this statement was material and misleading. It was also as a means of putting the proposed buyers off their guard and thus inducing them to accept a perfunctory sort of inspection and the assurance of Whalen, as they did, most fraudulent and misleading as the learned trial judge finds the conduct of respondents to have been.

The Gentles never told the appellants the fact, if a fact, of their alleged option, otherwise a somewhat different view might have been possible of the misrepresentation relative to their alleged interest as mortgagees.

Whalen was their paid agent for the purposes of the inspection of the property and they must therefore be held responsible for his misrepresentations which induced the appellants to buy.

These misrepresentations of Whalen and of the Gentles Brothers, were so material as to entitle the appellants to have the contract rescinded.

In that view it is not necesary to determine whether or not the conduct of Hurlburt was such as the learned trial judge finds it to have been. His conduct, as the only one of the alleged purchasers who had a knowledge of the district and business in hand, and the statutory regulations affecting the rights of Crown locatees relative to timber, was, to say the least, most peculiar.

It was he who signed as if for Sparling an agreement dated 2nd April, 1913, between Sparling and Whalen, whereby the latter agreed to peel and swamp the bark off all the green hemlock timber on the lots in question during the summer of 1913, and to cut and skid and deliver to a saw mill during the winter season of 1913 and 1914 all hemlock and pine timber suitable for logs standing, being or lying on the 12 lots in question.

How he, conversant with the regulations in that behalf, could have honestly entered into such an agreement without one word of warning as to the pine at least on the located and unpatented land, is rather puzzling and suggestive.

The same may be said of Whalen, who so contracted and the two Gentles, who subscribed this misleading document as witnesses.

It is not necessary to determine for the purposes of the relief sought herein, exactly what the purpose of executing such an agreement at that early stage of the negotiations really was.

Suffice is to say that Hurlburt's own conduct and his financial position as well as the production and use of this document are fraught with suspicion.

And the financial dealings of the Gentles and Hurlburt, in relation to the taking of a share by him in purchase, are far from being satisfactorily explained.

It is to be observed that the contract of purchase was with the Gentles Brothers, and if, as I conclude, they are responsible for the misrepresentations of Whalen and of themselves, then no matter how difficult it may be for them to get restored to the position in which they were by reason of any acts of their own or acts prompted by them in pursuit of their fraudulent purpose, they must abide by the legal consequence flowing therefrom.

I see no difficulty, so long as such a plain legal proposition is kept in view, in directing a rescision of the contract.

They professed to be in a position to sell the lands in question to appellants, and took the representative of the corporate appellant and Sparling, the other appellant, along with Hurlburt to their (the Gentles) solicitor and paid him fifty dollars for his services in carrying out the contract of sale and purchase.

Everything done seems to have been, so far as transfers of the property is concerned, done under his directions.

He was also Crown land agent and that seems to have facilitated the rather irregular methods adopted.

The transfers of the patented lots seem to have been completed on the 3rd of April, 1913. The mode of conveyancing adopted by the said solicitor in regard to these unpatented lots, was to procure from the respective locatees thereof transfers to the respective parties who were to become the new locatees, and thereupon to issue a new location ticket to each of the respective parties designated by the purchasers.

It is suggested and seems to have been maintained by the Appellate Division in reversing the trial judgment that thereby there has been created an insuperable difficulty in the way of rescission.

It is necessary in order to apply the principles of law properly to have a correct apprehension of the actual facts bearing upon the point attempted to be made.

The transfers having been got from the respective locatees then holding from the Crown to the respective parties designated by the purchasers, by the solicitor for Gentles Brothers, he drew up affidavits for each of the transferees to make in respect of the lot he was to take.

These affidavits in a proper case of transfer from a locatee to his vendee, honestly intending to observe the homesteading regulations, might be quite proper. But the new locatees in each of these cases now in question, do not seem to me to have fallen within any such class of persons, and as at present advised, I do not see how they came to make such affidavits or were permitted by the solicitor, either in his capacity as such or as Crown land agent to make such affidavits.

Their excuses are ignorance of the import thereof and what they were told by Charles Gentles and understood, from his solicitor, the suggestions he made as to the mode of transacting such like business.

There is also suggested in the factum of appellant the fact that the solicitor had used the expression in one of his letters to Sparling enclosing the affidavits for him to make, "you can safely make the affidavit." I do not think the expression was intended to apply to the whole affidavit but only to a part thereof, relative to which he was offering some explanations.

If these several affidavits had been entirely the work of appellant and without being promoted by Gentles Brothers, or their directions or interference, and thus these transfers had been the sole act of appellants there might have been some force

in the objection taken that they cannot in consequence thereof be restored to their original position.

So far from that being the case the facts are in addition to what I have outlined that each of these affidavits needed something more to be done to make them effective for the purpose of completing the purpose designed by the Gentles Brothers as vendors.

That something more was an affidavit supplementary thereto made by two persons in each case written at the foot thereof and referring to the statements in the affidavits.

The following is a copy of one of those made by the respondents, the Gentles Brothers:—

"We, Albert John Gentles, of the Town of Parry Sound, in the District of Parry Sound; and Charles Allen Gentles, of the Town of Parry Sound in the said District, each for himself make oath and say: That I am well acquainted with Robert C. Jamieson, named in the above affidavit, and that he is the male head of a family and has one child under eighteen years of age (consisting of one son) residing with him, and I further make oath and say that I know lots number 8 and 9 in the 8th concession of the township of Conger referred to above, that I am not aware of any claim to the said lots on the ground of occupation, improvement or otherwise, adverse to that of the applicant, and that the said lots are wholly unoccupied and unimproved (except) improvements which have been assigned by the locatee, John Whalen, Jr., to the said applicant, Robert C. Jamieson.

Sworn before me at Parry Sound this 17th day of April, 1913.
F. R. Powell, A Comm.

A. J. Gentles.
C. A. Gentles."

There were three others of a like kind each made by John Whalen, sr., and C. A. Gentles.

These affidavits furnish a strange commentary on the professed ignorance of the Gentles brothers as to the nature of the properties ten or twelve miles from their door. Is the invigorating air of Parry Sound capable of producing dual mental visions of fact?

It was thus, by the acts of those respondents who now venture to submit to the Court that they have been deprived by the acts of the appellants of the possibility of their being restored to their rights, that the documents were finally made effective.

Even the law as quoted from the judgment in the case of *Clarke* v. *Dickson* (1858), E. B. & E. 148, of Crompton, J., where he says:—"A party can never repudiate a contract after, by his own act, it has become out of his power to restore the parties to their original condition." I respectfully submit cannot maintain the proposition contended for on the foregoing facts. Compare these facts with those in *Clarke* v.

Dickson as summarized at page 324 of Fry and Specific Performance, and its inapplicability to this case, is apparent.

Moreover the quotation cited was contained in a judgment in an action at common law; and in a case turning solely thereon, stands as good law yet. It is not, however, the whole law.

Ever since the Judicature Act came into force the equitable jurisdiction of the Court must in a proper case prevail.

As there seems to exist a misapprehension of the law in that regard I submit the language used by Sir Edward Fry in criticism of said decision as follows:—

> "774. The receipt of dividends before discovery of the fraud was relied upon in the case of *Clarke* v. *Dickson*, as precluding rescission; and there are other authorities to shew that, at Common Law, the reception of any benefit under a contract will preclude its rescission for default of performance by the other party. But it is submitted that no such rule prevails where the rescission is on the ground of fraud, and that where a benefit has been received and is capable of restoration either in kind or by way of compensation, and the defrauded party offers such restoration, he has not lost his right to rescind.
>
> For the return to the illustration of the sheep:—if, before the discovery of the fraud, A has sheared the sheep, it appears reasonable to hold that such charge in the condition of the sheep will not deprive A of his right to rescind, if he offers to restore the sheep and account for the wool.
>
> So, in *Earl Beauchamp* v. *Winn*, the House of Lords *held* that this construction of a warping-drain and the inclosure of a common would not have prevented the rescission of contract for the sale of the land on the ground of mistake; and in *The Lindsay Petroleum Co.* v. *Hurd*, the Privy Council took the same view of the facts that possession had been taken under the contract and a trial well sunken. In that case the Court below had offered an account of the profit of the well, if any, which was not accepted."

The like views were expressed by the learned Chief Justice of Ontario in the case of *Addison* v. *Ottawa Auto and Taxi Co.* 30 O. L. R. 51, in maintaining a judgment of the Chancellor, Sir John Boyd.

The same case came before this court and the appeal was dismissed without assigning further reasons.

The difficulties to be overcome were much greater in the case of *Lindsay Petroleum Co.* v. *Hurd*, L. R. 5 P. C. 221, than anything that appears in this case. And the case of *Erlanger* v. *Sombrero Phosphate Co.*, 3 A. C. 1218, illustrates what a court of equity can do.

Lord Chelmsford's proposition referred to above in the case of *Earl Beauchamp* v. *Winn*, L. R. 6 H. L. 223 at page 232, seems to fit the peculiarities of this case.

The questions raised in argumnet as to Whalen not being a party are all idle in view of the fact that as a contracting party he had nothing to do with the sale. Except as agent of the vendors and making misrepresentations on their behalf we have nothing to do with him.

The difficulties of the vendors I repeat are all of their own making and the consequences of their own improper acts. Had they disclosed that they merely had an option other considerations might have been applicable.

All the vendees have to do is to surrender such title as they got. Indeed an investigation might shew they never got any title and that the whole of these locatees acting under and in obedience to Whalen never had anything to transmit. So long as the parties to the transaction in question are all before the Court as they are and their nominees are ready and willing to transfer whatever, if anything, they have got by reason of the sale, the respondents, (the Gentles brothers) must accept same. Each of these nominees is but a bare trustee bound to obey the directions of the party for whom he holds and that can be enforced, if need be, by the direction of the Court.

And it devolves upon the Gentles brothers, if incompetent to accept a reconveyance of what they sold, to find, if they can, some person qualified and willing so to do. No doubt such persons can be got if the lands are not absolutely worthless. And if they are in truth so, then the gross nature of the fraud becomes the more apparent, but that is no reason for the Court refaining from directing rescission.

Again it is suggested that the appellants come too late to ask relief and only after affirming the contract.

They did nothing after knowledge of the fraud practised upon them unless one of the Moores casually asking respondents (the Gentles brothers) if they would renew, and getting an answer of refusal. They affirmed nothing.

Thereupon Moore on his return home reported what he had by inspection discovered and the solicitor for the appellants at once advised an action to rescind and wrote respondents that a writ would be issued by a day named for rescission unless they saw fit to assent thereto meantime.

The respondents (the Gentles) decided their best policy was to do it to the others first, and sued at once upon the notes, and therefore there was no need for the appellants to do more

than what they have done, set up their demand for rescission by the counter-claim now before us.

Then it was said there was no fraud, because experts, though discredited by the learned trial judge, have figured out how cheaply the property was sold.

I may not be inclined to trust old John Whalen very far, but he assuredly knew more of the real value of the property than anybody else, and he was content after testing its sale ability to take $2000, or indeed perhaps only $1400. I prefer his judgment to that of anybody else even though expert in the use of the mulitplication table. And Hurlburt lost no time after the sale in testing the market the experts of respondents pointed to, but failed long before the war that is made to answer for so much.

I respectfully submit the judgment of the learned trial judge is also entitled to some consideration.

The appeal should be allowed.

Since writing the foregoing it has turned out that the majority of the Court has reached the conclusion, not only that there was fraud inducing the contract sued upon, but also that the parties were *in pari delicto* when entering therein to carry out the illegal purpose of violating the law relative to the cutting the pine timber on land located under the homesteading provisions of the "Free Grants and Homesteads Act" R. S. O. (1897) c. 29, and hence that the Court was bound to refrain from assisting either party.

There is a good deal in the case which might furnish arguable ground for distinguishing this from cases to be relied upon in support of the principle so involved. I should have preferred therefore, to have heard the point argued.

Though invited from the bench by my brother, Sir Louis Davies, in the course of the argument, neither side chose to heed the suggestion and hence cannot complain of the result being reached without argument.

I am too clearly on record, as for example, in the case of *Prevost* v. *Bedard*, 51 S. C. R. 149, and elsewhere in support of the general principle, to feel reluctant to assent to the decision thus reached. I agree, therefore, in the judgment about to be pronounced.

In defence to the argument I, however, allow my prepared opinion to stand as an effective dealing, from my point of view, with the case as presented in argument.

The pleadings failed to raise either point now proceeded

upon or that upon which the Appellate Division in great part proceeded.

The cases of *Scott* v. *Brown* [1892], 2 Q. B. 724, where Lindley, L. J., said:—

"No Court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal, if the illegality is duly brought to the notice of the Court, and if the person invoking the aid of the Court is himself implicated in the illegality. It matters not whether the defendant has pleaded the illegality or whether he has not. If the evidence adduced by the plaintiff proves the illegality the Court ought not to assist him. If authority is wanted for this proposition, it will be found in the well-known judgment of Lord Mansfield in *Holman* v. *Johnston*, Cowp. 343."

and A. L. Smith, L. J., said:—

"Neither the plaintiff nor the defendants would raise the point of the illegality of the transaction at the trial, and my brother, Wright, who tried the case, made some strong comment upon their conduct, but did nothing further in the matter."

and of *Gedge et al.* v. *Royal Exchange Ass.. Corp.*, L. R. [1900] 2 Q. B. 214, and *North Western Salt Co.* v. *Elec. Co.* [1913], 3 K. B. 422, shew that want of a plea makes no difference as regards the duty of the Court in such cases.

The only difficulty is that the case must clearly disclose the illegal purpose in order to entitle the Court to act upon its own initiative.

In this case my doubt is whether all the appellants at the outset had any clear comprehension of what was in law involved in their proposed purchase and whether or not they all had before parting with their money to meet the cash payment presented to them the actual legal facts likely to be involved in carrying out the transaction.

The parties acting, however, can hardly be absolved from the vicious view all too common of looking upon or inducing substitutes to look upon the taking of an affidavit as a mere matter of form.

It is to be hoped they and others will hereafter remember that though taking an affidavit is a matter of form it is not an idle form.

The respondents, if I have correctly presented their relation to the matter evidently were the more blameworthy of the two.

ANGLIN, J.,—The plaintiff, Charles Gentles, sues to recover $900, the amount of a promissory note given by the defendants as part of the purchase price from the plaintiff, and his brother, Albert Gentles, of twelve lots of land in the township

of Conger. Of these lots five were patented to one John Whalen and his son, Thomas, and seven were held under the Free Grants & Homesteads Act, R. S. O. (1897) c. 29, by sons and sons-in-law of John Whalen as locatees. About the time of the sale to the defendants, the Gentles had taken an option on all this property from the Whalens for $2000.

The defendants allege that the sale to them was brought about by fraudulent misrepresentations of the Gentles and of John Whalen acting for them and of the defendant, Hurlburt, acting in collusion with them, as to the Gentles' interest in the property and the character and quantity of the timber upon it. They also aver that Hurlburt fraudulently pretended to become a co-purchaser with them to the extent of a one-quarter interest. On these grounds they defend the action, and by counter-claim seek rescission, or, in the alternative, damages.

The learned trial judge held that the charges of fraud had been proved, dismissed the plaintiff's action and decreed rescission, assessing the defendants' damages, however, should they eventually be held not entitled to rescission, at $2725, or, if the note sued on should be delivered up, at $1825.

On appeal Latchford, J., held that the defendants were not entitled to rescission because they could not re-instate the vendors in their original position; nor to damages, because, when they purchased, the timber on the property was actually worth the amount that they agreed to pay for it. It was also his opinion that they had not been misled by any party to the action, and that they had ratified the transaction with knowledge of the alleged deficiency in the quantity of timber.

Falconbridge, C. J. K. B., Riddell, J., and Kelley, J., "agreed in the result."

While I concur in the view that the remedy of rescission is not open to the defendants because of the position in which the title to the located lots stands, giving to the findings of the learned trial judge, based on his observation of the witnesses, the weight to which they are entitled, I am, with great respect, of the opinion that the charges of fraud are sustained by the evidence, and that on this ground the plaintiff's action must fail. The incident relied on as ratification, as I read the evidence, probably occurred before, not after the defendants had made the second inspection of the lots which disclosed the conditions that led to the repudiation of liability.

On the question of damages, while I agree with Latchford, J., that they should be estimated according to the value

of the wood upon the lands at the time of the purchase, and not according to its value at the time of the trial, I incline to the view that substantial damages were sustained by the defendants, though possibly not to the full extent allowed by the learned trial judge.

As already stated, seven of the lots in question were "located" lots. It is the policy of the Free Grants & Homesteads Act (now Part II. of the Public Lands Act, R. S. O., 1914, c. 28) that such lots shall be held for "actual settlers," (s. 33). Not satisfied with forbidding alienation by free grant for other purposes, (s. 32) the Legislature has enacted that the locatee shall make affidavit that

> "the location is desired for his own benefit and for the purpose of actual settlement and cultivation and not directly or indirectly for the use or benefit of any other person or for the purpose of obtaining possession or disposing of any of the pine trees growing or being on the land or any benefit or advantage therefrom" (s. 36),"

and settlement duties must actually be performed before a patent can be obtained (s. 38). It is the common case of all the parties to this litigation that the substance of the transaction between them was a sale to the appellants of the timber upon the lots, including the pine trees (a deficiency in the quantity of which is made a ground of complaint by them), and that neither the appellants nor their nominees (in whose names some of the locations were taken, not for the benefit of the locatees, but for that of the appellants) had any idea of becoming settlers or of cultivating the land. Yet all the locatees made the affidavits prescribed by the statute, having been informed that they could "safely" do so by the Crown lands agent at Parry Sound, who also acted as solicitor for the Gentles in the transaction. Indeed one of the Gentles made an affidavit in support of the application for the land located in the name of Jamieson, which is characterized by the appellants as equally unveracious. As Mr. Justice Latchford states, "almost every averment in the affidavits is false." With that learned judge I have difficulty in accepting the view that intelligent business men like Messrs. Moore and Sparling resident at Meaford on the Georgian Bay, and themselves engaged in the lumber business, acted innocently in this transaction. The idea that they made the affidavits without reading them or knowing their contents cannot be seriously entertained. Neither can any Court accede to the argument made on their behalf that the making of these affidavits should be regarded as mere matter of form. Ignorance of the provisions

of a public statute, such as the Free Grants and Homesteads Act and of a Governmental policy, so long established and so well known as that in regard to land held for free grant cannot be invoked to uphold a transaction such as that now under consideration, avowedly entered into, as it was, by all parties with the express purpose of contravening explicit prohibitions of that Statute.

While the defendants in one sense perhaps do not base their counterclaim directly upon the illegal contract, in seeking damages for misrepresentation inducing it, they are obliged to make out their case through the medium and by the aid of the illegal transaction to which they were parties. *Fivaz* v. *Nichels*, 2 C. B., 501, 513; *Taylor* v. *Chester*, L. R., 4 Q. B., 309, 314; *Smith* v. *White*, L. R., 1 Eq., 626. They allege a shortage in the quantity of pine trees which they had intended to take and assert that the whole value of the property to them lay in the timber upon it, and they also claim that the lots located in the names of Jamieson and Charles Sparling were so located for their benefit and not for that of the locatees, and for the timber on them, and not for settlement or cultivation. Their right to damages rests upon their inability to accomplish their illegal object. The plaintiffs, on the other hand, are suing upon a part of the consideration obtained by them for the share in the illegal transaction. To both claims alike the illegality is a bar. Although for obvious reasons neither party has invoked it as a defence, since the illegality of the transaction has come to its notice, the Court will refuse its aid and will leave the parties in the position in which their own turpitude has placed them. *Scott* v. *Brown, Doering, McNab & Co.* [1892], 2 Q. B., 724, 728, 734. *Gedge* v. *Royal Exchange Ass. Corp.* [1900], 2 Q.B., 214, 219.

For these reasons I would allow the appeal as to the promissory note and dismiss the plaintiffs' action, and would also dismiss the appeal upon the defendants' counterclaim. We shall probably best mark our unqualified disapproval of this entire transaction and at the same time do substantial justice by withholding costs of this litigation from all the parties to it.

BRODEUR J.—I am of opinion that this appeal should be allowed as to Plaintiff Charles A. Gentles' claim. The action of the latter should be dismissed

As to the counterclaim of the appellants, their appeal should be dismissed. No costs of the litigation throughout to either parties.

RIDDELL, J. (WEEKLY COURT.) 3RD OCTOBER, 1916

HARGRAVE v. HARGRAVE

Husband and Wife—Alimony—Action for—Appearance Entered but no Statement of Defence Filed—Motion for Judgment—Rule 354—Judgment on Motion in Weekly Court.

Interim alimony not asked: — Where no application for interim alimony has been made and judgment is obtained on motion in default of defence, permanent alimony may be granted from the teste of the writ.

Rule 354: — In an action for alimony, where the husband does not file a statement of defence, he is, under Rule 354, deemed to admit all the statements of fact set forth in the statement of claim, and the wife is entitled to judgment for an amount which the facts thus admitted justify.

Sending case to Master: — Where admissions are before a Judge sufficient for him to dispose of an alimony action on motion in Weekly Court he should not send it to the Master.

Action for alimony. The defendant caused an appearance to be entered, but no statement of defence was filed, and on 26th September the pleadings were noted closed.

The plaintiff on 2nd October moved for judgment. The defendant claimed (on affidavit), that he had no property, and that the amount claimed was excessive.

J. Greyson Smith, for the plaintiff.

G. R. Roach, for the defendant.

RIDDELL, J.—Upon the motion I offered the defendant that he might file a defence, and then have a reference as to the amount, upon his paying the costs of this motion: This offer was declined.

Under Rule 354, the defendant notwithstanding what he now says on affidavit, and declining to get rid of the noting of the pleadings as closed, "shall be deemed to admit all the statements of fact set forth in the statement of claim."

The statement of claim sets out facts sufficiently to justify if not compel the Court to grant the plaintiff alimony. The "statements of fact" as to the defendant's means are that he has a cash income of not less than $6,000 a year, that he has a large sum of money on hand, and that he has interests in real estate, etc.

Thus having admissions which are sufficient for me to dispose of the case, I should not send it to the Master. *Soules* v. *Soules*, 3 Gr. 113, at 121.

Under the usual rule the defendant cannot complain if one-third of his income be taken to support his wife and children, or a little more. I shall, therefore, order the defendant to pay alimony fixed at $40 per week from the teste of the writ, and costs of this action. *Hagarty* v. *Hagarty* (Boyd, C.), Holmested & Langton, 902.

Judgment for plaintiff.

RIDDELL, J. (CHAMBERS.) 4TH OCTOBER, 1916.

FORBES v. DAVIDSON.

Affidavit on Production—Contradiction of Sought—Order for Production of Document.

Production should not be ordered:—When what is desired is in effect the contradiction of an affidavit on production, an order for production should not be made.

Appeal by the defendant from an order of the Master-in-Chambers, ordering the defendant to produce the whole diary in which, he swears, only entries produced refer to matters in issue in this action.

T. R. Ferguson, K.C., for the defendant, appellant.
M. L. Gordon, for the plaintiff, respondent.

RIDDELL, J.—In an affidavit on production, there are produced certain entries in a diary—the deponent swearing that he has read every entry carefully and that none of the other entries refer to the matters in issue in this action.

The Master-in-Chambers has ordered him to produce the whole diary for inspection, and he now appeals.

The rules of practice do not now permit a cross-examination on an affidavit on production—whether this is wise or not, I am not here concerned.

What is desired is in effect a contradiction of the affidavit, and should not have been ordered.

The appeal will be allowed. Costs here and below to the present applicant in any event.

Appeal allowed.

MIDDLETON, J. (WEEKLY COURT.) 6TH OCTOBER, 1916.

RE DURNFORD ELK SHOES, LIMITED.

Contract — Lease of Machinery — Cancellation of Lease on Insolvency of Lessee — Payment for Deterioration and to put Machines in Order—Fairness of Conditions—Fraud on Insolvency Laws.

Fraud on insolvency laws:—An agreement for the lease and hire of machinery which provides for the cancellation of the lease upon the insolvency of the lessee and for the payment of sums certain to put the machines in suitable order and condition to lease to another lessee and for deterioration, is not a fraud on insolvency laws and the contract may be enforced in the winding-up of the lessee company.

Fairness of provisions: — The Court should ascertain from the contract itself its force and effects quite irrespective of any consideration of the fairness of its provisions, and so long as it represents the bargain actually made, and no case of fraud of undue influence is made out, it is the duty of the Court to give effect to the contract.

Appeal by the United Shoe Machinery Company from an order of the Local Master of Stratford, made in the winding up of Durnford Elk Shoes, Limited, under the Dominion Winding-up Act, R. S. C. (1906) c. 144. The Master disallowed two items of the appellants' claim against the assets of the insolvent company.

The appeal was heard in Weekly Court at Toronto.

J. Jennings, for the United Shoe Machinery Co., appellants.

G. S. Gibbons, for the liquidator of the insolvent company, respondent.

MIDDLETON, J.—The United Shoe Machinery Company—for convenience called the claimant—manufactures and owns certain machinery made for use in the manufacture of boots and shoes. Some of this machinery is patented. A series of agreements were entered into in April, 1912, between the claimant and the company, which is now in liquidation, by which the company obtained the right to use certain machinery necessary for the equipment of its factory. These agreements are not identical in terms, but, speaking generally, are leases of the machinery; the company agreeing to pay certain royalties, and further agreeing to purchase certain material used in the operation of the machines, from the claimant and from it alone, and further agreeing, upon the happening of certain events—*inter alia*, insolvency—that the agreements might be cancelled

and that the machines should be returned in good condition, reasonable wear and tear excepted, and that in that event, or upon the expiry of the terms of the agreements, there should be paid "such sum as may be necessary to put such machinery in suitable order and condition to lease to another lessee." Upon the expiration or termination of the agreement, in addition to all other sums payable, it is stipulated that there shall be a named sum—$150 in the case of certain machines, less in others—paid "as partial reimbursement to the lessor for deterioration of the leased machinery, expenses in connection with the installation thereof, and instruction of operators." The claims which are disallowed are those in respect of the repairs and in respect of these items for deterioration, etc.

The contracts are not in any way impeached for fraud, nor is it suggested that they do not represent the true bargain between the parties. Much was said before the local Master and by him in his judgment, and before me on the appeal, about the fairness of the provisions found in the contract. With this, it appears to me, the Court has no concern. So long as the contract represents the bargain actually made, and no case is made out of fraud or undue influence, it is, I conceive, the duty of the Court to give effect to the contract; and so long as the language used is unambiguous a departure from its natural meaning is not justified by any consideration of its consequence or of public policy. It is the duty of the Court to ascertain from the contract itself its force and effect, quite irrespective of any consideration of the fairness of its provisions. When this salutary principle is departed from, that which is ordinarily simple becomes almost invariably confusion. I can see no difficulty in the provisions of the contract as they stand.

The claimant owned the machines; the company desired the privilege of using them but did not desire to purchase; the terms under which user was permitted were arranged and must be carried out. These terms, as I understand them, called for the return of the machines in good repair, save ordinary wear and tear. This is conceded. The contract also calls for the payment of such sum as would be necessary to put the leased machinery in suitable order and condition to lease to another lessee. It is said that this is in confict with the provision "except wear and tear" in the clause for return of the machinery. I do not so understand it; for reasonable wear and tear might have taken so much life out of the machine as to render it unsuitable and unfit for the purpose of another lessee. To il-

lustrate; the bearings of a shaft might be so much worn by reasonable wear and tear that new bearings or a new shaft might be necessary before the machine could again be leased. These would have to be paid for. It is said that this is hard upon the company; but the answer is, it was so agreed.

The evidence as to the repairs was not entirely satisfactory, but I think it was sufficient. The amount to be paid is not the cost of actual repair so that the repairs would have to be made before any claim arose, but the sum necessary to make the repair. The claim was in the first place based upon estimate, and later on repairs were actually made and the estimate was found to be substantially correct.

With regard to the second item I also think the Master has erred. The claim is mainly resisted on two grounds. First, it is said that by reason of the fact that the machines were returned in good order and that repairs were made and claimed for, there could not be any deterioration, and that it was not shewn that there was any expense in connection with the installation and the instruction of operators; and secondly, it is said that this sum is in the nature of a penalty and that the Court ought to relieve against it.

Upon the first ground I think it is sufficient answer that the parties, who were probably far better able to judge what was right and fair, agreed to fix this sum. In certain events the sum may be liberal; in other respects it may be entirely inadequate; but it was open to the parties to agree upon a sum as a pre-estimate of the amount. Although a machine may be restored to a condition suitable for leasing to another customer, it does not by any means follow that there has not been depreciation. The moment the machine is installed and used in a factory it becomes a second-hand machine; and even if the machine never left the plaintiff's custody and remained perfectly new, the mere lapse of time would result in depreciation; for, as pointed out by one of the witnesses, all machinery of this type is subject to such change and improvement that from the day of its manufacture it begins to become obsolete.

Nor can this be regarded as a penalty. The sum is payable at the termination of the hiring contract. If the hiring terminates by bankruptcy the amount is payable at an earlier date; but it is always a sum to be paid. There is no unfairness in this stipulation, for it undoubtedly costs much to sell

manufactured goods or to procure leases such as those in question; and the early cessation of the royalty payment deprives the lessor of a portion of the profits expected under the contract if allowed to run to its natural termination.

Some suggestion was made that this stipulation was a fraud upon the bankruptcy laws. This was but faintly argued, and clearly is not brought within the authorities. It is not a larger sum payable in the event of bankruptcy for the purpose of obtaining some advantage over other creditors, but it is a sum which the company undertakes to pay quite irrespective of bankruptcy, the payment being accelerated in the event of bankruptcy.

For these reasons I think the appeal succeeds and should be allowed with costs.

During the argument it was pointed out that there was some slight inaccuracy in the amount claimed. This must be corrected when the order comes to be settled.

Appeal allowed.

APPELLATE DIVISION, S. C. O. 6TH OCTOBER, 1916.

RE TORONTO & HAMILTON HIGHWAY COMMISSION & CRAB.

Expropriation of Land for Highway—Compensation Awarded by Ont. Ry. & Mun. Board—Motion for Leave to Appeal on Question of Amount Awarded.

Object of appeal:—Where the purpose of a motion for leave to appeal against an award of the Ont. Ry. & Mun. Board is to increase the amount awarded, where the argument in support of the motion is directed mainly and properly to that subject, and where the Court is satisfied that full compensation has been awarded, no matter whether the means by which that end was accomplished were regular or irregular, leave to appeal should be refused.

Ont. Ry. & Mun. Board not arbitrators:—Where the Ont. Ry. & Mun. Board acts in assessing compensation payable to land owners, under the Toronto & Hamilton Highway Commission Act, 5 Geo. V. c. 18, they act under the powers conferred upon them by their own Act, R. S. O. (1914) c. 186, and not as arbitrators.

Question of propriety of the members of the Ont. Ry. & Mun. Board discussing a proceeding before them with a member of that Board who did not sit on the case, discussed.

Special benefits accruing to the owner of land adjacent to a public work (in this case a main highway) may properly be set off against any compensation due the landowner for damages sustained by reason of its construction.

Motion by a land owner for leave to appeal under Ontario Public Works Act, R. S. O. (1914) c. 35, s. 32, from an award or decision of the Ontario Railway and Municipal Board; and a motion by the Toronto and Hamilton Highway Commission for leave to cross appeal.

The motions were heard by Meredith, C.J.C.P., Magee, and Hodgins, J.J.A., and Lennox, J., on 22nd September, 1916.

W. Laidlaw, K.C., for the land-owner, applicant.

H. E. Rose, K.C., for the Toronto and Hamilton Highway Commission.

MEREDITH, C.J.C.P.—The one substantial purpose of this motion, for leave to appeal against an award of the Ontario Municipal and Railway Board, is that the compensation awarded to the applicants may be increased and the prolonged argument in support of it was directed mainly and properly to that subject, and the evidence bearing upon the several items of the applicant's claim was referred to at great length for the purpose of shewing that there had been an under-estimation of the applicant's losses upon all of the items of his claim; and in taking that course, Mr. Laidlaw was right, because unless we are convinced that there is good ground for thinking that some substantial injustice may have been done to the applicant in the amount awarded to him, leave to appeal ought not to be given; if full compensation has been awarded, the means by which that end was accomplished, whether regular or irregular, are unimportant to the parties concerned. The final result of an appeal such as this, in which all that could be said on each side has been said, should be the fixing of the proper amount of compensation finally, by this Court, if the Board has failed in its efforts so to do; if the Board has succeeded nothing can be gained by giving leave to appeal.

And having given careful attention and consideration to all that was urged against the award, in respect of the amount awarded especially—and very much was said—I am fully convinced that the Board dealt with the applicant's claim, in all its particulars, in not only a fair, but in a generous manner; indeed the more that was said, and the more consideration given, the more convinced one became that if there be cause for complaint as to the sum awarded it is not on the applicant's side.

One cannot, having regard to the evidence and all the circumstances of the case, but think that if the land had the ex-

travagant values put upon it by the owner, and by some of his witnesses, such value would be largely attributable directly to the new road in question bringing it, in time and comfort of travelling, so very much nearer to Hamilton and Toronto, and so available as homes, temporary or permanent, for those engaged in business in one or other, or both, of those places; and so, if such values were real, instead of paying compensation, the builders of the road should receive it, or at least some expression of appreciation.

But such values are not real, they are, I find upon the whole evidence, but fanciful; the belief that they exist being born of the desire that they should for the advantage it would be to them who dream such dreams, and sometimes speculate on the chances of such things coming true.

As the Board did, so do I, place much more dependence upon the testimony of the witness, Flett, and the actual pertinent facts deposed to by him, than upon the evidence of any land speculator who had had no dealings in lands in the locality; naturally such witnesses take exalted views of the speculative value of properties, they are sellers and their whole happiness depends upon high prices.

Mr. Laidlaw has entirely failed to convince me that any injustice has been done to the applicant in the amount awarded to him, and so it becomes unnecessary to consider any question of irregularity in the making of the award, for the reasons I have already stated.

But in regard to the matters relied upon by him as vitiating the award altogether, should leave to appeal be given, I feel bound to add that I am not yet able to agree with him. The Board is composed of persons occupying positions analogous to those of Judges rather than arbitrators merely; and it is not suggested that they heard any evidence behind the back of either party; the most that can be said is that they—that is those members of the Board who heard the evidence and made the award—allowed another member of the Board who had not heard the evidence, or taken part in the inquiry before, to hear the evidence and to express some of his views regarding the case to them. Whether the Board was within its powers under the 9th or under 52nd section of The Municipal and Railway Board Act, need not be considered, and so should not be; but it is only fair to add that if every Judge's judgment were vitiated because he discussed the case with some

other Judge, a good many existing as valid and unimpeachable ought to fall; and that if such discussions were prohibited many more judgments might fall in an Appellate Court because of a defect which must have been detected if the subject had been so discussed.

The motion for leave to cross-appeal was, I understood, born of the motion for leave to appeal and is to die a natural death if that motion be now strangled; both must accordingly be dismissed.

But the dismissal should be only on the respondents carrying out, if the applicant desires it, their offer to connect together the tile drains on each side of the new road by means of water-tight pipes under or through the road. The Board seems to have been under the impression that there was no flow of water from those above to those below where the road now is, and so such a connection would answer no useful purposes, but there is a possibility that it might and the land owner should have the benefit of the doubt, and counsel's rejection of the offer, at one time, is not a sufficient reason for depriving the land owner of another chance to accept it.

MAGEE, J., agreed in the result.

HODGINS, J.A.—This was an application by the landowner under section 32 of the Public Works Act R. S. O. (1914), ch. 35, for leave to appeal. The reasons for the application were very fully discussed, so that the Court in fact considered the matter as if leave had been granted. In addition to this, a very full brief of argument and evidence has been submitted by Mr. Laidlaw.

A question is raised by him that, under the Public Works Act, when the Ontario Railway and Municipal Board acts in fixing compensation it does so through its members as arbitrators. By the Toronto and Hamilton Highway Commission Act, 5 Geo. V. c. 18, s. 10, the Commission may expropriate land and "shall have and may exercise the like powers and shall proceed in the manner provided in the Ontario Public Works Act where the Minister of Public Works takes land or property for the use of Ontario, and the provisions of that Act shall *mutatis mutandis* apply." In the course of carrying out that Act the Ontario Railway and Municipal Board have many duties cast upon them of finally settling disputes. The work is a public one and the Province of Ontario and the various

municipalities contribute towards its cost, and they are interested in the amount paid to the different landowners.

The sections giving rise to the contention set up are the following :—

"27. The Minister and the owner may agree upon the amount of the compensation, or either party may give notice in writing to the other that he requires the amount of such compensation to be determined by arbitration under the provisions of this Act."

"29. Where the Minister gives notice to the owner either before or after the service of the appointment upon him, that he desires that compensation shall be determined by the Ontario Railway and Municipal Board instead of by the Judge, the Chairman of the Board shall give the appointment upon the like application and shall have power to give like directions as the Judge might have given under the next preceding section and the proceedings shall thereafter be taken before that Board under this Act.

"31. The provisions of The Ontario Railway and Municipal Board Act shall apply to proceedings taken before that Board under this Act.

"32. (1) Where the amount of the claim exceeds $500, the Minister or the claimant may by leave of the Appellate Division appeal to that Court from any determination or order of the Judge or of the Board under this Act as to compensation.

"(2) The leave may be granted on such terms as to the appellant giving security for costs and otherwise as the Court may deem just.

"(3) The practice and procedure as to the appeal and incidental thereto shall be the same *mutatis mutandis* as upon an appeal from a County Court.

"(4) The decision of the Appellate Division shall be final.

"(5) Section 48 of The Ontario Railway and Municipal Board Act (1906) shall not apply to any appeal under this section."

These provisions seem to lay down a very clear proceedure. The parties may agree, or if they do not, either party may give notice that he requires the compensation to be determined by arbitration. If, however, the Minister—or in this case the Commission—before or after service on him of the County Judge's appointment at the instance of the landowner—gives

notice that he desires that the compensation shall be determined by The Ontario Railway and Municipal Board instead of by the County Judge, then the Chairman of the Board gives a new appointment and the proceedings are thereafter to be taken before the Board. In that case, by section 31, the provisions of The Ontario Railway and Municipal Board Act, R. S. O. (1914), c. 186, apply, except section 48, under which an appeal would be limited to questions of law.

I cannot take all this as meaning that the proceedings before the Board are other than according to its powers under its own Act. In that case it is not an arbitration. If it were otherwise why would the provisions of the Arbitration Act be excluded? They apply when the County Judge officiates. He deals with the matter as an arbitrator, as he does in certain claims for compensation under The Municipal Act. But the Board has its own procedure, and carries it on more as a Court, and not as if its members were sitting as a Board of Arbitration.

It is no unusual thing for claims against the Crown to be fixed by Court instead of by arbitrators.

To deal with the matter as suggested by counsel for the landowner would, I fear, lead to complications and reduce the powers of the Board in many respects. In The Ontario Railway and Municipal Board Act, R. S. O. (1914) c. 186, special provisions are found which are necessary if the Board is to accomplish its work, such as sections 6, 7, 8, 9 and 10. These sections fix the quorum of the Board, enable the Vice-Chairman to act for the Chairman and authorize any member to be detailed to report upon matters pending before the Board. Section 21, sub-sec. 4, and sec. 38 practically confer upon the Board the status and powers of a Court. Section 22 gives it exclusive powers in matters properly before it, and enables the Crown to be represented before it or before a Divisional Court upon any appeal.

It is the provisions of this Act, which are specifically applied to the process of fixing the compensation in this case, and I am wholly unable to see why they should be considered as nullified either by the fact that it is usual for compensation to be determined by arbitration or because in one event that would be the course followed under the Highway Act.

I have heard and read with care the very complete arguments submitted, and can find no real reason why the amount fixed, taken in connection with the undertaking given at the

hearing, should be interfered with. The only point as to which I had a doubt, namely, the setting off the special benefit against the capital value of the frontage tax, is, I think, satisfied by considering the incidence of the tax. Properties fronting on the new road, and those benefited by it, are to be assessed. Access is a special benefit, and I can understand why its value might be set off as direct, while the advantage gained by proximity, though paid for by assessment, might still be general in its effect.

The application for leave should be dismissed with costs.

LENNOX, J.—I agree in the conclusion reached by the learned Chief Justice as to the disposal to be made of this appeal, but with the very greatest respect I am not at present able to agree that the action of the two members of the Board in submitting the evidence to the third and consulting with him was proper or justifiable.

Leave to appeal refused.

APPELLATE DIVISION (S. C. O.) 6TH OCTOBER, 1916

WEDEMEYER v. CANADA STEAMSHIP CO.

Negligence—Seaman Swept Overboard and Drowned—Liability of Owners of Ship — Common Employment — Appeal — Finding of Fact by Trial Judge — Seaman as Witnesses — Ont. Workmen's Compensation Act.

Reversal of facts :—The findings of fact by a trial Judge, who has seen and heard all the witnesses, should not be reversed by an Appellate Court, unless it is satisfied that the findings were wrong.

Seaman Drowned : — Where a heavy wave sweeps the deck of a ship, washing a seaman overboard, the owners of the ship are not liable when the evidence shews that it was an accident for which no one was blamable, or that it was an accident caused by the neglect of duties by the crew. In the latter case the doctrine of common employment applies.

Ont. Workmen's Compensation Act has no application to seaman, on a Glasgow ship, upon high seas, serving under a contract made in Nova Scotia for a voyage from Sydney, N.S., to Manchester, Eng., and return.

Seamen as witnesses : — Seamen engaged in their calling, when required as witnesses, should be called up from the sea to testify only when they are needed and when their ship is in port, if it will be in port within a reasonable time. It is unreasonable to require their attendance in Court at all unless they are needed.

Appeal by the plaintiffs from a judgment of Britton, J., dismissing an action under the Fatal Accidents Act, brought by the parents of William Wedemeyer, a seaman employed by the defendant company on board their steamship, "C. A. Jacques," who was on the 19th July,, 1915, swept overboard and drowned, while on a voyage from Sydney, Cape Breton, to Manchester, England.

The action was tried without a jury at St. Catharines and Toronto.

A. C. Kingstone, for the plaintiffs.

D. L. McCarthy, K.C., for the defendant company.

BRITTON, J. (25th May , 1916)—The negligence alleged was in overloading the vessel, in not providing a proper and sufficient life-line upon the deck which might have been caught and held by the deceased, in not furnishing life belts, in not properly distributing the life-belts, in not having life-boats ready to launch, and in placing incompetent men at the wheel to do the stearing.

There was no doubt that the plaintiff's son was washed overboard by a wave; but, even if negligence in any particular was shewn there was nothing to prove that that negligence was the cause of or contributed to the death.

In an effort to rescue the deceased after he was overboard there was some delay in launching the life-boat by reason of it not being properly hung or the rope not being of the right strength; but there is nothing to shew that anything would have been accomplished if the life-boat had been launched in the quickest way. The sea was turbulent; it was a heavy gale; and the man was quickly lost to the sight of those on board. The chances are that the life-boat would have been lost rather than that the deceased would have been rescued.

Connolly v. *Grenier*, *Connolly* v. *Martel* (1909) 42 S. C. R. 242, distinguished.

Upon the evidence, it cannot be found that the vessel was unseaworthy when she put to sea.

Reference to *Hedley* v. *Pinkney & Sons S. S. Co., Limited*, [1892] 1 Q. B. 58.

Assuming that there was defective equipment, unless the accident was caused by the defendants, there can be no liability. There was an adequate cause for the accident and it was not the lack of or defect in the equipment.

There was no contributory negligence on the part of the deceased.

The plaintiffs are entitled, as administrators of the estate of the deceased, to $18.66 for wages.

The action is dismissed except as to wages, for which if necessary, judgment may go. No costs to or against either party.

The plaintiffs appealed from the above judgment to an Appellate Division of the Supreme Court of Ontario.

The appeal was heard by Meredith, C.J.C.P., Magee and Hodgins, JJ.A., and Clute, J.

A. C. Kingstone, for the plaintiffs, appellants.

D. L. McCarthy, K.C., for the defendant company, respondents.

MEREDITH, C.J.C.P. (6th October, 1916.)—The question involved in this case is not whether there was any evidence upon which reasonable men could find that the death of the plaintiff's son was caused by the actionable negligence of the defendants; nor is it whether there was any evidence upon which a reasonable man could find, as the trial Judge found, that they were not so guilty; if it were, the appeal must obviously fail; as it also must if the case had been tried with a jury and their verdict had been—as the Judge's was—not guilty.

There is no appeal against a finding of a jury; there is an appeal against a finding of a Judge; but upon such an appeal the obvious advantages which a trial Judge, who has presided at the trial, and who has seen and heard all the witnesses testify, has over a Court of Appeal entirely without such advantages, are always to be borne in mind, and no finding of fact should be reversed unless, after giving full effect to such considerations, the Appellate Court is fully convinced that the finding was wrong and should be reversed; and, in this particular case, the weight which ought to be given to the testimony of the witnesses might well be affected, materially, by the manner in which their evidence was given—their demeanour in the witness box as it is sometimes called.

Bearing these things in mind, should this Court reverse the findings, of pure fact, made by Britton, J., after the trial of the action before him, and after taking time, with a transcript of the shorthand notes of the trial before him, for further deliberation.

The trial took an unusual course, in that the defendants were not called upon to give any evidence they might desire to adduce before the finding in question was made; but that in no manner affects the question we have now to consider, though it may be said in respect of it, that it was taken by arrangement between the parties, and was, in the circumstances, a reasonable and proper course. The witnesses for the defence were sailor men employed in their calling, and it would be unreasonable to require their attendance at all if it were not needed; and quite reasonable to bring them up from the sea to testify only should their testimony be needed and when, within a reasonable time, their ship should be in port on this side of the Atlantic.

The case was accordingly dealt with upon the evidence adduced in the plaintiffs' behalf only; and as I have said the question now is, not whether any evidence upon which reasonable men could find for the plaintiffs was adduced; nor is it whether that evidence was enough to make what is commonly called a *prima facie* case against the defendants; but it is whether the trial Judge was wrong is refusing to hold the defendants guilty of causing the death of the plaintiffs' son by actionable negligence and of hanging a judgment for substantial damages upon it; see *Owners of S. S. Serbino* v. *Proctor* [1916] 1 A. C. 464.

Several grounds of negligence have been relied upon for the plaintiff in the argument of this appeal, namely: (1) that the ship was overloaded; (2) that the man at wheel when the accident happened was inexperienced; (3) that a "life-line," as it was called, or life-lines, were not in place then; (4) that there were no "life-buoys" on deck; (5) that the means of lowering a boat were out of order; (6) and that there was no crew competent to lower and man the boat.

The learned Judge seemed to think that, if all these things had been proved, he should not find that any or all of them, having regard to the whole evidence, was or were the cause of the young man's death. He was washed overboard by a heavy wave, which swept over the deck of the ship, and he was lost in the sea.

If all these things had been satisfactorily proved, and if the defendants were in law answerable for them, I am not prepared to say that I would not have found the defendants guilty, if the case had been tried before me, whatever should be done upon an appeal such as this.

But that is not so; the evidence regarding them is not clear and satisfactory. Two witnesses, seamen, or one a seaman and the other a stoker, were called to prove that the vessel was down in the water below the official water mark on the vessel. One said the mark was not visible in the stream, apparently meaning in or near the port of departure—Sydney, N.S.; nor does it appear when or how he observed it, except that it was the *night* before they sailed for Manchester, England; the other said that he looked over the one side of the ship when she was off the Grand Banks, and could not see the mark or the "disk" in which it is placed; he did not look on the other side of the ship. If upon such evidence ship-owners are to be found guilty of the serious offence of overloading, upon that finding are to be charged with the death of one of their servants and to pay substantial damages in consequence, then that must be done by some other juror; I join with my brother Britton in refusing to do it.

Again, just for one more instance to shew the unsatisfactory character of the evidence relied upon by the plaintiffs to support such serious consequences, let me read a few lines from the testimony of the plaintiffs' witness, and perhaps his main witness, of the circumstances relied upon by him:—

"Q.—What do you mean by a life line? A.—A line stretched from forward aft.

'Q.—Would that be of any advantage to a man in his position? A.—It would have.

"Q.—In what way? A.—He may have been able to save himself, he may not. It is hard to say, the way the boy stood."

There was no evidence that had there been "life-buoys" on deck, anyone could or would have thrown one or more over board; or, if it had been done, that it or they would have been of any kind of help.

Nor can anyone reasonably come to any other conclusion than that, had the boat been launched in good time and manned by able men, there was not one chance in a hundred of saving the man, there was greater chance of losing other lives; through that is seldom, by good sailormen, deemed a sufficient reason for not taking part in the risk.

I do not take time to refer to other things of a like character, because most of those things, were they clearly and fully proved, are not upon another ground, chargeable against the defendants, being chargeable only against fellow workmen in a common employment.

There is no evidence of the want of material to maintain a life-line on each side of the ship; there hardly could have been a lack of suitable rope. It was therefore the fault of those sailing the ship, if the fault of anyone, that these safeguards were not in place.

The same applies to lack of experience at the wheel. The plaintiffs' "expert" testimony shews, if it shews anything, that probably the master of the ship should himself have been at the wheel. So too as to the failure to launch the boat; the pullers were rusty or clogged, and a rope—"lanyard" it was called—broke; but whose duty was it to see that these things were not in neglect, in disorder, but were as they should have been, primarily, the master and crew.

In view of all these things, it seems to me to be impossible for a reasonable man conscientiously to find that any actionable negligence on the part of the defendants caused the plaintiffs' son's death; to find that it was not an accident, for which no one is blamable, or that it was not an accident caused by the want of a proper performance by their son and the other members of the crew of the duties they owed to one another as well as to the defendants.

But it was contended that the Ontario enactment respecting compensation to workmen for injuries precludes the defendants from setting up what is commonly called the doctrine or defence of common employment. That enactment, however, can have no sort of effect upon an injury sustained in a Glasgow, Scotland, ship, upon the high seas, by a workman serving under a contract made in Nova Scotia for a voyage from Sydney, in that province, to Manchester, England, and return.

There is, in my opinion, no course open to us but to dismiss this appeal.

MAGEE, J.A.—I agree.

HODGINS, J.A.—I agree.

CLUTE, J.—I agree in the result.

Appeal dismissed.

APPELLATE DIVISION (S. C. O.) 6TH OCTOBER, 1916.

Re McCARTHY & SONS CO. LTD.

Company — Winding up — Order under s. 110 Dom. Winding-up Act, R. S. C. (1906) c. 144 Delegating Powers of S. C. O. to Local Master — Leave to Bring Action Instead of Proving Claim Granted by Judge—Leave to Appeal from Order—Jurisdistion of Appellate Division.

Leave to bring action: — Where an order has been made under s. 110 of the Dom. Winding-up Act delegating the powers of the S. C. O. to a Local Master, in order to prevent confusion the parties should save in exceptional cases, apply to the Master for leave to bring an action against the company in liquidation, but the order delegating such powers does not absolutely prevent the Court from exercising its powers except by way of appeal; and where a Judge of S. C. O. has granted a creditor leave to bring an action instead of proving his claim in the liquidation, the Appellate Division will entertain an appeal from the order granting such leave, if "future rights" may be involved.

No appeal lies from an order granting leave to appeal.

Appeal by the liquidator of the J. McCarthy & Sons Co., Ltd., from an order of Kelly, J., giving the British Columbia Hop Co., Ltd., leave to bring an action instead of proving their claim in the liquidation.

The liquidation was under the Dominion Winding-Up Act, R. S. O. (1906) c. 144, and was proceeding before the Local Master at Ottawa, to whom the powers of the Court were delegated.

The liquidator moved before Riddell, J., and obtained an order, for "what it might be worth only," granting leave to appeal from the order of Kelley, J.

The appeal was heard by Meredith, C.J.C.P., Magee and Hodgins, JJ.A., and Lennox, J.

H. G. Hunter, for the liquidator, appellant.

H. E. Rose, K.C., for the British Columbia Hop Co., Ltd., respondents, raised the objection that Riddell, J., should not have granted leave to appeal, because none of the three conditions mentioned in section 101 of the Dominion Wind-Up Act were present in this case.

MEREDITH, C.J.C.P.—The single question involved in this motion is: Whether an appeal lies against an order, giving leave to bring an action against a company being wound-up under its provision.

The fact that leave to appeal may have been granted by a Judge, even if that leave had not been given, as it was given in this case, expressly for "what it might be worth only," can-

not stand in the applicant's way, if there were no power to give such leave. An order giving leave to appeal in such a case as this is unappealable in cases in which there is power to give such leave; but where no appeal lies the order must be ineffectual; and this Court, of its own motion, should refuse to entertain the appeal; and should quash it and discharge the order.

Whether an appeal lies depends entirely upon the meaning of section 101 of the Winding-up Act, the jurisdiction is entirely statutory, and it is not suggested that any other enactment confers upon this Court any wider power than that, and the next following section of the Act, confer; and those sections give such a right of appeal, by leave, in the following cases only:—

"(a) If the question to be raised on the appeal involves future rights; or

"(b) if the order or decision is likely to affect other cases of a similar nature in the winding-up proceedings, or

"(c) if the amount involved in the appeal exceeds five hundred dollars," * *

The single question involved in this appeal, or affected by the order in question is: Whether the respondents should be restricted, in endeavouring to establish their claims against the company, to the general methods provided for in sections 22 and 133 of the Winding-up Act, or be accorded the exceptional right of action, which section 22 also permits.

It is not suggested that the second of these requisites applies; there is no evidence of any other such cases in these particular proceedings; and it is quite improbable that there should be any such.

Nor can it, reasonably, be said that an amount exceeding $500 is directly involved in the question of practice whether proof of a claim shall be made in the winding-up proceedings or in an action.

So too it may be quite difficult to perceive how "future rights" are directly involved.

And so, having regard to similar words conferring similar rights contained in other enactments, and to the interpretations put upon them by the Courts, and especially by the Supreme Court of Canada, one might hesitate long before holding this case to be an appealable one, if the question had not arisen and been considered before, but it has so arisen and been decided in favour of a wide interpretation of the words "future rights," and in such manner as, I think, requires us to hold that there

is a right of appeal, whether it is put upon the ground of that which is indirectly involved, such as the amount claimed—$3,000—or the right of trial by ordinary methods involving future possible trial by jury and future unrestricted rights of appeal to this Court and to the Supreme Court of Canada, and other such like rights of the ordinary litigant.

So having regard to such cases as *Re Union Fire Insurance Company*, 13 A. R. 268; 14 S. C. C. 624, a case which was again before the Courts upon appeal as reported in 16 A. R. 161; 17 S. C. C. 265; and having regard to the practice since that case—which the recent case of *Re Auto Top and Body Co. Ltd.*, 10 O. W. N. 76, 129, affords an instance quite in point. I am in favour of overruling the objection to the jurisdiction of this Court, and of the appeal being heard on its merits in due course.

The future rights referred to in the case of *Re Union Fire Insurance Cmpany*, were only of the character of those involved in this appeal—see 13 A. R. at p. 295—though the order in question there was a winding-up order.

MAGEE, J.A.—I agree.

LENNOX, J.—I agree.

HODGINS, J.A.—The liquidator appeals from the order of Kelley, J., giving leave to the respondents to begin an action instead of proving their claim in the liquidation. Objection is taken to this appeal that although leave was obtained from Riddell, J., he should not have granted it, because none of the three conditions named in section 101 of the Winding-up Act are present.

I am not sure that this objection is well founded—the contemplated action involves over $3,000, and future rights are or may be involved—but I feel that the Court ought not to give effect to it. No appeal lies from an order granting leave to appeal *Ex. p. Stevenson* [1892]1 Q. B. 394, 609; *Re Central Bank*, 17 P. R. 395.

But if it is a question whether the conditions existed enabling the leave to be granted, then I think the Court appealed to should adopt the rule in *Gillett* v. *Lumsden*, [1905] A. C. 601, and followed in *Townsend* v. *Northern Crown Bank* (1913) 24 O. W. R. 516, and *Re Ketcheson* v. *Canadian Northern Railway Company* (1913), 25 O. W. R. 201, 252, and treat the right to appeal as being established.

The decision from which the liquidator appeals was made by Kelley, J., notwithstanding the fact that an order under section 110 of the Winding-up Act was made on the 15th February,

1916, "that all such powers as are conferred upon the Court by the Winding-up Act and amending Acts as may be necessary for the said winding up of the said company be, and the same are hereby delegated to the local Master at Ottawa." It appears that no application was made to the Master to grant leave.

There is no doubt that after such an order of delegation great confusion would occur if motions were made in the winding up to different Judges of the High Court instead of to the Referee, who, by special order of that Court, was directed to exercise its functions.

I do not think that an order under section 110 of the Winding-up Act absolutely prevents the Court from exercising its powers except by way of appeal. But it seems reasonable that save in exceptional cases the parties should be required to seek necessary directions from the Referee in charge.

However, that will be considered when the appeal comes to be heard. The objection is overruled, and the appeal should be placed again upon the list.

Costs will be in the appeal. *Objections overruled.*

APPELLATE DIVISION (S. C. O.) 6TH OCTOBER, 1916

BULL v. STEWART.

Contract — Building Contract — Claim by Builder for Work Done — Cross-claim for Damages for Poor Workmanship — Quasi-judicial Power of Architect — Application to Stay Proceedings — Arbitration Act, R. S. O. (1914) c. 65 s. 8 — Inherent Jurisdiction of Court — Payment Into Court not Admission of Liability — Con. Rules 308, 312.

Quasi-judicial position :— Where it clearly appears that the intent and meaning of a building contract is that the architect is to be the final judge in case of dispute between a builder and the owner, his position is that of an arbitrator and is quasi-judicial: To bind the parties he must be guided by the principles governing arbitrations, and unless specifically conferred he has no power to act as a mediator, he is to decide or determine questions in dispute, and is not to act by way of compromise but according to the very rights of the parties, as he understands their rights, exercising his best skill and judgment. Where he has done this Courts will hold the parties to their bargain and leave them to the domestic tribunal of their own selection: Where the architect has failed to exercise this function before a case comes up for trial the Court will not refrain from exercising its inherent jurisdiction to enable him so to do. Applications to stay proceedings of a Court under Arbitration Act, R. S. O. (1914) c. 65, s. 8, must be made after appearance and before delivery of any pleadings, otherwise it is too late.

Admission of liability :—Payment into Court is not necessarily an admission of liability; (Con. Rule 308) and where the money is not taken out it is still open for the defendant to contend that he did not owe so much.

Appeal by the defendant from a judgment of Latchford, J., at trial without jury.

The action was brought by a building contractor to recover $913.30 from the owner of a building, being an alleged balance due plaintiff for work done and for extras.

The defendant claimed a set off for damages for defective work, to the amount of $1,000, or more.

LATCHFORD, J., (4th May, 1916) gave plaintiff judgment and dismissed defendant's claim for a set off. Memoranda of the judgment is noted in 10 O. W. N. 235, and the reasons therefor are set out in the following judgment:

The appeal was heard by Meredith, C.J.C.P., Magee and Hodgins, JJ.A., and Lennox, J.

W. A. J. Bell, K.C., for defendant, appellant.

John Birnie, K.C., for plaintiff, respondent.

Their Lordships' judgment was delivered by

LENNOX, J.—After finding that the plaintiff was entitled upon the account to a balance of $913.30, against which the defendant claimed to set off damages for defective workmanship to the amount of $1.000 or more, the learned Judge says:—

"Having regard to the decision of the architect as expressed in his last letter to the plaintiff and in Court at the trial, I cannot, I regret to say, give effect to the claim of the defendant to set off $1,000 damages. Mr. Stewart was certainly unduly delayed and put to great expense by the carelessness or incompetence of the plaintiff, and the residence on which Mr. Stewart expended nearly $20,000 has been rendered unsightly by the defective workmanship which the architect states he passed in an effort to make the best of a bad job. I therefore make no order as to costs. The plaintiff is entitled to judgment for the $500 paid into Court and to an additional sum of $413.30.

The defendant's appeal is only as to disallowance of his claim for damages.

It seems clear from the language just quoted that the learned Judge was fully satisfied as to the right of the defendant upon the merits to recover damages, and a careful perusal of the evidence and consideration of the appeal convinces me that defendant has sustained actual damage by the negligent and improper execution of the plaintiff's contract, and a substantial amount should be allowed him against or in reduction

of the money otherwise payable to the plaintiff, unless some difficulty of the character above suggested stands in the way.

There is evidence by several apparently competent witnesses to shew that in respect to the chief grounds of complaint alone, and without any reference to the delay, the damages amount to $1,000 or more. Some of the witnesses put it at a higher sum and none of them at less. Against all this there is only the evidence of the plaintiff, and many of his statements and denials are obviously incorrect.

The only question for determination, then, appears to be whether any act of the architect, by correspondence or otherwise, precludes the defendant from recovering, by way of damages or reduction of the plaintiff's claim, the loss he is shewn to have sustained.

I can find nothing in the contract, the action of the architect or the evidence at the trial to compel or justify this manifestly unfair result. I am afraid I am not quite able to apprehend the sense in which the learned Judge uses the expression: "the defective workmanship which the architect states he has passed in an effort to make the best of a bad job" incorporated in the extract from the reasons for judgment hereinbefore quoted.

The letter referred to—and relied upon by the plaintiff—suggests a settlement upon the basis that other objections and complaints will not be urged if the plaintiff executes or remedies certain portions of the work to be done under the contract, and a list of thirteen items is set out. The architect and defendant both swear that this was not written by reason of any instructions given by the defendant. It was a voluntary, and I think unauthorized, attempt of the architect by compromise and leniency to bring about an amicable settlement, or, as the learned Judge says, more than once: "an effort to make the best of a bad job." Assuming for the moment, although I am far from regarding it as a correct interpretation of the Building Contract, and that the architect was by its terms clothed with authority to release the plaintiff from compliance with its provisions, to deliberately and knowingly accept and pass "unsightly" and "defective workmanship," assuming that he had independent authority by the terms of the contract to consummate a compromise settlement as outlined in the letter; yet with all this conceded for the purposes of argument, how can this gratuitous proposal to accept part performance for the full performance of the contract avail the

plaintiff as a reply or deprive the defendant of his contractual rights unless and until it is at least shewn that the plaintiff accepted, acted upon and complied with the terms of the architect's letter. It would be enough to meet the plaintiff's contention, to say that, aside altogether from the question of the agency or authority of the architect, of the thirteen defects mentioned in the letter the plaintiff only remedied or attempted to remedy three or four. The cross-examination of the defendant, the evidence of the architect, pages 88 and 89, and the tacit admission of counsel for the plaintiff in his written argument, make this fact quite clear; and of the obstacles in the way of allowing the defendant a reduction in price, for the damages he has sustained, referred to by the learned Judge, this is the formidable one, if either can be said to be formidable. The other is the statement of the architect in Court.

I cannot find anywhere in his evidence that the architect says the work was executed "in a true perfect and thoroughly workmanlike manner" or "agreeably to the plans, drawing and specifications" or "to the satisfaction of the architect" as required by the terms of the contract; and to shew "performance" and to be entitled to payment in full the plaintiff must shew this, *Smallwood* v. *Powell* (1910), 16 O. W. R. 615, or that the architect, acting judicially in the exercise of his best judgment and within the scope of the powers conferred upon him, determined the disputed points in his favour, and so acting approved of and accepted the work. The production of a final certificate is often necessary. It is not in this case. The learned Judge bases his denial of damages to the defendant upon "the decision of the architect as expressed in his last letter to the plaintiff and in Court at the trial." I have dealt with the letter, and as to the evidence, as I have said, I have not found anything to indicate that in the opinion of the architect the work was executed according to contract, or to his satisfaction, and speaking with great deference I have not found anything to indicate a *decision* of the architect come to or expressed at the trial that the plaintiff had performed his contract or that the work had been or ought to be accepted. On the contrary the text and purport of his evidence, as I read it, is that the work was badly executed, defective, unsatisfactory and incomplete, and, as to some of it, there is, practically speaking, no remedy. The one redeeming feature of this whole unfortunate case is that probably the plaintiff did not intend to slight the work, for the work which came within his own line

of handicraft, the plastering, was well done, and his failure to properly execute the other work may possibly be attributable to want of experience or lack of skill. However, this may be, it was abundantly established that the general character of the work under this contract was exceptionally faulty, and the defendant has good ground for complaint and redress.

There is, of course, hardly any, if in fact any, limit to the powers of decision or adjudication which the parties may expressly confer upon an engineer, architect, or other designated person. As said by Mr. Justice Hodgins in delivering the judgment of the Court in *Price* v. *Forbes* (1915), 33 O. L. R. 136, at p. 137: "The architect's certificate may be made, by express agreement, final and binding on both the owner and contractor and in that sense conclusive as between them." It is always a question of the intention of the contracting parties, to be determined by the specific terms and general scope of the agreement; and if it clearly appears to be the intent and meaning of the language used that the architect was to be the final judge, and he *has* considered and passed upon the question in the manner contemplated by the agreement, and in the absence of collusion or intentional unfairness, Courts do not hesitate to hold the parties to their bargain and leave them to the domestic tribunal of their own selection. But the jurisdiction of the Court is not ousted or limited and the exercise of its functions will not be withheld when a case comes up in Court for trial unless it appears that the certificate or other act of the architect was intended to be final and conclusive as to the matters ultimately submitted for judicial determination in Court: *Smallwood* v. *Powell*, 16 O. W. R. 615; a case distinctly in point upon this appeal.

The consideration of this question most frequently rises and is most conveniently determined—indeed must be determined according to the decision in *Contractors Supply Co.* v. *Hyde*—upon an application to stay proceedings under section 8 of The Arbitration Act, R. S. O. (1914) ch. 65; the application to be made after appearance and before delivery of any pleading. Later is said to be too late. See the judgment of the Divisional Court in *Contractors Supply Co.* v. *Hyde* (1912), 21 O. W. R. 530 at p. 532; and, as stated there, if the architect has not exercised his functions before the case comes up for trial, the Court will not refrain from the exercise of its inherent jurisdiction to enable him so to do. As to what are merely administrative and what judicial clauses and final, see *Wm. Kennedy*,

Ltd., The Mayor & C. of Barrow-in-Furness, decided under a similar provision in the English Act and fully reported in the first supplement to the 3rd edition of Hurdson on Building Contracts.

The position of the architect, where his decision is to be final, is that of an arbitrator and is quasi-judicial; to bind the parties he must be guided by the principles govering arbitrations, and unless it is specifically conferred he has no power to act as a mediator; he is to *decide* or *determine* questions, and is not to act by way of compromise but according to the very rights of the parties, as he understands their *rights* exercising his best skill and judgment: *Hickman & Co.* v. *Roberts*, [1913] A. C. 229; 82 L. J. K. B. 678.

The contract in this case is not of the rigid type of some years ago, with unlimited powers in the architect, presumedly intended to prevent, and historically productive of litigation. Here very limited powers are vested in the architect. The form employed is one revised and approved by the architects and builders of Toronto. It is very much the same, if not identical, with the contract in the *Hyde Case*. At all events the provisions in the contract in question relevant to this appeal are pretty fully set out in *Smallwood* v. *Powell*, 16 O. W. R. 615, where the same form of contract was considered; and the principles governing that case and this are the same. Notwithstanding anything said or done by the architect, I am clearly of opinion that the defendant was entitled to have the claim he set up determined by the Court upon the merits and to have damages, or a reduction of the amount otherwise payable to the plaintiff, equal to the loss he is shewn to have sustained, set off against the amount found.

The appeal should be allowed.

I regret that the learned trial Judge did not state what sum the defendant ought to be allowed if entitled an allowance or damages. A number of apparently skilled and trustworthy witnesses place it at $1,000—some of them at a higher sum and none of them at less. If this matter were at large, I think more than I propose to allow might reasonably be given upon the evidence, but it seems to me to be safer in this instance to be guided and limited by the act of the defendant. He paid $500 into Court. It is not necessarily an admission of liability: Con. Rule 308. But the plaintiff could have accepted the money paid in, taken the money out of Court and discontinued the action: Rule 312.

After taking the $500 into account there was on the find-

ing at the trial only a balance of $413.30 in the defendant's hands available for damages.

It is true that under *Denison* v. *Woods*, 17 P. R. 549, the money not having been taken out it is still open to the defendant to contend that he did not owe so much, but to be guided by this point of law does not appear to be the best way of getting at the real meaning of the defendant's act. Very likely, and perhaps very reasonably, the defendant may have considered that $413 was not nearly equal to his actual loss, but it can hardly be said that it was not, in a sense, his estimate of the measure of damages at that time, or at all events that to avoid further litigation with the possibility of further costs against him he was prepared, though not perhaps content, to let it go at that.

I am of opinion that the defendant's actual precuniary loss was probably greater, possibly very much greater, than the sum I am about to allow for it, but no certain measure of damages or mathematical calculation being possible in a case of this kind, I think it prudent and fair that the defendant should be left, financially speaking, in about the position he would have been in if the plaintiff had accepted the five hundred dollars when paid in, and which, according to the event, he should have accepted.

The appeal will be allowed to the extent of $413.30, and the $913.30 found payable to the plaintiff at the trial, will be reduced by this sum. The defendant will have costs in the Court below from the date of the payment in of the $500 and of the appeal, the plaintiff will have costs to that date. The judgment will be amended accordingly. The money in Court, as far as necessary, may be applied in payment or part payment of the defendant's costs.

Mr. Birnie asks, alternatively, for a new trial and says he was prevented from giving evidence in reply as to the character of the work. This is hardly borne out by the stenographer's notes. He gave evidence in chief and shut out evidence as to this, offered by the defendant, upon the ground that the architect's letter was conclusive and final. It is not noted that he tendered further evidence. This is what is reported to have occurred :—

"Mr. Birnie: I had a number of witnesses here who would speak of the character of the work, but I think the letter of the architect binds the owner to accept that work when done, even when it was badly done." No answer by anyone. This is not ground for a new trial. *Appeal allowed.*

APPELLATE DIVISION (S. C. O.) 6TH OCTOBER, 1916.

ROWSWELL v. TORONTO RY. CO.

Negligence—Street Railway—Man on Bicycle Struck by Tramcar—Findings of Jury.

Failure to stop car: — Where a motorman sees 180 feet ahead, a man on a bicycle who is in danger of being struck by the tramcar, and where the motorman can stop his car within 120 feet by applying the brakes with full force, it is negligence for him to only successively apply the brakes if by so doing he fails to stop the car in time to prevent an accident.

Common knowledge: — The jury are at liberty to apply common knowledge in arriving at their verdict.

Appeal by the defendant railway company from a judgment of York County Court in favour of the plaintiff upon the findings of a jury, for the recovery of $75 and costs, in an action for damages for injury sustained by the plaintiff, while riding a bicycle on a highway, by being struck by one of the defendants' cars.

The appeal was heard by Meredith, C.J.C.P., Magee and Hodgins, J.J.A., and Lennox, J.

D. L. McCarthy, K.C., for the appellant railway.

J. Hales, for the plaintiff, respondent.

MEREDITH, C.J.C.P.—The only ground upon which the plaintiff's judgment could be interfered with here, and the only ground upon which it has been contended that it should be interfered with, is that there is no evidence to support the jury's answer to the seventh question which was submitted to them.

Nothing turns upon the particular form, or words, of that question, nor upon the trial Judge's charge respecting it, because no kind of objection was raised as to either at the trial, but all concerned treated, and still treat, the answer to it conclusive of their rights as long as it stands, and in so doing are, in the circumstances I have mentioned, right.

But Mr. McCarthy's contention, if it prevail, does away entirely with that finding and entitles the defendants to judgment dismissing the action, for upon that finding alone the plaintiff's judgment is sustainable.

His contention is: that there is no evidence upon which reasonable men could find that the driver of the defendants' car, after becoming aware of the plaintiff's danger, could have prevented the injury for which the jury have awarded him $75 damages; that the only eveidence upon the question is that of the driver, and that he exonerates himself; but in neither respect am I able to agree in that contention; there was other very material evidence, upon the question, contained in the testimony of the plaintiff and in the circumstances of the case; and there was common knowledge which the jury were at liberty to apply to it.

The driver's story was that when he first saw that the plaintiff was in danger from his car, he applied the brakes and "threw off the power" of his car in the manner which he deemed, and still deems, was best calculated to prevent injury; but that, then, he was so near to the plaintiff that the injury could not be prevented. If there were no other evidence upon the subject, that would, of course, exonerate the man; but there is other evidence, part of it given by this witness; but self, from which reasonable men could discredit his views of his own blamelessness, and find him to be ultimately blamable.

In the first place: the jury discredited his story that when he first saw the plaintiff the car was only 25 feet away from him; they found that it was about 100 feet away, that is 75 feet and half the width of Concord street: and if they give credit to the story of the plaintiff as to the place where he was actually struck, the distance was more than enough to condemn him—the driver—upon his own testimony as to what he could and should have done.

The plaintiff's story—one not at all improbable having regard to the speed at which the plaintiff said he was going, and which he was likely to be going with the car coming on behind him and the speed at which the car is likely to have been going with the brakes applied as the driver said they were—

is that he was struck about 120 feet east of Concord street, and the jury found, on conflicting testimony, that the car was 75 feet west of Concord street when the driver first saw the plaintiff, which the driver said was "when he came out of Concord street," to which distances must be added the width of Concord street, making in all considerably over 200 feet: whilst the driver's testimony was that by successive applications of the brakes, in the manner in which he thought the best, and as he on this occasion applied them, the car should be stopped, when going as it was on this occasion, in a distance of about 180, whilst if applied with full force should be stopped in about 120 feet.

So that if the jury found, as they well might upon the whole evidence, that the distance run between first seeing the danger and running the man down was over 180 feet, the driver not only failed to exonerate, but condemned himself: because not only did he say in effect that he should immediately have done all in his power to stop the car, but also that he actually did all in his power to stop it by the most effectual means. His difficulty and dilemna lie in the evidence as to the distance traversed before running the man down after seeing the danger.

The appeal fails, and must be dismissed.

MAGEE, J.A.—I agree.

HODGINS, J.A.—I agree.

LENNOX, J.—I agree.

Appeal dismissed.

APPELLATE DIVISION (S. C. O.) 6TH OCTOBER, 1916.

FLEXLUME SIGN CO. v. VISE.

Contract—Material Alteration after Execution—Public Interests—Denial of Indulgence.

Material alteration: — Where a contract is materially altered, while in the custody of the plaintiff, one of the contracting parties, and without the knowledge or consent of the defendant, the other contracting party, the contract is vitiated. Public interests require the denial of indulgence to persons who unwarrantably fix up contracts to suit their own purpose after they are completely executed.

Appeal by plaintiffs from a judgment of York County Court dismissing with costs an action to recover $163 for rent of an electric sign, in pursuance of an alleged contract.

The appeal was heard by Meredith, C.J.C.P., Magee and Hodgins, J.J.A., and Lennox, J.

J. L. Counsell, for the plaintiff, appellant.

J. H. Cooke, for the defendant, respondent.

MEREDITH, C.J.C.P.—It is not needful to consider what the effect of the contract sued on should be if it could be now enforced, because it was vitiated by a material alteration made in it whilst in the custody of the plaintiffs, and indeed by them, as their seeking to enforce it in its altered form only, and the evidence generally, prove.

Whatever if anything conclusive, otherwise could have been said in support of any liability of the defendant, personally, on the contract, nothing can be said in support of any liability apart from it. The sign was delivered to and used by the incorporated company only; the monthly charge for it was made against and paid by the company only; and the unpaid charges for the last four months, before the plaintiffs re-took the sign—being all of such charges remaining unpaid—were made against the company only.

No recovery can be had on the altered writing; and no

other ground of action against the defendant personally exists.

The company admitted and still admit liability; so there is no justification for this litigation.

I would dismiss the appeal.

LENNOX, J.—At the time the contract in quesetion was entered into the defendant, Rube Vise was carrying on a business on Queen street under the name "Vise's." It was, he says, his wife's business and he was the manager. There was at this time also a business carried on by his mother, Mrs. Jennie Vise, at 290 Yonge street, under the trading name of "J. Vise and Co." Jacob Vise is the husband of Jennie Vise and father of the defendant.

Shortly after the execution of the contract a company with limited liability was incorporated under the name "J. Vise & Co. Limited," and the business of Mrs. Jennie Vise, until then carried on under the name of J. Vise and Co., was transferred to this limited company. It may be that this transfer was contemplated at the time the contract was entered into—it matters not. It may be too, indeed it is quite probable, that from first to last the sign purchased by the plaintiff company was intended by the Vise family to be used in connection with advertising their new venture. This again, having regard to his evidence, does not affect the question of the defendant's liability. It is not unusual, in fact it is the common practice, when a successful and sometimes an unsuccessful trader determines to turn his business into a family company with limited liability that the initial or preliminary expenses and liabilities are provided for or incurred by and in the name of the old concern. If I were at liberty to speculate as to probabilities and ignore the evidence by affidavit and otherwise, I would have difficulty in resisting the conclusion that this was what was actually intended by all parties interested in this family deal, or in other words, that Jennie Vise authorized the making of the contract in the name in which she carried on business and in which it was actually made. The intrinsic evidence afforded by the document itself points distinctly in this direction, and the fact that the descriptive provision as to the lettering of the sign differs from the description of the parties (or party) to the contract does not weaken but strengthens this inference.

The matter comes down to a very simple issue. The contract was made by a professed agent in the trade name under

which Jennie Vise carried on business; an existing business carried on under and known by a partnership name. This was peculiarly within the knowledge of the defendant. If authorized to act for her, Jennie Vise would be bound. To represent that he had authority required no verbal declaration to that effect on the part of the defendant Rube Vise; his action was in itself an inevitable and emphatic representation that he had authority. If he had not authority so to contract he was guilty of a misrepresentation inducing the contract, and *ipso facto* became personally liable. The same legal result would perhaps follow, if the defendant without the knowledge of the plaintiffs, contracted in the name of non-existent company, but I do not take this to be the fact although he says that is what he intended.

Swearing as he does that he had no authority to enter in a contract on account of the partnership whose name he used, he could not be heard to complain if the Court accepted and acted upon his denial of authority be the fact what it may. The plaintiff company's right to recover rests upon the defendant's misrepresentation and an action should have been launched as a claim for damages. The action is not technically well framed, but if the matter ended here I would certainly be disposed to allow the company to amend, but it does not. The company sues upon the contract, and under one of its alleged terms claims a penalty of five dollars a month after removal of the sign to the end of the contract term.

It is in evidence and not denied that a penalty was not discussed and the fixed penalty was not in the contract at the time it was signed. There is no explanation as to when, how or by whom it was subsequently inserted, but it was done while in the custody of the company and without the knowledge and consent of the other contracting parties or party. It is a material alteration, unlawfully introduced, and vitiates the contract. It is only by reason of the contract, if at all, that the defendant can be made liable. It is not a case in which the plaintiff can ignore the contract and fall back upon an original consideration. The sign was not for the defendant or used by him, and an action for materials supplied and services rendered would be against J. Vise & Co. Limited—a remedy not sought by the plaintiff company.

The public interest requires the denial of indulgence to persons who unwarrantably fix up contracts to suit their own

purposes after they are completely executed. Indeed the company did not ask to amend, and, if it had, is not entitled to any indulgence.

The appeal should be dismissed .

MAGEE, J. A.—I agree.

HODGINS, J.A.—I agree.

Appeal dismissed.

APPELLATE DIVISION (S. C. O.) 6TH OCTOBER, 1916.

DUFFIELD v. PEERS.

Negligence—Master and Servant—Liability of Master for Injury Caused by Servant—Scope of Employment—Finding of Jury—Evidence.

Scope of employment: — A company employing an agent on commission on goods sold by him, which hires a horse and waggon and rehires them to the agent for use in his business as a sales agent, is liable in damages to a pedestrian who is knocked down and injured by said horse and waggon when being driven by said agent on his way back to the company's stables, after his day's work is done, where the jury finds that the agent was acting within the scope of his employment and where there is evidence to support such a finding.

Appeal by the defendants the Computation Scale Company from a judgment of Latchford, J., entered 22nd May, 1916, upon the findings of a jury, in favour of the plaintiff, Mrs. Emma Duffield, for the recovery of $2,500 damages and costs, in an action for damages for injuries sustained by the plaintiff by being knocked down by a horse and waggon at the corner of Isabella and Yonge streets in the city of Toronto, on 26th May, 1915.

The appeal was heard by Meredith, C.J.C.P., Magee and Hodgins, J.J.A., and Lennox, J.

M. C. Cameron, for the appellants, contended that the defendant company was not liable on the ground that Peers was a sales agent, on commission, only, and the company had no control over his movements.

D. L. McCarthy, K.C., for the plaintiff, respondent.

MEREDITH, C.J.C.P.—Cases of this kind present difficulties enough even when the evidence is well-directed to the real

points in the case, and all that is available is adduced; they become much more difficult when shipshod methods only are applied and one is obliged to grope, much in the dark, for the facts which are to govern them; but the parties chose to leave this case as it was when it went to the jury, and to be presented to the jury, as it was, without objection of any kind; and so we must deal with it, however, unsatisfactory the material upon which it has to be considered may be.

The one question now involved is: whether there was any evidence upon which reasonable men could find, as the jury in this case did find, that the man who was found by the jury to be in law blamable for the accident, which is the subject matter of the action, was, at the time of the accident, acting within the scope of an employment by the appellants.

He was what is called "a sales agent;" he sold and delivered the appellants' wares, being paid for his services by way of a commission on the price of the goods only. There is nothing in the evidence to shew whether he was bound to give any specified time to the sale and delivery of the goods; for aught that appears in evidence, directly, he may have been under no obligation in this respect. He was bound to use a horse and conveyance, owned by an agent of the company, in selling, delivering some of the goods, and in some other work, apparently, about them, and to pay the owner, through the appellants, hire for the use of such horse and conveyance; and the plaintiff's injury, for which large damages have been awarded, was caused in a collision with the horse which the man, in the conveyance, was then driving back to their stables after his day's work was done.

The evidence relating to this question is extremely meagre: the appellants' general manager testified that the man was one of the appellants' agents: selling for them "on commission:" and that "his territory" was "anywhere we had a mind to send him;" that the "horse and rig," before mentioned, belonged to J. H. Davidson, who is also employed by the company: that the man used them in his work and paid Davidson, through the company, for such use: and the man testified that they were not used by him for any other purpose: that in the first instance he was told by the sales manager to use the horse and conveyance, and that he was then under his "authority" and "control:" and it seems to have been admitted that when the accident happened the horse and conveyance were

being driven back to their stables, by the man, after his day's work was done.

Upon the evidence, reasonable men might find that the man was, when the accident happened, about his employers' business and conforming to the terms of his contract with them, as well as about his own business of earning his livelihood by the commissions he won in doing the work involved in selling and delivering his employers' wares, and such other services as he performed respecting them, about which the evidence is very far from clear.

It may be that they could not have commanded him to go upon the business he was then about, or to be where he was when the accident happened, but being there upon their business, even if at the same time in his own interests and at his own choice, there was evidence upon which it could be found that his acts in and about that business were, as to a third person affected, their acts, and none the less so because he paid hire for the horse and conveyance; if they were his own, and he was to provide them as well as his own services in his employment, that would not necessarily exclude him from being in the service, and acting in the place, of his employers. There was also some evidence upon which reasonable men could find that, in using the horse and conveyance generally, he was acting under the directions of his employers, and that it was part of his duty to them, under such directions, to return the horse and conveyance to the stables as he was doing when the accident happened.

Some of the cases under the Imperial Workmen's Compensation for injuries enactment are helpful to the plaintiff on the question of the scope of the man's employment, but it is always to be borne in mind that, having regard to the purposes of such enactment, a very liberal interpretation has been given often, as might be expected, to the words "arising out of and in the course of the employment:" see *Dick* v. *North Sea &c.*, 9 B.W.C.C. 725 *Parker* v. *Black Rock* [1915] A. C. 725; *Richards* v. *Morris*, [1915] 1 K. B. 220, and *Edwards* v. *Wingham &c.*, [1913] 3 K. B. 596; and see also *Whatman* v. *Pearson*, L. R. 3 C. P. 422, and *Turcotte* v. *Ryan*, 39 S. C. R. 8.

The verdict cannot be disturbed, and consequently this appeal must be dismissed.

MAGEE, and HODGINS, J.J.A., and LENNOX, J., agreed.

Appeal dismissed.

APPELLATE DIVISION (S. C. O.) 10TH OCTOBER, 1916.

UPPER CANADA COLLEGE v. CITY OF TORONTO.

Assessment and Taxes—Local Improvements—Validity of By-law—Exemption by Special Act—Conflict of Statutes—Rule of Construction.

Exemption by Special Act:—Notwithstanding the Local Improvements Act, R. S. O. (1914) c. 193, s. 47, which provides that land on which a church, university, college, etc., is erected, which is exempted by the Assessment Act, R. S. O. (1914) c. 195, shall be liable to be specially assessed for local improvements, Upper Canada College is by its Act, R. S. O. (1914) c. 280, s. 10 specially exempt from all taxes including local improvements; and following the general rule for contruction of statutes "that local Acts not repealed by public general Acts in the absence of any indication so to do on the part of the legislature?," it was held that Upper Canada College is not liable to be taxed for local improvements, and therefore, is not qualified and competent to sign a petition for local improvements; and that the validity of a local improvement by-law of the city of Toronto was not affected by the absence of its signature to the petition although it owned more than one-half in value of the property adjacent to the highway on which the improvements were to be made.

Appeal by the plaintiffs from a judgment of Falconbridge, C.J.K.B., dated 25th April, 1916, whereby he dismissed the plaintiff's claim without costs, 10 O. W. N. 211.

The appeal was heard by Garrow, Maclaren, and Magee, J.J.A., and Masten, J.

Frank Arnoldi, K.C., and *D. D. Grierson*, for the appellants.

Irving S. Fority, the respondent municipality.

G. H. Sedwick, for P. W. Ellis and others.

Their Lordships' judgment was delivered by

MASTEN, J.—The action is to set aside three by-laws of the defendant municipality and to restrain the defendant from proceeding with the construction of an asphalt pavement and of a sidewalk on Oriole road in the City of Toronto at the points and in the manner now proposed.

The plaintiff's claim is put upon two grounds. First that the Council by resolution adopted by it at the time of a conference between the governing body of the College and the

City Council, agreed to locate the pavement and sidewalk in question symmetrically with respect to the centre line of Oriole Parkway, a sixty-seven foot roadway, and is bound by the agreement and resolution to so locate its pavement in the middle of a sixty-seven foot street, and the sidewalks and boulevards symmetically thereto. During the course of the argument this contention was dealt with by the Court, and the only point now remaining for decision is that next stated.

(2.) The other branch of the case upon which the plaintiff founds its claim is that the by-laws under which the pavement and sidewalk are being laid by the city are invalid and must be quashed or declared ineffective, because such by-laws can only be passed after compliance with the preliminary statutory formalities prescribed by the Local Improvements Act, R. S. O. (1914) Ch. 193, including in particular the lodging of a petition signed by two-thirds in number and one-half in value of the property owners liable to assessment for the proposed improvement; (sec. 12). The contention of the appelant is that it owned more than one-half in value of the lots liable (according to its contention) to be specially assesser for this improvement, and that the petition was not signed by it, hence that the petition was invalid and that the by-law has no legal foundation. The fact is not contested that the plaintiff is the owner of more than one-half in value of the lots which if legally assessable would be liable to be specially assessed in support of this improvement.

It therefore becomes the sole question in this action whether the plaintiff was or was not liable to be taxed for this local improvement, or, in other words, whether or not it was a person qualified and competent to sign the petition for the local improvement.

The petitions relative to the asphalt pavement and the sidewalk appear to have been lodged in the month of June, 1914, and the Local Improvement By-Laws based thereon to have been passed in June and July, 1914. They are thus governed by the provisions of the Revised Statutes of Ontario, 1914, which came into force on the first day of March, 1914.

The opposing contentions are as follows: On the one hand the defendant contends that the lands of the plaintiff are not liable to assessment for local impovements, being ex-

empted by the Upper Canada College Act, R. S. O. 1914, ch. 280, sec. 10, which declared as follows: "(1) All property now vested in or which shall be hereafter in any way acquired by or vested in the College shall be exempt from taxation in the same manner and to the same extent as property vested in the Crown for the public uses of Ontario."

On the other, the plaintiff contends that its lands are liable to assessment for local improvements under the Local Improvements Act, R. S. O. (1914) ch. 193, sec. 47, coupled with sections five and six of the Assessment Act, R. S. O. (1914) ch. 195.

Section 6 of the Assessment Act provides that: "The exemptions provided for by section 5 shall be subject to the provisions of the Local Improvement Act as to the assessment for local improvements of land, which would otherwise be exempt from such assessment under that section."

Section 47 of The Local Improvement Act, R. S. O. (1914) ch. 193, provides that the "land on which a church or place of worship is erected or which is used in connection therewith, and the land of a university, college or seminary of learning, whether vested in a trustee or otherwise, which is exempt from taxation under the Assessment Act, except schools maintained in whole or in part by a legislative grant or a school tax, shall be liable to be specially assessed."

With respect to the by-law for opening Oriole Parkway passed in 1912 on a petition filed in the same year, the statutes then in force must govern; but, while they differ in words, I do not find that they differ in effect from the consolidation contained in R. S. O. (1914), and which I have just quoted above. Notwithstanding the argument, I understand that the collection of money for local improvements pursuant to R. S. O. (1914) ch. 195, is taxation. I also understand it to be admitted that Upper Canada College is not a school maintained in whole or in part by a legislative grant or a school tax, and that it is a college or seminary of learning. The provisions of section 47 would therefore apply to render its lands liable to assessment for local improvements.

On the other hand, the provisions of section 10 of the Upper Canada College Act exempts it broadly from all taxation including local improvements if lands of the Crown are likewise so exempt. The two sections are thus in conflict, and the question is, which governs.

The general rule is that in the absence of any indication of intention on the part of the Legislature, local Acts are not repealed by public general Acts. Craie's Statute Law, 4th ed., 469. This rule is illustrated and applied by Ferguson, J., in the case of *Ontario Railway Co.* v. *Canadian Pacific Railway* (1887), 14 O. R. 432.

In that case he held that where there are provisions in a special Act and in a general Act on the same subject which are inconsistent, if the special Act gives a complete rule on the subject, the expression of the rule acts as an exception of the subject matter of the rule from the general Act.

In the present case the general Act provides that a college or seminary of learning shall be liable to taxation for local improvements. The Upper Canada College Act makes that particular institution an exception to the general rule, and that, I think, is the result here.

Some effort was made in argument to reach a different conclusion on the footing that the later general Act repealed the earlier special Act. I think that the rule of construction which I have quoted and applied above would over-ride this latter argument; but an examination of the provisions of the statutes in force from time to time leads me to the conclusion that apart from the rule on which I have relied this argument of the plaintiff is not sound.

The lands in question were conveyed to the Crown in 1889. The deed is absolute and not in trust (if that makes any difference).

At that date the matter was governed by the Assessment Act, R. S. O. (1887) ch. 180, sec. 6, s.s. 1, by which there was exempted from taxation all property vested in or held by Her Majesty. The original enactment from which section 47 of R. S. O. (1914) ch. 193, is derived was first enacted in 1890, as section 3 of ch. 55 of that year; but when passed it had no effect on the lands in question, because they were lands held not by the college but vested in and held by Her Majesty.

So the matter remained until in 1900 the passing of 63 Vict. ch. 55, vested these lands in the college.

At that date the general statutory provision corresponding to what is now section 47, was R. S. O. (1897) ch. 223, sec. 684, and it seems to me probable that during the years 1900-1901 and until the Act 1 Edw. VII. ch. 42 was passed, these lands were liable to taxation for local improvements;

but it also seems clear to me that that Act was passed for the very purpose of removing any such liability and that its purpose was effectively accomplished.

If, then, such an investigation has any bearing, I am unable to see that it aids the plaintiff's contention; but the investigation seems to me irrelevant, for in the present case we are governed by the two statutes which became law simultaneously on the bringing into force of the Revised Statutes of 1914.

Since, then, the lands on the west side of Oriole Park are admittedly held by the plaintiff, Upper Canada College, the matter is governed by the direct provision relative to this particular college, namely, that its lands shall be exempt from taxation to the same extent and in the same manner as the lands of the Crown.

By section 5, sub-sec. 1 of the Asessment Act, the interest of the Crown in any property is exempt from taxation. The enquiry resolves itself into a question whether property vested in the Crown for the public uses of Ontario is or is not liable to taxation for local improvements.

Local improvement taxes cannot be imposed on the Crown unless the statute making the imposition expressly directs that the statute is to apply to the Crown. I can find no such direction anywhere in The Local Improvement Act or elsewhere.

The result may be summarized thus:

Crown Lands are exempt from taxation under R. S. O. (1914) ch. 195, sec. 5, sub-sec. 1.

This exemption is not cancelled or varied by the Local Improvement Act or otherwise. Hence Crown Lands are not subject to taxation for local improvements, and neither are the lands in question.

It was not therefore necessary that the petition for the by-law relative to these improvements should be signed by the plaintiff.

The by-laws, therefore, appear to be valid and this action not well founded.

This renders it unnecessary to deal with the other question argued on behalf of the plaintiff, i.e., whether the certificate of the City Clerk given in pursuance of section 16 of The Local Improvement Act is final and conclusive, or whether it can now be questioned. It also renders it unnecessary to discuss

the point raised by Mr. Rose, that the by-law in question cannot be quashed after the expiry of one year.

The result is that the appeal must be dismissed.

Appeal Dismissed.

Annotation by Editor

In the case of *Boston* v. *Lelievre.*, C. R. 6 A. C. at 15, Lord Westbury said, "consolidated Statutes may be treated as one great Act, and their Lordships think it would not be wrong to take the several chapters as being enactments which are to be construed collectively, and with reference to one another, just as if they hed been sections of one Statute, instead of being seperate Acts."

MIDDLETON, J. (CHAMBERS.) 6TH OCTOBER, 1916.

YOUNG v. SPOFFORD

Interpleader—Parties to Issue—Who should be Plaintiff?—Costs.

Wife claiming ownership:—A married woman now stands in precisely the same position as any one else, and where it is shewn that goods are actually in her possession, then, *prima facie* they are hers as against all the world; and where an execution creditor of her husband attacks her title to the goods, he should be the plaintiff in an interpleader issue; but where the husband is the owner or tenant of the house, then, the goods are in his apparent possession and the wife is rightly plaintiff: However, the form of an interpleader issue is immaterial, for whatever be the form, the substance must be looked at, as the object of the issue is to inform the conscience of the Court, and it matters not which party is made plaintiff.

Sheriffs having no interest in interpleader issues should be refused costs where they appear in Court.

Appeal by an execution creditor from part of an interpleader order made by the Local Master at Guelph.

The Master directed that the execution creditor should be the plaintiff in an interpleader issue between himself and the wife of the execution debtor, she having claimed the goods which had been seized by the sheriff and the sheriff having made an interpleader application.

R. L. McKinnon, (Guelph) for the execution creditor.

Goetz, for the wife of the execution debtor, claimant.

P. Kerwin, (Guelph) for the sheriff.

MIDDLETON, J.—In this case the wife being the owner of the house was in apparent possession of the goods and the execution creditor is rightly the plaintiff in the issue: *Farley* v. *Pedlar* (1901) 1 O. L. R. 570.

When the husband is the owner or tenant of the house the goods are in his apparent possession, and the wife is rightly plaintiff: *Hogaboom* v. *Grundy* (1894) 16 P. R. 47.

The execution creditors, it is true, in another proceeding has attacked the wife's title to the land, but this can make no difference—it cannot in the meantime be assumed against her that she will not succeed in maintaining her title.

At the trial no doubt the claimant must face the difficulty there always is in satisfying the Court that property acquired during coverture is that of the wife, but the dictum of Strong, J., in *Crowe* v. *Adams* (1892) 21 S. C. R. 344, that the goods found in the possession of the wife are *prima facie* the goods of the husband goes altogether too far.

The better view is that a married woman now stands in precisely the same position as any one else and once it is shewn that the goods are actually in her posssession *prima facie* they are hers as against all the world. The real difficulty may be to ascertain whether the husband or wife has possession. Here the wife being the owner of the land is in possession.

Clearly the onus is upon the execution creditor in his attack upon the wife's ownership of the land—why should it not also be so in his attack on the ownership of the goods?

As a rule nothing is more idle than these discussions as to the form of an interpleader issue. As pointed out in *Bryce Bros.* v. *Kinnee* (1892) 14 P. R. 510 "Whatever be the form the substance must be looked at. The object of the issue being to inform the conscience of the Court it is immaterial for that purpose which party is made plaintiff."

If the wife were plaintiff and she proved that the goods were in her possession at the time of the seizure, the onus then would shift to the execution creditor to displace the presumption of ownership implied from the fact of possession.

The appeal is dismissed with costs to be paid by the execution creditor to the claimant in any event.

The sheriff had no interest in the question and should have no costs.

Appeal dismissed.

MIDDLETON, J. (WEEKLY COURT.) 11TH OCTOBER, 1916.

RE MCCURDY & JANISSE

Vendor and Purchaser—Objection to Title—Will—Lands Devised to Executors in Trust—Income to Widow—Lands Sold for Taxes—Purchased by Stranger—Re-purchased by Widow—Widow not Trustee—Title Absolute.

Fiduciary trustee: — Where lands are devised to executors in trust and the widow is entitled to the income therefrom, she is not a life tenant nor a trustee of the lands; and where the taxes are allowed to fall in arrears and the lands are sold to a stranger for taxes and the widow afterwards purchases them from the stranger she obtains a good title.

Motion by the purchaser, under the Vendors and Purchasers Act, to determine the validity of two objections taken by him to the title of the vendor, upon a contract for the purchase and sale of land.

The motion was heard in the Weekly Court at Toronto, on the 10th October, 1916.

A. H. Foster, (Windsor) for the purchaser.

R. A. Junor, (Windsor) for the vendor.

MIDDLETON, J.—The first objection arises on the construction of the will of the late Moses F. Grey, who apparently died in 1874. The exact date is not shown. By his will, dated 6th December, 1873, he made the following provision :—

"I give and devise to my wife, Harriet Grey, the house and other buildings situate lying and being on that north part of park lot letter A in the town of Sandwich which contains five acres, together with the building on one acre of the said five acres, being one-half acre in breadth by two acres deep . . . to have and to hold to her, her heirs and assigns forever."

This clause is followed by a provision respecting the remaining four acres, part of this lot letter A, which with other lands is to be rented during the lifetime of the wife and the income is to be given to her during her life.

Upon one acre, a portion of the five acre lot, was situated

the homestead and all the buildings; and although the clause is involved I think sufficient appears to indicate intention to give to the wife this one acre with all its buildings absolutely.

Acting on this assumption, which, I think, is correct, the widow has been in possession from 1874 to the present time.

The second question is more difficult. The four acres are devised to the executors and the widow is entitled to the income for life. The taxes were allowed to fall into arrear. On the 7th April, 1910, the four acres were conveyed by tax deed to one J. G. Watson for $39·37, and on the 22nd April, 1910. Watson and his wife conveyed the four acres to the widow (then Harriet McCurdy) for $60.62. The tax title stands confirmed by special statute, 3 & 4 Geo. V. ch. 120, sec. 5, which enacts that all lands conveyed by tax deed are vested in the purchaser in fee simple free and clear of and from all right, title and interest whatsoever of the owners thereof of the time of the sale. The objection taken is that notwithstanding the tax sale and the very wide terms of this statute, Mrs. McCurdy occupied such a position by reason of her life interest in the income that she would hold the land as trustee for those beneficially interested in the will of her late husband. No cases were cited in support of this contention; but I suppose the principle evoked may be taken to be fairly illustrated by *Building and Loan* v. *McKenzie*, (1897) 28 O. R. 316, and the cases there collected. The principle as I understand it is that no trustee can acquire a title and set it up in derogation of the right the *cestui qui* trust. This principal has been enlarged so as to be applicable to all fiduciary and quasi fiduciary relationships, and to the relationship of mortgagor and mortgagee; and I have no doubt that if this case had been one in which a life tenant whose duty it was to pay taxes, in breach of that duty allowed the taxes to fall into arrear and then purchase the lands, the life tenant could not set up absolute ownership as against the reversioners. But here, in the first place, the widow was not the life tenant; she was merely entitled to receive the income, that is, the net income, from the executors who held the lands in trust; and in the second place the widow did not become the purchaser, but appears to have bought from the first purchaser.

The facts may well be considered as suspicious and suggestive of collusion, but there is nothing upon the paper beyond the naked fact indicated, and the transaction has stood unim-

peached for more than six years by those who have the right to attack. I cannot think that the suggestion of the possibility of any outstanding equity in the remainder men constitutes any defect in the vendors title that justifies the purchaser in refusing to carry out the sale.

In the result, I think, I should find that the two objections, concerning which the opinion of the Court was sought, do not constitute valid objections to the vendor's title, and I should so declare. If the costs have not been arranged between the parties they should follow the event.

Objections overruled.

MIDDLETON, J. (CHAMBERS.) 11TH OCTOBER, 1916.

REX v. GIEGER.

Criminal Law—Vagrancy — Annoying Persons Sleeping — Not Offence under Code s. 238.

Annoying persons sleeping:—Disturbing the slumbers of a person 85 years of age, at half-past eleven o'clock at night, and telling him untruly that his horse had got into his garden and was destroying it, does not constitute the offence of vagrancy under Criminal Code s. 238.

Motion to quash the conviction of the defendant, Sangster Gieger and two other boys, by a magistrate, charged with creating a disturbance contrary to a municipal by-law.

The motion was argued on 10th October, 1916.

A. B. McBride, (Waterloo) for the defendants.

A. L. Bitzer, (Kitchener) for the prosecution.

MIDDLETON, J.—Three young men, according to the evidence, which appears to be uncontradicted, at half-past eleven on the night of the 29th of January, so far forgot all decency and propriety as to find amusement in disturbing the slumbers of a man eighty-five years old and his wife by waking them up and telling them untruly that their horse had got into the garden and was destroying it. For this offence the young men were prosecuted and convicted; the charge being laid as a breach of a municipal by-law. Unfortunately no by-law was proved. It is now sought to uphold the conviction as falling within the vagrancy section of the Criminal Code. , That among other things, provides that everyone is a loose, idle or

disorderly person or vagrant who (e) loiters on any street . . . and obstructs passengers by standing across the footpath or by using insulting language or in any other way; (f) causes a disturbance in or near any street . . screaming, swearing, or singing or by being drunk; or (g) by discharging firearms or by riotous or disorderly conduct in any street or highway or wantonly disturbs the peace and quiet of the inmates of any dwelling house near such street or highway.

I do not think that the offence here shown is brought within any of these clauses. (e) relates to loitering on the highway; (f) to uproarious conduct on a highway, and (g) to riotous and disorderly conduct. If any offence has been disclosed by the evidence it would have been my duty to amend the conviction, but I do not think I should amend the conviction unless clearly satisfied that the case is brought within the statute, which is now a *dernier resort* relied upon to uphold a conviction where the prosecution has been commenced under another enactment.

With some regret I find myself compelled to quash the conviction, but do so without costs, and with an order for protection.

Conviction quashed.

BOYD, C. (TRIAL.) 12TH OCTOBER, 1916.

TRAILL v. NIAGARA, ST. CATHARINES & TORONTO RY. CO.

Limitation of Actions — Passenger on Railway — Injured by Negligence—Action for Damages brought Two Years after Accident—Right to Recover.

Railway Act, R. S. C. (1906) c. 37, does not prescribe any limitation of time in which an action must be brought against a railway to recover damages for injury sustained by a passenger owing to the negligence of the railway.

Action to recover damages for injuries sustained by plaintiff while a passenger on a car of the defendants', by reason of a collision with another car of the defendants' standing on an open switch.

The action was tried at St. Catharines, by a jury which assessed the plaintiff's damages at $1,500.

A. W. Marquis, (St. Catharines) for the plaintiff.

Geo. F. Peterson, (St. Catharines) for the defendants.

BOYD, C.—The plaintiff was a passenger on a car of the defendants—a Dominion railway company—and was injured by the collision of the car on which he was going with another car of the defendants, stationary on an open switch. Negligence was in effect admitted, and the main question for the jury was the quantum of damages, which they estimated at $1,500. This was subject to a point of law reserved: whether the company was liable to be sued after the lapse of time between the injury and the date of the writ—two years or more.

The defendants relied upon the provisions of the Dominion Railway Act, R. S. C. (1906) ch. 37, sec. 284 (7), and sec. 306.

Section 284 (7) gives a right of action for any one aggrieved by the neglect or refusal of the company to comply with the requirements of the section from which the company shall not be relieved by any notice, etc., if the damage arises from the negligence of the company, and sec. 306 enacts that "all actions * * * for indemnity for any damage or injury sustained by reason of the construction or operation of the railway shall be commenced within one year next after the time" when the alleged cause of action has arisen.

The prescription or limitation clauses of the Railway Act have been uniformly held to apply to actions for damages caused or occasioned in the exercise of powers given by the Legislature to the company for enabling them to construct and maintain the line—but not to actions arising out of negligence in the carrying of passengers. This was laid down by the Court of Queen's Bench in *Roberts* v. *Great Western Ry. Co.* (1856) 13 U. C. R. 615. The reason of this rule is well defined by Richards, J., soon afterwards, in *Auger* v. *Ontario Simcoe & Huron Ry. Co.* (1857) 9 U. C. C. P. 164, 169: "The limitation clauses do not apply when the companies are carrying on the business of common carrier (in the) use of locomotives, etc., for the conveyance of passengers and goods, etc., but the liability arises in these cases from the breach of contract, arising from their implied undertaking to carry safely and to take proper

care of the goods, etc." These decisions were accepted as rightly stating the law in *Ryckman* v. *Hamilton, Grimsby & Beamsville Electric Ry. Co.* (1905) 6 O. W. R. 271, 279; 10 O. L. R. 419, 429.

This very point was considered by Mr. Justice Duff in *Sayers* v. *British Columbia Electric Ry. Co.* (1906) 12 B. C. R. 102, and his judgment, affirmed by the Full Court in appeal, was that the restriction of the statute did not extend to causes of action arising out of contractual relations such as those involved in taking passage on the cars.

In the most recent decision bearing on this subject, Mr. Justice Duff, now in the Supreme Court of Canada, refers to the decision in B. C., and he says, having reconsidered the question he has no reason to alter the view therein taken: *British Columbia Electric Ry. Co.* v. *Turner* (1914) 49 S. C. R. 470, 489.

Mr. Justice Anglin in the same case upon the proposition that a claim for personal injuries sustained in a railway accident is not within the purview of that provision, while very strongly inclining to that view yet does not base his judgment on it: 49 S. C. R. 499.

To my mind (though it does not seem to have been noticed in any case to which my attention has been directed), the legislation has itself exempted from the limitation clause actions brought against the company upon any breach of contract express or implied for or relating to the carriage of any "traffic." By the interpretation clause "traffic" means the traffic of passengers as well as of goods, sec. 2, cl. 31; R. S. C. (1906) ch. 37 sec. 306, sub-sec. 3.

Both from the force of decision and from the reading of the Act in its present form, I would hold that the Act imposes no time-limit upon an action for injuries sustained by a passenger by reason of the negligence of the company in the safe and proper conduct of his person to its destination.

Therefore I order judgment to be entered for the plaintiff for the sum of $1,500 damages, with costs of litigation.

Judgment for plaintiff.

MIDDLETON, J. (WEEKLY COURT.) 13TH OCTOBER, 1916.

RE CORMACK TRUSTS.

Trusts and Trustees — Breach of Trust by Executors and Trustees—Administration of Estate—Failure to Set Aside Trust Funds—Abatement of Legacies—Allowance to Trustees on Passing Accounts—Costs.

Allowance to Executors:—Even though the Court may not be entitled to go behind an interim passing of executors' accounts, still the amount then allowed executors may be taken into consideration in determining the amount that should be allowed them on the final passing of their acounts.

Loss in realization: All loss in connection with the realization of an estate, whether by fault of an executor or otherwise must be born by the residuary legatee.

Retaining poor investments:—A clause in a will directing executors to call in and convert the estate, save such "securities for money which my trustees may in their discretion think it better to retain as part of residuary trust fund investment," gives the executors a discretion to retain investments made by the testator even though these investments are not such as trustees are authorized to make under the general law.

Three appeals from a report of the Local Master at Guelph, dated 1st April, 1916, on the passing of the accounts of the retiring executors and trustees under the will of the late James Cormack.

The appeals were heard in Weekly Court at Toronto, on the 11th October, 1916.

J. H. Moss, K.C., (Toronto) and *N. Jeffreys*, (Guelph) for Majorie K. Harley.

J. A. Mowat, (Guelph) for Frank Harley.

P. Kerwin, (Guelph) for the surviving trustees and the executors of the deceased trustee.

R. L. McKinnon, (Guelph) for the Guelph General Hospital and the Elliott Home.

MIDDLETON, J.—An order was made appointing new trustees and referring to the Master at Guelph to pass the accounts of the retiring trustees, and upon the passing of these accounts

the difficulties giving rise to these appeals appeared.

James Cormack, the testator, died on the 28th September, 1907. By his will and codicil, dated 18th April, 1904, and 4th March, 1907, respectively, he appointed as executors and trustees the late Donald Guthrie, K.C., A. W. Alexander and G. B. Hood. Probate was issued to them on the 5th November, 1907. Mr. Guthrie died on the 31st October, 1915. The order appointing new trustees was made on the 22nd December, 1915.

To understand the difficulties which have now arisen the terms of the will must be briefly set out. All the property was given to the trustees. By the will the dwelling house and other real estate were directed to be sold and out of the proceeds a legacy of $4,000 was to be paid to the testator's son, James, and two other legacies of $500 each. By the codicil the trustees are given full discretion to postpone the sale of the dwelling house until the testator's grand-daughter has attained the age of twenty-five years, during which period she is to be allowed to use it and the furniture rent free, and the trustees are authorized to pay the pecuniary legacies already referred to out of the other trust estate, and the proceeds of the real estate in that event are to form part of the trust or residuary trust estate.

The executors, in the exercise of their discretion, postponed the sale of the house, and, although the grand-daughter attained the age of twenty-five in 1912, the house has not yet been sold.

After dealing with certain personal chattels and household furniture the testator in clause 10 of his will deals with the "whole residue" of his property by directing that the sum of $12,000 be set apart and invested as a fund to yield the sum of $500 per annum to be paid to his wife under the terms of the separation deed during her lifetime; upon her death this fund and any accumulation to form part of the testator's "final residuary estate."

It is then provided that a fund of $20,000 shall be set apart and invested until the grand-daughter attain the age of twenty-five years or marries. Upon her attaining this age or marrying, the $20,000 and accumulated interest shall be settled upon trustees for her. In the meantime power is given to the testator's trustees to apply the interest from the $20,000 for maintenance. If the grand-daughter should die before

attaining twenty-five or marriage, then this fund is also to form part of the "final residuary estate," and to go to the "ultimate residuary legatees."

It is next provided that there shall be paid to the directors of the Guelph General Hospital $5,000, and a further sum of $5,000 to the Provost and Council of Wick, Scotland, for the relief of the poor.

A further sum of $6,000 is directed to be invested for the benefit of Frank Harley.

So far there is nothing in the will to indicate any intention on the part of the testator that any of these sums shall have priority over the other.

Then follows a clause providing that after payment of all the forgoing legacies and setting aside the several sums mentioned there shall be paid to the Directors of the Guelph General Hospital what shall remain of the residuary fund.

By a further clause the testator gives "what I have heretofore denominated as my final residuary estate"—that is, as I undestand it, the $12,000 to be set apart to secure the wife's annuity and the $20,000 for the grand-daughter if that should lapse by reason of her death unmarried before the age of 25—to the General Hospital.

The testator, according to the inventory filed by his executors, left an estate of the nominal value of upwards of $62,000. Of this sum $800 represented furniture given to the grand-daughter; $4,000, the value of the house retained for her use; there were debts and testamentary expenses amounting to something less than a thousand dollars; the pecuniary legacies of $5,000; the two legacies directed to be paid out of the residuary estate amounting to $10,000, $20,800 in all, so that approximately $41,000 would remain out of which the three funds, $12,000, $20,000, and $6,000, $38,000 in all, would be set apart.

The executors did not at once realize all the assets, perhaps could not do so, and did not set apart the two funds of $12,000 and $20,000, but appear to have set apart the $6,000 for James Harley.

The wife survived the testator and died on April 25th, 1915 Shortly after her death—24th June, 1915—the executors transferred to the Guelph General Hospital securities of the value of $10,693, upon the theory that the hospital had then

become entitled to receive the $12,000, trust fund and any accumulation thereof over and above what had been necessary to meet the annuity due the widow. A further sum of $600 had been paid to or for the hospital, making a total amount of $11,293.

When the accounts were taken before the Master it appeared that what was left of the estate, in addition to the house, consisted of certain stocks and other property now unrealized and which, as to some of the items, there may be difficulty in realizing. Majorie Harley, the chief beneficiary under the will, naturally objects to the conduct of the executors in transferring to the hospital the ultimate residuary beneficiaries, all the more fluid assets, so that she against her will has been converted into the residuary legatee.

Mr. Moss, I think, goes too far in his contention that the hospital takes merely as residuary legatee. The scheme of the testator's will was, I think, to provide that after payment of the $4,000 and the two $500 legacies, and after the specific gifts, the residuary estate should constitute one trust fund, to be dealt with by the executors in the manner pointed out by clause 10. This contemplated the disposition of $48,000; the payment of the two $5,000 legacies and the creation of the three trust funds. If this residuary estate, which I think did not include the house, did not amount to $48,000, then the legacies and funds would have to abate *pro rata*. If the residuary estate exceeded the amount named, the hospital took as residuary legatee under clause "L". Upon the falling in of the $12,000 fund on the death of the wife, or upon the falling in of the $20,000 fund by reason of the death of the grand-daughter unmarried and under the age of 25, these funds, which would otherwise have gone to the hospital under clause "L" as residuary legatee, would go to it under the specific gift found in clause "M".

If the executors had done their duty and had set apart the funds, any loss resulting from the administration of the estate would have had to be borne by the particular fund in which the loss occured. But as the two funds were never set apart, I think that when the widow died and the executors then sought to distribute, they had no right to so discriminate as to allocate unquestionable assets entirely to one fund and throw doubtful assets into the other.

I think it may be fairly inferred (and it was admitted by all counsel) that at the time of the death or shortly thereafter the executors ought to have had no difficulty in finding sufficient estate to enable them to set apart the two funds as well as to set apart the $6,000 fund and pay the $10,000 to the legatees; and therefore it would follow that the assets in hand at the death of the widow ought to have been so apportioned between the funds that they would be ratably distributed in the proportion of 20 to 12, having regard to their then true value.

The testator, by his codicil having given the executors the discretion which they exercised, of retaining the house for the use of the grand-daughter until she attained the age of twenty-five, I think took the house out of the trust fund which the testator directed to be apportioned and invested. The indirect effect of this is that upon this house being sold the proceeds would go to the hospital under the residuary clause; but the gift of the house was intended to be, and is, I think, residuary so far as the hospital is concerned, and the proceeds of the house must in the first place be used to make good the trust fund as far as there may be any shortage upon realization; for all loss in connection with the realization of an estate, whether by the fault of an executor or otherwise, must be borne by the residuary legatee.

It follows from this that the assets as yet unrealized must now be realized upon by the Master, unless the parties can agree upon a valuation at which Miss Harley is ready to accept them as part of her trust fund. If, as the result of this valuation or realization, it is found that she cannot receive the same proportion of her $20,000, as the hospital received of its $12,000 (due adjustments being made with respect to interest and accumulation) the executors should be declared to be liable to her fund for the amount of the deficiency, and this without prejudice to any right there may be to compel a refund by the hospital of the amount overpaid. In the meantime, no payment should be made to the executors of anything on account of commission or costs, as the default must be made good before they can receive anything.

The accounts of the executors were passed before the Surrogate Judge on the 31st July, 1909, at a time when everything had been paid and only the two funds in question and Frank Harley's $6,000, were outstanding, and it was then shewn that

after making allowance to the executors of $2,000 for their compensation up to date there was on hand a total of $41,270. Deducting $6,000 allocated to Frank Harley would leave $35,270 to answer to $32,000 required for the funds in question. The homestead was included in this, valued at $4,175. Unless there has been some substantial loss, for which the executors are not responsible, there seems to be no reason why the funds should not both be paid in full.

In the Master's report for judgment he has made an analysis of the estate, starting with the estimated value as shewn upon the application for probate, $62,635.11; and after deducting $17,918.39, the amount of legacies entitled to priority over the three trust funds, he proceeds to deduct a sum of $10,209.25 as representing the expenses of administration and losses, thus leaving a net balance of $34,507, which would be applicable to the three trust funds, $38,000. If this is the net result of the realization, which is not yet complete, it would mean that a deficit of $3,500 would have to be distributed among the three funds, and Frank Harley as well as the hospital should refund the due proportion.

The Guelph Hospital, by its appeal, seeks to attack the propriety of certain allowances made by the Master. The hospital was a party to the passing of the accounts in the Surrogate Court and I think it is concluded by the accounts then passed. Neither Miss Harley nor James Harley, as I understand it, were notified of the passing of these accounts; but they have launched no appeal with respect to the items allowed.

Dealing with the matter set forth in this appeal in the order stated in the notice of motion, they are :—

(1) The improper payment by the executors of succession duty out of the estate instead of charging it against the legatees. The contention of the hospital is undoubtedly right, but it is bound by the accounting in 1909, when the payment was allowed;

(2) It is said that there has not been a proper discrimination between capital and income. I do not see that this is of practical importance.

(3) This item also relates to capital and income, and is of no practical importance.

(4) Complaint is made because the Master has failed to

charge the executors with more than $560, with respect to the rent of the residence since July 1912, when Miss Harley attained the age of twenty-five. Upon this item the executors cross-appeal, seeking to escape the charge entirely or to charge it over against Miss Harley. Apparently the executors arrranged that Miss Harley should remain in the residence as caretaker, expecting to sell. It is not easy to sell, and no sale has yet been made. I do not think the executors are particularly diligent, but I do not think they ought to be charged as being in default, nor do I think that Miss Harley, who stayed under this definite arrangement for an indefinite time, ought to be charged with rent. I would allow the executors' appeal with respect to this item, but I think they ought to be penalized as I shall indicate later.

(5) Excessive payments are said to have been made to Miss Harley. This has not been made out.

(6) This again relates to payments made to Miss Harley and Frank Harley. No improper payment has been shewn.

(7) There is a general allegation of default against the executors in failing to set aside the three funds. This has already been dealt with.

(8) A submission that there should be a *pro rata* abatement between the three funds. With this I agree, as appears above.

(9) It is said that the Master, though finding the $6,000 fund was set apart, has failed to treat it as separate. I cannot see that this is material.

(10) The $600 paid to the hospital, it is claimed, as a payment on account of the general residue and not a payment on account of the fund. I think the Master is right in treating this as a payment which can be charged against the hospital as part of the fund which it is entitled to receive.

(11) It is sought to charge the executors with $900, paid on account of calls made upon certain stock in the Equity Fire Insurance Company, an investment for the testator, and for

loss in having failed to realize upon this stock, when, as it is suggested, there was a market for it. Under Clause (10) of the will the executors are to call in and convert the estate, save such "securities for money which my trustees may in their discretion think it better to retain as part of the residuary trust fund investment." This, I think, gives the executors a discretion to retain investments made by the testator even though these investments are not such investments as the trustees would be authorized to make under the general law or under the later clause in the will authorizing investment. There is nothing to shew that the executors in any way acted improperly in the exercise of the power of retention which the testator chose to give them.

(12) Lastly, it is said that the commission allowed the executors is too large; and with this I agree. The Master has allowed a sum which, with the sum allowed on the interim passing of the accounts, amounts to $3,372. Possibly I am not entitled to go behind the report of 1909, but I think I should consider the matter as whole; and the amount then allowed is one of the factors to be considered in determining the amount that should now be allowed; and I have to consider the laxity of the whole conduct of the affairs of the estate—the failure to realize, the failure to obey the instructions of the will and set apart the funds, and the very large amount which has been allowed to the executors for costs paid to the legal firm of which one of the executors was a member. I think I ought also to consider the burden of costs that has now to be borne by the estate, which means those beneficially interested in it, a direct result of the bungling of the executors; and I think I am treating them with great liberality when I do no more than deduct from the amount allowed by the Master eight hundred dollars, leaving the bills of costs to stand as they are.

I think the above covers everything that was argued. In the result the matter must be now referred back to the Master, as already indicated, to realize upon the assets for the purpose of providing the fund to which Miss Harley is entitled to set apart for her. This involves that the Master should enquire and ascertain by how much each of the three funds should abate, and the Master should readjust the account in accordance with my ruling in reference to the $560, charged against

the executors for rent and the reduction of the amount of commission and costs now allowed to them.

The costs of all parties to this appeal may well be allowed out of the estate in such a way that they shall be charged *pro rata* against the three funds; but no costs should be paid to the executors, to the hospital or to Frank Harley, until the amounts for which the executors are liable, and which ought to be refunded by the hospital or Frank Harley, are made good. The losses, the expenses of administration, and costs, must all be borne *pro rata* by the three funds and cannot be cast upon Miss Harley's fund.

If there is no intention of carrying the case further it seems probable that much expense might be saved and a satisfactory solution reached without much difficulty by which the assets might be taken over by Miss Harley's trust and the amount to be refunded by the hospital and Frank Harley's trust might be ascertained.

If I can be of service in working out a settlement I am at the service of the parties.

MIDDLETON, J. (WEEKLY COURT.) 14TH OCTOBER, 1916.

RE FITZGIBBON.

Will—Construction—Abatement of Legacies—Identification of Legatee—Perpetual Trust—Charitable Purposes—Rejection of Life Estate.

Perpetual trusts: — A gift to an institution aiding emigrant girls coming to Canada, the income of the gift to be used in awarding annual prizes to domestics who have gone through that institution and who have remained in one place for three years, giving satisfaction to her employer, is a gift for charitable purposes.

Rejected life estates given by will do not inure to the benefit of the reversioner, they fall into the residuary estate; nevertheless, the rejection of the life estate does not defeat the gift over, but the gift over only takes effect upon the death of the life tenant.

Indentification of legatee: — Where a testator was for years connected with the "Women's Welcome Hostel," an incorporated body, it was held that a gift to the 'Hostel" was a sufficient identification of the institution.

Abatement:—Where an estate is inadequate to answer the benevolence of the testator the residuary legacies must abate.

Motion by the executors for an order construing the will of Mary Agnes Fitzgibbon, who died on the 17th May, 1915.

E. G. Long, for the executors.

John A. Paterson, K.C., for the Women's Welcome Hostel.

R. H. Parmenter, for Miss Morphy.

E. C. Cattanach, for the Official Guardian, representing infants.

MIDDLETON, J.—Miss Fitzgibbon died on the 17th May, 1915, and several questions arise upon her will. Concerning some of these matters there can be no doubt.

In the first place the Women's Welcome Hostel undoubtedly is the institution referred to in her will as "The Hostel." It is an incorporated body with which she was identified for years and of which she was the secretary. Secondly, the annuities are directed to be paid out of the residue, and this gives priority to the specific legacies of $500 to Miss Plunkett and $1,000 to Miss Moody. Miss Fitzgibbon undoubtedly did not contemplate the extent of the deficiency, and probably might not have desired these legacies to have priority; but this cannot affect the construction of the will or the application to it of the well settled rules of law.

Out of the residue the testatrix directs sufficient to be set apart to realize $200 per annum for her nephew, Francis Badgley; the interest to be paid to his mother during her lifetime and the capital to him at her death. This is followed by a provision that "a second portion realizing $200 per annum" is to be invested in trust for Douglas Simpkin, the income to be paid to his mother until he comes of age, when the capital is to be paid to him. Then follows a clause which gives rise to much trouble; "I desire that a third portion of $200 be invested and held in trust, the interest to be paid to my niece, Mrs. Isabel Morphy, quarterly."

Mrs. Morphy contends that I should enlarge this provision so that it should read "a third portion yielding $200 per an-

num." I cannot see my way clear to so construe the will. I may suspect that the testatrix did not write what she intended. My function is to construe that which she has written. If she had written Ten Thousand Dollars instead of Two Hundred Dollars, I do not think it could be argued that ten thousand dollars meant ten thousand dollars per annum, and I cannot construe the words as having a different signification simply because the capital amount which is named in this clause is the same amount as the annual amount mentioned in the other clauses; and I would draw attention to the fact that in dealing with the second portion the testatrix directs the sum of $200 to be paid, while in this clause she directs the interest on the sum named, as invested, to be paid. I think it must be declared that Mrs. Morphy is entitled only to have two hundred dollars set apart for her.

The estate is altogether inadequate to answer the benevolence of the testatrix, and the residuary legacies must abate. The funds to be set apart must abide *pro rata*. Those for the nephews will be dealt with as directed by the testatrix, so that the mothers will receive the income from the abated fund. The gift of the interest to Mrs. Morphy is sufficient to entitle her to receive at once her abated portion representing the $200.

One question remains. The testatrix, out of a certain fund constituting part of her estate, directed an amount to be set apart which would yield $10 per annum to be paid to her brother if he complied with certain terms. The brother has declined to accept the gift on the stipulated terms. The testatrix provided that on the death of the brother half of the capital from which this income was to be derived was to be set apart in trust, to be known as the Fitzgibbon trust, and an annual prize was to be given to any domestic going through the hostel (which is an institution to aid immigrant girls) who has remained in one place three years or upwards, giving satisfaction to her employers to be judged by the manager or the hostel and the employer of the recipient. The refusal of the brother to accept the benefit offered to him does not, in my view, defeat the gift over to this fund; but the gift over will only take effect upon the death of the life tenant. The rejected life estate does not inure to the benefit of the reversioner, but the

life estate falls into the residuary estate: *Kearney* v. *Kearney*. [1911], Irish R. 137. This can be adjusted between those beneficially interested by estimating the value of the brother's life estate and reducing the fund accordingly, so that there may be an immediate division .

Upon the argument of the validity of this perpetual trust was discussed. Unless the purpose indicated can be regarded as charitable the gift would be invalid. Charity is said to cover a multitude of sins. The ultimate text seems to be whether the gift is one that can be considered as beneficial to the community; and, bearing in mind that it has now been held, not only that a gift to establish a fund for the payment of prizes to be given in school for learning is charitable, but also that a gift to establish squash racket courts in connection with a public school is charitable, this gift can easily be upheld. In *Re Mariette* (1915) 113 L. T. R. 920, it is pointed out that although it is quite possible for a gift to a charitable organization to be of such a character as not to be itself a charitable gift, yet the fact that the gift is in furtherance of the aims and objects of a charitable institution goes far to indicate the true character of the gift. This institution is undoubtedly a charitable institution, for the laudable purpose of aiding and assisting emigrant girls coming to Canada with a view of obtaining employment. The object of this bequest is to further the aims of the institution by providing for a reward to those who bring credit to the institution by their faithful services, after having passed through its hands and obtained employment.

This bequest being one from the particular fund pointed out by the testatrix and not in its nature residuary, is not called upon to abate.

Costs of all parties may come out of the estate.

MIDDLETON, J. (CHAMBERS.) 17TH OCTOBER, 1916.

PORT ARTHUR WAGGON CO. v. TRUSTS & GUARANTEE CO.

Trial—Motion to have Law Determined before—Rule 132—Other Issues in Action.

Rule 132:—Questions of law raised by way of motion under Rule 132, should not be determined before the trial of other isues in the action unless it is made to appear that the point missed is one which is reasonably clear ought to be resolved in favour of the applicant.

Motion by the defendants under Rule 132 for an order directing the determination of a question of law before the trial of the other issues in the action.

The motion was heard by Middleton, J., in Chambers on the 13th October, 1916.

W. J. Boland, for the defendants.

Peter White, K.C., for the plaintiffs.

MIDDLETON, J.—The Port Arthur Waggon Company is in liquidation, and sues by its liquidator. The defendant is the administrator of Christian Kloepfer deceased, in his lifetime a director of the Waggon Company, and also director of another company known as the Speight Waggon Company, Limited. It is said that in August, 1910, an agreement was entered into between the two companies by which the Speight Company sold to the plaintiff company all its assets for certain stock in the plaintiff, and that consequently a resolution was passed by the directors of the plaintiff company authorising the payment of certain sums in cash for the completion of the sale. In December, 1910, the Speight Company conveyed lands to the plaintiff company, covenanting that these lands were free from incumbrance; but the lands were in truth incumbered. Kloepfer, it is said, not only paid the price without deducting the amount of this incumbrance, but also paid to the Speight Company, out of the assets of the plaintiff company, a large sum, the payment of which was entirely unauthorised and in this it is said he was guilty of misfeasance and breach of trust. The assets of the Speight Company were distributed among the creditors and shareholders, of that company, and Kloepfer, it is said, received a portion thereof, I understand both as a creditor of the company and as a shareholder.

Kloepfer died on the 9th February, 1913. The writ in

this action was issued on the 9th October, 1914, more than a year after his death; so that if the action can only be maintained by virtue of the provisions of the statute, ch. 121, sec. 41, the time limit is a bar. Mr. Boland contends that, apart from the statute, the action will not lie. This the plaintiff denies; and the question of law thus raised is the one sought to be determined as a preliminary issue.

I think it may be taken as clearly determined by *Phillips* v. *Homfray* (1883) 24 C. D. 439, that an action *ex delicto* cannot be pursued against the executor of a wrong doer unless the property of the plaintiff or its proceeds has been appropriated by the deceased person and added to his own estate, and that it is not enough that the estate has been benefited by the act complained of, but there must be property which can be traced to his assets. This rule has, however, never been applied to cases depending on breach of contract, express or implied, and the position of a trustee is one in which there is a quasi contractual obligation, the law implying a promise to faithfully perform the duties undertaken. This is very clearly pointed out in *Concha* v. *Murrieta* (1889) 40 Ch. D. 543. The principle has been applied to the case of a director by Pearson, J., (Who decided *Phillips* v. *Homfray*) in *Ramskill* v. *Edwards* (1885) 31 Ch. D. 100.

As I understand the principle to be applied to applications of this kind, I ought not to grant the leave sought unless it is made to appear that the point of law which is sought to be raised is one which it is reasonably clear ought to be resolved in favour of the defendant.

From what I have said it appears that the point has been concluded by high authority against the defendant's contention, and the balance of convenience is therefore is favour of allowing the action to go to trial in the ordinary way.

The motion is consequently refused.

To avoid any possible misunderstanding, it should be said that the refusal is not to prejudice the presentation of this legal question at the hearing. It is then to be open to the defendant; and if it is thought necessary for the defendant's protection it may be provided in the order that it is without prejudice to the right of the defendant to argue the question of law at the hearing.

Costs to the plaintiff in any event. *Order refused.*

SUTHERLAND, J. (WEEKLY COURT) 18TH OCTOBER, 1916

RE NESBIT ESTATE.

Executors and Administrators — Compensation for Services — Quantum—Advances Made by Executor to Estate—Passing of Accounts.

Remuneration:—Where an estate consisted chiefly of real estate and the only money realied by the executhe sale of somepersonal property, allowed $50 for commission and $75 for pains and trouble in connection with the management of the estate for a year, he having personally advanced the estate $676.19.

Motion by way of appeal by the Official Guardian, representing Mary Murphy, an infant, from an order of the Judge of the Surrogate Court for the County of Lincoln, dated 24th July, 1916, made on the passing of the accounts of the executor of the will of the late John Nesbit.

J. Hoskin, K.C., for the Official Guardian, contended that the allowance made to the executor was excessive, and that the costs allowed were not in accordance with the tariff of the Surrogate Court.

A. C. Kingstone, for the executor.

SUTHERLAND, J.—The testator died on the 14th April, 1915, leaving a will dated 11th February, 1915, wherein two executors were named, one of whom, William J. Oliver, renounced, and letters probate whereof duly issued to the other, William H. Swayze. The estate consisted of about $12,000 worth of property. By the order appealed from it is found that "the total amount of money received by the executor from the estate" is "$18.75" realized from the sale of some personal property.

The said order also found that the unrealized assets of the estate amounted to $11,510.75, of which $10,642.50 are real estate and $868.25 personal estate consisting apparently of farming implements. The executor is found by said order to have properly paid out and disbursed in due course of his

administration of the estate $694.94, of which $676·19 have been advanced by himself personally, there being no funds of the estate available for the purpose. The order finds that there are unpaid debts to the amount of $1,822.30, which includes said sum of $676.19 owing to the executor, together with $62.90, costs of an audit of his accounts and $300 allowed him as compensation, and the balance thereof consists of an item of $431.42 for succession duty and about $325 for solicitor's and valuator's fees in connection with a contest over the amount of succession duty, and some other small items of costs. The contest about the Succession Duty seems to have been somewhat expensive having regard to the value of the estate and the amount involved.

By the said will the testate disposed of his property as follows :—

"I will, devise and bequeath unto my brother, James Nesbet, the whole of my real estate for and during the term of his natural life and upon his death I will, devise and bequeath the whole of my estate both real and personal unto my niece, Mary Murphy, absolutely forever, but I direct that my sister, Jane Murphy, shall be entitled to reside in the family dwelling on the homestead farm and receive such maintenance from the products of the said farm as she may require for and during the term of her natural life.

"And I hereby direct that during the life occupancy of my said lands by my said brother my said executors shall not be liable for the maintenance or repair or condition of the said real estate and during his occupancy my said brother shall be entitled to the use of the farm, stock, implements and chattels and household goods on my said lands."

It is said that the Surrogate Judge at first made an allowance to the executor as follows :—

2 per cent. on Real Estate amounting to	$10,642.50 —	$212·84
3 per cent. on Personalty....	887.00 —	26.61
3 per cent. on Executors disbursments, $694.94, and on outstanding accounts $1,434.20 or total of	2,129·14 —	63.87
	Total....	$303.32

The Official Guardian took exception to the allowances. The Judge is said thereupon to have reconsidered the matter, and then delivered a written judgment to the following effect:

"On reconsideration I cancel the allowance of commission made by me on the 13th inst. which allowance was calculated on a precentage basis and in lieu thereof I now allow the executor a lump sum of $300.00, this to include and cover the percentages upon Receipts and Disbursements and an allowance for care and management. This I consider a fair and reasonable allowance for the Executor's care, pains and trouble, and his time expended in or about the Estate. It is to be borne in mind that the duty cast upon the Executor was most undesirable by reason of the dissolute habits of James Nesbit. *Re Farmer's Loan & Savings Co.* (1904) 3 O. W. R. 837."

It is contended by the appellant that the personal estate is comparatively small. The only amount thereof realized by the executor being the sum of $18.50, and that it is in the main and to the extent that he has paid the debts of the estate and of his dealings therewith, he is properly entitled to a commission. It is contended also that he has practically nothing to do with the real estate or the renting thereof and that at all events up to the present time and until it ultimately passes to the testator's niece, Mary Murphy, he is not entitled to any commission in connection therewith, the real estate being still undisturbed assets on which no commission should be allowed.

It is on the other hand contended that the habits of the life tenant were such as to make it objectionable for any one to act as an executor of the estate and that the executor in question most reluctantly consented so to do, that he found there was no money to pay the debts and had considerable difficulty and responsibility in connection therewith, advancing the sums mentioned for the purpose of saving the estate. It is also said that apart from the terms of the will with respect to the real estate he in fact had a good deal of trouble about the farm and also in connection with the contest as to the amount of succession duty to be paid. It is also said that the infant represented by the Guardian, the niece Mary

Murphy, is about twenty years of age and expresses her satisfaction with the commission.

After a careful consideration of the matter and having regard to the value of the estate as a whole and to the small amount of the personal estate as compared to the real estate and the short period of time during which the executor has has had the management of the estate, I cannot but think with due respect for the opinion otherwise of the Surrogate Judge and his local knowledge, that the sum allowed by him is excessive.

I think that the sum of $50 for commission and the further sum of say $75 for pains and trouble in connection with the estate would be ample. I therefore allow the appeal and reduce the compensation to $125. Reference to *Stinson* v. *Stinson* (1882), 7 P. R. 560; *McDonald* v. *Davidson*, (1882) 6 A. R. 320; *Re McIntyre, McIntyre* v. *London & Western Trust Co.* (1904) 3 O. W. R. 258, 7 O. L. R. 548; *Re Farmer's Loan & Savings Co.* (1904), 3 O. W. R. 837 at 839; *Re Toronto General Trusts Corp. & Central Ontario Ry. Co.* (1905), 6 O. W. R. 350; *Re Patrick Hughes* (1909), 14 O. W. R. 630; (1913) 49 C. L. J. 19; *Re Godchere Estate* (1913-14), 25 O. W. R. 570; Widdifield's Law & Practice as to Executor's Accounts (1916), 221 et seq.

The appeal on the ground that the costs allowed were not in acordance with the tariff of the Surrogate Court was not apparently pressed upon the argument, so I do not deal with it.

The Guardian will have his costs of the appeal out of the estate and otherwise there will be no order as to costs.

Appeal allowed in part.

SUTHERLAND, J. (TRIAL) 19TH OCTOBER, 1916

MCARTHUR IRWIN CO. v. GAUSBY.

Sale of Goods—Contract—Delivery in Excess of Purchaser's Agreement to Accept—Goods Stored in Building not Owned by Purchaser — Purchaser Allowed to use as Required—Insured by Vendor—Assignment by Purchaser for Benefit of Creditors—Goods Claimed by Assignee.

Title to goods in storage:—Where a company previous to becoming insolvent entered into a contract for the purchase of a certain quantity of goods, and where the vending company in order to save freight charges stored a large quantity of such goods in building not owned by the purchasing company and paid the fire insurance on the goods so stored, but gave the purchasing company the right to use such of the goods as they might require and at the end of each month pay for what they had used, *held*, that the goods so stored belonged to the vending company and the assignee of the purchasing company had no claim to them.

Action to recover the value of certain goods. The facts of the case are sufficiently set out in the judgement below.

A. B. Cunningham, (Kingston) for the plaintiff.

J. A. McEvoy, for the defendant.

SUTHERLAND, J., An action by the plaintiff company against the defendant as the assignee for the benefit of creditors of the Rathbun Match Company Limited to recover the value of a quantity of chlorate of potash claimed by the plaintiff company but which the defendant as such assignee is alleged to have wrongfully taken possession of as part of the assets of said insolvent company and which was sold pending the litigation under an order of the Court with the approval of both plaintiff company and defendant.

The contest herein is about the proceeds of such sale, the money having been paid into Court to await the determination of the action. By a written proposal of the plaintiff company to the Rathbun Match Company, dated May 17th, 1915, covering also other articles of merchandise, they offered to sell 35,040 pounds of chlorate of potash at 30 cents per pound, terms net 30 days, F. O. B. Montreal, to be shipped in equal monthly ship-

ments of 2,920 pounds, the first to leave the plaintiff company's warehouse July 15th. This offer was accepted on the date named. Soon after, namely on May 22nd, the plaintiff company wrote to the Match Company stating that they had requested their principals to make direct shipments to the Match Company and asking if the latter could take delivery of 6,000 pounds per month and that they would arrange with them for payments. They went on to say "This will mean a saving in freight for us."

The Match Company, on the 25th May, replied that they would be willing to take delivery of the shipments as they came into them after August first on condition that the plaintiff company would accept payment as follows:

"We to remit you cheque in payment for 2,920 lbs. at the end of each month; should we use more than the above amount in any one month, payment to be made for same at the end of that month. We will meet freight charges on these shipments from Point of Loading to Deseronto, but should that rate be higher than the rate from Montreal to Deseronto on equal shipment, you to credit us with difference.

"We presume that you would insure against Fire such goods as remained from time to time not yet bought by us, or make us an allowance to cover increase in premiums which we would incur in taking out extra insurance to cover these goods."

The plaintiff company's place of business was at Montreal and the Match Company's at Deseronto, and the plaintiff company apparently bought the potash to deliver to the defendants under the contract from manufacturers at Buckingham, Quebec. The plaintiff company and the Match Company then negoiated about the securing of a place at Deseronto to receive and store the potash, and on the 2nd June, 1915, the Match Company wrote the plaintiff company as follows:

"In reference to the storing of Chlorate of Potash here at Deseronto earlier than August next, the Rathbun Company have lent us a place in which we could store it, on condition that it does not affect their insurance of the building in question, they have taken the matter up with the Insurance people and we expect a reply by to-morrow. We will let you know their answer at once and should you wish then to have the goods shipped at once to us we will place them in store here."

The Rathbun Company referred to was a company entirely independent of the Rathbun Match Company, and on the 8th June the latter again wrote to the plaintiff company as follows:

"The Insurance Company have given the Rathbun Company permission to use one of their buildings for this purpose, so that should you now wish to have the potash shipped direct here, we will take delivery of it for you and place it in store."

At first the Match Company insured it but later on the plaintiff company insured it in its own name. On the 23rd June the plaintiff company wrote the Match Company as follows:

"Under date of June 16th we were invoiced with 39 kegs of powered chlorate of potash shipped direct to you. We are this day charging these goods to your account, and you will note that this chlorate of potash is to be paid for as per agreement made with Mr. Hodge, that is, you are to pay us at the rate of 2,920 lbs. per month, beginning in July. We have instructed our principals to make all shipments direct to you, and as these shipments are made, we will invoice you with same, which we trust will be satisfactory."

On the 30th of July Messrs. Wickman & Wickman, insurance agents at Montreal, acting for the plaintiff company, wrote the Match Company as follows;

"We wrote you on the 19th asking for details of building and its location and fire protection in which stock of McArthur Irwin Limited is stored. We have not as yet been favored with any reply."

On August 4th the Match Company wrote the plaintiff company as follows:

"Please accept our apologies for not enclosing copy of letter to us from Messrs. Wickman & Wickman re insurance of potash, herewith please find it. Mr. Rixon of the Rathbun Company has given these people all necessary particulars as requested."

On August 25th the Match Company wrote the plaintiff company:

"As regards chlorate of potash we have on hand now 117 kegs of potash made up by three shipments, but we have not yet used any. We will in the future advise you weekly of the amount on hand as you request." And on September 13th,

they wrote them: "With this we are sending you statement of an account we have paid for the insurance on the chlorate of potash stored here by you from June 24th to July 15th, 1915" and on March 7th, 1916, they wrote to them with reference to 7 kegs of chlorate of potash that had been shipped "This chlorate is being shipped as we understand on our contract, and therefore is not due for payment yet."

The Match Company got into financial difficulties and made an assignment to the defendant on the 20th June, 1916. The invoices for the shipments of the chlorate of potash by the plaintiff company to the Match Company are as follows:

June 23, 1915, 39 kegs, 4,368 pounds at 30c. $1,310.40, and six similar ones for similar amounts dated respectively, July 19th, August 16th, September 15th, October 15th, November 15th, December 20th, 1915, and one dated February 25th, 1916, for seven kegs 784 lbs. at 30c., $245.20 (or 235.20?) and two similar ones dated March 15th and April 16th, also for seven kegs, and in each amounting to $235.20. On the face of the first four of the invoices named appear the words "to be paid for as agreement;" on the fifth, sixth and seventh the words "as per agreement;" on the eighth, ninth and tenth, the words "net 30 days," and in the case of the last two someone has partly erased these words, which are in ink, by a lead pencil tracing and written above them the word "agreement."

The plaintiff company in their books kept two accounts with the Match Company into one of which they carried apparently all the goods sold by them to the Match Company during the period in question other than the chlorate of potash, and in the other this latter commodity only. In this second account they charged up against the Match Company the chlorate of potash according to the date and amounts of the invoices just as though they were actual and completed sales. On the other hand the Match Company were billed by them for the purpose of monthly payments with 2,920 pounds of chlorate of potash at 30c. per pound, $876, subject in some cases to variations arising out of insurance or freight adjustments and the Match Company paid or adjusted these monthly accounts by cash or notes. The Match company is given credit in the plaintiff company's books in the chlorate of potash account for these monthly payments running from September 15th, 1915, to May 15th, 1916.

After the assignment for creditors notice thereof was sent to the plaintiff company but it does not appear that they sent in any notice of their claim. At the meeting of the creditors they claimed that the potash still on hand and in the actual or ostensible possession of the Match Company at Deseronto belonged to them.

It is admitted that in all 32,928 pounds were shipped by the plaintiff company in the way mentioned to the Match Company and that in this action the sole contest is over the 6,648 pounds claimed respectively by the plaintiff company and the assignee.

While it is contended upon the part of the defendant from the manner in which the plaintiff company dealt with the potash in their books and otherwise, that there was a variation in the original contract which resulted in an out and out sale by the plaintiff company to the Match Company of the potash as shipped from time to time, though payment therefor was not to be made by the Match Company except on the basis of the price of 2,920 pounds per month at the agreed rate unless more potash were used in any one month, in which case payment for such extra amount so used in that month would also be paid for. The secretary of the Match Company himself put it in this way.

"Q. You did make certain arrangements in regard to warehousing the chlorate of potash in Deseronto?

"A. McArthur—Irwin wrote to us and asked us if they shipped ahead of their contract over and above our monthly requirements if we could put it some place and insure it or let them insure it. They shipped this to us and we were to pay them from July, the date of the 1st shipment, for 2,920 lbs—our requirements. I agreed if we used more we would advise McArthur-Irwin and pay for it."

The contract which the plaintiff company had with their principals to purchase potash which they in turn furnished to the Match Company called for the shipment of the larger monthly quantity of 30 kegs (4,368 lbs.) referred to in the invoices mentioned, and the deliveries under that contract were to be completed by the month of December, 1915.

From the correspondence quoted it is, I think, apparent that neither party to the contract was treating the potash so shipped to and received at Deseronto as a sale by the plaintiff

company to the Match Company except to the extent of the monthly amounts the latter were under their conract obliged to take and pay for, or to the further extent that they should pay for a larger quantity if more were taken in any month. From that correspondence and the evidence and documents otherwise, I am of opinion that the delivery and storing of the potash at Deseronto was for the convenience of the plaintiff company as to insurance and freight and in connection with their contract with their principals, that it was for this reason that the account was kept in their books as it was, and that in fact the ownership of such potash as was not taken out by the Match Company from the amount on hand from time to time to the extent of 2,920 lbs. per month, for which they were to pay according to their contract with the plaintiff company, remained the property of the latter and was at the time of the assignment their property as against the claim of the assignee.

I think the plaintiff company should therefore have judgment for the proceeds of the sale of the potash in question, with costs against the defendant as such assignee as foresaid.

The defendant was, as it seems to me under the circumstances, justified in having the question involved determined after action brought and should have his costs out of the insolvent company's assets.

FALCONBRIDGE, C.J.K.B. (TRIAL.) 17TH OCTOBER, 1916.

MILES v. CONSTABLE.

Landlord and Tenant—Lease of House—Damage to Tenant's Goods by Flooding—Landlord's Duty to Repair—Warranty of Fitness for Habitation.

Fitness for habitation:—A warranty at or before the making of a lease that a house is in a fit state for habitation, whether as regards repairs or drainage, may be given as an express contract or may be implied from a representation as to the state of the house, but it is well settled law that in the absence of an express stipulation or a statutory duty the landlord is under no liability to put the demised premises into repair at the commencement of the tenancy nor to do repairs during the continuance thereof, nor is there any implied warranty by the landlord that the premises shall be fit for the purpose for which they are taken.

Action by a tenant to recover $1,500 damages for injury sustained by the flooding of a house leased from the defendants.

The action was tried without a jury at Toronto.

T. F. Slattery, for the plaintiff.

J. H. Moss, K.C., and *W. Lawr*, for the defendants.

FALCONBRIDGE, C.J.K.B.—George W. Constable, who was one of the original defendants, fell fighting for his country in November last, and on the 7th day of April a consent was signed by solicitors whereby the action was dismissed as against George W. Constable without costs, and the action should be proceeded with as against the remaining defendants.

I am of the opinion that as against the defendants still before the Court this action fails. Their position is that of lessors only, and it is well settled law that in the absence of an express stipulation or a statutory duty the landlord is under no liability to put the demised premises into repair at the commencement of the tenancy nor to do repairs during the continuance thereof, nor is there any implied warranty by the landlord that the premises shall be fit for the purpose for which they are taken: Hals., volume 18, p. 501, sec. 984; Foa, 5th ed., p. 140 et seq.

True it is that a warranty at or before the making of a lease that a house is in a fit state for habitation, whether as regards repair or drainage. may be given as an express contract or may be implied from a representation as to the state of the house: Hals., vol. 18, p. 502, sec. 986; and some such case is endeavoured to be set up here by plaintiff in an alleged conversation with the deceased, George W. Constable. I am of the opinion that the evidence does not establish any such case, and plaintiff's solicitor's letters do not allege any such case.

But if any such collateral agreement or warranty had been established, it would be only that of George W. Constable; and there is no evidence of any express authority from his co-defendants to make such agreement or warranty, and there is nothing in the case from which any implied authority on his part can be inferred.

The same remarks would apply to any supposed case of misrepresentation by George W. Constable. That would be only a common law action of deceit and at an early stage of the trouble the plaintiff might have got relieved of his bargain, and he refused defendants' offer to give him back his money and let him go, and thereby he affirmed the lease.

The plaintiff's action must be dismissed with costs; and there will be judgment against him on the defendants' counterclaim for $1,399.62 with costs.

Fifteen days' stay. *Action dismissed.*

APPELLATE DIVISION, S. C. O. 20TH OCTOBER, 1916

PALMER v. TORONTO

Negligence—Highways — Overhead Bridge Connecting Two —Snow and Ice on Steps Leading to Bridge—Liability of Municipality for Injury to Person Slipping on Steps — Municipal Act, R. S. O. (1914) c. 192, s. 460 — Climatic Conditions of Municipality.

Bridge over railway:—In an action by a man and wife to recover damages for injuries sustained while descending the 44 steps of an overhead bridge crossing railway tracks and connecting two highways in Toronto, the trial Judge found that the steps were in a dangerous condition owing to snow and ice and that the defendant municipality neglected their duty to keep them in proper repair and awarded the woman $1,000 and the man $100 damages and costs. An Appellate Division, S. C. O., *held*, that there was not sufficent evidence to support such finding, therefore, defendants' appeal was allowed. Lennox, J., dissented.

Appeal by the defendant municipality from a judgment of Clute, J., dated 20th June, 1916, in favour of the plaintiffs.

This action was brought by husband and wife to recover damages for injuries sustained by the wife while descending the 44 steps of an overhead bridge crossing railway tracks and connecting two highways in the city of Toronto. Plaintiffs alleged that the injuries were caused by negligence on the part of the defendant municipality by failure to keep the steps in a safe condition.

The action was tried by Clute, J., without a jury at Toronto, and he found that the steps were in a dangerous condition owing to snow and ice having been allowed to accumulate thereon and that the defendants had thereby neglected their duty to keep them in proper repair. The wife was awarded $1,000 and the husband $100 damages and costs.

The appeal was heard by Meredith, C.J.C.P., Riddell, Lennox, and Masten, J.J.

Irving S. Fairty, for the appellant municipality.

Wm. Proudfoot, K.C., for the plaintiffs, respondents.

MEREDITH, C.J.C.P.—The plaintiffs' claim in this action is based altogether upon an alleged breach of the defendants' duty, under the provisions of the Municipal Act, to keep every highway and bridge, under their jurisdiction, in repair; and the liability, in like manner imposed upon them, "for all damages sustained by any person" through their "default" in that respect.

The duty is to keep such public ways reasonably sufficient for the purpose of the traffic over them; and the defendants are not to be held liable for such damages except upon reasonable proof of damages sustained through "such default."

Such a way may be out of repair and damages may be sustained without the municipality being in default. Reasonable opportunity must be afforded for the performance of the duty thus imposed. And when a "personal injury" is caused by snow or ice upon a sidewalk there is no such liability "except in case of gross negligence."

The female plaintiff's injury seems to have been caused by snow or ice upon the steps leading to and from a foot bridge over a number of railway tracks, the bridge taking the place of "a level crossing," over them, for safety's sake. She ascended the steps on one side of the bridge, crossed it, and fell in descending the steps on the other side, when more than half way down.

However sincere she may have been in giving her evidence, no reliance can be placed upon her statements as to the condition of the steps, because of her evident uncertainty respecting it, and because, in so far as they related to the depth of the snow, they differ widely from that of all the other witnesses. There could have been, and there was, but very little snow on the steps, going down which she fell, at the time that she fell. Her main witness, Dr. Mathieson, in answer to the question—"How deep was the snow?" said: "Can't tell you:" and to the question "Quarter or an inch?" answered: "Possibly": and then in answer to the further question: "Just a thin covering?" said: "Well enough to make the steps slippery." The driver of the ambulance which took the woman to the hospital, who was a witness for the plaintiff, said, in regard to the condition of the steps: "It had been snowing and it had been trod-

den down on the steps,'' but that he ''did not pay much attention to them,'' and that ''there was a big crowd around, you could hardly see.''

For the defence, a policeman, who was one of the first at the place after the accident and who procured the ambulance, testified positively that there was no ice upon the steps, and that as to snow there was a ''very slight amount, nothing to speak of:'' that the steps were not slippery, and that they were able to carry the heavy woman, on a stretcher, down the steps ''without the slightest danger of slipping:'' and another witness, a sergeant of police, testified positively that at about one o'clock, less than an hour after the accident, there was only about one-half inch of slushy snow on the steps.

It was also proved beyond question: that light snow had been falling all the morning: that the temperature was slightly above freezing at 8 o'clock and a few degrees below freezing when the next observation was recorded at noon; and one of the witnesses testified that the damage occurred a little before noon.

It was also proved beyond question: that the defendants had one man employed solely in keeping this bridge and its stairways safe and clean; that though an old man he was able for such work; and that on the morning of the accident, three or four hours before it happened, he had swept down the steps upon which the woman afterwards fell: one witness saw him in the act, two other said that, from their condition when they saw them, they must have been swept that morning, indeed it could not be otherwise with the steps in the condition in which they saw them after the continuous fall of snow that morning, however light the falling snow may have been.

The man whose duty it was to keep the bridge and steps in order was away at his dinner when the accident happened; and died a few months afterwards and before his testimony could be taken in this action.

The trial Judge seems to have rejected all other evidence upon the subject of the condition of the steps in favour of the testimony of the witness, Dr. Mathieson, and to have based his judgment upon that alone. That I should not have done: the circumstantial evidence and the probabilities of the case as well as the direct testimony of the other witnesses would have had much weight with me.

Dr. Mathieson was somewhat emphatic about the slippery and dangerous condition of the steps: he also was positive that there was ice and snow on the steps, and in regard to the length of time it had been there, "hazarding a guess' put it at "three or four hours or maybe longer." A witness may describe a place he has seen as dangerous, and, of course, he may describe it as slippery: but his evidence is of no great weight until he has told why he so describes it, whether it proved slippery or dangerous to him, or whether he is merely expressing an opinion as to danger or slipperiness. It is to be regretted that this witness was not interrogated as to this, and perhaps asked whether, like the policeman, he had not been in the slightest danger of slipping either as a stretcher-bearer or otherwise, or had seen anyone slip or in danger on the steps. So too it should be borne in mind that the witness attended the woman, as her surgeon, through all that she has suffered from this accident, and so being human, could not but have some yearning for her success in this litigation; indeed I have no hestitation in saying that no man can read the evidence in the case alone without a strong feeling in her favour: a woman getting pretty well on in life, and who has, through her husband's earning powers, apparently until recently, been in comfortable circumstances, but now, owing to her husband having suffered a stroke of paralysis, is obliged to become the bread-winner in the toil of needle work; and was in search of such work when this calamity happened; the witness would be an extraordinary man if his evidence could have been given in an entirely impartial manner.

But accepting his testimony to the fullest extent that it may be helpful to the plaintiff, how can the judgment in their favour be upheld, unless we are to make the defendants substantially insurers of the safety of all who cross the bridge in question?

No fault is found with the construction of bridge or stairs: the "treads" were wood, and they and the "risers" of the usual width and height: there was a wooden hand rail on each side of the stairs, and they seem to have been in themselves as free from objectionable qualities as such enclosed stairs usually are. A man was kept constantly employed in the care of the bridge, a man capable of taking care of it so far, at all events, as the removal of snow and ice was required: and there

is no evidence that the man ever failed to perform his duties; on the contrary it is clearly proved that on the day in question, and at the place in question, he had done so; and that is supported by the witness, Dr. Mathieson, in his "hazarded guess" that the snow and ice, said by him to have been upon these steps, had been there three or four hours. In fact the steps were cleared off by this man just between three and four hours before the accident; and they were cleared off again by the man in charge after his return from his dinner.

There was no suggestion of anything in the nature of a trap, or concealed danger: there was no suggestion that the step at which the accident happened was in any respect different from any other step; and, that being so, to make the defendants liable it must be found that failure to sweep the steps off oftener than once in every three or four hours in weather existing up to mid-day on the day of the accident was "default" in the statute-imposed duty to keep this highway, among very many miles of other highways, in repair; a finding which no one could properly make.

The suggestion, if even suggestion it can be called, that sand should have been scattered upon the steps, has no kind of weight and is contrary to all the evidence bearing upon the subject: with light, wet snow continually falling one might well doubt the sobriety of the caretaker of the bridge if he had been seen scattering sand upon, instead of, as he was seen, sweeping the steps clear of the soft snow, called by some of the witnesses "slush." Sand was provided, kept in a box under the bridge, by the defendants; but the time had not come when it should be used; there was yet opportunity to clear off all the snow: sand would be needed only when ice or hard snow had been allowed to accumulate so as to prevent pedestrains having the benefit of walking on the bare boards free of such ice and snow.

The appeal must be allowed, and the action dismissed.

RIDDELL, J.—In the city of Toronto there is an overhead footbridge across the Canadian Pacific Railway tracks, leading from Wallace avenue to Dundas street. This is owned and looked after by the city.

On December 13th, 1915, the female plaintiff, a married woman of mature years and without physical disability, was

crossing on this bridge about 12.30 p.m. when by reason of the snow, etc., she fell and sustained somewhat serious injury. At the trial before Mr. Justice Clute, without a jury, my learned brother found in favour of the plaintiffs (both husband and wife sued), and awarded $1,000 to the wife and $100 to the husband.

The city now appeals.

It may be said at once that if there is liability no fault can be found with the quantum of damages awarded; but the defendants claim that there is no liability at all.

The city contends that this footbridge was a sidewalk, and that consequently it cannot be liable except for "gross negligence." R. S. O. (1914) ch. 192, sec. 460(3). In the view I take of this case I do not think it necessary to decide as to this contention or to consider what it meant by "gross negligence" as distinguished from "negligence" *simpliciter*, whether the former is not just the same as the latter with a "vituperative epithet." I made an attempt to consider the law in *Carlisle* v. *Grand Trunk Ry. Co.* (1912), 20 O. W. R. 860; 25 O. L. R. 372.

So far as I am concerned, the case will be considered as though the defendants should be held liable if the accident happened through their negligence, "gross" or simple.

Moreover, I accept the finding of fact of the learned trial Judge :

"I am of opinion that the bridge at the time the plaintiff received the injuries was not reasonably safe for foot passengers," when explained by the sentence immediately following :

"I have no reason to doubt, and I do not doubt, the correctness of the evidence given by Dr. Mathieson, and I find that the bridge was in the condition described by him, that it was unsafe for traffic at that time."

Sub modo, also, I adopt my learned brother's statement of law, "that it was the duty of the city's servants to see that it was in a reasonably safe condition in order that a person might with reasonable safety use it."

This duty is subject to circumstances. It is not the duty of the city to have any highway for foot, horse or motor at all times such that "a person might with reasonable safety travel on it." Snow may fall, ice form, a torrential rain come, rendering a way unsafe for a time. The city is not liable for that. All the city can be called upon to do is to exercise due care in

making and keeping their ways "reasonably safe."

The learned Judge having found "That the bridge was in the condition described by" Dr. Mathieson, it will be necessary to see precisely how he describes it. He says :

"At that time the steps were very slippery. There was ice and snow on the steps without any protection whatever as regards putting sand on. I don't know whether they had been cleaned or not, but it was snow and ice, and the snow and ice had frozen on the steps."

On cross-examination :

"Q. You said, I think, that the steps were covered with snow which might have fallen in the last three or four hours? A. Yes.

"Q. How deep was the snow?. A. Can't tell you.

"Q. Quarter of an inch. A. Possibly.

"Q. Just a thin covering? A. Well, enough to make the steps slippery."

"Q. There was no four or five inches of snow on the steps? A. No, of course not. The steps were slippery; in a slippery and icy condition; unusually slippery.

"Q. How do you mean?. A. It made it dangerous to go up and down those steps.

"Q. Were the steps covered with a thin coating of snow; does that describe the whole condition? A. The steps were slippery. That day there had been snow and rain fall and the steps were slippery.

"Q. The people had been walking up those steps? A. Of course.

"Q. And that is what made them slippery or slippery from the fall of snow? A. I can't tell you that. They were in a slippery condition and a dangerous condition."

This is the extent of his evidence; he guesses, indeed, that the steps had not been cleaned that morning, but he cannot be sure :

"Q. I am instructed that the steps were cleaned that morning? A. I can't contradict that."

On this evidence, accredited as it is, the steps had about a quarter of an inch of snow and were slippery and dangerous for that reason, unusually slippery.

But the conditions must be looked at. It is proved by a

competent observer, whose duty it is to be accurate, that it snowed from the previous evening all day long till about 7.45 p.m., that until afternoon the snow was steady, a light snow, and that in the afternoon there were only flurries; the total fall for the day being two and a half inches.

The city had a man, one Riddle, specially placed to look after this bridge. Unfortunately he has since died, but it was proved that he had been seen sweeping the steps that morning about 8.15. It is plain that the bridge must have been swept at some time that morning, or there would have been more snow than the thin covering described by Dr. Mathieson; and it is most probable, almost certain, indeed, that it was swept immediately before Riddle went to his lunch at noon.

The suggestion that sand might have been used answers itself. The snow was soft, slushy, and under such conditions it is not thought wise to put sand on, at least till the snowfall stops. The learned Judge does not find against the city upon that ground.

On all the evidence I am unable to say that the city's man did not do his duty; and think the appeal should be allowed and the action dismissed. Costs to follow the event.

LENNOX, J. (dissenting.)—Counsel for the defendants assumed that the learned Judge based his findings solely upon the evidences of Dr. Mathieson and argued that even if this evidence can be taken as conclusive as to the condition of the stairway at the time of the accident it does not establish actionable negligence.

The vital question is not, "How was the judgment arrived at or reasoned out, but is it supported by the evidence and right as a matter of law. I would be slow in concluding that the experienced Judge who tried this action adopted wrong methods or failed to consider any question of fact involved in reaching a just determination of the issues: and, reading his reasons for judgment and the evidence, I am very far from concluding that he did. Whether he makes every step in the reasoning clear and positive beyond cavil is another, and comparatively unimportant question: it is still for this Court, in a case tried by a Judge alone, to determine, was there evidence upon which the Judge might reasonably find the facts as he did?

It must be reasonably clear that the Judge erred as to his

conclusions of fact before we disturb his judgment in this repect; I am not by any means satisfied that he did, and not much in sympathy with technical logic or finely spun verbal criticism in considering a Judge's reasons for judgment.

The learned Judge says: "I am of opinion that the bridge at the time the plaintiff received the injuries was not reasonably safe for foot passengers. I have no reason to doubt, and I do not doubt the correctness of the evidence given by Dr. Mathieson, and I find that the bridge was in the condition described by him, that it was unsafe for traffic at that time and that it was the duty of the city's servants to see that it was in a reasonably safe condition in order that a person might with reasonable safety use it. * * * The evidence to a certain extent is contradictory, but I am satisfied that the bridge by reason of neglect was not in a reasonably safe condition, and I so find."

Can it be fairly said that this indicates that the Judge depended upon the evidence of Dr. Mathieson alone—though it would be competent and might be perfectly reasonable and proper for him so to do—or the evidence of the plaintiffs' witnesses alone, or that he accepted or acted upon the evidence of this witness as verbally accurate in every particular, or that he excluded the consideration of any of the evidence, or does the language quoted mean more or less than this: that after searching out the evidence most likely to be unprejudiced and trustworthy and sifting and weighing all the evidence, and finding the evidence as he says "to a certain extent contradictory" (though I fail to find substantial contradiction on any material question), the learned Judge regarded Dr. Mathieson as an honest and independent witness, and *the witnesses*, having regard to the time of the happening of the accident, best able to give an intelligent and accurate picture of actual conditions at the time the woman fell? And why not? With the exception of Ironsides, he is the only witness able to speak of the condition of the steps before the activity of Riddle had changed it all, when he returned from dinner; and Ironsides' evidence is the same in substance and effect as Dr. Mathieson's. Mathieson is the only disinterested witness with the exeception of Tweedie, of the Weather Records office. He is not contradicted by anyone as to there being snow or the amount of snow or snow and slush upon the steps, or that it was slippery.

No, I am wrong, there was another early arrival, Mog-

ford. He was the first of all and was able to go up and down the lower eight or nine steps without slipping, but he again is in substantial agreement with Dr. Mathieson. There was, he says, a quarter of an inch of snow and snow-slush upon the steps; and Donald McDonald, the only other witness who saw the steps before Riddle cleaned them off in the afternoon, says there was half an inch. All the defendants' witnesses say there was very little snow falling in the forenoon. None of them say that snow upon steps does not create a slippery condition and increase the liability to accident, no responsible witness I imagine, would care to say so.

Ironsides, the first on the scene as I said, found the steps crowded with people and the snow trodden down. Mr. Tweedie says the warmth from people's boots might produce moisture. It takes a lot of light, fluffy snow, quite as much as 2½ inches I would think, to produce even a quarter of an inch coating of tramped snow or snow mixed with water spoken of as slush. I am not concerned as to how deep it was, neither is it of much importance in the view I entertain whether or not Riddle cleared off the steps at eight o'clock that morning. There is hardly a scintilla of proof that he did. A broom will not brush away snow trodden upon and beaten down for hours by people passing to and fro and up and down the steps; does not work automatically, and even in the hands of a civic servant is unlikely to develop perpetual motion. Who knows that he "finished his job," or if he removed what was there at eight o'clock—an hour fairly remote from the time of the accident—or that he removed the subsequent snow fall, or that he was there at all during the four hours immediately proceeding the time Mrs. Palmer sustained her injuries; and the conditions point rather the other way. But this is only in passing—my judgment would be the same in effect if it had been shewn beyond question that the snow was cleared away at about eight o'clock. I will take the evidence as a whole and practically the undisputed facts as a basis. These are: there was snow upon the steps, of the depth stated by the defendants' witnesses; it may have been partly melted or soft and slushy; it was tramped upon and packed; it is sworn that it was slippery and not denied except argumentatively (by Mogford); it is universal knowledge that snow is slippery, and the occurrence was at a point of the highway of exceptional hazard, even un-

der the most favourable circumstances, a *quasi*-dangerous place *per se*. Does this amount to actionable negligence? Also, but without deciding that it is so, I will assume for the time being that the contention that the stairway in question is "a sidewalk" within the meaning of sub-section (3) of section 460 of the Municipal Act, R. S. O. (1914) ch. 192, is well founded; and upon this hypothesis the defendants are only responsible for "gross negligence."

It is quite clear, I think, that the Legislature did not intend that the statutory obligation of corporations to repair would be the same in all municipalities, or as to *all sidewalks* in the same municipality, or as to *all parts of the same sidewalk*: in other words snow or ice upon a sidewalk at a certain point may be evidence of "gross negligence" and, with the same weather conditions, snow or ice at another point may not be evidence of negligence at all. Although not admitted to be the cause of the accident, it was not and could not be fairly argued that the condition of the steps was not the proximate cause of the accident, but it was strenuously urged that even taking the condition to be as described by Dr. Mathieson, put forward as the extreme of the evidence, it is a condition for which they are not responsible in damages. I prefer to allow the defendants greater latitude, to regard the evidence of their two chief witnesses, as far as it goes, as substantially correct and to decide upon a basis of non-controversial facts as above stated.

On this basis, is gross negligence established? Take weather conditions as described, an accident during or immediately after a snow storm, upon a level or nearly level sidewalk lightly coated by the recently fallen snow. I am of opinion that the corporation would not be liable in this case. It is the case in question, minus Riddle and the 44 steps, but this may be a distinction *with* a difference.

Take an extreme the other way: a much frequented thoroughfare and a smooth cement sidewalk down a sharp incline —say a drop of a foot in two—or a cross-scored or corrugated sidewalk will do as well; a thin coating of recently fallen snow; a place where it is known that snow must come but *when* is necessarily unknown; a man engaged to sweep it off but only for a fraction of the traffic hours and during the absence of this man, and at an hour when he was not engaged to be there, a woman, wearing rubbers and proceeding with due care, steps

upon the snow flakes, as she must, almost as they fall and by reason of the snow is thrown down and injured; is the corporation in this case also exempt, or must the corporation make provision for reasonable safety commensurate with the obvious probability that accidents may otherwise occur? The woman might, perhaps, have gone another way and the same may be said of Mrs. Palmer. She did not know that there was a bridge, but she was forced to use it; she was only impliedly invited.

When the defendants constructed or took control of this bridge—standing about 30 feet above the level and with 44 steps at either end—they were aware of the climatic condition of this city and knew that snow storms were as inevitable as springtime and autumn, or summer and winter; that the steps would become smooth as a painted floor; that the outer edges would be rounded down and the steps gradually thinnned and lowered towards the outer edge; knew that snow resting upon a smooth surface an eighth or a sixteenth of an inch or less deep is *at least* as liable to cause a man to slip and fall as inches of snow; knew that, the conditions under foot being the same, the risk of slipping and falling while battling with a snow storm or blinded by snowflurries is greater than at any other time, and that *any snow at all*, however light or thin it may be, upon a stairway running down thirty feet on a drop of at least seven inches in ten—is necessarily a dangerous thing, and calculated to occasion casualties, and that the use of sand would mitigate, although it might not obviate the risk; knew that it was impossible for one man however diligent he might be to keep this bridge and its stairways in a reasonably safe condition as regards snow and ice, and knew or ought to have known that by the expenditure of a very moderate sum, less, far less, than the wage account of Mr. Riddle for his seven years' service, these steps could be roofed and enclosed in a way to secure absolute immunity from the menace of snow or ice. In every case it is, of course, for Municipal Councils to determine, in the first instance, how their highways are to be constructed and maintained. If they fail in the performance of their statutory duty to keep them in repair, and personal injury results they are liable in damages. The defendants have failed to discharge the duty imposed on them to keep their stairway-highway in repair and reasonably safe for people hav-

ing occasion to use it. On the evidence of the defendants' own witness it was in a distinctly dangerous condition at the time of the happening of the injury complained of, unless it can be said that snow and slush is not slippery and slippery steps do not involve risk of injury to persons using them.

I am of opinion that in this part of the Province where snow and snow storms are inevitable winter conditions, the defendants, maintaining stairway-highway of the character by their foreman, Matthews, described, must be taken to have notice in advance that dangerous conditions must from time to time arise if the steps are allowed to become coated or covered with snow or ice, were called upon to exercise exceptional vigilance by reason of the exceptional and *quasi* dangerous character of the structure they provided for public use, and were bound to take effective measures to prevent the occurrance of conditions such as confronted Mrs. Palmer and occasioned her injuries on the 13th of December last.

The defendants wholly failed to discharge these obligations, and, whether the stairway is a sidewalk or not, were guilty of gross negligence.

The appeal should be dismissed.

MASTEN, J., I think it is established by the evidence and is not inconsistent with the findings of fact by the trial Judge or with the evidence of Dr. Mathieson on which he relies;

(1) That this foot bridge was between 200 and 300 feet long, including the stairs by which it was approached.

(2) That the city employed a competent man whose sole duty it was to keep this bridge, including the steps, in proper condition for use as a passenger bridge.

(3) That at 8.15 o'clock a.m., on the day of the accident this man was seen engaged in cleaning the snow from the stairs leading to the bridge.

(4) That during the storm which then occurred two and one-half inches of snow fell, and that the storm lasted from some time in the night before the accident till about the time when the acident occurred.

(5) That at the time of the accident there was about one-half an inch of snow on the steps where the plaintiff fell.

(6) As an inference from the above that the steps were cleared some time between eight and nine o'clock on the morning of the accident and that afterwards snow continued to fall.

I think as a conclusion from the above facts that the defendant corporation cannot be held guilty of negligence, gross or otherwise, and that the appeal should be allowed and the action dismissed.

Appeal allowed; Lennox, J., *dissenting.*

SUTHERLAND, J. (TRIAL.) 18TH OCTOBER, 1916.

NAIRN v. SANDWICH, WINDSOR & AMHERSTBURG RY.

Negligence—Street Railway—Collision between Street Car and Automobile—Personal Injuries to Owner of Automobile—Findings of Jury—Contributory Negligence—Ultimate Negligence—Costs.

Contradictory findings of jury:—Where a jury answered "yes", to the question, "was the plaintiff guilty of any negligence which caused or contributed to the said injuries?" and also found the defendants guilty of negligence and awarded plaintiff $200 damages, *held,* that the effect of the answer was that in the opinion of the jury the plaintiff had been guilty of some initial negligence but that defendants' negligence was the ultimate cause of the accident.

Fixing costs:—Where a plaintiff might have reasonably expected a considerable larger verdict (having regard to his own personal injuries and the incidental expenses flowing therefrom in addition to the damage to his motor car) costs were fixed against defendants at $200 without set off.

Action by the owner of an automobile to recover damages for personal injuries to himself and for injuries to his automobile.

T. Mercer Morton. (Windsor) for the plaintiff.

M. K. Cowan. K. C., (Toronto) and *A. R. Bartlet,* (Windsor) for the defendant railway.

SUTHERLAND, J.—In this action the plaintiff, the owner of an automobile, claimed damages against the defendant street railway company for personal injuries to himself and injuries to his motor car as the result of alleged negligence on the part of the driver of the street car which ran into the rear end of the motor car which was travelling ahead of it and in the same direction on the railway track.

The action was tried with a jury and the questions put to them were answered as follows:

"1. Was the defendant railway company guilty of any negligence which caused the injuries to the plaintiff and his motor car? Yes.

"2. If so wherin did such negligence consist? We feel that

motorman did not have his car under proper control for the rate of speed he was going in coming to a dangerous crossing.

"3. Was the plaintiff guilty of any negligence which caused or contributed to the said injuries? Yes.

"4. If so wherein did such negligence consist? We feel Mr. Nairn didn't take proper precaution in looking to see whether or not he could go upon the track in safety.

"5. Damages (if any). $200.00 for plaintiff."

The jury also handed in when bringing in their verdict a paper as follows:

"We have put a value on the automobile of ($400.00) Four Hunderd Dollars at time of acident, we therefore state damages to plaintiff for two hundred dollars.

"Signed on behalf of Jury,

"Fred Crawford, Foreman."

It is perhaps difficult to determine just what the jury meant as to liability by their findings. It is also difficult to know how they came to fix the damages at only $200 in the light of the evidence. The plaintiff Nairn and his chauffeur, who were the occupants of the motor car at the time of the accident, both testified that they had looked when approaching the street intersection in question and saw the track apparently clear of the street cars for a reasonable distance to enable them to safely turn the corner and go out upon the track. The evidence was that the street car hit the motor some little distance from the easterly intersection of the two streets.

In the light of the evidence given at the trial, I am inclined to think that the effect of the answers is that though the plaintiff was guilty in the opinion of the jury of some initial negligence in going on the track in front of the car without taking some further precautions, the motorman, not having his car under proper control, having regard to the rate of speed at which the street car was going, was guilty of the ultimate negligence causing the accident.

With some hesitation, therefore, I direct judgment to be entered for the plaintiff on the findings for the $200.

As to costs, it seems to me the plaintiff might, having regard to his own personal injuries and the incidental expenses and loss naturally flowing therefrom in addition to the damage to his motor car, reasonably have expected a considerably larger

verdict. In the circumstances I fix the costs to the plaintiff as against the defendants at $200 without set off.

Judgment for plaintiff

RIDDELL, J. (CHAMBERS.) 7TH OCTOBER, 1916.

BULMER v. BULMER.

Lis Pendens—Action for Alimony—Wife Loaned Money to Husband—Invested by him in Land—Wife Acquire no Lien.

Alimony action — *Lis pendens* should not be issued and registered in an alimony action; not even where a wife has advanced money to her husband and he has invested it in land, because the wife thereby acquires no lien on the land and she is not entitled to register a certificate of *lis pendens*.

Motion by the defendant husband to vacate the registry of a certificate of *lis pendens* filed against his lands by the plaintiff wife in an alimony action.

Harcourt Ferguson, for the defendant.

J. E. Lawson, for the plaintiff.

RIDDELL, J.,—This is an action for alimony only according to the writ of summons; the plaintiff has filed a certificate of *lis pendens* and the defendant now moves to have it set aside.

There can be no doubt that *lis pendens* should not be issued: *White* v. *White* (1874) 6 P. R. 208; *Crandell* v. *Crandell* (1884) 20 C. L. J. 329; but here the plaintiff says that another claim is also set up on the statement of claim, and I have given him an opportunity to make out a case.

No statement of claim has been put in and I should be wholly justified in dealing with this motion as though no statement of claim had been filed at all.

But I assume that the statement of counsel is true, viz.: that in the statement of claim it is alleged that the plaintiff lent or advanced money to her husband and he put that money into the property in question.

This gives the plaintiff no lien upon the land and does not entitle her to the certificate of *lis pendens*. The motion is allowed with costs to the defendant in any event.

Order granted.

RIDDELL, J. (CHAMBERS) 10TH OCTOBER, 1916.

RE NASH & CANADIAN ORDER OF CHOSEN FRIENDS.

Lunatic—Confined in Asylum—Beneficiary under Certificate of Life Insurance—Payments of Money to Inspector of Prisons and Charities.

Life insurance money: — The provisions of the Hospitals for the Insane Act, R. S. O. (1914) c. 295 s. 36 override *pro tanto* those of the Insurance Act, R. S. O. (1914) c. 183 s. 176; therefore, the Inspector of Prisons and Public Charities is entitled to be paid any money which becomes due under a certificate of life insurance to a beneficiary after having been confined in an asylum.

Motion by the Inspector of Prisons and Public Charities for an order directing the Canadian Order of Chosen Friends to pay to him the proceeds of an insurance upon the life of William Nash, deceased.

K. W. Wright, for the Inspector
Lyman Lee, (Hamilton) for the Society.

RIDDELL, J.—The late William Nash in 1895 became a member of the Canadian Order of Chosen Friends: he took out an Insurance Certificate for $1,000 payable to his wife, Emma Nash. William Nash died March 25th, 1916, in good standing in the Order, whereby Emma Nash became entitled to the insurance money, some $750 odd.

She, however, had become insane and in the previous September had been admitted to the Hospital for the Insane at Hamilton, being still there at the time of this application.

William Nash having died intestate, letters of administration were granted to Mr. Dumlop, Inspector of Prisons and Public Charities.

The Inspector applies for payment to him of the proceeds of this policy: the Order opposes the motion and desires to pay the sum into Court.

I think the provisions of the Hospitals for the Insane Act, R. S. O. (1914) ch. 295, sec. 36, override *pro tanto* those of the Insurance Act R. S. O. (1914) ch. 183, sec. 176; 4 Geo. V. ch. 30, sec. 10; and that the money should be paid to the Inspector.

Order accordingly.

APPELLATE DIVISION, S. C. O. 20TH OCTOBER, 1916.

KILLELEAGH v. BRANTFORD.

Negligence—Highway—Sidewalk below Level of Ground Beside Walk—Ice Formed in Depression—Dangerous Condition—Municipal Act, R. S. O. (1914) c. 192, s. 460—Gross Negligence—Liability of Muncipality—Notice of Claim—No Date Given of Accident—Location of Accident Wrongly Given.

Depression in sidewalk: — It is gross negligence on the part of a municipality to allow a sidewalk to remain for three years below the level of the ground beside it with the result that water from rain and melted snow flows upon it and freezes making a dangerous spot unobserved when fresh snow has fallen.

Notice of claim for damages given pursuant to the Municipal Act, R. S. O. (1914) c. 192, s. 460, is not defective because no date is given on which the accident occurred, nor because it states that the accident occurred on the south instead of the north side of the street

Appeal by the defendant municipality from a judgment of the Judge of Brant County Court, dated 23rd June, 1916.

This action was brought to recover damages for a broken arm sustained by the plaintiff by a fall upon icy sidewalk in the defendant city, on the 22nd December, 1915. The plaintiff alleged that the accident was caused by negligence of the defendant municipality by reason of non-repair of the sidewalk.

The action was tried without a jury and the trial Judge found that the sidewalk, at the time of the accideent, was in a dangerous condition by reason of non-repair and gave plaintiff judgment for $250 and costs.

The appeal was heard by Meredith, C.J.C.P., Riddell, Lennox, and Masten, JJ.

J. W. Wilkes, K. C., for the appellant municipality.
W. M. Charlton, for the plaintiff, respondent.

MEREDITH, C.J.C.P.—In order that the plaintiff should recover in this action it was necessary that she should prove: (1) that the injuries she complained of were caused by the gross

neglect of the defendants in their duty to keep the highways and bridges under their jurisdiction in repair; and that (2) notice of her claim and of the injury she complained of was given to the defendants, in writing, within seven days after the happening of the injury: Municipal Act, R. S. O. (1914) ch. 192, sec. 460.

The plaintiff succeeded at the trial; and this appeal is brought against the judgment there directed to be entered in her favour on the grounds: that the requisite notice was not given; and that the plaintiff's injury was not caused by the gross negligence of the defendants .

The objections to the notice are: (1) that it does not state the day on which the accident happened, and: (2) that in it the accident is said to have happened on the south side of the street whereas in fact it happened on the north side.

The statute does not expressly require that the time of the injury shall be stated in the notice; in regard to time it requires only that it shall be given "within seven days after the happening of the injury;" and in this case there is no suggestion that the defendants were in any manner prejudiced, or even inconvenienced, by the absence of a statement of the time when the accident happened, though in all well-drawn notices such information should be and is given.

The purpose of the legislature in requiring notice to be given was not to defeat just claims on formal objections, but was that timely notice should be given of a claim intended to be made, so that the municipal corporation should have a fair opportunity for investigation of it. Having regard to the expressed requirements of the Act, and to the circumstances of this case, I am of opinion that the trial Judge was right in refusing to give effect to this objection to the plaintiff's claim.

The other objection to the notice is of even less weight. There is nothing to shew that the defendants were, or could have been, misled by the mistake in the points of the compass; they could not have been because the notice indicates that it was on that side of the street on which the telephone poles are placed, and that is the north side. It was a case of plainly mistaken description, which, being rejected for that reason left sufficient information as to the place of the accident. The appeal fails on this point also.

Then was "gross negligence," proved? Fault is often found with the expression "gross negligence," as being something undefined and perhaps indefinable; but there is some certainty regarding it in such a case as this, in that it means something more than mere default regarding the obligation in general which the statute imposes on municipal corporations, to keep highways and bridges in repair; for, after enforcing such a general liability, and exception out of such liability is made in these words: "Except in case of gross negligence a corporation shall not be liable for a personal injury caused by snow or ice upon sidewalk."

No exact measure can be given of negligence: generally one can say that it is a neglect of duty that ordinarily does not happen; and perhaps as much can be said of gross negligence, that it is negligence, greater than mere negligence, which would ordinarily be described as gross or by some like word. Not merely negligence with an expletive, in the correct meaning of that word, but perhaps negligence which would ordinarily call forth a preceding expletivee, profane or otherwise, in its colloquial meaning.

In this case the place where the accident happened was part of a sidewalk in the city of Brantford; and at this place it had been either so constructed as to be, or was allowed through disrepair to become, lower than the ground beside it, with the result that the water, from rain or melted snow, flowed upon the sidewalk, and, there freezing in cold weather, made a dangerous spot, unobservable when fresh snow had fallen, and so a dangerous place, something in the nature of a trap, sometimes.

If this improper state of affairs had arisen from ordinary wear and tear, and had been put right in a reasonable time, there would have been no neglect of the defendants' duty to keep this highway in repair; if that were not done there would have been that "default" which makes corporations liable "for all damages sustained by any person by reason of such default."

To allow the sidewalk to remain in that condition through a whole winter's season would be taking more than a reasonable time to discover the disrepair and make the needed repair though the highway was not a prominent one, and not withstanding all other the defendants' obligations extending over

many miles of many highways of all kinds, and the high rates of taxation to which the defendants are already driven by many other obligations of various kinds. To let such a state of disrepair continue for a whole year would unquestionably amount to negligence whether it would amount to gross negligence need not be found, because according to the evidence the sidewalk had been left in that state of disrepair for three years, and according to the testimony of one of the witnesses the water ran down upon the sidewalk so that "there was quite a little river;" and that no matter how slippery the sidewalks might be she had never in 35 years known the defendants to sprinkle sand upon them in the highway in question, which is called Park avenue.

If one year's disrepair be enough to justify a charge of unquestionable negligence: three years assuredly must justify a charge of gross negligence: must be default which ordinarily would not be described without an adjective of more or less emphatic character, in all probability in many cases the colloquial profane expletive.

In my opinion the trial Judge was right in his finding that the defendants were guilty of gross negligence.

And the fact that at the time when the plaintiff sustained her injury weather conditions had made all walks slippery, and more or less dangerous, cannot relieve the defendants from liability for an accident happening upon the ice before formed owing to the gross negligence of the defendants: because nature made danger everywhere, because it increased, perhaps, the danger at this spot, is no good reason for relieving the defendants from liability for an injury caused by their neglect of duty, not by the weather conditions, generally: rather because of such weather conditions, and their occasional recurrence, more care should be taken to have the sidewalks in repair, or if out of repair to mitigate the evil with a sprinkling of sand. It may be that if the plaintiff had not fallen at this spot she might have fallen and been injured worse some where else; and it is quite certain if, like some of the witnesses, she remained indoors on this slippery day, she could not have fallen where she did fall, but she had her work to do away from her home and was not negligent in going out to do it; so these things cannot affect her right to recover in this action.

And I am of opinion that the trial Judge was right in finding: that the defendants' gross negligence was the proximate

cause of the plaintiff's injury; and that she was not guilty of contributory negligence; and so I would dismiss the appeal.

RIDDELL, J.—I agree.
LENNOX, J.—I agree.
MASTEN, J.—I agree and have nothing to add.

Appeal dismissed.

APPELLATE DIVISION, S. C. O. 20TH OCTOBER, 1916.

HIRSHMAN v. BEAL.

Automobile—Left for Repairs—Testing after Repaired—Testman Driving on his own Business — Without Authority of Owner—"Stolen From Owner?"—R. S. O. (1914) c. 207, s. 19 as Amended by 4 Geo. V. c. 36, s. s. 3—Criminal Offence under 9 & 10 Edw. VII. c. 11—Liability of Owner of Automobile for Damage Caused by Testman while Driving.

Marginal notes to a statute are no part of the statute. Some marginal notes are grossly inaccurate.

Stolen Car: — The owner of an automobile is liable under 4 Geo. V. c. 36, s. 3 for violations of the Motor Vehicles Act, R. S. O. (1914) c. 207, when it is in his own possession, that of anyone in his employ (even if that person has stolen it), or of anyone not an employee who has not stolen it. In this case the foreman of a repair shop had taken the car out to test it and had afterwards gone on a tour for his own pleasure. While so driving he injured the plaintiff and the owner was held liable for damages, notwithstanding that the owner had prosecuted and secured a conviction of the foreman, under 9 & 10 Edw. VII. c. 11. The Court holding that such offence is not theft.

Belated contentions: — The contention that there is no evidence upon which a jury could properly find that any negligence of the driver of an automobile was the cause of plaintiff's injuries should be raised at the trial; it comes too late when raised, for the first time, in an Appellate Court.

Employ of owner:—Workmen and others connected with a shop where an automobile has been taken for repairs are not in the employ of the owner of the automobile within the meaning of the Motor Vehicles Act, R. S. O. (1914) c. 207, as amended by 4 Geo. V. c. 36, s. 3.

Appeal by the plaintiff from a judgment of Kelly, J., dismissing his action to recover damages for injuries sustained,

by coming into contact with the defendant's automobile, in a public highway in Toronto, on the 22nd September, 1915.

At the time of the accident the automobile was being driven by one Sheppard, who was employed as foreman by Andersons Limited, to whose repair shop the defendant had taken his car for repairs. After it had been repaired Sheppard took it out to test it, but after having tested it, he did not return it to the repair shop. He took it home while he had his dinner and then took his wife, his brother-in-law and his wife for a drive about the city, and, while so doing he injured the plaintiff, a lad of five years, who by his next friend, brought action to recover damages.

The action was tried by Kelley, J., and a jury at Toronto. The jury found in favour of the plaintiff and assessed his damages at $800. Kelley, J., however, held that the car had been stolen from the owner, and therefore the owner was not liable. He dismissed the action with costs. A note of the judgment is in 10 O. W. N. 411.

The appeal was heard by Meredith, C.J.C.P., Riddell, Lennox, and Masten, JJ., on the 4th October, 1916.

E. F. Singer, for the plaintiff, appellant.
T. N. Phalen, for the defendant, respondent.

MEREDITH, C.J.C.P.—Though this case was one intended by the parties to be tried by a jury, when it came on for trial, and was tried, the important questions of fact: whether the driver of car at the time when the plaintiff was injured, was in the "employ" of the owner of it, and whether such driver had "stolen" the car, were, apparently with the concurrence of all concerned, withdrawn from the jury and left to be determined by the Judge who presided at the trial: and fault is now found, on one side or the other, with the findings of both jury and Judge.

The defendant, in endeavouring to support the judgment in his favour in case the trial Judge's finding in his favour is reversed, contends: that there was no evidence upon which the jury could properly find that any negligence of the driver of the car was the cause of the plaintiff's injury: a very belated contention, the case having gone to the jury not only on the question of negligence, but also of what is sometimes called

ultimate negligence, without any objection, of any kind, by anyone, a course which a perusal of the evidence shews was a proper one.

There was evidence upon which reasonable men could very well have found, as the jury in this case did find, on each question of negligence. The evidence for the plaintiff was, substantially, this: that the driver was endeavouring to pass a street car, whilst it was yet moving, in order that he should not be obliged to stop whilst the street car was stopped for the purpose of letting down and taking up passengers, an act very far from being unheard of in motor car drivers; that the plaintiff—a boy—was crossing the street in an ordinary manner, and that the danger of the driver running him down was so plain whilst car and boy were yet some distance apart, that onlookers rushed out and shouted to the driver to stop, but he did not. The evidence for defendant was substantially this: that whilst the car was being driven carefully, at moderate speed, the plaintiff ran out from the sidewalk and against the fender of the car just behind the front wheel; and that the car was stopped in a distance of about six feet—not that it could have been so stopped but that it actually was.

There were very direct conflicts of testimony, as these questions and answers taken from the testimony of the driver, and of his friend and companion, who was in the front seat of the car with him, shew :—

"Q. We have had two witnesses here this morning who swore that this child ran across the street from the east side of the street, got past in front of your car and was hit on the west side of your car. What do you say about that? A. I cannot help it if they did not tell the truth.

"Q. No, don't comment on their evidence. Is that the fact or is it not? A. No, it is not.

"Q. The child that came in contact with your car, you say, came from the sidewalk on the west side of the street? A. From the west side of the street, yes.

"Q. Now, then, how far away was that child from you when you first saw it, and where was it when you first saw it? A. There was several playing on the sidewalk: playing all around.

"Q. On which sidewalk? A. On the west sidewalk.

"Q. And what happened? A. They were playing there,

and all at once this child ran off and ran right into the car.

"Q. Did the car hit the child or did the child hit the car? A. Well, according to that, the child hit the car.

"Q. And where did the child hit the car? A. Right at the back of the front wheel. Hit the fender at the back of the front wheel."

That from the driver's testimony; this from his companion's :—

"Q. There were witnesses here this morning who said the child ran from the east side of the street, across the street, and in front of the automobile before it was hit. What do you say about that? A. No, the child ran from the west side.

"Q. And how far away were you from the child when it ran north? A. Well, wouldn't be very far. Just two or three feet, I guess.

"Q. Well, indicate by an object here? A. Well, we were going along and the child just ran at the side."

The judgment against the defendant cannot be disturbed on this ground.

Then it is sought to upset it on the ground: that the car was not "stolen from the owner" at the time of the plaintiff's injury: the trial Judge having found that it was: that finding being, in view of the case of *Downs* v. *Fisher*, (1915), 33 O. L. R. 502, and the amendment to The Motor Vehicles Act, made in the year 1914—4 Geo. V. ch. 36, sec. 3 (O.)—enough to sustain the jury's verdict.

The facts, bearing upon this question, are simple and not disputed: the car was left by the owner of it, at the shop of the emloyers of the man who was driving it when the plaintiff was injured, for repair, and it was this man's duty, as foreman of the shop, to see that the car was repaired, and for that purpose it was necessary, or proper, that he should run it in the public streets to some extent, but, having done that, instead of returning the car to the shop, he went home in it, to lunch, and on his way back to the shop after lunching, brought his wife, and his brother-in-law and his wife, on their way into town, back with him in the car, and the accident happened when the four of them were thus in the car.

The trial Judge rejected this contention, holding that, in these circumstances, the driver had "stolen" the car: but I am quite unable to agree in any such finding, indeed, if the man

were on trial for larceny before me, upon the same evidence, I should tell the jury that there was no evidence upon which they could find him guilty, that is, no evidence of a guilty intent: whilst, if the case went to the jury, can it be doubted that the man would be promptly acquitted? And in this connection it may be mentioned that the defendant and the driver had long been acquainted with one another and so much so that even in the witness-box the defendant called him by his nickname "Bert:" and also admitted that but for this action he would never have thought of charging him with stealing the car.

The laws of England were at once time extremely severe—perhaps necessarily so—upon thieves; but I cannot believe that, even in their severest days, the driver of this car could, in the circumstances of this case, have been found guilty of the felony of larceny, and have been made subject to its extreme punishment.

No one could properly desire to make too little of the wrong of anyone in making use of the property of another against his will; but it must not be forgotten that in the every day small affairs of most men there is a good deal of giving and taking by tacit, as well as expressed, leave; and that the *animus furandi*, an intention to steal, is an essential part of the crime of theft; as the *mens rea*, a guilty mind, is still, generally speaking, a necessary part of a crime.

The middle way between too much harshness and too much leniency, in such cases as this, seems to me to have been well chosen by Parliament in its somewhat recent legislation directly in point. It has made it a minor offense, punishable—or summary conviction only—by fine, not exceeding $50, or imprisonment not exceeding thirty days: 9 & 10 Edw. VII. ch. 11: to take a motor car for use without the consent of the owner.

To say that this legislation makes the taker a thief, guilty of a crime which was formerly called a felony, is to say something which, it seems to me, the enactment itself refutes: if it were theft what need for the enactment? The whole subject of that crime and its punishment, great or small, was already covered by the other provisions of the Criminal Code. And why not call it theft, if theft it were to be made by Act of Parliament?

A marginal note to a statute cannot make white black even if indeed it can be made use of at all in the interpretation of

the enactment. There are some interesting observations upon the subject of the use and effect of marginal notes to statutes contained in the report of the argument of the case of *Attorney-General* v. *Great Eastern Ry. Co.* (1879) 11 ch. D. 449, some of which are as follows: "Bramwell, L. J.: "I thought you could not properly look at the marginal note of an Act of Parliament. Some of the marginal notes are grossly inaccurate." Lindley, L. J.:—"What authority has the Master of the Rolls for saying that the Courts do look at the marginal notes?" Baggallay, L. J.:—"I never knew an amendment set down or discussed upon the marginal note to a clause. The House of Commons never has anything to do with the amendment of the marginal note. I never knew a marginal note considered by the House of Commons." James, L. J.:—"Is it not merely an abstract of the clause intended to catch the eye?"

And it is to be observed that though Parliament has expressly made the preamble of every Act a part thereof, intended to assist in explaining the purport and object of the Act"—R. S. C (1906) ch 1, sec. 14—it has done nothing for the marginal note.

Without making, or being able to make, and distinction between a temporary theft of the car and a theft of any part of the gasoline in it for the purpose of running it and with which it was run, I have no difficulty in reaching the conclusion that the trial Judge erred in this respect that he should not have found that the car was "stolen."

This leaves but two controlling points undisposed of; that is the contention of the plaintiff that the driver of the car was "in the employ of the owner" of it; and so the owner is answerable for his negligence; or, at least, that fact takes the case out of the amendment to The Motor Vehicles Act, in so far as it relieves an owner from liability, and leaves the defendant liable even if the car had been stolen.

The finding that the car had not been stolen gives the plaintiff the verdict, and so it is not essential that these things be now considered; but, as he relies upon them as sufficient grounds for his action, and as the trial Judge has, in part, dealt with them, it may be better to deal with them here also.

That the plaintiff is not entitled to recover on the ground that his injury was caused by the negligence of a servant of

the defendant in the course of his employment is obvious; no such relationship existed, and, if it had, the injury was not caused by him in the course of his employment: see *Halparin* v. *Bulling*, (1914) 50 S. C. C. 471.

Upon the other question, the trial Judge found that the driver was not in the "employ" of the defendant within the meaning of the words "in the employ of the owner" contained in the amendment to the Act; and in that I am quite in agreement with him.

The interpretations already put upon the 19th section of the Act have assuredly gone to the widest extent possible; to carry them further, in making the words—"in the employ of the owner"—apply to the owners of the repair shop, in which the car in question was repaired, and to all the workmen in it, would be going far beyond the ordinary meaning, and any reasonable application, of the words.

The word "employ" is, in these days, in this country, sometimes used as a noun, and as a word synonyous with the words "employment" and "service;" and in that sense it plainly seems to me to have been used in the enactment in question. Generally the owner of a car is not to be liable for the acts of a thief of it unless that thief was someone in his service.

The result is that the plaintiff is entitled to recover in this action, under section 19 of The Motor Vehicles Act, because the driver of the car had not stolen it from the owner, and so the owner is not made, by the amendment to the section, exempt from its provision.

The appeal must be allowed, and judgment entered for the plaintiff, and damages in the amount assessed by the jury.

RIDDELL, J.,—The defendant bought a motor car from the Andersons, Ltd., in May, 1915, and was thereafter to take the car to them if and when it required repairs or adjustment, and this was done on several occasions In September the car was not working right and he took it to the Andersons' garage and left it, with instructions to repair it. Sheppard, Andersons' foreman, was the person to whom the defendant spoke, and he agreed to have the work done by noon.

The trouble was found to be in the transmission. Sheppard had it fixed by one of his men, and then took the car out to try it. He went up the Hill and, finding the car all right,

went home with it some miles from the garage. After lunch he took his wife, his brother-in-law and his wife into the car to take them down town. He intended to drop them on the way to the garage.

With the car thus loaded, he drove it so negligently that an accident happened; the plaintiff, a child walking across the street, was struck by the car and injured.

At the trial before my brother Kelly and a jury at Toronto, the jury found that the accident was due to the negligence of Sheppard and assessed the damages at $800. No reasonable complaint can be made in respect of either finding. Mr. Justice Kelly, however, was of opinion that the defendant, the owner of the car, could not be held liable under the circumstances; 10 O. W. N. 411.

The plaintiff now appeals.

In the case of *Downs* v. *Fisher* (1915), 33 O. L. R. 504, this Court held (1) driving a motor vehicle on the highway negligently was a violation of The Motor Vehicles Act, R. S. O. (1914) ch. 207. See sec. 11 (2); (2) that under sec. 19 the owner of such vehicle was liable for the negligence of anyone driving the car (an exception being made of the case in which the car had been stolen—this in deference to the opinion of the majority of the Court in *Cillis* v. *Oakley* (1914), 31 O. L. R. 603, and to reconcile that case with *Lowry* v. *Thompson* (1913), 29 O. L. R. 479.

The Legislature since the occurrance of the accident considered in *Downs* v. *Fisher*, passed the amending statute (1914) 4 Geo. V. ch. 36, sec. 3. It is beyond question that the defendant is liable unless he can make his case come within this amendment, that is, he is liable for the violation of the Act "unless at the time of such violation the motor vehicle was in the possession of a person, not being in the employ of the owner, who had stolen it from the owner."

The owner is liable for a violation of the Act when the car is in his own possession, that of anyone in his employ (even if that person has stolen it) or of anyone not an employee who has not stolen "it," i. e., the car, not the gasoline or the use of car, from the owner.

This very stringent legislation makes the ownership of a motor vehicle distinctly more dangerous than the ownership of a rattlesnake. The Legislature has thought that it is better that

the comparatively few who own an automobile should be liable for the mishaps caused by their machines than that the many not so fortunate, who may be injured by them, should have to look to some unknown person for compensation.

I agree with the learned trial Judge that Sheppard was not in the employ of the defendant. None of the fairly numerous cases in which one person hires and pays a servant who, nevertheless, is in law the servant of another has any application.

The defendant made a contract with the Andersons company through Sheppard as their agent, not with Sheppard as the other contracting party. Sheppard saw to it that the work was done, but the work so done by Sheppard and his man was the company's work which the company had undertaken to do, not the defendant's work. The company had undertaken to do the work, not to supply the defendant with a man to do the work for him as his servant. The distinction between the two cases is discussed in *Lavere* v. *Smith's Falls Public Hospital* (1915), 35 O. L. R. 98.

The point upon which this case must turn is, had Sheppard stolen the car from the defendant? My learned brother Kelly considers that he had, but I am unable to agree. An article is "stolen" when some one has committed the act of "stealing" with reference to it, and not otherwise. "Stealing" is defined by the Code, sec. 347, as "the act of fraudulently and without color of right taking" etc. This is not very dissimilar to Bracton's "*contractatio fraudulenta*," the common law "*cum animo furandi*" the civil law "*lucri causa*;" what a few years ago was called "felonious intent". Unless the recent Dominion Statute (1910) 9 and 10 Edw. VII. ch. 11, makes a change, no one would consider that what Sheppard did was done "fraudulently." He took the machine intending to use it for a time and to return it to the owner, not to make it his own even temporarily. In *R.* v. *Phillips*, 2 East P. C. 662, the prisoners had taken horses and ridden them for thirty miles, leaving them with ostlers and walking away. They were arrested after walking away some fourteen miles. It was held that as they did not intend to make the horses their own, but only to use them to save themselves labour in travelling, this was not *animo furandi*. Mr. Justice Grose thought the act was felony, because they did not intend to return the horses. If they had intended to return the horses when they took them, and did

not at any time change this intention, no one would say that the act was *animo furandi* or "fraudulently taking away."

Many like cases are to be found in Russell C. & M., vol. 2, ch. x. Crankshaw, pp. 397, sqq.

It remains to be considered whether the amendment to the Criminal Code 9 & 10 Edw. VII. ch. 11., makes a difference.

It may be at once admitted that the Parliament of Canada can make any act a "theft" or "stealing;" but before we brand an act which would otherwise be but a civil trespass with such a name and brand its perpetrator as a "thief," the legislation must be clear and unmistakable. The Act provides that "everyone who takes * * * from a garage * * any automobile or motor car with intent to * * * drive * * the same * * without the consent of the owner shall be liable on summary conviction to a fine * * or to imprisonment for a term not exceeding thirty days."

Assuming that it could be said that when Sheppard intended to drive the car "without the consent of the owner" and I should hesitate long before finding that there was not implied consent of the owner for Sheppard to drive the car so far as was reasonably necessary to test it, and that is all on the evidence that Sheppard intended when he first took the car) I do not think that act was "stealing." No doubt some one, clerk, printer, or some one else, has placed a marginal note to this provision "Theft of Motor Car;" but marginal notes are no part of the statute, however convenient they may be for the purposes of reference.

The statute is not an amendment of the larceny or theft part of the code but an addition to a section dealing with injury caused by negligent driving of carriages and motor vehicles; and there is nothing to indicate that Parliament intended the new offence to be "a theft."

The act of clerk, printer, or even of the Minister of Justice, in making the marginal note the title of the section in certain publications of the Department of Justice is of no consequence. Clerks, printers, ministers, Departments, cannot legislate in such matters.

I think Sheppard cannot be said to have "stolen" the car even if he was (as it is said he was) convicted of an offence under 9 and 10 Edw. VII. ch. 13, (Code 285 B.)

The appeal should be allowed, and judgment entered for the plaintiff for $800 and costs of action and appeal.

LENNOX, J.:—I agree.

MASTEN, J.,—I have had the opportunity of perusing the judgments of my Lord the Chief Justice and of my brother Riddell, and agree in the several conclusions reached by them, but desire to add a few words relative to the temporary conversion to his own use by Sheppard of the defendant's car by using it on his own affairs to go home some four or five miles and to bring his wife and relatives back to town. His act, in my opinion, approaches perilously near to the crime of theft or stealing, as defined by section 347 of the Criminal Code. That section in so far as it is relevant to the circumstances here before us, defines theft as follows:

"Theft or stealing is the act of fraudulently and without colour of right taking or fraudulently and without colour of right converting to the use of any person anything capable of being stolen with intent :

"(a) To deprive the owner or any person having any such property or interest therein temporarily or absolutely of such thing or of such property or interest; or

"(d) To deal with it in such a manner that it cannot be restored in the condition in which it was at the time of such taking and conversion.

"(2) Theft is committed when the offender moves the thing * * * or begins to cause it to become moveable with intent to steal it.

"(3) The taking or conversion may be fraudulent although effected without secrecy or attempt at concealment.

"(4) It is immaterial whether the thing converted was taken for purpose of conversion or whether it was at the time of conversion in the lawful possession of the person converting."

From this definition it will be seen that theft under our Code is not restricted to what, under the common law, constituted larceny, while the circumstances of the present case present many of the elements of theft as above defined. Sheppard temporarily converted to his own use the defendant's motor and he knew at the time that he was so depriving him of his property. The motor was to have been repaired and ready for delivery to Beal at twelve o'clock: Beal went up to get it be-

tween twelve and one o'clock and found that Sheppard had it out and away. It was not brought back to the garage till nearly three o'clock. Sheppard dealt with the car in such a manner that technically it could not be restored in the condition in which it was at the time of his taking it. Every motor when it is originally turned out of the shop, new, possesses the capacity of running a certain number of miles or hundreds of miles before it is worn out. Every mile that it is run exhausts so much of its running capacity. When Sheppard took this motor out and ran it eight or ten miles he exhausted that much of the running capacity of the car, which could not be restored. It may be suggested that Sheppard did not steal because he used defendant's car "with colour of right;" that is, in an honest belief in a state of facts which if it existed would be a legal justification of excuse, but I do not think that the facts bear this out. Sheppard himself was examined as a witness at the trial and says that after repairing the car it was necessary to take it out and test it to see that the repairs were satisfactory and that it was running right. To make this test he took it to a hill known a Pellatt's Hill. The car ran up the hill in a satisfactory manner, and thereupon the test was complete. In his evidence Sheppard says:

"Q. Then, when you got up to Pellatt's Hill and found the car was all right, did you bring it back to the garage? A. No.

"Q. What should you have done after you found the car tested all right? A. Well, I should have brought it right back again to them.

"Q. I said what should you have done? A. I should have brought it back, I guess.

"Q. Well, did you bring it back to the garage? A. No.

"Q. What did you do? A. I went home to lunch with it."

My opinion is that he assumed that this trivial use of the car would not be objected to by the owner, and that while he had no legal right he was not morally wrong in doing what he did; but that did not give him "a colour of right." *R.* v. *Johnson*, 8 Can. Cr. Cas. 123; *R* v. *Watier*, 17 Can. Cr. Cas. 9.

But in my opinion there is lacking one element essential to the crime of theft, viz., a criminal mind on the part of Sheppard. The statute says that a theft or stealing is the act of

fraudulently converting to the use of any person the thing stolen; and this accords with the underlying principle of law that a person cannot, except under special statutory authority, be convicted and punished in a criminal proceeding unless it can be shewn that he had a guilty mind: *Chisholm* v. *Doulton* (1889), 22 Q. B.D. 736.

While section 347 has made important changes in the common law and has made that theft which was not theft before, the element to which I have just adverted seems to me to be still an essential element in establishing theft. No doubt Sheppard intended to take the car and use it for his own purposes, but I do not think that he took it fraudulently, or that there was in his mind any evil inention at the moment he took it. such intent is an inference of fact depending on all the circumstances of any particular case.

In the present case Beal says :

"Q. You told me the reason you were annoyed was that you wanted your car, not that you had any objection to his being out in your car. That is right? A. Yes." and further on :

"Q. You prosecuted him because you were going to be sued? A. Yes.

"Q. You would never have prosecuted him otherwise, would you? A. No, I don't suppose I would.

The inference which I draw from all the facts and circumstances in this case is that when Sheppard, having completed his test of the car at Pellatt's Hill, started home for lunch he had no guilty intention of infringing Beal's legal rights or otherwise injuring him, but assumed, unwarrantably perhaps but honestly, that there would be no objection on Beal's part to what he was doing.

I have emphasized this phase of the case lest by any chance the judgment now pronounced might be taken to lend countenance to the contention that the temporary taking and using of another's car, though unauthorized, cannot be theft. He who does such an act incurs grave risk of that liability, and, speaking for myself, slight circumstances would be sufficient to convince me that there was such a blameworthly condition of mind on the part of the taker as made the act a theft; but I do not find such circumstances here.

For the reasons here assigned I am of opinion that what was done by Sheppard was not theft of Beal's car within the

Criminal Code; and, for the same reason, coupled with the reasons set forth by my learned brothers, in which I concur, I think that the defendant is not entitled to the benefit of the Ontario Statutes (1914) ch. 36, sec. 3. If that Act read: "unless at the time of such violation the motor vehicle was in the possession of some person other than the owner without his consent express or implied, not being a person in the employ of the owner." it would more nearly accord with the principles of law which have obtained in this Province. But with the policy of the statute this Court has nothing to do.

I therefore agree in allowing the appeal.

Appeal allowed.

FALCONBRIDGE, C.J.K.B. (CHAMBERS.) 13TH OCTOBER, 1916.

WHITTAKER v. TORONTO RY. CO. & DOM. TRANSPORT CO.

Trial — Notice of Trial — Served too Late —Holiday.

Service too late:—Notice of trial served on 30th Sept. as for 10th Oct. is too late, where the commission day for holding Court was 9th Oct. notwithstanding that that day was appointed Thanksgiving Day.

Motion by the defendants, the Toronto Ry. Co., to set aside plaintiff's notice of trial as having been served too late.

W. N. Cox, for the defendants, the Toronto Ry. Co.

H. R. Frost, for the plaintiff.

The defendants, the Dominion Transport Co. took no part in the motion.

FALCONBRIDGE, C.J.K.B.—The notice of trial was served on the 30th September as for the 10th day of October. The commission day of the Toronto autumn jury sittings was Monday, the 9th of October. That day was subsequently appointed to be Thanksgiving Day, and jurors and others interested were notified that no business would be taken up until Tuesday the 10th; but the 9th still remained the commission day, and the Sheriff actually attended on that day in accordance with the statute and adjourned the Court until Tuesday the 10th.

Under these circumstances the notice of trial was too late, and must be set aside and the case removed from the list. Costs to be costs in the cause to the Toronto Railway Company in any event. The Dominion Transport Company took no part in the motion.

APPELLATE DIVISION, S. C. O. 20TH OCTOBER, 1916.

CLERGUE v. PLUMMER

Vendor and Purchaser—Action for Special Performance—Evidence of Terms of Sale — Question Whether Agreement for Sale of Whole or Half of Vendor's Interest — Inexcusable Delay—Evidence—Entries in Land Sales Book—Admissibility.

Entries in book: — In an action, brought in 1914, for specific performance of an agreement for sale of lands, it was admitted that some kind of an agreement in respect to said lands was entered into in 1903. Plaintiff alleged an agreement for sale of vendor's entire interest and produced an incomplete agreement for sale supporting his contention. Defendant produced a counterpart of said document, which shewed that plaintiff was to have only an undivided half interest. Defendant also produced certain entries in a Land Sales Book kept by deceased vendor which further supported his contention. *Held*, that under the circumstances the entries in the book were admissible as evidence.

Belated claim: — Where an agreement for sale of lands was entered into in 1903, and an action for specific performance was brought in 1914; *held*, that the equitable remedy of specific performance is not given unless sought with great promptitude, and that in this case the claim was altogether too belated, no attempt having been made to excuse the great delay; however, the purchaser was allowed a return of the money paid on account of the purchase price.

Appeal by the defendants from a judgment of Middleton, J., dated 13th June, 1916, maintaining plaintiff's action, as purchaser, for the specific performance of an agreemeent, dated the 22nd May, 1903, for the sale to him of certain water lots in Sault Ste Marie, Ontario.

The appellants were the executors of the will of the late W. H. Plummer, the vendor; and the main contest between the parties was, whether the agreement was for the sale of the lots or of only an undivided half interest therein.

A note of the judgment of Middleton, J., is in 10 O. W. N. 356.

The appeal was heard by Meredith, C.J.C.P., Riddell, Lennox, and Masten, JJ.

W. N. Tilley, K.C., for the defendants, appellants.

R. McKay, K.C., for the plaintiff, respondent.

MEREDITH, C.J.C.P.—If this case had to be determined upon the single question of fact dealt with by the trial Judge, and if he were right in his ruling on the question of admissibility of evidence, I should feel obliged, by the evidence, to come to a conclusion the opposite of that which he reached, and to favour a dismissal of the action, on that ground, in so far as specific performance of a contract for the sale of the whole of the land in question is sought: but the case does not turn upon that question alone; on the contrary the claim for such specific performance fails upon other, and to me very plain, grounds.

I cannot agree in the contention that the writing relied upon by the plaintiff and his testimony at the trial make a clear and indisputable case for specific performance as sought by him; on the contrary, though it may be that I should feel obliged—leaving out of consideration for the moment the question of delay—to hold the plaintiff entitled, upon such evidence, to specific performance, I should do so with the strongest feeling that the very truth of the matter had not been discovered—that truth was still at the bottom of the well.

For in the first place, the writing itself is inconclusive and unsatisfactory.

Each of the parties to the transaction was a capable business man and each had had many and large transactions in the buying and selling of land, and was quite capable of putting any contract that he might eventully enter into in unmistakable well-chosen and well-written words. And anything like trickery, in such a transaction as this, in any manner, by either of them, is entirely out of the question, for more reasons than their probity only.

These things being so, and indeed if they were not, the writing is self evidently one of an incomplete, of a preparatory character. The changes in regard to the payments to be made are of that crude character which might do for a rough draft of the writer's intention, but are very far removed from the finished document which either of these gentlemen would allow to go forth as drawn by either of them and evidencing their concluded agreement for the sale and purchase of land.

Then the writing does not provide for a sale and conveyance of the land, in the usual manner, but merely for a convey-

ance of the land, suggesting to my mind, however it might or might not affect the minds of others, that the conveyance might be for some other purpose than an absolute transfer for the sole use and benefit of the transferee: and so I should anxiously look for a part of the agreement, or for some other agreement signed by the plaintiff, setting out that which he bound himself to do.

But this writing is not signed by, and does not contain any obligation on the part of the plaintiff; and so is manifestly incomplete as an agreement and no ohter writing signed by the plaintiff is forthcoming; though I cannot but think there must have been such a writing, and that if the other party to the transaction were living it would be forthcoming or its loss accounted for. As I have said each was a competent business man in transactions of this kind as well as other kinds. Whether such a writing, if it ever existed, was a declaration of trust of the property after conveyance, such as that contained in another writing in respect of the property till conveyance, need not trouble us; it is enough for present purposes to say that such a writing was possible, and, in my opinion, probable; and it is certain that the absence of writing or even signature binding the plaintiff, even that alone, makes this writing inconclusive and unsatisfactory.

And in regard to the plaintiff's testimony, however convinced anyone may be of its sincerity, it is enough to say that from the year 1903 to the year 1913, the plaintiff, and his brother, and his solicitor were in continuous negotiation, not only with the Plummers, but with prospective purchasers of the land in question, treating throughout the plaintiff's right as a right to an undivided one-half of the land only: and that it was not until the plaintiff's brother, in January, 1913, "in looking up the copies of the papers" again, conceived the idea that his brother was entitled to the whole, and then, for the first time, set the ball rolling in support of the claim now made. When the brother, by letter, informed the solicitor of this discovery, the solicitor's answer, by letter, was in part conveyed in these words: "I have your favour of the 6th inst., and until I received it and looked up the papers, I was under the impression that your brother had only purchased a half interest in the water-lot from the late Mr. W. H. Plummer. On looking up the agreement I see that he agreed to purchase the whole water-lot on

which he paid $1,000 and the balance of $2,000 remains unpaid."

But the papers had been in their hands all these years, and had been "looked up" years before; or else the solicitor and the brother and agent were very remiss in their duties, a carelessness incredible: and the man who made the bargain, if any were made, did not need to look up the papers; he could hardly help knowing whether he was to have a half or the whole, yet until this discovery by his brother, he, as well as the other two, were always in the same boat treating his right as, not to the whole but, to an undivided half only of the land.

Then, coming to the evidence for the defence—there is, in the first place, a writing coming from the custody of the defendant, dated on the same day, and evidently made at the same time as that which comes from the custody of the plaintiff, and which gave rise,in the way I have mentioned, to the plaintiff's belated claim to the whole of the land, and being substantially a counterpart of it, except that it contains an additional clause referring in plainly expressed words to the interest to be conveyed as being an "undivided half interest" and providing that if the title should be left in the seller he "will give a declaration of trust" that he holds such half interest in trust for the plaintiff.

Neither writing, as I have said, is signed by the plaintiff, nor is any writing relating to the matter, signed by him, produced or proved: yet it is hardly possible that these two capable business men intended to leave the transaction in that loose and unsatisfactory state; so that looking at the indisputable circumstances of the case I can have no doubt that if the seller had not died there would not have been any litigation or contest, that he could have given evidence, probably in writing, which would have made it plain to the plaintiff that he had been pursuing the true course until the "discovery" made by his brother, after the seller's death, turned him out of it.

The thought that the purpose of the two writings might have been to evidence two offers, one for the whole and the other for an undivided half, is at once dispelled when it is observed that the price is the same in each, the amount which it is admitted the plaintiff was to pay—$3,000; the man could not have intended to offer the whole and the half at the same price.

Then which of these writings should prevail? Not neces-

sarily that which happens to be in the possession of the plaintiff. If he had signed either it would have been that which the seller was to keep; and the one which he did keep is that which makes it plain that the plaintiff was right in so long dealing with his purchase as a half interest only. It is impossible for me to believe that these two writings were not before the parties during their negotiations, trickery of any kind is entirely out of the question, because of the character of the men; and trickery such as preparing or retaining a false document such as this would be out of the question in any dealing between intelligent men, because of its uselessness if a true completed document had been given. And besides this the plaintiff's testimony is that there were two like writings, not only one writing.

And, in addition to all that, a contemporaneous regular entry in the seller's books not only, in the plainest terms possible, set out the transaction as a sale of a "half interest" only, but opened an account, which has been carried on hitherto, debiting the plaintiff with half the disbursements and charges in connection with the land and crediting him with one half of the income from it.

The trial Judge was of opinion that it was improbable that the plaintiff would have agreed to buy anything less than the whole of the land: the contrary seems to me to be the case not only as to the plaintiff's buying but as to the seller selling. When the transaction took place the industries with which the plaintiff had been so prominently connected were "languishing" and he had been "superseded" in the control of them, and, according to his own testimony, though originally negotiating for the purposes of those industries, he in the end acquired whatever right he has for himself only. The seller was greatly concerned, by reason of his ownership of other property which would be much enhanced in value by the establishment of the ferry dock on the land in question, so that it would have been folly for him to have parted altogether with this land, but would have been wisdom to have had the plaintiff pecuniarily interested with him in the establishment of the ferry there.

All these things make it impossible for me to agree with the trial Judge in his conclusion; they lead only, as it seems to me, to an oppisite conclusion.

But it is urged here, as it was at the trial, that the entries in the seller's books are not evidence, and should be rejected: though if that were so it would by no means be conclusive against the contention that an undivided interest only was the subject matter of the transaction.

In that contention, however, I am unable to agree. if the statement alone is to be looked at in considering the question of admissibility, then the statements contained in the entries in the seller's books are donbly against his interest; against his property interests in admitting that he had parted with some of them; and against his pecuniary interests in admitting that he had been paid $1,000 of the price he was to be paid for them: whilst if the hesult is to be ascertained and is to be the criterion, even then the statement is against both property and pecuniary interest unless it has been proved that $2,000 is more than the land was worth; and no evidence was directed to that point though in more than one sense it seems to me to have been an important point. I do not consider the testimony of the witness Fawcett, as to the seller having told him that "he could sell the three pieces for $3,000 which at that time would be a big thing" —having said this when he was negotiating for the purchase through Fawcett of one of the three pieces for which he afterward said, through Fawcett, $1,357.50. The piece that was thus bought was alone useless for dock purposes, it was the ownership of the three pieces together that give the especial value.

In all cases, however, the weight of such evidence is doubtless more important than the question of its admissibility—if of no weight its admission is harmless: in this case it is very important, having regard to the character of the men—the impossibility, I think, of a fraudulent entry.

It is, however, unnecessary for the defence to go so far as to establish a contract for the sale of an undivided one-half of the property in order to defeat the plaintiff's action.

The plaintiff is not seeking to enforce a legal right, he is seeking the special relief which a Court of Chancery granted when the remedy at law, for breach of an agreement for the sale of land, was inadequate; and so, in a sense, the equitable remedy is one lying in the discretion of the Court, and is a

remedy which ought not to be granted in some cases, of which this case seems to me to be plainly one.

It has been commonly said that this equitable remedy of specific performance is not given unless sought with great promptitude.

It is sought in this case after the greatest inexcusable delay. No attempt has been made to excuse it. It is sought notwithstanding the facts: that the plaintiff wholly failed to carry out the contract after making the first payment upon it when the agreement was made; he neither gave his promissory note for nor paid the balance of the purchase, nor indeed made any kind of offer to pay until nearly nine years after the time when the whole of it should have been paid: he neither got nor sought any extension of the time for payment—things entirely inconsistent with his claim to the whole of the land but not at all inconsistent with the seller's consistent statements throughout that he held the land in the joint interests of the two and as the income was paying the outgo of it—and this action was not brought until nearly eleven years after the transaction took place, and nearly ten years after the last payment should have been made.

The correspondence between the parties began in the year 1908—five years after the transaction was closed—and continued until about the time of the commencement of this action, affords no answer to the charge of delay, is no admission that helps the plaintiff in this action though it would be if he had been obliged to sue and were suing for that which the defendant is now and always has been willing he should have, an undivided one-half of the land in question.

In all these circumstances a judgment for specific performance, such as the plaintiff sought in this action, should, I think, have been out of the question: without mentioning the subjects of mutual mistake or misunderstanding, or unilateral mistake.

I would allow the appeal: and, as the defendant is and always has been willing to perform the contract as one for the sale of an undivided one-half of the land in question or refund the money paid on the contract as the plaintiff might choose, and as he has chosen a refund of the money, would direct that, upon repayment of the $1,000, with interest, the action be dismissed.

The appellant should have his costs of this appeal, but

there should be no order as to costs of the action, the seller being much to blame for having left the writings in such a state as to encourage "discoveries" such as that without which there would have been no action nor any claim for more than that which the plaintiff might at any time have had without action.

RIDDELL, J.—This is an appeal by the defendants, executors of the late W. H. Plummer, from the judgment at the trial of Mr. Justice Middleton directing specific performance of an agreement concerning certain land at the harbour of Sault Ste. Marie, Ontario. That there was some contract in respect of the said lot there is and can be no controversy. The defendants contend that it was for the sale of a half-interest; the plaintiff that it was for the whole.

The first question of difficulty is as to the admission of evidence. The learned trial Judge has set out the facts and considered the authorities; and I entirely agree with the conclusion at which he has arrived, i.e., that in the present state of the law the entries in the books of W. H. Plummer are competent evidence.

It reduces down, then, to a question of the weight of evidence; and in that I find myself unable to agree with the conclusions of my brother Middleton.

The plaintiff was till the month of April, 1902, in control of very large and important concerns. In the fall of 1902 he, as the executive of these, took up with W. H. Plummer the question of purchasing the lots in question for his companies. That fell through, and the plaintiff severed his connection with the companies in April, 1903. Thereafter (in May) the matter of the purchase was taken up again and the deal made, whatever it was. The fact that now the plaintiff was dealing for himself and not for the companies seems to me to deprive of weight my learned brother's consideration that the companies would not deal with the lots with Plummer a co-owner. It seems to me that in the then existing state of affairs the plaintiff would be rather glad than otherwise to be associated with a man of the standing of Plummer, his friend, "A man highly respected in a large business way, a successful man."

Plummer came to Clergue's office with a contract already written out in his own handwriting as follows :

"Sault Ste. Marie, 22nd May, 1903.

"To Francis H. Clergue,
"Sault Ste. Marie,

"Dear Sir :

"For and in consideration of the sum of Three Thousand Dollars receipt acknowledged I hereby agree to convey to you or your assigns in fee simple except half the taxes for 1903 the following lands and premises. (Here follows a description of the five lots not necessary to copy or refer to).

"If any of the title are found defective I agree to return any money paid thereon within 10 days from date.

"W. H. Plummer."

The document when produced from the possession of the plaintiff has at the end of the first line "$1000;" between the first and second lines "Fifteen Hundred" scored through followed by "namely two thousand dollars." The second line has the words "Three Thousand Dollars" scored through, and between the third and fourth lines are interlined the words "on account balance to be by note on one year at 6 per cent. int." The interlineations are in the plaintiff's handwriting, all the changes were made by him.

The document reads now :

"For and in consideration of $1000
"namely two thousand dollars
"receipt acknowledged

"on account balance to be by note on one year at 6 per cent. int.
"I agree to convey &c., &c.,

But there is a (caret) mark after "balance" running up to the (original) second line below the word "namely" in the interlineation; this, it is said, should be considered as before the word "namely," so that the contract should read "the sum of $1,000 on account balance namely two thousand dollars to be by note on one year at 6 per cent. int." Doubtless that is the way to make the document consistent and intelligible; but the loose

form seems to me rather to indicate that we may not have here the bargain between the parties as they finally settled it.

Plummer dealt largely in land, and kept a "Land Sales" Book. He entered in that book under date May 22nd, 1903, an account, p. 100, headed "F. H. Clergue & W.H.P." "Sold F. H. Clergue one-half interest in the 3 water lots adjoining the East side of the Dock known as the Government Dock, contains about 320 feet front, takes in Kinderhey Property. Terms $1,000 cash, balance $2,000 in one year with interest 6 per cent. per annum."

On the debit side	On the credit side
"1903	
"May 22, Sold F.H.C. ½ in above lands for $3000.00"	May 22, Cash F.H.C. $1000.00"

The account is properly indexed "Clerque F.H. & W.H.P. 100" and there is nothing to indicate any bad faith. Moreover, there is produced from Plummer's papers a document purporting to be an agreement to sell these very lands to the plaintiff for $3,000. The agreement reads: "I further agree to assign the aforesaid one undivided half interest to you or your assigns whenever you demand same or if you prefer to leave title in me I will give you a declaration of trust that I hold said half interest for you." There is no clause as to repayment in case title proved defective.

Several letters are produced written by Plummer to Clergue in which it is made abundantly plain that he believed the contract was for only a half interest. There is nothing to indicate bad faith and I am convinced that whatever the plaintiff thought, Plummer did not intend to sell anything but a half interest. I do not think it necessary to go through the correspondence to shew this or to shew that the plaintiff had but little memory of the exact contract; nor do I dwell upon the evidence of Col. Penhorwood, which the learned Judge has not dealt with.

It seems to me that the case stands thus: the parties were not at one as to what the contract was—not *ad idem*—or the sale was of a half interest only. The defendants offer to carry out the sale of a half interest, or call the deal off. The plaintiff prefers the latter if he must take either; and I think he must.

There should be judgment declaring that no contract was

entered into, with the proper consequences (a reference if the parties cannot agree). The defendants should have the costs of the appeal, but otherwise there should be no costs.

LENNOX, J.— I agree.

MASTEN, J.—Owing to the arrangement made between the parties and stated to the Court by counsel at the close of the argument the only question which falls to be determined here is whether the whole interest in the lands in questions was sold by the late W. H. Plummer to the plaintiff, and it is unnecessary to determine whether an agreement exists or ever existed for the sale of a half interest in the lands.

I agree with the trial Judge that the entries in defendants' books are admissible as evidence in view of the principles laid down in the cases to which he refers. The admissibility of the document found among Plummer's papers and signed by him alone seems to me exceedingly doubtful. There is no evidence that it ever came to the plaintiff's notice, or that in any way it formed part of the *res gestae* at the time of the negotiations.

But considering such of the evidence as is clearly admissible and particularly considering the correspondence and the conduct of the parties I am unable to agree in the conclusion of the trial Judge that the plaintiff has made out a case justifying specific performance of a contract for sale of the whole interests in the lands. The whole evidence must, in my view, be considered in its entirety and not bit by bit. In other words, I think it is not to be weighed by commencing with the particular instrument adduced by the plaintiff and then placing it singly in succession against each piece of contrary testimony, first against one and then against another; but rather that a bird's eye view must be taken of the result of the evidence as a whole. Considering it in that way some of the dates appear to me to be specially significant. The agreement sued on is dated 22nd May, 1903, and the writ of summons in the action was issued only in May, 1914, W. H. Plummer, the vendor having in the meantime died, on the 13th October, 1911. Such delay in seeking relief in respect of a contract where specific performance is claimed interposes a serious difficulty in the plaintiff's way. But more serious than that, to my mind, is the uncertainty which forces itself upon one's mind as the result of all the testimony.

Without going in detail through all the correspondence and

evidence I refer as an outstanding example of the difficulties encountered, to the letter of the 29th August, 1908, written by W. H. Plummer to F. H. Clergue and received by his brother, who in the plaintiff's absence was looking after his business affairs:

"There is due me on account of the purchase by you *of a half interest in the Pim St. property*, near the Government Dock, $2000.00 and interest at six per cent. from May 22nd, 1902.

"Please advise me whether you intend carrying out the deal or whether I will consider the matter settled by the forfeit of the $1000.00 that you have paid."

" Yours truly,

(sgd) "W. H. Plummer."

The explanation afforded in the testimony fail to satisfy my mind that Plummer's statement in this letter (that he was only selling a half interest) did not come to plaintiff's notice before Plummer's death. On the contrary the matter appears to have formed the subject of consideration and discussion between B. H. Clergue, F. H. Clergue and their solicitor Rowland, as appears from the correspondence of August and September, 1911, and no protest or disclaimer was made by or on behalf of Clergue that Plummer's letter of August, 1908, incorrectly stated the situation. On the contrary it appears to have been accepted by both parties down to the time of Rowland's letter to F. H. Clergue on the 12th March, 1912. At that time W. H. Plummer was dead, his demise having occurred as above stated on the 13th October, 1911.

I mention this fact merely as one outstanding circumstance among others (some of which are specifically mentioned by my learned brothers in their judgments) which induce great uncertainty on the issue before us; an uncertainty so great that in my opinion the Court could not be reasonably certain that in decreeing specific performance of a sale of the whole interest in these lands it was carrying out that which the parties agreed in 1903. Considering Plummer's death, considering the delay in asserting the claim, and above all considering the uncertainty induced on the main issue as the result of all the evidence, I am of opinion that specific performance cannot consistently with established principles, be granted.

Appeal allowed.

BOYD, C., (WEEKLY COURT.) 23RD OCTOBER, 1916.

RE SMITH

Executors and Administrators—Continuing Business—Solicitor-executor—Estate Increased Tenfold—Professional Services—Trustee Act, R. S. O. (1914) c. 121, s. 67—Remuneration.

Continuing business:—Where a retail liquor business was continued by the executors for five years and by reason of the advice and legal services rendered by a solicitor-executor and the active managment of the business by the co-executor, the estate increased from $26,237 to $230,126, it was held, that the executors were entitled to a reasonably large sum as compensation for their time and services and for their care, pains and trouble in administering the estate; and the Court on appeal would be loath to interfere with the amount allowed by the Surrogate Court, even though it seemed that it was more liberal than the Court would have given if applied to in the first instance.

Appeal by Mrs. Sweet from an order of Judge Morgan, of York County Surrogate Court, made upon the passing of the executors' accounts, allowing the executors a large sum as compensation for their time and services and for their care, pains, and trouble in administering the estate of her first husband, Smith.

The appeal was heard by Boyd, C., in Toronto Weekly Court, on 18th October, 1916.

J. A. Paterson, K. C. for the appellant.
W. N. Tilley, K. C. for the solicitor-executor.

BOYD, C.,—Appeal is taken from the allowance made to the executors by Surrogate Judge Morgan by one of them who is also sole beneficiary (barring $3,000 of money legacies to relatives) on the ground of excess and error in principle.

I find no error in principle and the only question is one of *quantum*. On this head the Court is on appeal loath to interfere, even though it seems that the allowance is more liberal than the Appellate Court would in the first instance have given. *McDonald* v. *Davidson*, (1881) A. R. 321.

The testator carried on a retail liquor business on the S.W. corner of King and Bay Sts., the license for which was near-

expiring at his death in August, 1910. By his will he directed his executors to secure a transfer of license before its expiry to some other fit and proper premises (the will is dated 1909). Between the date of the will and his death he had arranged for the leasing of another site at the S.E. corner of Queen and Simcoe Sts., upon which a work of reconstruction as to the building was in progress at the time of his death. This, of course, indicated the place to which the transfer should be made, and the evidence shews that a good deal of trouble arose in securing that result. The License Board were opposed generally to granting the privilege to any one but a male proprietor and, though Mr. Burns wished the license to be in the names of the executors, it was finally granted to the widow. This, at all events, was in conformity with the direction of the will that empowered the widow in her capacity as executrix to receive all and any moneys that might be payable by any person. This clause was put in the will by the express desire of Mr. Burns, who was asked to be executor by the testator on account of his special experience in license matters, and on account of his qualifications as a lawyer to advise and assist the widow, who had no particular financial or business aptitude. True it is that under the will she received all the money that came in from the receipts of the business till it was sold in August, 1915, totalling $162,616, but she was assisted from day to day during the evenings in the disposition of these moneys, which were needed to pay creditors. These were pressing for payment and to avoid selling at a sacrifice Mr. Burns took time and trouble to negotiate with them so as to stave off the most urgent and providing by payment by instalments out of the proceeds of the business. In this aspect there was no error in principal in the allowance of commission for these services, though the cash did not actually pass through his hands. He saw that the daily receipts were duly deposited in the bank and duly paid out to those entitled. He had also many interviews with the architect and had difficulty with the contractors who threatened to sue, but whom he persuaded to give time till something was coming out of the new business. Mr. Burns also drew the papers in connection with the sale of the hotel to Kaiser and tried to shew the widow, who had married Mr. Sweet in November, 1913, that the sale to Kaiser in 1915 was a beneficial one—she having the idea that the estate owned the land instead of hav-

ing merely a lease-hold interest. Complaint is made that there was a bungle in carrying out the sale because no mortgage was taken upon the leasehold to secure the balance of the price. A chattel mortgage was taken and a power of attorney given to Mrs. Sweet and two other prior chattel mortgagees who were in the trade and each of them to enter upon the premises and carry on the business with other ample provisions to preserve the property as a going concern in case of default by Kaiser to make his payments, etc. This is said to be a customary mode to deal with licensed premises where there are several incumbrancers, all interested in the value of the security, and it seems to be an efficient mode of securing the vendee instead of taking a mortgage on the leasehold for the unpaid balance of the price.

The result of the policy of carrying on the business instead of winding up by sale within the usual year for administration and the success of the result is shewn in a comparison of the figures: whereas the sum total of the estate at the death was $26,237, it increased at the period of accounting and fixing compensation to the sum of $230,126, as found by the Surrogate.

Besides the papers in connection with the sale to Kaiser, a good deal of miscellaneous legal business was done and advice given by Mr. Burns for which he might have made professional charges but for his position. That is a matter which is to be taken into account when the value of the executor's service is to be estimated. See the Trustees and Excutors Act, R. S. O. (1914) ch. 121, sec. 67 (4). Where a barrister is personal representative and has rendered professional service to the estate, regard may be had to the allowance and it shall be increased by such amount as may be deemed fair and reasonable in respect of such service. The Surrogate Judge has not made any separate finding as to this aspect, but he has, I think, taken it into account in his estimate.

The peculiarity of the present case is that the estate has derived its worth mainly from the acts and services of the executors after the death of the testator and by the prosecution of the business till a suitable time came for selling The nearest case involving a continuation of the business which I can find is *Thompson* v. *Freeman*, (1868) 15 Gr. 384. The testator was car-

rying on business in the State of Indiana, and by will authorized his executors to go on with it. They did so for some years, with what result does not appear, but one would guess that it must have been a favourable one. Spragge, V.-C., thought that the executors were not entitled to any commission on the receipts but agreed that some compensation should be made. His words were, "it was the duty of the executors to see that the estate did not suffer detriment unnecessarily in the conduct of the business, and this would involve some labour, care and anxiety, and for this they should be compensated and not illiberally."

The testator sanctioned the prosecution of the business, but it was a foreign part, and none of the moneys passed through the executors' hands but were administrated by the agents in charge. Here the moneys were received by the executors: true the executrix alone handled them in the first place, but all done with the privity and discretion and supervision of the other. Though not directed by the testator, the nature of the business suggested that it should not be summarily stopped within a year, but the prosecution of it was sanctioned by and in the interest of the sole beneficiary, who was also co-executrix. But both incurred the risk and responsibility in this departure from the ordinary methods of winding up the estate, if the venture had proved disastrous or had diminished the value of the estate to the detriment of creditors. No doubt the widow gave more personal attention to the conduct of the business. She lived in the premises and obtained that benefit, but her personal service may be set against the mental vigilance and skilled supervision which the executor gave, and both may be fairly regarded as equally meritorious.

Some reference was made to English authorities. They are not apposite to the status of executors and trustees in Ontario. The English rule is that a trustee (or executor) is not entitled to compensation for personal trouble and loss of time: yet if the nature of the trust is such as to justify a claim for compensation a special case must be made out and warranted by the Court before the trust is accepted: *Brocksoff* v. *Barnes* (1820) 5 Madd. 90. Even in England in an exceptional case I find an allowance by way of lump sum made for the trouble and loss of time of executors in managing a leasehold estate and carry-

ing on the testator's business for two years: *Foster* v. *Ridley* (1864) 4 Deg. J. & S. 452.

But in this Province, as also in most of the States of the American Union and of the Australasian Confederation, executors and trustees have by statute a right to be paid for their services and generally by a percentage on the receipts: R. S. O. (1914) ch. 121, sec. 67.

I do not think there is a double payment for the same moneys or the same services in regard to the percentage allowed on the receipts and outlays of the business and the yearly salary for management. Apart from the mere getting in and paying out moneys, the situation called for care and caution in the oversight of the business as to its general proper conduct —to see that there was no breach of the law or violation of decorum which might imperil the license. This sort of management is a distinct service which may rightly be appropriately recognized in fixing compensation.

It is said that the intervention of the second husband, Mr. Sweet, embittered the situation. However that may be, I rather think that the main difficulty is the clash of interests in one and the same person between the active executrix and the receptive beneficiary. So long as her co-executor is reduced to $1,000, she does not ask compensation because she has all the estate. But the matter is to be dealt with on the footing of joint services. Both acted beyond the limits of executorial duties in the continuation of the business with all its perils for over three years. Had the co-executrix been a stranger, she would have made no demur to the recognition of the value of her services and those of her fellow which had been passeed upon and as passed upon by the Surrogate.

The costs allowed on passing accounts are complained of as excessive. They appear to have been taxed by the Registrar of the Court, affirmed and adopted by the Judge, and no item has been referred to as improper: so that the costs should stand as unimpeached.

The appeal is dismissed with costs.

Appeal dismissed.

SUPREME COURT OF CANADA. 10TH OCTOBER, 1916

VERRONEAU v. THE KING

Criminal Law—Grand Jury—Disqualification of One Member—Affect upon Constitution of Grand Jury Generally—Juorman Disqualified Giving Evidence Before Other Juormen—True Bill Found—Disqualified Juorman in Box When Bill Returned—Motion to Quash—Evidence of Non-participation in Proceedings of Grand Jury by Disqualified Juorman.

Disqualification: — Notwithstanding that the party complainant before the Magistrate was sworn as a member of the Grand Jury and gave evidence before them, but took no part in their deliberations in the particular case in which he was interested, although present in the Grand Jury room and also in the Box when they returned a true Bill, *held*, that the Grand Jury was regularly constituted and the indictment should not be quashed.

Admissibility: — It is proper for the trial Judge to admit evidence by affidavit shewing that a Grand Juror did not take part in the deliberations of the Jury on a particular case in which he was disqualified.

Appeal from a judgment of Quebec Court of King's Bench (Appeal Side) refusing to quash an indictment found against the appellant.

The appellant, Dr. Verroneau, laid a charge of attempt to murder against one Denis S. Bachand, but at the trial he was acquited. Then Bachand laid a charge against Dr. Verroneau that he had committed perjury in the course of his prosecution for attempt to murder. The Magistrate who heard the preliminary inquiry committed Dr. Verroneau to stand his trial.

When the case came before the Grand Jury, the complaintant, Bachand, was one of the Grand Juormen. He was present in the Jury Box when the Grand Jury was charged with the consideration of the indictment and again when a true Bill was returned. Before the defendant pleaded to the indictment his council moved to quash it because of the presence of Bachand as a member of the Grand Jury, and also because Bachand had said to one Brault, another Grand Juorman, words in French to the effect that

"'the way things stand either I or Verroneau will have to leave Coaticook.''

which Brault had repeated to other members of the Grand Jury, while they were assembled for deliberation.

Proof was given by affidavit, which satisfied the trial Judge, that Bachand had taken no part in the deliberations of the Grand Jury on this particular indictment, and he refused to quash the indictment, but he reserved for the decision of the Appeal Court the following question;

> Did the fact that Denis S. Bachand was assigned as a Grand Juror affect the legality of the constitution of that body and could the latter bring in a true Bill against Verroneau, Bachand not having taken part in the deliberation on the subject of this Bill and should the decision of this Court quashing the motion of the accused stand?

The Reserved Case came before Quebec Court of King's Bench (Appeal Side) and a majority (Archambault, C. J., Lavergne and Cross, JJ.) held that the Grand Jury was regularly constituted and that the motion of the accused was properly quashed. Carroll and Pelletier, JJ., dissented.

The appeal to the Supreme Court of Canada was heard by Fitzpatrick, C. J., Davies, Idington, Anglin and Brodeur, JJ., on the 29th May, 1916.

C. C. Cabana, (Sherbrooke) and *Hector Verrett, K.C.,* (Coaticook) for the appellant.

W. L. Shurtleff. K. C. (Coaticook) for the respondent.

THE CHIEF JUSTICE,—This is an appeal on a stated case.

In answer to the first question I would say the Grand Jury was regularly constituted notwithstanding that Bachand, who was the party complainant before the Magistrate in this particular case, was sworn as a member of it. A Grand Juror is not sworn like a Petit Juror to try and a true deliverance make on the evidence submitted. His duty is to diligently inquire and a true presentment make of all such matters and things as shall be given him in charge *or shall otherwise come to his knowledge.* Until quite recently Grand Jurors might make presentments of their own knowledge and information without, the intervention of any prosecutor or the examination of any witnesses. *Vide* Report of Royal Commissioners on English Draft Code, pp. 32 & 33.

As to the proceedings before the Grand Jury, it is part of the stated case that Bachand, whose name was on the back of the indictment, was examined, but took no other part in the proceedings. In these circumstances, Bachand was not a stranger in the jury room. His presence is explained and accounted for by the fact that he was a witness before the Grand Jury in this particular case. And if Bachand took no part in the proceedings, I do not think his mere physical presence somewhere about could affect the result of the Grand Jurors' deliberations or constitute an interference with the privacy of their proceedings. There is no impropriety in some one or more proper persons being present with the Grand Jury during their inquires on bills of indictment, *R.* v. *Hughes*, C. &. K. p. 519. I have not overlooked *Goby* v. *Wetherill*, 31 T. L. R. p. 402. The stated case might have been more explicit on this point, but when the judge states the fact to be that Bachand "n'a aucunement pris part aux deliberations qui eurent lieu au sujet du dit acte d'accusation", I think he must be assumed to mean that he took no part in the finding of the bill. It would have been wiser, however, for Bachand to have left the room after giving his evidence and, as a matter of ethics or propriety, he should not have been present in the box when the bill was returned.

We must assume for the purposes of this appeal that Bachand took no part except as a witness in the discussions or deliberations on this indictment or in the finding of the true bill, and I express no opinion as to whether if he had done so the indictment should have been quashed.

I attach little importance to the observations made by Brault.

DAVIES, J.,—This appeal is one from a judgment of the Court of King's Bench (Appeal Side) Province of Quebec refusing by a majority to quash an indictment found against the appellant on the alleged ground that one of the Grand Jury which found the indictment was interested and biased having been the prosecutor.

I should say that if the facts proved had shewn Bachand to have taken any part in the proceedings or in the consideration of the Bill found by the Grand Jury of which he was a member, as to which he was interested or biased, that would have justified the appeal and the quashing of the indictment.

The question is one of fact capable of being proved by evidence. The finding of the learned trial judge before whom the motion to quash was first made—that the proof established that Bachand did not participate in the proceedings of the Grand Jury upon this particular Bill or in the consideration of the Jury's finding of a true bill upon it, approved by the Appeal Court, if sustained by the evidence is sufficient to dismiss the motion.

I am of opinion that the evidence to shew this non-participation and non-interference was properly admissible and that it is sufficient to uphold the findings of the Courts below.

I cannot accede to the proposition that the fact of one member of a Grand Jury being disqualified from interest or bias with respect to one of the Bills brought before that body for consideration, affects the constitution of the Grand Jury generally.

Such a disqualified person cannot take any part in the proceedings or findings of the Jury with respect to the Bill in which he is interested, but such disqualification is a personal and limited one and does not affect the constitution of the Jury as a whole or the right of the Juror so partially disqualified from taking part in all the proceedings or findings of the Jury on other Bills in which he has no interest or bias.

This question of the participation or non-participation of Bachand in the proceedings of the Grand Jury upon this Bill including their finding upon it was the main and substantial question argued on this appeal. There were other subsidiary questions mentioned with respect to them. I do not think there was anything in them to justify this Court in interfering with the judgment appealed from.

IDINGTON, J.—The appellant was indicted for perjury and the learned trial judge was moved to quash the indictment on the ground that the private prosecutor was a member of the Grand Jury which returned the bill as true.

The learned trial judge investigated the matter and dismissed the motion but reserved the point raised thereby together with another which developed during the trial.

In his stated case separate questions were asked. The Court of Appeal disposed by their unanimous judgment of the second, leaving only that bearing upon the motion to quash in

regard to which in that Court there were dissentient opinions which enabled the accused to appeal here.

The first question, which thus comes before us, was stated as follows:—

Premiere question.

Le fait que Denis S. Bachand avait ete assigne comme grand jure affectait-il la legalite de la constitution du grand jury, et ce dernier pouvait-il legalement rapport er comme bien fonde, l'acte d'accusation porte contre Verronneau, Bachand n'ayant aucunement pris part aux berations qui eurent lieu au sujet du dit acte d'accusation et la decision de cette Cour renvoyant la motion de l'accuse, etait-elle celle qui devait etre rendue?

The law applicable to the question raised before the learned trial judge is stated in section 899 of the Criminal Code, as follows:—

899. No plea in abatement shall be allowed.

2. Any objection to the constitution of the grand jury may be taken by motion to the court, and the indictment shall be quashed if the court is of the opinion both that such objection is well founded and that the accused has suffered or may suffer prejudice thereby, but not otherwise.

The fact that the private prosecutor took no part in the deliberations on the subject of the accusation, seems to me conclusive against this appeal. His having been summoned and sworn as a Grand Juror seems to furnish no ground of objection He was bound to obey the summons and be sworn. It was not competent for him to refuse for the very good reason that the conduct of the matter lay in the hands of the Crown officer and might not come before that Grand Jury or they might be directed by the learned trial judge under such circumstances if he saw fit for good reasons to refrain from dealing with it.

We are asked to presume nothwithstanding the statement of fact contained in the question which is the boundary of any Appellate Court's jurisdiction herein, that in fact the private prosecutor so summoned as a Grand Juror did take part in the deliberations in question herein as such Grand Juror.

In other words, we are asked to presume not only against the stated fact but also against the presumption of law that he did so.

The presumption of law is that he did not and that the

Crown officer in charge saw to it as part of his duty, if aware of his being a Grand Juror, that he was properly instructed in that regard either by the foreman or the learned trial judge or himself, and that due order of law was observed.

Possibly he was a witness and as such before the Grand Jury for such length of time as the requirements of giving his evidence or otherwise relative to the presentation of the evidence in accordance with what convenience in the case might demand. Nothing further can be presumed as to the fact of his presence there.

Then it is said he appeared with the Grand Jury when its foreman presented the "true bill" in Court.

Again there is no presumption to be drawn therefrom. For aught we know he may merely have taken a seat in the places assigned in the Court room for the Grand Jurors which he was entitled to do, for many proper reasons. Other bills may, for example, have been returned by the foreman to the Court at the same time as this, or have been expected to have been so presented.

The mere presentation by the Grand Jurors of a Bill forms no part of their deliberation and determination. That is disposed of in the Grand Jurors' room and the finding there written, is simply handed in to the Court. Often judges presiding at a busy Court direct, as they may, that the foreman alone or such number of jurors as directed may do so, without the whole panel appearing.

And assuming the worst that can be said of a private prosecutor appearing under such circumstances it is specially directed by the final part of the statute I quote that unless the accused has suffered prejudice thereby the indictment must not be quashed.

I cannot find anything deserving serious consideration in all that has been urged by appellant's council to maintain this appeal. To do so would, I submit, be a reversion to technicality which the Criminal Code and its predecessors did so much during last century to eliminate from the law, in order that justice might be done.

I have assumed in favour of the decent administration of justice, but am not to be taken as expressing any opinion, that in law a convicted man is entitled to go free simply because his accuser formed one of those Grand Jurors who presented his

case for trial. I express no opinion on that legal issue, nor shall I till need be.

The appeal should be dismissed.

ANGLIN, J.—(*Dissenting*) The defendant appeals to this Court under ss. 1013 (3) and 1024 of the Criminal Code from the judgment, on a case reserved under s. 1014 (2), affirming the verdict and conviction recorded against him on a charge of prejury. The opinion of the majority (Archambault, C. J., Lavergne and Cross, JJ.) was delivered by Mr. Justice Cross. Carroll and Pelletier, JJ. dissented on only one of the reserved questions, viz., whether a motion to quash the indictment had been properly rejected, which is therefore the subject of the present appeal.

On the 3rd of November, 1914, one Bachand, who had been unsuccessfully prosecuted at the instance of the defendant on a charge of attempt to murder, laid a complaint against the defendant of having committed perjury in the course of the earlier prosecution. The defendant having been committed for trial his case came before the Court of King's Bench in October, 1915 At this term of the Court Bachand was a member of the Grand Jury. He was present in the jury-box when the Grand Jury was charged with the consideration of the indictment preferred against the defendant and again when a true bill was returned. Before the defendant pleaded to the indictment a motion was made on his behalf that it should be quashed because of the presence of Bachand as a member of the Grand Jury, and also because Bachand had said to one Brault, also a Grand Juryman, the following words:

"C'est de valeur ce proces la, mais au point ou on est rendu la, il va falloir que moi ou Verroneau parte de Coaticook,"

which Brault had repeated to other members of Grand Jury, while they were assembled for deliberation.

In the reserved case the learned judge makes the following statement:

"Avant adjudication sur cette motion, il fut etabli devant la Cour qu'en effet Denis S. Bachand avait ete assigne comme grand jure pour le dit terne d'octobre, mais qu'il n'avait aucunement pris part aux deliberations du grand jury sur l'accusation portee contre Verroneau. Il

fut aussi etabli que les paroles susdites avalent ete dites par Bachand a Brault et que ce dernier les avait rapportees, dans le salle des deliberations, aux autres grand jures: mais il n'a ete aucunement etabli que ces paroles aient influence ces derniers et qu'elles aient eu pour effet do determiner leur rapport.

Il est vrai que Bachand etait dans la boite des grand jures quand ceux-ci ont rapporte l'acte d'accusation comme bien fonde contre l'accuse.''

In the respondent's *factum* it is stated that the fact that Bachand took no part in the deliberation upon this case "was proved by the affidavits of two witnesses before the Court." These affidavits are not in the record and, although their production has been demanded, are not forthcoming. In view of the strict provisions as to the secrecy of all that transpires in the jury-room and the terms of the Grand Jurors' oath I find it difficult to understand how the learned judge was in a position to make the statement which he does as to the abstention of Bachand from taking part in the deliberation in this case. *Rex* v. *Marsh*, 6 A & E, 236, 237; *Greenleaf on Evidence* par. 252; *Taylor on Evidence*, par. 943; *Archbold Crim. Pleading* 23rd ed., p. 103, *4 Blackstone's Com.* par. 126. I am likewise at a loss to appreciate the force of the learned judge's observation:

"Il n'a ete aucunement etabli que ces paroles aient influence ces derniers et qu'elles aient eu pour effet de determiner leur rapport."

As at present advised I incline to think that we should ignore both the statements that Bachand took no part in the deliberations upon the charge against Verroneau and also the statement that it was not established that the repetition of what he had said to the juror Brault influenced the Grand Jury.

But if we are bound by such statements made in the special case, it should be pointed out that it does not appear (as indeed it could not without impropriety, *Taylor on Evidence* par. 943) whether the bill against Verroneau was returned by the vote of more than seven members of the Grand Jury; nor is there an explicit statement that Bachand did not vote upon the bill as a Grand Juryman although he had refrained from taking part in the deliberation. Bachand having been present in the jury-box when the jury was charged with the consideration of

the case against the defendant and again when the bill was returned, his presence in the jury-room while it was under deliberation seems to be a reasonable inference which is in nowise negatived in the case submitted.

The question reserved for the consideration of the Court is stated in the following terms:

> Le fait que Denis S. Bachand avait ete assigne comme grand jure affectait-il la legalite de la constitution du grand jury, et ce dernier pouvait-il legalement rapporter comme bien fonde, l'acte d'accusation porte contre Verroneau, Bachand n'ayant aucunement pris part aux deli-deliberations qui eurent lieu au sujet du dit acte d'accusation, et la decision de cette Cour renvoyant la motion de l'accuse, etait-elle celle qui devait etre rendue?

In answer to the appeal council for the Crown takes the position that there is no right of challenge to a Grand Juryman individually, that the remedy of an accused person in the case of a disqualified Grand Juryman was, prior to the Criminal Code, by plea in abatement, that such pleas have been abolished, *Crim. Code*, s. 899), that a motion to quash in lieu thereof is permitted only in the case of an "objection to the constitution of the Grand Jury" (*ibid.*) and that an objection that a member of the Grand Jury was not indifferent because of alleged interest is not an objection to the constitution of the Grand Jury, *The King* v. *Hayes*, 9 Can. Crim. Cas., 101. His position, therefore, is that, although it should be assumed that Bachand took part in the finding of the true bill against Verroneau and even that his vote was necessary to its return, nevertheless Verroneau would be without redress because the law affords him no remedy. In the alternative he maintains that, in view of the statements in the reserved case that Bachand had taken no part in the deliberation of the Grand Jury, and that it was not proved that his conversation with Brault, though repeated to the Grand Jury, had in fact affected them, a court could not properly hold, although the objection should be deemed well founded, that accused has suffered or might suffer prejudice thereby:

It seems unnecessary to consider the somewhat debated question whether there is a right of challenge to the polls in the case of a Grand Jury. I appreciate the force of the argument *ab inconvenienti* pressed in the *R.* v. *Sheridan* 31 How., St. Tr. 543, and incline to the view that under the old practice an objection to a Grand Juryman would be properly made when

the accused was arrainged either by plea in abatement or by motion to quash the indictment. I agree with Mr. Justice Cross that either course would seem to have been open, the latter however, being the only method available when, as may often happen, the defendant first became aware of the ground of objection after he had pleaded not guilty." Since the adoption of the provision of the Criminal Code abolishing all pleas in abatement the remedy is by motion to quash.

I also agree with Cross, J. that the view that the phrase "any objection to the constitution of the Grand Jury" (*Crim. Code*, 899, s. 2) covers only objections based on lack by jurors of qualifications expressly prescribed by provincial statute law, or on disqualification of the officer charged with the duty of selecting and summoning the Grand Jury, seems to be too narrow. Anything which destroys the competency of the Grand Jury as a whole, or the competency of any of its members, I think affects the constitution of that body and affords a ground of objection which may be raised by a motion of the Court under s. 899. A Grand Jury may be well qualified as to all the cases on the docket save one and wholly unfit to pass upon that one. As to that case the jury would not be properly constituted while he sat upon it.

In *The King* v. *Hayes*, 9 Can. Crim. Cas., 101, the contrary view was taken, apparently based largely upon what, with respect, would appear to have been a misconception of s. 662 of the Criminal Code then in force.

> Every person qualified and summoned as a grand or petit juror, according to the laws in force for the time being in any Province in Canada, shall be duly qualified to serve as such juror in criminal cases in that Province.

Apart from any question as to the constitutional validity of this section as a provision dealing with the constitution of the Court rather than with criminal procedure, it should be noted that the qualification which it declared sufficient was not merely that prescribed by the provincial statute law, but qualification "according to the laws in force for the time being in Province of Canada." I know of no law in force in any province which has taken away the common law right to object to a

juror *propter affectum* or deprived an accused in the Province of Quebec, as in Ontario and the other older provinces, of the right, before conviction for an indictable offence, to have his case passed upon first by a body of impartial Grand Jurors and afterwards by a Petit Jury likewise composed of indifferent men 4 *Blackstone's Com.* par. 306. The disqualification of interest—*propter affectum*—rests upon the common law maxim "that no man is to be a judge in his own cause" which, as Lord Campbell said in *Dimes* v. *Grand Junction Canal Co.* 3 H.L.C.759

> it is of the last importance * * should be held sacred. And that is not to be confined to a cause in which he is a party but applies to a cause in which he has an interest.

The presence of one interested justice on a bench of magistrates renders the Court improperly constituted and vitiates the proceeding, although the majority without reckoning his vote favoured the decision. *Reg.* v. *The Hertfordshire Justices* 6 Q.B., 753. The same rule is applicable to a Grand Jury. *The Queen* v. *Upton St. Leonards*, 10 Q. B., 827. The case last cited is also particularly in point because of the statement made by Bachand to Brault and repeated to the other Grand Jurors, which not only put Bachand's interest in the prosecution beyond doubt, but was of a character "not unlikely to influence the Grand Jury in their decision."

The reasoning and grounds of decision of Peters, J., in *The Queen* v. *Gorbet et al.* 1 P. E. I., 622, commend themselves to my judgment rather than those which prevailed in the *King* v. *Hayes.* 9 Can. Crim. Cas., 101.

As already stated I am unable to agree with the view taken by Mr. Justice Cross that evidence was legally received that the juror Bachand, though apparently present in the Grand Jury room, did not participate in the discussion of Verroneau's case. It would in my opinion, be a practice fraught with very grave dangers to enter upon any such inquiry. The illegality of the presence of a mere stranger in a jury-room is illustrated by the recent case of *Goby* v. *Wetherill* [1915], 2 K. B.,674. The presence of an interested person, himself a member of the body, must be still more objectionable. Moreover, as already pointed out, the statement that Bachand did not take part in the

deliberations of the Grand Jury on the Verroneau case not only does not negative his presence in the jury-room, but is also not inconsistent with his having voted on the finding. The true principle, however, is that upon which the decisions in *Reg.* v. *The Hertfordshire Justices*, 6 Q. B., 753; *Rex.* v. *Lancashire Justices*, 75 L. J. K. B., 198, and *Reg.* v. *Meyer*, 1 Q. B. D., 173, proceed. As Blackburn, J., said, in the case last cited,

> we cannot go into the question whether the interested justice (juror) took no part in the matter (i. e., in the discussion of the case).

See also for a different application of the same principle, *Reg.* v. *London County Council* [1892] 1 Q. B., 190, 196.

As to the statement of Bachand to Grand Juror Brault, repeated by the latter (probably in Bachand's presence) in the jury-room, it was of a character calculated to influence other jurymen and it is impossible to know whether it did or did not in fact influence them. Mr. Justice Cross was under the erroneous impression that

> the learned trial judge has found that the communication did not affect the decision of the grand jury.

All that the special case states is that

> Il n'a ete aucunement etabli que ces paroles aient influence ces derniers et qu'elles aient eu pour effet de determiner leur rapport.

The effect of Bachand's statement upon the Grand Jury is a field of inquiry not open to us. The statement was improperly before them. It had all the weight of a communication from one of the body itself. The defendant is entitled to have it assumed that it produced some effect.

The accused has been deprived of the substantial right of having his case passed upon by a duly qualified and unbiassed Grand Jury and it was in my opinion, quite impossible when the motion to quash was disposed of in the trial court to affirm that he had not suffered or might not suffer prejudice thereby. To hold, as was apparently held by one learned judge in the *R.* v. *Hayes*, 9 Can. Crim. Cas. at p. 118, that, because the appellant was subsequently convicted by Petit Jury at the trial, to which he was compelled to proceed upon the rejection of his motion to quash, it cannot be said that he was really prejudiced

by anything which concerned the action of the Grand Jury, would entail a denial of redress in any case after conviction, however gross the improprieties accompanying the finding of the indictment, however prompt the action of the defendant in taking exception thereto, and however erroneous the rejection of his objections.

In my opinion the motion to quash the indictment should have been granted and the question submitted should be answered accordingly.

BRODEUR, J. (Dissenting. Translation.)—This is an appeal from the judgment of the Court of King's Bench affirming the conviction recorded against the appellant.

The appellant Verroneau and Mr. Denis S. Bachand are evidently persons of standing in the city of Coaticook. One of them, in fact, in a physician and the other a man of sufficient means to qualify on the Grand Jury.

They are evidently old enemies and they have chosen to air their quarrel before the Criminal Courts of the country.

Verroneau had in first place brought a charge of attempt to murder against Bachand, but on the trial the latter was acquitted. In his turn Bachand laid a complaint against Verroneau of having committed perjury in the course of the prosecution for attempt to murder which he (Verronneau) had launched against him.

The Magistate charged with the preliminary inquest found reason for prosecution against Verroneau on the prejury charge and an indictment was accordingly submitted to the Grand Jury.

As a very strange coincidence we find Bachand himself a member of the Grand Jury . When therefore a true Bill was returned Verroneau made a motion to quash the indictment on the principle that the jury was not legally constituted as amongst the jurors was his proper accuser.

Proof was given by affidavit on this subject and it appears to have been established to the satisfaction of the presiding Judge that Bachand had taken on part in the deliberation. He does not say, however, whether Bachand was in the room where the Jury deliberated.

It is also proved that Bachand said to one of his fellow

jurymen that "the way things stand either I or Verroneau will have to leave Coaticook."

It is also established that Bachand was in the Grand Jury box when the Jury returned a true bill against Verroneau.

The question before us is whether the jury was validly constituted to return the bill in question. There is no doubt that Bachand was a member of the Grand Jury and that he was sworn in as such.

The presiding Judge has reserved for the decision of the Appeal Court the following question :—

> Did the fact that Denis S. Bachand was assigned as Grand Juror affect the legality of the constitution of that body and could the latter bring in a true Bill against Verroneau, Bachand not having taken part in the deliberation on the subject of this Bill and should the decision of this Court quashing the motion of the accused stand?

The positions of accuser and judge are absolutely incompatible according to the primordial principles of our judiciary organization. That the Crown has taken this view is shewn by the fact that in the present cause it has proven that Bachand, the accuser, had taken no part in the deliberations which took place with regard to the indictment against Verroneau.

The facts cited by the Judge and which form the basis of the reserved question are perhaps not as fully given as they should. Thus, for instance, I think it would have been important to know if Bachand remained in the room or not during the deliberations of the Jury. The Judge simply said that he took no part in the deliberations. Does this mean that he was not present in the room where the Jury deliberated? I was at first inclined to believe that the fact of mentioning that he took no part in the deliberations, might be interpreted as meaning that he was not present. But on second thought I consider that the best interpretation which might be given to this expression of the Judge is that Bachand was present, but took no part whatever in the deliberations.

I consider that under these circumstances the Jury was not legally constituted to bring in a bill.

Chitty says:—

> This necessity for the grand inquest to consist of men free from all objection existed at Common Law and was affirmed by the Statute II. Henry IV c. 9 which enacts that any indictment taken by a jury, one of whom is unqualified shall be altogether void and of no effect whatever. So that if a man be outlawed upon such a finding, he may on evidence that one of the Jury was incompetent, procure the outlawry against him to be reversed.

The Grand Jury in the present case might have been legally constituted for hearing other cases submitted, but as far as the Verroneau case is concerned, I consider it was not legally constituted.

I cannot, consequently, concur in the opinion expressed in the case of *Regina* v. *Hayes*, 9 Can. Cr. Cas., p.101. I believe that the principle laid down in the case of *Regina* v. *Maguire*, 4 Can. Cr. Cas. p.12 is more acceptable and conforms better to our judicial system.

For these reasons I am of opinion that the charge against Verroneau should be dismissed and the appeal allowed with costs.

Appeal dismissed.

SUPREME COURT OF CANADA 16TH OCTOBER, 1916.

SHENANGO STEAMSHIP CO. v. SOO DREDGING AND CONSTRUCTON CO.

Negligence—Obstructing Navigable Channel—Projecting Large Boulder in Channel — Absence of Warning to Navigators — Vessel Grounded on Boulder—Liability of Dredging Company Projecting Boulder in Channel—Navigable Waters' Protection Act, R. S. C. (1906) c. 115, s. 14.

Projecting boulder in channel: — A vessel while proceeding down a dredged channel in a navigable river grounded upon a large boulder, which had been projected into the channel by a dredging company, in the course of its operations under a Government contract. The evidence shewed that the boulder had been marked by a buoy but the buoy had been carried away at least 2½ hours before the accident. *Held,* that the whole duty of the dredging company was not performed by placing the buoy without provision that it should remain where it was placed; that 2½ hours was an unreasonable time to allow an obstruction to remain without warning and more than a reasonable time to allow the discovery of the absence of the buoy and to replace it; therefore, the dredging company was liable for the damages sustained by the vessel.

Appeal by the plaintiffs from a judgment of the Second Appellate Division of the Supreme Court of Ontario, pronounced 23rd November, 1915, affirming the judgment of Britton, J., pronounced 23rd June, 1915, dismissing the plaintiffs' action with costs.

The action was brought by the underwriters of the Steamship *Snyder* in the name of the owners, the Shenango Steamship Company, to recover damages sustained by the steamer in running upon a rock or boulder, alleged to have been projected in the navigable channel of St. Mary's river by the defendant dredging company.

BRITTON, J., tried the action without a jury, at Sault Ste. Marie. He dismissed the action with costs, holding that the identity of the boulder struck by the vessel, *Snyder*, had not been established beyond reasonable doubt, and that, if it were, the knowingly leaving of it unbuoyed for 2½ to 3 hours was not negligence. A note of his Lordship's judgment is in 8 O. W. N. 530.

The Second Appellate Division, by a majority, affirmed the judgment of Britton, J., Riddell, J., dissenting. A note of their Lordships' judgment is in 9 O. W. N. 207.

The appeal to the Supreme Court of Canada was heard by Fitzpatrick, C.J., Davies, Idington, Anglin and Brodeur, JJ., on 7th and 8th *June, 1916.*

Gideon Grant, (Toronto) for the plaintiffs, appellants.

A. C. Boyce, K.C., (Sault Ste. Marie) for the defendants, respondents.

THE CHIEF JUSTICE.—On the 22nd of August, 1912, the respondent was and for some time previously had been engaged under contract with the Dominion Government in widening the navigable channel in the St. Mary's river at the lower entrance of the Sault Ste. Marie Canal.

On the 22nd August, 1912, the appellant's Steamer *William P. Snyder* a ship of some 10,000 tons burden coming down the canal passed through the lock into the channel. Almost immediately after entering the channel she grounded on some obstruction and became fast, after being lightered she was pulled off on the following morning. The vessel was seriously injured and for this and the other consequences of the accident damages are claimed against the respondent on the ground that in the course of dredging for widening the channel the respondents had negligently dropped or shoved into the old channel a boulder on which the *William P. Snyder* struck and had neglected to buoy the same or give any warning of its location.

It is necessary for the appellant to establish :

(1.) that at the time of the accident the steamer was in the old channel.

(2.) That the obstruction on which it grounded was placed in or permitted to remain without notice in the said channel by and through the negligence of the respondent.

That the steamer was in the old channel at the time of the accident scarcely admits of doubt. There would seem to be almost a presumption of its having so been. Here was a large steamer well equipped it would appear in every respect plying constantly through the channel. Her captain and crew were well acquainted with it. Under the most favourable conditions shortly after noon on an August day she left the lock and within two boat lengths was aground. Her officers had the ranges,

the buoys, buildings on the shore, everything possible to enable them to keep the correct course. It was certainly most remarkable if under these conditions she failed in so short a distance to keep within the navigable channel.

Let us look at the evidence.

The width from the axis of the range that is the centre of the channel to the south side was 155 feet. The boat is 56 beam.

Capt. Ott, the Master, swears that from observations he took when the vessel was aground, she was about parallel on the range and the port side was about 50 feet south of the range.

James C. Swinton, the First Mate, confirms this evidence.

Walter A. Holmes, the wheelsman, says that at the time of the accident they were parallel to and just a trifle south of the ranges.

The evidence of Chas. N. Hollins, the Chief Engineer, is that the starboard side was about 25 or 30 feet from the south side of the channel when under instructions the Government launch ran along it.

Frank E. Nelson, the Captain of the *Schenck* who pulled the *Snyder* off says that he found her lying in the channel parallel with and just off the centre line.

Richard J. Neville, the Captain of the *Edwin H. Ohl*, a vessel like the *Wm. P. Snyder*, and which immediately followed her down, says that he passed the *Wm. P. Snyder* and he was then about 50 feet from her.

Mr. Ross, the Superintending Engineer on the Soo Canal, says that it was up to him to report that the boat was there; he went down on a Government launch and located her position; in his judgment the obstruction upon which the *Snyder* grounded was 125 feet from the axis of the range line; and the starboard side of the vessel was 30 feet from the south limit of the channel.

Now against all this what is the evidence given on behalf of the respondent?

Thos. B. Climis, Captain of a tug employed by the respondent in connection with the dredging works, does not state very clearly what he thought was the position of the vessel when aground, but he thought it was further south than the previous witnesses. His evidence is, however, largely discredited by the facts elicited on cross-examination. That there were various ranges for the dredging cuts and that he was unable to say on

which he took the observations on which he based his opinion as to the position of the vessel.

The next witness was Thos. Mackie, the Manager of the respondent company. He gave it as his opinion that when the vessel was grounded, the starboard side was 20 feet south of the channel. He says, however:—"The only accurate way would have been to have had an instrument there at the time which nobody had as far as I can learn" and confronted on cross-examination with the evidence of Mr. Ross and asked "what do you say, that her port side was lying 65 feet south of the range; will you deny it?" he answered:—"I cannot say."

The foregoing is a summary of all the evidence there really is upon the point and I think it must be considered conclusive in favour of the appellant's contention. It bears out what I have before referred to as being the reasonable presumption that the vessel was not likely without any cause to have gone out of the channel in the short distance she had run from the lock.

The next point to be considered is the distance as accurately as it can be ascertained from the south pier to the spot where the accident happened. I do not want to go through the evidence in detail. The witnesses are the same as those whose evidence I have already been dealing with. I think a careful examination of this evidence will shew that the estimates of the witnesses do not vary to any substantial degree or more than might be expected.

There was a black buoy marking the south side of the channell about 1000 feet east of the pier and ordinarily another pier in between, but this middle bouy was not there at the time. Mr. Ross says the vessel was somewhere about the location of the middle bouy.

The vessel was 530 feet long and the general estimate seems to be that when aground her stern was some 400 feet from the pier. It seems at any rate that her bow had not reached the further buoy—certainly not when she first struck the obstruction.

Now I will take the very important question of the proof of the respondent having dropped or shoved a boulder into the channel.

The effect of the evidence of Wm. Dennison is that he was on the dredge as inspector during the whole of the time she was

dredging and it was his duty to make reports of what took place to Mr. Fripp, the Government Engineer. A few days before the accident happened on the 22nd August the man in charge of the dredge told him "that some time previous to that the dredge had shoved a boulder or moved a boulder and that it had gone out into the channel a distance and that they were bringing up a buoy to put up against it." He told me that a few hours after the boulder was supposed to have been put into the channel * * * "He pointed out to me from where the dredge was working" the point where the boulder was pushed into the channel * * * and in re-examination:

Q. Did you report this occurrence to Mr. Fripp, about the boulder, as your duties called you to do? A. I reported it to him.
Q. That the boulder had been shoved into the channel? A. Yes.

Mr. Fripp, the Government Engineer, was absent at the time of the accident, but on the 27th August he wrote to the respondent a letter which has been put in evidence and is as follows:

Sault Ste. Marie Canal,
Engineer's Office,
Sault Ste. Marie, Ont., Aug. 27th, 1912

The Soo Dredging & Construction Co.,
Sault Ste. Marie, Ont.

Dear Sir,

I have been advised by the Superintendent Engineer of the Canal that on the 22nd inst. the Steamer William P. Snyder grounded on a large boulder that had been moved out into the channelway during the operations of widening the south side of the channel and that the buoy place under my direction to mark this boulder, awaiting the arrival of dynamite to remove the same, was taken away by an officer in your employ.

In the first place I am very much surprised that my instructions given to you on the 19th inst. for the immediate removal of this boulder, were not complied with (dynamite having been received by your company on that date) and further that your officer should have removed the buoy marking the obstruction before he had the plant necessary to remove it in position.

Will you kindly explain this matter at your earliest convenience.

Yours faithfully,
F. B. Fripp,
Engineer in charge.

This letter, of course, confirms the above quoted evidence of Mr. Dennison.

Edward Lane, the Engineer, running the dredge for the respondent was asked:

Q. Do you know anything about the boulder being shoved out there?
A. I know there was one shoved out there.

Mr. Ross, the Engineer of the Canal, was asked in cross-examination:

Q. You did not see and nobody else saw that it was a boulder it (the ship) was on, yet you reported to the Department that it was a boulder."
A. Yes, it had been so talked of by the parties before.
Q. You don't know how that boulder got there?
A. No, it was general conversation by those who put it there.

It must here be pointed out that all the confusion in the case has been caused by the introduction of evidence concerning another boulder or rather a large sandstone rock which was discovered in the course of the dredging operations lying 1000 feet to the south of the old dredged canal. This rock, as I will call it for the sake of distinguishing it from the boulder alleged to have been shoved into the channel higher up, was of great size, too big to have been moved by the dredge and the respondent's evidence is that it never was moved. The trial judge is right when he says: "The plaintiff makes no claim as to this rock." I think the mistake was quite honestly made by the respondent's witnesses and it explains the evidence in particular of Mr. Mackie, the respondent's manager. Even in his letter of the 28th August, in answer to Mr. Fripp's letter of the 27th of that month, he was, I think, referring to the rock and not to the boulder.

I have dealt at length with the evidence as to the position of the vessel when aground because doubts have been expressed about this in the endeavour to support the judgment. I agree, however, with Mr. Justice Riddell that the evidence is overwhelming that the vessel was in the old channel and that there is really nothing to contradict the evidence that she had not gone 1000 feet when she struck. It is suggested in some of the reasons for judgment that there is "a difficulty in gauging or estimating distances over the surface of water where actual measurements are not taken." That is a common-place which requires to be used with discretion. It may well be true on the open seas where there is nothing fixed to go by, but here the vessel was lying at any rate within two boat length from the pier in a buoyed channel with buildings along either bank of the river; to say that under these circumstances marines well acquainted with the locality could form no estimate of the

distance of the vessel from the pier is to credit them with but feeble powers of observation.

Of the evidence that a boulder was shoved into the channel in the course of the dredging operations it is unnecessary to say much. We have here no question of estimating distances, no possibility of imagining grounds to account for the accident subsequent to the occurrence. The evidence of Dennison which there is no reason whatever to discredit in any particular is confirmed by other witnesses including at least one for the plaintiff and by the letter of Mr. Fripp.

Then it seems to me we have this case established. A few days before the date of the accident, on the 22nd of August, probably on the 19th of that month, a boulder was shoved by the dredge into the old channel. The *Snyder*, whilst passing down this channel grounded on some obstruction sustaining injuries which might and in the opinion of competent persons were caused by striking and stopping on a boulder. The place where this occurred was as nearly as can be ascertained where the boulder was shoved into the channel.

Now I do not well see what further or better evidence the appellant could have been expected to give or could have given. In a case of negligence the burden of proof is certainly on the plaintiff, but we are not looking for mathematical or absolute proof, which in a vast number of cases it would be impossible to make and the requiring of which would defeat the ends of justice. The proof must be such as to satisfy a reasonable man that it accounts for and gives the true explanation of the cause of the accident. And further account must be taken of the possibilities of evidence owing to the nature and circumstances of the case. The same degree of proof cannot be expected in the case of an obstruction placed in a water highway and invisible as might be required on a land highroad. In cross-examination it was put to Mr. Ross as a matter of reproach that he swore it was a boulder though he did not see it; well, of course, he did not see it as it was in 20 feet of water and he admitted reasonably enough that he "did not go down on the bottom."

It only remains for me to deal with the question of the buoys on which I have purposely said nothing so far because I find the evidence so confused that it is difficult to come to

any conclusion upon it, I have grave doubts whether the boulder was really ever buoyed at all.

Most of the evidence pointing to this having been done refers, I think, not to the boulder, but to the rock outside the channel near the 1000 foot buoy. There is, however, a general consensus of evidence that the obstruction whatever it was that caused the accident was not buoyed at the time of the accident. Mr. Justice Latchford giving judgment for the present respondent expressly guards himself against being "understood as asserting to the view that it would not be negligence on the part of the respondent to leave unbuoyed for two and a half hours an obstruction occasioning injury placed by him in a fairway so continuously navigated by ore carriers and other vessels of the draft as the old channel."

I think that this must be the correct view. The risk involved in the case of great ships like the *Snyder* was of course tremendous. I suppose it was only the slow rate at which she was travelling and the promptness with which her captain stopped that prevented a greater disaster. If the facts are as I find that the *Snyder* whilst in the regular channel struck an obstruction placed thereby and to the knowledge of the respondent company, then I think it must be liable for neglecting to take every possible precaution to avoid just such an accident as occurred.

I do not know that it is necessary for me to say more, but lest it should be thought that I have overlooked it I desire to refer to the testimony of the diver, Archie Kerr. He deposed that he went down and examined the rock near the 1000 foot buoy around about the 18th or 19th of August and that he made another examination on the 23rd of that month. On the latter date he found that since his first examination the rock had been broken. I have already shewn that there is abundant reason for concluding that it was not on this rock that the *Snyder* struck and of course we are not strictly concerned to shew how it came to be broken. It seems to me, however, apart from the previous evidence I have referred to that it is far more likely that the rock was struck by some other vessel than the *Snyder*. The conditions found by the diver would seem to suggest that a vessel struck the rock with her stern shattering it in pieces, but being of sufficiently light draft to pass over these without injury to her bottom. I do not see that the conditions fit in

the least with the circumstances of the accident to the *Snyder* which struck on the ship's bottom midway between the centre and the starboard side and eventually rested on the obstacle being held as the witnesses say as on a pivot.

I do not know anything about the small item for surveyor's fees which Mr. Justice Riddell says should be excepted from the amount claimed. If the parties cannot agree about this, it can be disposed of by the Registrar when the judgment comes to be settled.

Subject to this there will be judgment allowing the appeal and directing judgment to be entered for the appellant with costs of the action and the appeal.

DAVIES, J. *(Dissenting.)*—This action is one brought by the underwriters of the Steamship *Snyder* in the name of the owners, the Shenango Steamship Company, to recover damages sustained by the steamer in running upon a rock or boulder alleged to have been placed in the navigable channel of the St. Mary's river by the defendants.

It was not commenced until two years after the alleged damage had occurred and this long delay unexplained was properly commented upon by defendants' Counsel at bar as under the peculiar facts of the case tending to throw suspicion upon the claim and calling for strong evidence to support it.

The trial Judge dismissed the action with costs and the Appeal Court (Second Appellate Division) upheld that judgment.

The question upon which this appeal turns is purely one of fact and in asking us to reverse the judgment of two Courts the appellant shoulders a very great onus and must make out a very conclusive case.

The *Snyder* was a large iron vessel, 552 feet over all in length, 56 feet beam, and capable of carrying 10,000 tons of ore.

To sustain this appeal it is necessary to hold that there was a huge boulder negligently dropped or shoved by the defendants into the old navigable channel of the river some hundred feet (estimated as between 400 and 700) below the south pier and an estimated distance of nearly 50 feet from the south-western bank of that old channel, that it was not marked by or with any buoy when the *Snyder* sailed over it and that the

steamer grounded upon it without negligence and sustained the damages claimed.

There is no dispute about the fact of the steamer having grounded upon a large boulder or rock after passing the south pier in the river.

The dispute is whether this rock or boulder was a huge flat boulder or rock, lying some 15 or 20 feet inside of the old navigable channel of the river and at an estimated distance of about 1,000 feet from the south pier, or whether it was the large boulder above referred to, which the defendants had as alleged shoved into the navigable channel.

That the *Snyder* ran upon a boulder either resting in the navigable channel of the river or a few feet (10 to 20) inside of the southerly limit of the old channel and on the bottom of the extension of that channel southerly which had been dredged by the defendant company is undisputed. The question is whether there is sufficient evidence to sustain the plaintiffs' contention that the steamer ran upon the boulder in the navigable channel. It is not contended, of course, that if the boulder she ran on was the one 10 or 20 feet outside of the navigable channel the defendants would be liable.

If the plaintiff is right and if the defendant company dropped or shoved or negligently permitted during their actual dredging operations a huge boulder to roll from the extension of the channel they were dredging into the old channel which at the time constituted the waterway for such ships as the *Snyder* and had not removed the same or efficiently guarded it by buoyage or marks as a warning to passing vessels and the *Snyder* without contributory negligence on the part of her navigators ran upon that boulder and was injured, I should say there was no doubt of the defendants' liability.

I do not wish to be considered as concurring with an argument advanced that assuming there had been sufficient proof of the negligent placing or shoving of this alleged boulder into the channel of a river such as the St. Mary's navigated by so very many steamers and other crafts, and assuming that the defendants had at once buoyed this boulder and that the buoy had been carried away in the night by a passing steamer and a following steamer the next morning, some hours after daylight, had been injured by running upon the boulder when unbuoyed and not marked, that the defendants would have been exonerat-

ed from liability. In such a case, where negligence in the shoving of such a boulder into such a navigable river upon which a passing steamer grounded is once proved the guilty party would have an enormous onus placed upon him of shewing that every possible precaution which skill or science suggested had been taken to prevent accidents to passing vessels. In the view I take of the facts as proved, however, it is not necessary to pass upon that question.

The crucial question of fact therefore remains to be determined, upon which boulder or rock did the *Snyder* ground?

The onus, of course, lay upon the plaintiffs and both the trial Judge and the Court of Appeal have held that he failed to discharge it.

It was strenuously argued by Mr. Boyce that no witness was called who did or could speak to the fact of such a boulder having been shoved by the defendants' workmen or negligently allowed to roll into the navigated channel of the river by them from the dredging operations they were carrying on.

This vital fact was allowed to rest upon the hearsay evidence of Dennison, a government employee, who speaks of himself as a "dredge hand" under one Mr. Fripp, the Government engineer in charge of the dredging operations. Dennison stated that his duties were to "keep track of the scows taken out by the dredge and the progress made by the dredge each day from station to station."

He further says that "somewhere around" the 22nd August he went to the dredge and either the first or the second runner, that is the man then operating the dredge told him "that some time previous to that the dredge had shoved a boulder or moved a boulder and that it had gone out into the channel a disance and that they were bringing up a buoy to put against it" and further that the channel meant was the "steamship channel" the former "dredge channel."

Now it is obvious that what the runner meant by the channel in his statement to Dennison might be very different from what Dennison says he understood him to mean and in any case it was mere hearsay. The two men who operated the dredge were Edward Lane and Peter Casey. Lane was examined and not only is his evidence absolutely inconsistent with his having made any such a statement to Dennison but speaking as the engineer or runner in charge of the dredge and describing the

manner in which the operations were carried on he says that the material dredged up would be deposited in the scow and "could not possibly go in anyway over the channel." With some minuteness he explained the system of operating the dredge and why it was not possible for any of the dredged material to go in the channel.

His assistant, Peter Casey, was therefor the only man who could have given the information to Dennison about the boulder having been pushed into the channel. Casey's evidence was therefore vitally important to prove the material fact in dispute and on the proof of which alone the plaintiff could recover. He was not called and I have not been able to discover any evidence shewing that efforts were made to obtain his evidence and that such efforts were fruitless.

Whether Dennison reported this conversation to his superior officer, Fripp, or to Ross, the Canal Superintendent, does not appear; but a letter was received I think improperly in evidence from Fripp to the defendant company dated 27th August in which he, Fripp, says: "he has been advised by the superintendent engineer of the Canal (Ross) that on the 22nd inst. the steamer *William P. Snyder* grounded on a large boulder that had been moved out into the channelway during the operation of widening the south side of the channel," and "that the buoy placed under my direction to mark the boulder awaiting the arrival of dynamite to remove the same was taken by an officer in your employ."

The engineer of the canal (Ross) in his evidence repudiated having reported or suggested that the dredging work had anything to do with the boulder said to be in the channel, or that any officer in his employ had removed the buoy marking same.

Fripp's letter is based upon Ross's alleged report to him and makes no reference to any report from Denison on the subject. Its material part so far as defendant is concerned was repudiated by Ross in his evidence. Fripp, who, although counsel at the trial stated, was brought by the plaintiffs all the way from Prince Edward Island as a witness was not called by plaintiffs.

The company replied the following day: 28th August, 1912, to Fripp's letter saying amongst other things that

this buoy was not removed at all, as it was in position at 8 p.m. on 21st of August and that during the night or early morning some boat had run over it and broke it off for when the diver went to remove the boulder the next day he picked up the broken part of the buoy outside of where boulder was located.

This letter is of importance as having been written a few days after the accident and as shewing that the boulder which had been buoyed as a danger to navigation and on which they then believed the *Snyder* had grounded was the boulder found by the diver, Kerr, some 10 or 20 feet inside of the old navigable channelway and in the dredged extension of that channelway.

That this is the boulder which they had buoyed and which buoy had been carried away during the night of the 21st August by some steamer or other craft is I think placed beyond reasonable doubt by the evidence of the diver, Kerr.

Kerr's evidence is most important and if believed is to my mind conclusive upon the issue in question. No question was raised as to his credibility. He shews beyond reasonable doubt that the boulder upon which the *Snyder* must have grounded was 15 or 20 feet inside of the old channelway; that the boulder was about 30 tons in weight; that he went down twice and made two examinations of this boulder, one before the grounding of the steamer at which time he found it was intact and not broken or cracked, and the other the day after the grounding of the steamer when he found it was cracked and broken into three parts. He further states that the buoys which had been placed by the company to mark this boulder and which were carried away during the night immediately preceding the grounding of the steamer were placed at and above this boulder, and that he never knew or heard of any other boulder than this one.

The evidence as to the pieces of the buoy broken off which he picked up just alongside and outside of this boulder prove beyond reasonable doubt to my mind that this was the boulder buoyed which buoys had been placed to mark and which had been broken away and on which the steamer *Snyder* grounded.

Now Kerr was a submarine diver in defendants' employ in 1912 who had charge of a derrick scow used for cleaning up or sweeping the bottom of the newly dredged channel after the dredge had gone over it. He says that on that south side he had been working about five days when he came across a

boulder "around about the 18th or 19th of August, that it was at the lower end of the line of work, that is in the South East end and about 20 feet south of the line of buoys marking the south side of the old channel; that he went down and examined it, went all around it to determine whether they could raise it, that he roughly measured it with his arms and estimated its size as 10 x 10 feet and a little over four feet thick, that it was a gray sandstone and square in shape—with smooth surface; that there would be less than 22 feet of water over it and that he concluded his scow could not lift it in one piece. He further says that he again visited the place after doing some other work "the day after the *Snyder* went on;" that there was nothing then to mark the place of the boulder and that there had been two buoys one above the stone and one below the stone, that is east and west of it along the south side of the navigated channel, the stone as he had said lying inside of that line about 20 feet. Kerr says that on this second examination very soon after the boat got off he went down to the stone again and found it cracked into three parts with a few marks on its surface which were not there when he made his first examination and that the "break" was not there at the first examination. That he hoisted out two large pieces and seven smaller ones and levelled off the rest, and that when he picked up the pieces "he certainly thought he had 33 tons of stuff."

He further stated what is most important that on this second examination he found "two broken spar buoys near or around that boulder" that "there was an anchor, a weight and then a shackle and a piece that comes up on the buoy that it bolted through the foot of the buoy and the weight holds that buoy upright"—that there was about six feet of the bottom part left that—"there was six feet of the woodwork of the buoys remaining under the water, indicating, as he says, that something had broken them off." That he "hoisted the broken buoy up on the deck of the derrick scow and unshackled the wood part and threw the stone part on the dump."

In his cross-examination which was lengthy and covered all his main examination he stated with respect to the two buoys the pieces of which he had found at the south limit of the navigable channel and near to the 33-ton stone he had described :

Q. You do not think they were put up to mark the stone at all?
A. No. Those were buoys placed there to mark the south limit of the navigable channel. *There was one put out-side where the boulder was to mark the stone where the big stone was.*

He said the two buoys were about 30 feet apart and parallel and he supposed they marked the southerly limit of the navigable channel.

On re-examination he stated that no other means were used by this company for picking up boulders than the derrick scow and the diver and that he found the buoy on the north side of the boulder.

The evidence of Mackie, the Manager of the defendants is important with respect to the exact location of the *Snyder* when she grounded. He went aboard her and says her officer was "working the boat which was swinging both ways on a pivot stationed somewhere at this point "B" (on the plan produced) but that at no time was his bow near the centre line." I could watch the centre ranges. The bow of the boat would not reach the centre range at any time but the stern might" and that the pivot was about one-third of the way back from the bow.

In answer to the question "how far over on your work would you estimate that that boat was?" he said: "I figured at the time that the starboard side of the boat was 20 feet over the line we had the buoys on."

In his cross-examination, Mackie makes a statement which our common knowledge satisfies us is true that "You cannot judge distances on water unless you have some measurements."

Great reliance was placed by Mr. Grant for the appellants upon the estimates made by some of the witnesses as to the distance in their opinion the *Snyder* was from the end of the South pier when she was grounded to shew that the obstruction on which she grounded was some hundreds of feet nearer the south pier than the rock or boulder on which the defendant contends she grounded. There was much discrepancy between these estimates but when it is recollected that the distances between the alleged boulder on which plaintiff relied in the channel and the boulder which defendants contended the steamer grounded on was only a few hundred feet and that they were merely estimates without any measurements having been

taken it will be at once felt how weak such evidence was in the face of the other proved facts.

Scanlan, the superintendent of the dredging, speaks of Kerr having reported to him the finding of the boulder on the south side of the channel "15 feet or maybe a little more inside of the buoy south of the buoy" which buoy was marking the south boundary of the channel. He with presumably more accurate knowledge than other men of the dredging of the extension to the southward of the navigable channel the defendants were engaged in, says that on the day before the accident he placed that buoy which Kerr had reported to him as being 15 feet or more outside of the boulder he, Kerr, had found and which buoy marked the south boundary of the navigable channel because the one that had been there before had been run over or broken off in some way and that he had ranges to locate it exactly and did so with ranges he had "so that in case the buoy was shifted or displaced or anything happened to it it would be all right." He further says that on the morning of the accident he went up into the launch and went all the way around the *Snyder* and found that "her bow was over the range of the south boundary line and her stern was swung to the northward that he did not notice any buoy around or near the *Snyder* and that after the *Snyder* was released he took the derrick scow down and with the aid of his "ranges" located the position of the buoys marking the south boundary of the old channel and of the boulder Kerr had reported to him, sent down the diver and raised the *boulder or stone in three pieces*, and that "the two buoys that had been set in there and broken off we found them to the north of the boulder." The boulder, he swears, was "*15 feet to the south of the ranges marking the south boundary of the channel.*"

There is, as may be expected in a case like this, great diversity with regard to the exact location of the steamer when grounded with respect to the S.W. pier and the centre range of the channel, from which evidence plaintiff asks the inference to be drawn that the steamer grounded on a boulder in the old or navigable channel, but it is upon this opinion evidence that the plaintiff is forced to rely.

After a close perusal of all the evidence given, I have reached the same conclusion as that of the trial Judge and the Court of Appeal, namely that the plaintiffs have entirely failed

to prove that the defendants had dropped or shoved a large boulder into the navigable channel and that the *Snyder* grounded upon it.

The great weight of evidence in my opinion is in favour of the contention that the steamer grounded upon a boulder or rock some 15 or more feet inside the southerly limit of the navigable channel where the depth of water was 20 feet or about and which boulder was a few days after the steamer grounded raised in three pieces by the defendant's dredge.

There is not a *scintilla* of direct evidence given that any such boulder as the plaintiffs contend for was ever dropped or shoved into the channel at all.

The hearsay evidence of Dennison to the effect that he was told so by one or other of the two runners or captains operating the defendant's dredge has no support from any witness and in my opinion should not have been received or be now considered.

It was one of the vital points of the case. The evidence of the captain or runner of the dredge, Edward Lane, shews that he at any rate never gave Dennison such information and the other possible man, Peter Casey, was not called by plaintiffs or his absence satisfactorily accounted for.

There is no evidence that any such boulder as that suggested ever was *found or raised after the accident*, either by defendants or anyone else.

It cannot surely be contended that such a huge boulder as the one on which the ship grounded undoubtedly was could have been raised secretly or without the knowledge of many persons from the navigated channel of such a river as the St. Mary's.

If it was not secretly raised, and I do not think Mr. Grant in his argument at bar suggested that, then what became of it? The evidence on the point is ominously silent. There is no evidence of its having been dropped or placed in the channel or recovered from the channel.

The evidence of the existence of the 30 ton boulder found by Kerr on the bottom of the dredged extension of the channel and some 15 or 20 feet inside or to the south of the navigable channel is clear and explicit.

That boulder when found by Kerr, the diver, two days before the *Snyder* grounded was intact and not broken. When Kerr went down again to examine it either one or two days af-

ter the steamer got off it was found to be cracked and broken so that it was raised in three pieces or parts. The remnants of the buoy which had been placed to mark it and which had been broken off presumably by a passing vessel were found alongside of this boulder. This huge steamer very heavily laden with iron ore when she ran on the boulder which ever one it was had not remained stationary upon it but had been moved on it as on a pivot so as to straighten out the lay of the steamer with the channel and lessen her obstruction to navigation. It was plain from the examination of the steamer bottom made afterwards that the steamer so laden had scraped over the boulder on which she grounded for some distance. Mr. Kerr, the diver, a day or two before the steamer grounded had found the huge 30-ton boulder about 15 feet inside the line of the navigable channel. It was then whole, uncracked and intact. A day or perhaps two after the grounding, when he again examined it he found it cracked into three parts, which he and the other workmen raised.

What cracked this boulder if this steamer did not? It is not suggested that any other vessel grounded on it or that lying 20 feet under water it could have been cracked as it was found to be except by a steamer or vessel grounding on it.

The evidence of the finding of the parts of the two buoys north of this boulder and about the southern limit of the navigable channel and which had been broken off by some passing vessel is strong confirmatory evidence that the boulder which had been buoyed and on which the steamer grounded was this boulder whose existence, location, buoying and subsequent removal have been so definitely fixed by the evidence.

The plaintiff's case is founded and must rest entirely upon the estimates made of the distances the steamer was when she grounded from the south pier head and from the centre of the channel way as shewing that the obstruction she grounded on was some 300 feet nearer that pier head than the boulder on which I contend the evidence shews she really grounded on and was in the navigated channel. I have already adverted to the unreliability of evidence of estimates of this kind when no measurements are taken given so long after the accident happened with respect to distances over water and when I find them not only differing amongst themselves greatly but incon-

sistent with proved facts about which there cannot be any mistake I decline to accept them.

For these reasons, I would dismiss the appeal and confirm the judgments of the Appeal Court and the trial Judge.

IDINGTON, J.—The appellant claims damages from respondent suffered by reason of one of its vessels laden with nearly ten thousand tons of iron ore having run upon a boulder in the dredged navigable channel on the Canadian side of the St. Mary's river near the eastern entrance to the ship canal at Sault Ste. Marie in Ontario.

The respondent was engaged in executing a contract with the Canadian Government for the widening of said channel.

The appellant alleges that the boulder in question was where it was run upon by said vessel as the result of the respondent's operations in executing said contract and that the respondent was notified to remove it and until removed to have placed upon it a buoy or signal warning sailors of the danger it caused.

The vessel in question was undoubtedly injured by running upon a boulder about half past twelve p.m. of the 22nd August, 1912.

The chief questions raised are of fact and it is suggested by respondent that two Courts below have found against appellant and hence this Court should not interfere.

It does not appear to me that the reasons which lead us sometimes to rely upon the concurrent finding of facts by two Courts are at all applicable here, inasmuch as the same view of the facts are not taken by two Courts and as the chief evidence appellant relies upon, at all events for one branch of its case, was taken under a commission.

The appellant claims that the boulder upon which its vessel ran was in the navigable channel, and the respondents claim it ran upon a rock twenty feet from the channel.

A careful perusal and consideration of the entire evidence in the case leads me to the conclusion that the boulder in question was in the channel and that the vessel never departed from that channel.

The accident happened in broad daylight and no pretence is set up by either side that there was any fog or other cause to obstruct or obscure the view of those navigating the vessel.

The captain in charge had an experience of twelve years in navigating the waters in question on various ships and with this one, this was his seventh trip.

The south side of the channel was shewn by buoys five hundred feet apart. One of these had been passed and the other ahead of the vessel to its starboard when it ran on the boulder in question. A point in the distance was given the wheelsman by the captain as that to which he should steer, and he steered accordingly.

The question raised in argument by counsel for respondent that the point was too indefinite, is well met not only by the captain's and wheelsman's evidence, but also by another captain of long experience as a proper course to take.

The evidence of the captain in charge and his officers reads as if given by frank, candid men who do not seem to be over anxious to strain their evidence in any way.

It would certainly have been a most remarkable thing if, having the buoys and range signals they had to guide them, experienced mariners should, under such circumstances, have departed from the channel. They say they did not. Moreover they are corroborated by others whose duty led them to the place to inspect and enable a report to the Government to be made.

In short I agree with Mr. Justice Riddell in his dissenting judgment that the evidence is overwhelming that the accident took place in the old channel.

The nature of the injuries to the bottom of the vessel are given by Mr. Riley, the superintendent of the appellant, and Mr. Donohue, a marine surveyor, and so explained as to shew that they must have been caused by a movable boulder or like object, and not by an immovable rock such as the respondent pretends.

To reach that rock the vessel must have departed not only twenty feet south of the old channel spoken of by those testifying to its existence. but also in addition thereto nearly half the width of the vessel which had fifty-six feet of beam.

And according to Mr. Donohue's description there was a shifting of the vessel in its passage over the obstacle or on the part of the obstacle which was quite impossible to exist in anything that could have occurred in case the vessel had run on

that rock; even if we make all allowance for the alleged remarkable spilt in that rock.

Indeed I confess the persistent effort made to attribute the accident to contact with that rock when coupled with the rather unsatisfactory evidence of respondent's manager and superintendent tends to discredit the entire defence.

The admirable *factum* of appellant's counsel collates the evidence in such a way as to render it needless for me herein to enter upon any exhaustive analysis thereof.

Th evidence thus relied upon satisfies me that there should be no doubt but that the vessel's injuries were the result of a movable boulder in the navigable channel.

The questions of how that came there and the respondent's responsibility for it being there are, when one has thoroughly examined the whole matters in question, the only matters fairly arguable in the case.

Dennison, an assistant to Mr. Fripp, the Government engineer in charge of the work, tells us his duties were as follows :

Q. What were your duties? A. I kept track of the scows taken out by the dredge, and the progress made by the dredge each day from station to station.

Q. And made reports of what took place? A. Yes.

Q. Was that your duty? A. Yes.

Q. To make reports to whom? A. To Mr. Fripp.

Q. You were on the dredge from time to time as it was working? A. Yes.

Q. And it was your business to keep posted on what was doing, and report to Mr. Fripp? A. Yes.

Q. And to keep posted, in the performance of your duty? A. Yes.

It is necessary to observe that it lay in the course of his duty to see and report and do just what he says he did see and do.

He testifies that one of the respondent's men in charge told him the dredge had shoved a boulder or moved a boulder and it had gone a distance into the channel and that he reported the matter accordingly and as a result he was directed to notify some one of the men what the Chief Engineer required; that was to remove the boulder and meantime to place a buoy or other signal upon it to warn navigators.

He says there was a signal placed accordingly upon the spot which had been indicated and it remained there a day or

two but had disappeared the morning or forenoon of the accident.

The correspondence which took place between the engineer and the respondent's manager a few days after the accident leads me to accept this story as absolutely true.

The reply of the manager fails to deny and rather disingenuously, as it seems to me, tries to mislead by connecting that with something relative to the rock now set up as the cause of the injury to the appellant's vessel.

The absurdity of placing a signal upon a single rock twenty feet beyond the channel as a warning to navigators when there was a buoy at the margin of the channel near the same spot to guide them and prevent them ever reaching such a rock, is not entitled to much consideration.

I cannot believe that there ever was anyone in respondent's employment stupid enough to believe that the doing so was a compliance with the message got through Dennison from Fripp.

It is quite possible that there was a mark put there to indicate to respondent's workmen where there was a rock to be removed. And it is equally possible that the remains of a buoy found near by were the result of the knocking about the boulder in the channel got from contact with the ship which loosened and released such remains as existed of the buoy Dennison saw for a day or two.

However, that may be, I have no doubt of Dennison's story, confirmed as it is by the external evidence in the correspondence.

And the rumour which Mr. Ross and others refer to as hearing, probably did not escape the ears of respondent's men so concerned about the accident as to come up and take some observations they now testify to.

The remarkable thing is none of them so concerned seem to have been bold enough to put forward at the time what must have been very palpable to them if a word of truth in the rock twenty feet outside the channel being the cause of the accident. It would have been a great relief to respondent's manager when rumour ran about a boulder being the cause to have been able to demonstrate to others the fact. Of course he and others were entitled to keep their own counsel and say nothing.

Besides all this evidence there is a high degree of probability that the boulder got where I find it was as the result of re-

spondent's operations. Others would seem to have got further in for which respondent felt responsible and in duty bound to remove.

It was bound by its contract to take due care and I cannot conceive of a boulder such as that in question escaping notice if due care was had.

The duty in law as well as under the contract required respondent in such case to do what Dennison says its men were requested to do.

I agree in the reasons assigned by Mr. Justice Riddell and need not therefore repeat all that might be said and has already been well said.

I think the appeal should be allowed and judgment be entered for appellant with costs throughout.

ANGLIN, J.—The allegation of the plaintiffs is that their vessel, the *Wm. P. Snyder*, while proceeding down the channel of St. Mary's river, east of the locks and north of the international boundary, grounded on a boulder which had been projected into the channel by the defendants in the course of dredging operations, which they were carrying out under a Government contract, and had been negligently left by them without the protection of a buoy.

The grounding of the vessel upon a rock or boulder in, or a little to the south of the channel, is common ground.

Three questions of fact are involved in the issue presented. Was the *Snyder* in the channel when she grounded? Was the rock on which she grounded put there by the defendants? Did they negligently fail to keep it buoyed? The burden of establishing the affirmative in each point rests upon the plaintiffs.

The learned trial Judge dismissed the action holding that the identity of the boulder struck by the *Snyder* had not been "established beyond reasonable doubt" and that,if it were, the knowingly leaving of it unbuoyed for two and a half to three hours was not negligence.

On appeal Falconbridge, C.J.K.B., simply "agreed with the learned trial Judge, in finding that the plaintiffs have failed to make out their case." Latchford, J., held it to be "obvious" that the *Snyder* had grounded not in the channel but on an object which lay south of the channel and would have found

that she had grounded on a large flat rock, 1000 feet east of the south pier of the Canadian lock which had not been moved and was fifteen or twenty feet to the south of the channel. But he would not assent to the view that it would not have been negligence for the defendant's to have left unbuoyed for two and a half hours a dangerous obstruction placed by them in the fairway. Kelly, J. found that the location of the vessel is at least subject to grave doubt and that there is a lack of convincing proof of the identity of the boulder which caused the damage. He inclines to the view that it was the stationary flat rock south of the channel referred to by Latchford, J., but he rests his judgment upon the insufficiency of the proof that it was the boulder alleged by the plaintiffs to have been moved into the channel by the defendants. It was the view of Riddell, J., who dissented, that there was sufficient evidence to establish that a boulder had been placed in the channel by the defendants, that it was on such a boulder and not on a flat rock south of the channel that the *Snyder* grounded, and that the evidence is overwhelming that the ship was in the channel when she struck. Under these circumstances, although questions of facts are at issue and the case can scarcely be dealt with as *res integra*, the appellants are not embarrassed as much as is usual where the judgment of the trial Judge has been affirmed in the provincial Appellate Court.

After most careful study and analysis of the evidence I agree with Riddell, J. that the proof is overwhelming that the *Snyder* was well within the old channel when she grounded.

I shall first state a few undisputed facts. The Canadian channel (old) was 310 feet wide—lying 155 feet to the north and 155 feet to the south of a centre range line. The south side of the channel was marked by two black buoys, one 400 or 500 feet east of the southern lock pier and the other 1000 feet east of that pier. The *Snyder* is 552 feet long over all and 56 feet wide. She passed down out of the Canadian lock above Sault Ste. Marie at 1:20 p.m. (12:20 American time) on the 22nd of August. An up-coming ship, the *Thomas Barlum*, entered the lock at 1:40 p.m. This ship must have crossed the *Snyder* in the channel before she grounded, and there can be little doubt that it was in order to pass the *Barlum* safely that the *Snyder* was taken to the south of the centre range line. The *Snyder* grounded at 1:35 p.m. (12:35 American time). As

shewn by the marks on her hull, the rock had come into contact with the ship twenty-five feet abaft her stem and seven feet to starboard of her keel. There was a well marked corrugation running parallel to the keel and seven feet from it for about 150 feet, which then went off more to the starboard side ending in an indentation five or six inches deep about 250 feet from the stem and fourteen and a half feet from the centre line of the boat. The ship had apparently rested at this point on the rock or boulder as on a pivot on which it swung to and fro freely when pulled by a tug.

Except a rock situated near the north pier of the Canadian lock, which is out of the question, the only rocks spoken of in the evidence are the flat rock fifteen or twenty feet to the south of the channel and 1000 feet east of the south pier of the lock, asserted by the defendants to have been the object on which the *Snyder* ran, and the boulder alleged by the plaintiffs to have been the cause of the damage.

Mr. Ross, the Superintending Engineer of the Sault Canal, having been notified of the grounding of the *Snyder*, accompanied by Mr. Dennison, assistant to Mr. Fripp, the Government Engineer in charge of the dredging work, who was himself away at the time, went down in a launch to examine her situation in order to report to the Department. Mr. Dennison says that they circled the *Snyder* four times, running down on the centre range line as accurately as possible and up, as Mr. Ross says, under his instructions to follow the south line of the channel, 155 feet south of the centre range line. Mr. Dennison is positive in his evidence that the launch ran down the centre range accurately and that Mr. Ross noted the distance between the launch and the *Snyder* both going down and coming up. He says he conscientiously followed out Mr. Ross's instructions. Mr. Ross states, as a result of his inspection, that the *Snyder* when parallel to the range line was lying with her port side about 65 feet south of that line and her starboard side about thirty feet north of the south side of the channel.

Captain Neville, who says he knows the channel very well, navigated the steamer *Edwin H. Ohl*, 445 feet long and 54 feet wide, down past the *Snyder* on the afternoon of the 22nd of August. He thought the *Snyder* was so nearly in mid-channel that he hesitated to attempt to pass her. When passing the *Snyder*, after he had been assured that he could do so with

safety, while the centre of his vessel was to the north of the centre range line, he estimated the distance between his boat and the *Snyder*, then lying parallel to the range line, at 50 feet. He adds that the *Snyder* bound down, if passing an up-coming boat, could have got over closer to the black channel buoys and given the up-coming boat more room. Captain Neville also saw the 1000 feet black channel buoy lying 40 or 50 feet off the starboard bow of the *Snyder*.

Frank Nelson, Captain of the tug *Schenck*, who was thoroughly familiar with the channel and endeavoured to pull the *Snyder* off with his tug, says that the port side of the *Snyder* lay about 50 feet south of the centre range line and that he saw the 1000 feet black buoy marking the south side of the channel 30 or 40 feet ahead of her and 25 or 30 feet to starboard, the *Snyder* at the time lying parallel with the range line. These are four independent witnesses whose honesty has not been, and could not very well be challenged. Mr. Ross, no doubt, exercised care in making his observation commensurate with his responsibility. The value of Mr. Dennison's evidence as to distances, ranges and locations is enhanced by the fact that he was Assistant Engineer in charge of the dredging work for the Government. Captain Neville and Captain Nelson's knowledge of the channel and its boundaries is scarcely open to question.

Captain Ott of the *Snyder* says that when parallel to the centre range line the port side of his ship lay 50 feet to the south of it. He also saw the black channel buoy off the starboard bow but cannot fix its distance. Holmes, the wheelsman on the *Snyder*, who was on watch, says that when the ship struck she was parallel to the ranges and very little to the south of them. Hollins, Chief Engineer, observed Mr. Ross and Mr. Dennison at work and testifies to Mr. Ross's instructions to Dennison to run the launch up stream along the south side of the old channel. He says that in running up stream the launch passed 25 or 30 feet from the starboard side of the *Snyder*.

Swinton and Bull, respectively first and second mates of the *Snyder*, corroborated the foregoing testimony as to her location in the channel. I cannot understand on what the learned trial Judge based his statement that "there was not a complete agreement between the plaintiff's witnesses" as to the *Snyder* having been in the dredged navigable channel when it met with the accident.

Captain Nelson of the *Schenck* states that in swinging the *Snyder* he could pull her bow up to the centre ranges and her stern "clear away past the ranges." Two witnesses for the defence gave some evidence which is strongly corroborative of the plaintiffs' contention that the *Snyder* grounded in the channel. Edward Lane, Engineer of the defendants' dredge, says in examination in chief :

Q. Were you there when the *Snyder* was aground? A. I went up there after she went aground.

Q. Did you notice her position? A. No, not particularly.

Q. As regards the south boundary of the old channel, we will say? A. Yes, she was over on the boundary; she crosssed the line.

Q. What part of the boat? A. Her bow. Her stern was sticking out towards the channel at that time.

Q. And her bow was where? A. In towards the bank.

Q. Where, can you give it to us more definitely than that? A. In regard to how far she was from the pier?

His Lordship:—Q. Taking the points of the compass, in which direction was the bow of the boat? A. She was heading eastward.

Mr. Hayward:—Q. You perhaps can show us on the blue print Exhibit 2; here is the centre line of the channel; shew us the position of the boat? A. Heading sort of in this way (pointing).

Mr. Grant:— He indicates a line, with the stern towards the centre line and her bow down on the southern limit of the old dredge canal.

Mr. Hayward:—Q. With regard to that southern limit of the old channel, where was her bow? A. About the middle.

Q. About the south boundary? A. About the south boundary.

Q. That is as near as you can fix it? A. Yes.

Lee V. Scanlon, Superintendent of Dredging, who apparently also saw the *Snyder* when swung with her stern out into the channel, says :

Q. Tell us what you did? A. I went up with the launch, and went all the way around the Snyder.

Q. What was her position, what did you find her position to be, in regard to the south boundary of the old channel? A. Her bow was over the range of the south boundary line, and her stern was swung to the northward.

Q. Can you tell us how far her bow was over the range of the south boundary line? A. I cannot.

Q. And her stern? A. Her stern was swung to the north.

This witness also states that at the time of the accident the 1000 foot black channel buoy was in place although he does not remember having noticed it when he went up to see the *Snyder*.

On the other hand Thomas W. Mackie, manager of the defendant company, says that the bow of the *Snyder* never could reach the centre range line although her stern might. He

saw the vessel when parallel with the range line and says that she then lay 20 feet over the south boundary of the channel and that she was right on top of the 1000 foot channel buoy, which he also says he had seen in place on the evening of August 21st. Thomas Climie, also a defence witness, says he placed the stern of his tug 72 feet long about two feet from the starboard quarter of the *Snyder* and that the bow of his boat was then on the southernmost dredging ranges. In answer to a leading question he says the *Snyder* lay 56 feet from the ranges that marked the southerly limit of the dredging area, but on cross-examination he admits that he cannot say whether it was the southernmost ranges or the first out or northernmost ranges that he observed.

No doubt better evidence might have been given had a diver been sent down to observe the precise location and character of the boulder on which the *Snyder* rested or had cross bearings been scientifically taken or even had buoys been placed at the vessel's sides and bow and stern. The failure to take some of these precautionary measures is a fair subject for criticism as is also the lack of promptness in bringing the action. But, making all proper allowances for these omissions, upon the evidence in the record it is, I think, sufficiently established that when the *Snyder* grounded she was in the old channel, her starboard side lying some 20 or 30 feet north of its south bank.

It is also fairly well established that the boulder on which the vessel grounded was considerably less than 1000 feet east of the south pier—the location of the flat sandstone rock lying 15 or 20 feet south of the channel on which the defendants claim the *Snyder* struck and opposite to which the 1000 feet black channel buoy was placed. If the vessel rested on this rock 250 feet from her stem, her stern must have been 700 feet from the bridge pier. Captain Ott says it was 400 to 500 feet; Captain Nelson, who was in the best position to know, says 300 to 400 feet; Captain Neville, close to 400 feet; Mr. Mackie, possibly in the vicinity of 300 to 400 feet; and Edward Lane, probably 300 to 400 feet. Dennison in his evidence, presently to be referred to more fully, says the situation of the boulder indicated to him by Casey was about or a little over the length of the *Snyder* (552) feet from the south pier. On all this evidence the boulder on which the *Snyder* rested was between 600 and 700 feet east of the south pier. It had probably rolled with the

ship as the marks on her hull indicated. If we add to this the evidence of Riley and Donoghue, who inspected the boat in dry dock, as to the nature of the injuries to the hull, commented on by Riddell, J., and the positive testimony of the witnesses who saw the black channel buoy 30 to 40 feet ahead and 20 to 30 feet to the starboard of the *Snyder*, it is pretty conclusively shewn that she did not ground on the flat sandstone rock, for which the defendants contend, 1000 feet south of the pier, but on a rock or boulder between 600 and 700 feet south of the pier.

It is urged, however, that there is no proof that the defendants ever placed a boulder in the channel or that it was on such a boulder that the *Snyder* grounded.

In the first place boulders, such as would cause the injuries complained of to a steel vessel like the *Snyder*, are not lying about promiscuously in a channel such as that of the St. Mary's river, only 300 feet wide and crowded with the heaviest traffic in the world. If it be established that the defendants did cause a boulder to enter the channel about the place of the accident and shortly before it, and that that boulder had not been removed, it is a fair assumption that it was the cause of what occurred.

Mr. Dennison, whose duty it was to receive such reports, states that one Peter Casey, the Assistant Engineer of the defendant's dredge and at the time in charge of it, reported to him some days before the accident, that the dredge had shoved or moved a boulder, that it had gone out into the channel some distance, and that they were bringing a buoy to put against it. He shewed Dennison where the boulder was. Dennison duly reported these facts to Mr. Fripp, the Government Engineer in charge of the dredging, and that very evening he saw a buoy placed at the point indicated to him as the place where the boulder had gone. That all this evidence relates to the sandstone rock 1000 feet below the pier and 15 to 20 feet out of the channel, which it is clearly proved by the defendants' witnesses had never been moved before the accident and could not have been moved by the dredge, is simply impossible. Exception has been taken to the admissibility in evidence of Casey's statements to Dennison. But Casey's position as assistant engineer is proved by the chief engineer Lane. Lane's absence and that Casey was at the time in charge of the dredge is proved by Dennison. Clause 13 of the defendants' contract provides that a

competent foreman shall be kept on the works during all the working hours, who shall be considered as the lawful representative of the contractor to deal with the Government engineer. The trial Judge thought, I think, Casey's statement admissible: but, if it were not, Dennison's report to Fripp, made in the course of his official duty, would be, and when this is taken with his subsequent observation of the buoy in place and the correspondence between Fripp and the company, also official, hereinafter referred to, it leaves practically no room for doubt that a rock or boulder in the channel and other than the flat sandstone rock was buoyed by the defendants. Several witnesses spoke of having heard that a boulder had been moved into the channel, notably Captain Nelson and Thomas Climie, a witness for the defendants, who says that he had heard about a boulder out in the stream which had been buoyed. Edward Lane, the Engineer in charge of the defendant's dredge, says that he "knew that a boulder had been shoved out there." On the morning of the accident Dennison noticed that the buoy which he had seen placed to mark the boulder in the channel had disappeared and about 10:30 or 11 o'clock he notified one of the officials of the company of that fact, who told him that they (the company) were going to lift the boulder right away after removing another (the rock near the north pier) which they thought a greater obstruction. This statement is confirmed by the defendants' letter of August 28th to which I am now about to refer.

After the accident the following letters were exchanged between Mr. Fripp and the defendant company :

Sault Ste. Marie Canal,
Engineer's Office,
Sault Ste. Marie, Ont., Aug. 27th, 1912

The Soo Dredging & Construction Co.,
Sault Ste. Marie, Ont.

Dear Sir,—

I have been advised by the superintendent Engineer of the Canal that on the 22nd inst., the steamer William P. Snyder grounded on a large boulder that had been moved out into the channelway during the operation of widening the south side of the channel, and that the buoy placed under my direction to mark this boulder, awaiting the arrival of dynamite to remove the same, was taken away by an officer in your employ.

In the first place I am very much surprised that my instructions given to you on the 19th inst., for the immediate removal of this boulder, were not complied with (dynamite having been received by your company on that date) and further that your officer should have removed the

buoy marking the obstruction before he had the plant necessary to remove it in position.

Will you kindly explain this matter at your earliest convenience.

Yours faithfully,
F. B. Fripp.
Engineer in charge.

August 28, 1912.

F. B. Fripp, C. E.,
Engineer in charge,
Sault Ste. Marie Canal,
Soo, Ont.

Dear Sir,—

Your letter of August 27th to hand, and contents carefully noted, in reply will say we are very much surprised to learn that you were informed that some of our men removed the buoy that was stationed outside of boulder that was on the edge of channelway. I wish to state positively that this buoy was not removed at all as it was in position at 8 p.m. on 21st of August and that during the night or early morning some boat had run over it and broke it off for when the diver went to remove the boulder the next day he picked up the broken part of the buoy outside of where boulder was located. The reason this boulder was not removed sooner was that in the sweeping near the entrance to the piers they found a very large boulder with only 17 feet of water over it and we thought this one was more of a menace to boats entering or leaving the locks than the one on the south side of channel as there was no buoy to mark the location of the upper boulder.

You can verify this statement by asking any of our men or some of the employees or officers of the New Ontario Dock Company.

We also note that there are two other buoys marking the channel going to the canal that has been out for some time, we notified Canal Office some time ago that these buoys had been removed and offered the services of our tug to replace same at any time. Hoping you will find these explanations right, we are,

Yours very truly,

It will be noted that in Mr. Fripp's letter he speaks distinctly of

> a large boulder that had been moved out into the channelway during the operation of widening the south side of the channel,

and he adds the statement that

> the buoy placed under my instructions to mark this boulder * * * was taken away by an officer in your employ.

He also refers to his instructions for the removal of the boulder as having been given to the defendant company on the 19th of August. In the company's reply neither the fact that the defendants had caused the boulder to enter the channelway, nor the fact that Mr. Fripp had instructed them to buoy it, nor the fact that they had buoyed it is challenged. On the contrary, the statement is emphatically made that this buoy "stationed

outside the boulder that was on the edge of the channelway" (not outside the flat rock 20 feet to the south of it and certainly not one of the permanent channel buoys) had been in position at 8 p.m. on August 21st and was broken off during the night by some passing vessel. This letter affords strong corroboration of Mr. Dennison's testimony as to the putting of the boulder into the channel by the defendants, their buoying of it and the disappearance of the buoy on the morning of August 22nd. Yet Mr. Mackie, the defendant company's manager, in giving evidence denies that his company had "put buoys on any boulders." In his examination for discovery, however, he had said that he knew of a boulder on the 19th of August by the report either of the Government Inspector or of his own men. Is it a mere coincidence that it was on the 19th August, as Mr. Fripp states in his letter, that he gave instructions for the immediate removal of the boulder reported to him as having been moved out into the channelway by the defendants? Edward Lane, the dredge engineer, states that if they found a rock to the south of the buoys marking the channel they would not place a buoy on it because it was not in the course, but that if they found one shoved out into the old course he supposes they would buoy it. On cross-examination Mr. Mackie at one time said " I don't know whether it (the boulder) was ever pushed out or not." Then we have the evidence of Mr. Dennison, who had passed four times around the *Snyder* in a launch, that the rock or boulder on which she was grounded was situated at about the spot which Casey, the Assistant Engineer of the Dredge, had pointed out to him as that where the boulder had been shoved by the dredge. Dennison further stated that he was present when pieces of boulder were lifted by the defendants' derrick as nearly as he could fix it at the very place where the *Snyder* had been aground, about the length or over the length of that vessel from the end of the pier. The defendants carefully proved that they removed in pieces the flat sandstone rock 20 feet south of the channel and 1000 feet east of the pier and marked by the outer black channel buoy, as no doubt they did; but, as Mr. Mackie says they also removed other boulders and there is no explicit contradiction of Dennison's statement that they removed a boulder in pieces from the channel-bed at the place where Casey indicated they had shoved one in and where later on the same day

Dennison saw a buoy placed to mark it. That the rock to which Dennison thus refers was the flat sandstone rock is simply incredible. He saw the buoy, which Casey had said was about to be placed to mark the boulder, in position on the very evening when the presence of the boulder had been reported to him; and that buoy was gone on the morning of the 22nd. The evidence is "overwhelming"—to use Mr. Justice Riddell's expression—that the black channel buoy opposite the sandstone rock was still in position after the accident.

Assuming, as I think we must, that Dennison was competent, it is inconceivable that he should have confused a buoy specially placed to mark a boulder in the channel with one of the permanent navigation buoys, or that he should have confounded a boulder in the channel some 600 or 700 feet east of the pier with a flat rock 15 or 20 feet outside of the channel and 1000 feet from the pier.

On the whole case I am convinced that the evidence sufficiently establishes that the *Snyder* grounded in the channel on a boulder for the presence of which the respondents were responsible. I agree with Mr. Justice Latchford and Mr. Justice Riddell that, apart altogether from s. 14 of the R. S. C. (1906) cap. 115, to have left such an obstruction unbuoyed in the St. Mary's river channel for two and a half to three hours after notification that the buoy which they had placed upon it had been removed, amounted to actionable fault on the part of the defendants. *The Snark* [1900], P. 105.

I would, for these reasons, allow this appeal with costs in this Court and in the Appellate Division and would direct the entry of judgment for the plaintiff with costs in the terms stated by Mr. Justice Riddell.

BRODEUR, J.—I concur in the result.

Appeal allowed with costs.

SUPREME COURT OF CANADA. 16TH OCTOBER, 1916.

BONHAM v. THE HONOREVA.

Ships—Collision in Canal—Rules of Navigation—Damages—Failure to Observe Art. 25.

Rules for Navigation, Art. 25: — Where the *Honoreva* collided with the *Maggie* in the Soulanges Canal, owing to the failure of the *Honoreva* to observe Art. 25 of the Rules for Navigation, etc., which required her to keep to the starboard side of mid-channel, she was held liable for the damages sustained by the *Maggie*.

Appeal by the plaintiff from a judgment of the Exchequer Court of Canada, which affirmed the judgment of Dunlop, L.J. A., in favour of the defendant.

The appeal to the Supreme Court of Canada was heard by Fitzpatrick, C.J., Davies, Idington, Anglin, and Brodeur, JJ., on the 18th May, 1916.

J. A. H. Cameron, K.C., (Montreal) for the plaintiff, appellant.

R. T. Henkler, K.C., (Montreal) and *H. N. Chauvin, K.C.* (Montreal) for the defendant, respondent.

THE CHIEF JUSTICE, concurred with Idington, J.

DAVIES, J. concurred with Anglin, J.

IDINGTON, J.—This is an appeal against the judgment of the Exchequer Court maintaining a judgment of Mr. Justice Dunlop in favour of respondent.

The appellant sued as owner of the barge *The Maggie* sunk and lost or damaged by reason of a collision with the respondent in the Soulanges Canal when being towed by the tug *Frank Jackman* down said canal and about to enter the Red River bridge, crossing said canal.

It seems quite clear that the collision took place west of the bridge and, according to respondent's *factum*, when her stern was opposite the "West Rest Pier."

The respondent was moving westerly and the tug and tow easterly.

The bridge is a swing bridge and when opened rests with either end on a cement pier. The easterly one is known as the "East Rest Pier" and the westerly one as the "West Rest Pier."

The entire distance between the easterly side of the "East Rest Pier" and the westerly side of the other is a little over three hundred feet. The entire length of the bridge is a little over two hundred and twenty feet. It swings on a pivot half way between these piers. It is less than forty feet in width and occupies in itself but little space.

The water channel between the cement walls on either side of the canal underneath the bridge and its sweep of space in opening or closing and between these piers is one hundred and two feet in width—or a few feet less in width than the general width of the canal for a long distance on either side of the bridge.

The water is of the same depth between the cement walls belonging to the bridge structure and that in the bottom of the canal on either side thereof.

In fact the only practical difference in the channel passing the bridge and that in the part after the bridge is passed, is that the cement walls are about perpendicular and the bank of the rest of the canal slopes up on each side thereof from the bottom of the general depth of the water. In considering this case and the draught of the respondent and circumstances herein the difference is of little consequence.

The rule of the road applicable to the case of meeting vessels is Article 25, s-s. (a) which reads as follows :

> Article 25 (a). In narrow channels every steam vessel shall, when it is safe and practicable, keep to that side of the fairway or mid-channel which lies on the star-board side of such vessel.

enforced as it seems to me by article 17 of the Canal Rules and Regulations, which reads as follows :

> 17. In all cases of vessels meeting in a canal, their passing shall be governed by the then existing rules and regulations of the Marine Department respecting the passage of vessels; and any violation of such rules shall subject the owner or person in charge of the offending vessel to a penalty of not less than two dollars and not exceeding twenty dollars.

The observance of these rules on the part of the respondent would have avoided the collision in question.

A little regard for the rights and safety of others on the part of respondent would also have avoided the collision.

There never perhaps can be framed rules that will serve the infinite variety of circumstances arising in navigation and hence due care and use of a little common sense must be held binding upon all concerned as well as the due observance of the written law.

Whether any two vessels should ever attempt to meet and pass each other in such a place as between the walls and piers at this bridge, must depend largely on the size and structure of the craft involved in the movement.

No one would pretend that two row boats or two small launches or small tug boats without any tow should never attempt to pass each other in that part of the canal simply because there was a swing bridge overhead.

Nor do I imagine that two such vessels as respondent, or as she and the tug and tow in question should try to do so.

Having outlined the situation and what I conceive to be the law applicable, there are a few outstanding contentions set up which I wish to dispose of without pretending to enter upon all the points of dispute raised herein.

The appellant claims that his vessel had the right of way because there is a current and he was moving with the current.

I am not inclined to dispute his contention in a proper case but his tug and tow failed to reach the place where they might have asserted such a right and they failed to signify, either by what some assert is the usual practice or in any other way, the intention to claim what I assume without expressing any definite opinion, might have been their right.

Moreover counsel at the trial did not in launching this case found anything upon that pretension. All involved therein seems to me should be set aside from consideration herein.

The respondent's pilot and others pretend they did not see the tug and tow till within three hundred feet. All I need say is that in my opinion as it was broad daylight and no reason why a proper lookout should not have observed the tug and tow when a mile away as those on the latter with probably less chances of observation did see respondent at that distance.

I can find no excuse therefor unless I find it in the anxiety for dinner or laziness. Nay more if a proper lookout had been kept the pilot in charge should have known the situation better and governed himself accordingly.

If he had done so he would not or should not have persisted in keeping to the centre line of the narrow channel when it was so easy to have kept to the starboard without running the slightest risk or inconvenience.

If he had tried to get into a position where he would have been enabled to observe the letter of the law when he reached the place where the collision took place he would then have put his vessel on the starboard side of the channel and there would have been no such collision as took place unless there had been more unjustifiable conduct on the part of the tug and tow than appears.

The letter of the law, to say nothing of the reasonable conduct called for under the circumstances on the part of the pilot had he realized as he should have done the actual situation, demanded that the respondent ought to have been at her point of progress where the collision took place on her own side of the channel.

For those reasons above I think the appeal should be allowed and the respondent be condemned to pay damages.

The case of *Davies* v. *Mann*, 10 M. & W. 546, is, strangely enough, relied upon by respondent.

I should rely upon it as furnishing that law of reason and common sense (which ought to be identical) which forbade the respondent, if due care and proper outlook had been kept, from running down this tug and tow even if by the folly of their managers tethered like the donkey in the wrong place.

My difficulty in the case begins there however.

At common law the respondent in such a case would be cast for the whole damages.

Can we find anything in the conduct of the tug-and-tow to blame?

Giving due heed to the excuses put forward for being placed where they were I cannot quite excuse them for taking all the risks they did.

It seems impossible to be quite sure whether the effect of the movement of respondent in the water produced all the results in the movement of the tow which are described.

It would have been so easy after whistling its intentions by a single blast if going to starboard for the tug to have tried to remain still for a few minutes or to have got to the starboard side and tried to remain so still, when it had evidently lost its

chance of priority in entering the bridge area that I cannot acquit it of all blame.

I think it was the minor offender. It was smaller than respondent and the insolence of the stronger who will not be just, cannot be too often rebuked and made to bear the consequences of disregarding the rights of others.

I shall be governed by others of this Court taking my view of respondent's action in allotting the relative shares to be borne of the damages.

The counter-claim of course fails in my view and no need for entering upon the law bearing upon the law in that regard.

I may, however, remark that those disposed to take the case of The Ships "*A. L. Smith*" and "*Chinook*" 51 S. C. R. 39, for their guide, should observe that there the tug and tow were both owned by and under the direction of one common owner.

ANGLIN, J.—An outstanding and most material fact, found by the learned trial Judge, affirmed on appeal to the Exchequer Court and supported by the evidence of the witnesses for the defence as well as that of the witnesses for the plaintiff, is that, when the collision which forms the subject of this action occurred, the up-coming steamship, the *Honoreva*, was in mid-channel. If she was rightly there—if she had an exclusive right of way—if it was the duty of the down-going tug-and-tow at their peril to have avoided her, then the judgments in appeal are well founded. They rest on this basis, held by the learned trial Judge, and affirmed by the learned Judge of the Exchequer Court as a matter of law and upon the construction of the rules deemed applicable to the circumstances. If, on the other hand, the down-going tug-and-tow had right of way, or if both vessels were equally entitled to the right of passage through the bridgeway, then the *Honoreva* was at fault in holding the mid-channel and the judgments in her favour cannot be supported.

If the judgments in appeal depended on findings of fact made upon conflicting evidence, I would be disposed not to interfere with them. In regard to several questions of fact, however—some of them important, others probably not vital—I am, with great respect, of the opinion that conclusions have been reached which indicate a grave misapprehension of the evidence. For instance the learned trial Judge states :

The *Honoreva*, when she was about to enter the opening of the bridge and when it was not possible for her to stop or to turn back, observed a steamer towing a large barge coming in the opposite direction.

The plaintiff's witnesses agree in stating that they saw the *Honoreva* when she appeared to be six or seven arpents (1150—1300 feet) below the bridge, they themselves being about the same distance above. The defendant's pilot, Daignault, says that the *Honoreva* was 300 feet below the bridge when he saw the down-coming tug immediately on the opening of the bridge. He adds that the tug was then a quarter of a mile, or 1320 feet, above the bridge, the two boats according to this estimate being over 1600 feet apart. Yet the learned trial Judge says:

The pilot, Daignault, swears that the tug was about 300 feet away when it was first seen by those on board the *Honoreva*.

Daignault adds that he concluded, when he first saw the tug on the opening of the bridge, that he would have time to pass through before the tug and barge would enter. He says he did not tie up to the right side of the canal below the bridge because he believed he had time to pass through; and that if he had anticipated the boats meeting in the bridgeway he would, as a prudent man, have waited below the bridge. He went on because he was convinced that he had time to pass through. From this evidence it is abundantly clear that the *Honoreva* could have stopped below the bridge after her pilot saw the approaching tug-and-tow.

When the bridge was opened the *Honoreva* was ascending the canal in mid-channel at a speed of about 4 miles an hour. She probably slowed down to 2½ to 3 miles an hour while passing through the bridge. The tug-and-tow were descending at a speed of about 5 miles an hour and maintained that speed. I have no doubt that the *Honoreva* was in fact considerably nearer to the bridge than were the tug-and-tow and that the estimate of witnesses for the plaintiff as; to the distance of the *Honoreva* below the bridge when they first saw her is erroneous. I accept Daignault's statement that she was then about 300 feet below the bridge.

The learned Judge further holds that Daignault would have seen the tug sooner if the latter had whistled to have the bridge opened. He might have heard the signal, although those on board the tug did not hear the like signal given by the *Honoreva*

but according to the evidence the bridge until opened probably obstructed the view and would have prevented the tug-and-tow being seen from the *Honoreva;* and Daignault says he saw the tug as soon as the bridge was opened.

In the fifth paragraph of the Statement of Defence, it is stated that Chief Officer Denwoodie of the *Honoreva* was on the forecastle head on the lookout. No doubt he should have been there. There is no sugestion that there was any other lookout. Denwoodie gives this evidence :

> "Q. Did you see the accident? A. No.
> Q. Where were you? A. I was getting dinner in the saloon.
> Q. Therefore you know nothing about the accident? A. No.
> Q. You were downstairs? A. Yes."

The failure of those in charge of the *Honoreva* to see the tug earlier, if the bridge did not prevent it, was probably due to this absence of lookout. The tug is blamed for not having signalled for the opening of the bridge. But it was opened on the signal of the *Honoreva,* given when she was 500 feet below the bridge, and while the tug was still 1300 feet above it. There was no obligation upon her to give an unnecessary signal.

Shortly after the opening of the bridge signals were exchanged between the two vessels to indicate upon which side they intended to pass one another. The learned judge states :

> The *Honoreva* blew one blast of her whistle notifying the *Jackman* that she wished to pass her port to port, at the same time putting her helm to port. This latter signal was answered properly by the *Jackman.*

The fact, as deposed to by the plaintiffs' witnesses and also by the pilot Daignault, it that the *Jackman* first signalled by one blast of her whistle for a starboard course and that the *Honoreva* by a like signal replied accepting that course. There is no evidence that the *Honoreva* first signalled for a starboard course. If, as the learned Judge says, and plaintiff's witnesses thought was the case, the *Honoreva* put her helm to port when the signal for a starboard course was given, (a fact which the *Honoreva's* witnesses deny) she must have reverted to the mid-channel course very shortly afterwards, because the testimony of Daignault and of all the other witnesses is explicit that in passing through the bridge she held the mid-channel. If the helm of the *Honoreva* was momentarily put to port, as the learned Judge finds, that fact affords a satisfactory explanation of

the statement of the plaintiff's witnesses that if the *Honoreva* had held the course then taken, or the course they properly assumed she had taken in view of her response to the *Jackman's* signal, the passage could have been safely effected and the collision would not have happened. According to the evidence of Daignault the *Honoreva* maintained her mid-channel course until she was clear of the bridge, and her helm was then put to port. Very shortly afterwards—according to the evidence of the assistant engineer, Stewart, either a couple of seconds before or a couple of seconds after the collision (he puts it both ways)—the engines of the *Honoreva*, which had been at "dead slow forward" were reversed to "full speed astern." The effect of the change of helm and reversal of engines probably was to deflect the bow of the *Honoreva* slightly to starboard at the moment of the collision and to throw her stern somewhat to port. This accounts for the fact that that vessel was struck 30 feet abaft her stem. But, as deposed to by the bridge keeper, Sauvé, and other witnesses, the *Honoreva* still occupied the mid-channel at the moment of the collision. The learned Judge of the Exchequer Court says that this testimony of Sauvé corroborates the evidence for the *Honoreva*. As the learned trial judge puts it :

> The *Honoreva* proceeded to pass through in mid-channel. The *Honoreva* had not only entered the bridge but had *practically* passed through before the collision occurred.

It may, therefore, be taken as conclusively established that when the collision occurred the *Honoreva* was still in mid-channel.

In order to make the situation clear it is advisable to state a few other material facts which the evidence seems to place beyond doubt.

The *Honoreva* was 240 feet long by 36 feet wide and, as laden drew about 14 feet.

The tug *Jackman* was 65 feet long and between 13 and 14 feet wide. The barge *Maggie* was 175 feet long and 26 feet, 4 inches wide. She was light. The distance between the stern of the *Jackman* and the bow of the barge was between 20 and 35 feet. The Soulanges Canal has a uniform width at the bottom of the channel of 100 feet, and its banks a slope of two feet to one. The approximate depth of water is between 16 and 17

feet. At the Red River bridge the width at top and bottom alike is 100 feet clear between piers.

There is a current down the Soulanges Canal of about one mile an hour. There were at the time of the collision, and there still are tying-up posts on the north, or right bank of the canal ascending, below the Red River bridge. At the date of the collision there were no tying-up posts on the south, or right hand side of the canal descending, above the Red River bridge: such posts have since been placed there.

The tug *Jackman* passed clear of the *Honoreva* which was struck 30 feet abaft her stem by the barge *Maggie*, whose captain says :

> Il m'a frappe en joue de ma barge, a peu pres trois (3) pieds en avant de mon bateau, de cote.

The force of the collision drove the barge *Maggie* against the south pier of the bridge with such violence that she received injuries which subsequently caused her to sink. Since the *Honoreva* was in the mid-channel, if not slightly to the south it, she occupied at least 18 feet of the 50 feet of channel south of the centre line. It follows as an indisputable physical consequence that the port side of the tug was more than 18 feet to the south of the centre lines of the channel and the port side of the barge about that distance south of the centre line when the collision occurrd. This bears out the statement of the Captain of the tug that he had placed his helm to port and taken the starboard side of the canal from the moment that he signalled to the *Honoreva* his intention to take that course. The evidence of the Captain of the tug is that at the moment of the collision the tug was 6 or 7 feet from the south pier of the bridge and the Captain of the barge says that the barge was 8 or 10 feet north of the line of the face of the pier. There is no contradiction of these statements. The tug had already entered the piers of the bridge when the collision occurred: the barge was still some 25 feet above them. As the learned trial Judge finds,

> The *Honoreva* * * * had practically passed through before the collision occurred.

When about 150 feet away from the *Honoreva*, the tug, already well to the starboard side of the canal, turned still farther to the right, but the barge did not immediately take the new direction,

probably owing to there being but a single tow line. In the effort to pull away from the *Honoreva* the tug also increased its speed. The barge maintained its course for a few seconds—up to the time of the collision, the defence witnesses insist—which accounts for the fact that at the moment of collision, while the starboard side of the tug was within 6 or 7 feet of the south pier, the starboard side of the barge, although she was wider, was from 8 to 10 feet north of the pier line. But it also shews that the course maintained by the barge kept her from 13 to 15 feet south of the centre line of the channel. Yet the case has been treated in both the lower Courts as if the tug-and-tow had maintained a mid-channel course until collision was imminent and had then first sought to pass to the starboard side of the channel. The learned Judge of the Exchequer Court says :

> I think it is evident the Captain of the tug miscalculated the space between the *Honoreva* and the port shore and ported her helm too late and then to make up for her negligence put on extra speed preventing the tug from colliding but throwing the barge to port.

The Captain of the tug states that, although already well to starboard, he turned still farther to starboard, when a short distance from the *Honoreva* because he then realized that she was persisting in her mid-channel course and that collision was inevitable unless he could succeed in bringing the tug and barge farther to the south. With the *Honoreva* occupying 18 feet of the 50 feet of channel to the south of the centre line, there was left for the barge 26 feet 4 inches wide only 32 feet of clear way to pass through.

Apart from the fact that there were no tying-up posts on the south side of the canal above the bridge, which affords most cogent evidence that down-going vessels were not expected to stop, there is uncontradicted testimony, if, indeed, it be necessary, that, whereas it is comparatively easy to stop a steamer ascending against the current, it is more difficult to stop a down-going steamer, and that when the down-going steamer is accompanied by a tow it is dangerous to attempt to stop or even to slacken speed. Had the *Jackman* slowed and thus lost control of her tow in the current, a very strong case of negligent navigation might have been made against her. The learned trial judge speaks of a "common custom and rule" that

> No two vessels are allowed to cross each other in going through the opening of the bridge, which is the narrowest part of the canal; the first

one arriving has the right to proceed through the bridge, the other being tied up or at least remaining a sufficient distance to enable the first vessel to get clear of the bridge, which, it appears by the evidence, the *Jackman* did not do.

I find no such rule in the record and no evidence of any such custom. Testimony bearing upon this particular matter is given by the bridge keeper, Hector Sauvé, an independent witness, who says :

Q. Lorsque deux (2) bateaux viennent en sens inverse, est-ce que c'est l'habitude pour les bateaux qui remontent le courant d'aseoster plus bas que le pont? R. C'est presque toujours ce qu'ils font; surtout la nuit.

Q. Ils laissent passer le bateau qui descend, et passent apres? R. Oui. Ils s'en rencontrent quelqu'un; mais la plus graude partie attendent en bas; ils se rangent a cote, ils arretaient completement; il y en a d'autres qui passaient pareil.

Q. Mais, la prudence est de moderer en bas? R. Ils peuvent passer la meme chose.

Although the pilot Daignault urges that because the tug-and-tow were so much farther above the bridge the *Honoreva* had the right of passage, he also says that if two vessels are about the same distance from the bridge the down-going boat has the right of passage.

Daignault says that his object was to pass through the bridge and clear it before the tug-and-tow entered and that it was because he thought he had time enough to do this that he proceeded instead of tying-up below. Yet he also states that when about to enter the bridge he reduced the speed of his vessel from about 4 miles an hour to dead slow—2¾ miles an hour —although he then realized that the tug-and-tow were coming down fast—he thought at more than 5 miles an hour. Daignault also makes the following statement :

Q. Juste avant la collision, avez-vous cru que la collision etait possible, avez-vous craint qu'il y aurait collision? R. Non, monsieur.

This makes it clear, if farther proof were needed, that the tug and barge were well to the starboard side of the canal. Daignault of course knew the *Honoreva* was in mid-channel. He also gives the two following answers :

Q. A quel moment avez-vous donne le signal de faire vitesse en arriere sur votre bateau? R. Du moment que j'ai vu que la barge venait sur nous autres.

Q. Et, est-ce qu'a ce moment-la vous aviez tourne votre gouvernail de mainiere a diriger votre navire a droite? R. Oui, monsieur.

This would indicate that the helm of the *Honoreva* was put to port only when Daignault at the last moment realized that a collision was imminent. Moreover although Daignault swears that the reverse signal was given at the same time—he says a minute and a half before the collision, it was obeyed only a second or two before, or a second or two after the collision, according to the evidence of Stewart, who was then in charge of the engines. Stewart was not qualified to act as an engineer—a direct violation of 8 Ed. VII., c. 65, s. 20, amending R. S. C. (1906), cap. 113, s. 641, s-s 1.

Finally it was stated by Henry Newbold, the Engineer of the *Honoreva*, and by David Fitzpatrick, her Captain at the date of the trial, both witnesses for the defendant, that there was plenty of water to permit of the *Honoreva* having passed quite close to the north pier of the bridge, that it was quite safe and practicable for her to have kept to the starboard side and within 5 feet of the north pier, in passing through the bridge. This evidence is uncontradicted. She was in fact 32 feet, if not more, south of the north pier.

Under s.24 of c.35 of the R. S. C. (1906), The Railways and Canals Act,

> The Governor in Council may, from time to time, make such regulations as he deems proper for the management, maintenance, proper use and protection of all or any of the canals.

Regulation 17 enacted by the Governor in Council under this statute, provides that

> In all cases of vessels meeting in a canal their passing shall be governed by the then existing rules and regulations of the Marine Department respecting the passage of vessels.

Art. 25 of the

> Rules for navigating the great lakes, including Georgian Bay, their connecting and tributary waters, and the St. Lawrence River as far east as the lower exit of the Lachine Canal and Victoria Bridge of Montreal.

adopted by Order-in-Council, April 20th, 1905, and amended May 18th, 1906, is as follows :

> (a) In narrow channels every steam vessel shall, when it is safe and practicable keep to that side of the fairway or mid-channel which lies on the starboard side of such a vessel.

(b) In all narrow channels where there is a current, and in the Rivers St. Mary, St. Clair, Detroit, Niagara and St. Lawrence, when two steamers are meeting, the descending steamers shall have the right of way and shall before the vessels shall have arrived within the distance of half a mile of each other give the signal necessary to indicate which side she intends to take.

Section 916 of The Canada Shipping Act, R. S. C. (1906), c. 113, enacts that

If in any case of collision it appears to the Court before which the case is tried that such collision was occasioned by the non-observance of any of such regulations (for preventing collisions and for distress signals, of which the foregoing Article 25 is one) the vessel or raft by which such regulations have been violated shall be deemed to be in fault unless it can be shewn to the satisfaction of the Court that the circumstances of the case rendered a departure from said regulations necessary.

If, as I think, the Soulanges Canal is a narrow channel, the *Honoreva* was guilty of a breach of paragraph (a) in having failed to keep to the starboard side of the fairway or mid-channel after the approach of the tug-and-tow became known. There is nothing to indicate that it was not safe and practicable for her so to do.

In passing through the bridgeway the *Honoreva* was undoubtedly in a narrow channel where there is a current. She was meeting the descending tug-and-tow. The latter under clause (b) had the "right of way." In reasonable compliance with clause (b) the tug signalled for a starboard course. The *Honoreva* accepted that course by responding with a like signal. It was her clear duty thereafter to have taken and kept the starboard side of the channel. In distinct contravention of clause (b) she maintained a mid-channel course up to the moment of the collision. She did so at her peril. There is no room for doubt that the collision between the *Honoreva* and the barge *Maggie* was occasioned by the non-observance by the *Honoreva* of the regulation contained in Art. 25. There were no circumstances in the case rendering a departure from that regulation necessary. On the contrary the evidence of the defence witnesses themselves is that instead of maintaining a mid-channel course with her starboard side 32 feet to the south of the north pier of the bridge, as she did, the *Honoreva* could with perfect safety have passed through the bridgeway within 5 feet of the north pier and in such a manner that she would have been well

to the starboard side of the fairway or mid-channel. She could, while keeping the starboard side, have maintained a space of about 14 feet between her and the north pier. Her non-observance of Art. 25 clearly occasioned the collision. Had she obeyed it no collision would have occurred. She must, therefore, be deemed to have been in fault under the Canada Shipping Act, sec. 916.

Regulation 22 of The Canal Regulations, passed under the authority of sec. 24 of The Railways and Canals Act above quoted, is as follows :

(a) It shall be the duty of every master or person in charge of any vessel on approaching any *lock or bridge* to ascertain for themselves, by careful observation, whether the lock or bridge is prepared to allow them to enter or pass, and to be careful to stop the speed of any such vessel in sufficient time *to avoid a collision with the lock or its gates, or with the bridge or other canal works;* any violation of this regulation shall subject the owner or person in charge of such vessel to a penalty of not less than five dollars, and not exceeding two hundred dollars.

(b) All vessels approaching *a lock,* while any other vessel going in the contrary direction is in or about to enter the same, shall be stopped and be made fast to the posts placed for that purpose, and shall be kept so tied up until the vessel going through the lock has passed. Any violation of this provision shall subject the owner or person in charge of any such vessel to a penalty of not less than four dollars and not exceeding twenty dollars.

Paragraph (a) of this article relates to both locks and bridges, but it has to do not with the safety of vessels passing through them, but with the safety of the structures themselves, its purpose being, as the paragraph states.

to avoid collision with the lock or its gates or with the bridge or other canal works.

This paragraph has no application to the present case. Paragraph (b), on the other hand, applies only to vessels approaching a lock, and has no application to vessels approaching a bridge. The distinction between the language of the two paragraphs is marked. In the present case we are dealing not with vessels approaching a lock but with vessels approaching a bridge. Yet the learned trial Judge would appear to have applied paragraph (b). He says the *Jackman* violated Rule 22 in that

She should have slowed down at a reasonable distance from the bridge or tied at the posts provided for that purpose.

He apparently entirely overlooked the fact that there were no "posts provided for that purpose" to which the *Jackman* could have tied. Again he refers to "the rule" that

No two vessels are allowed to cross each other in passing through the opening of the bridge which is the narrowest part of the canal. The first one arriving has the right to proceed through the bridge, the other one being tied up or at least remaining at a sufficient distance to enable the first boat to get clear of the bridge which it appears from the evidence the *Jackman* did not do.

This misapprehension as to the application of Rule 22 is the foundation of the learned Judge's judgment, which rests upon his view that because the *Honoreva* was about to enter the bridgeway, clause (b) required that the down-going *Jackman* and her tow should have been stopped, made fast to posts and kept tied up until the up-going vessel had cleared the bridge. Not only is there no such rule applicable to the case of a bridge, but according to the evidence of the bridgeman Sauvé, who was in the best position to know about it, although both vessels had the right to pass through simultaneously, and vessels do frequently so pass through the bridge in opposite directions, the more usual practice is for the up-going vessel to tie up below the bridge and await the passage of the down-going boat.

The pilot Daignault, on his own admission, saw the down-going tug-and-tow when he was in a position to have stopped the *Honoreva* and tied her up and allowed the tug-and-tow to pass. He chose not so to do. He says he proceeded because he thought he had time to get through the bridge and clear it before the tug-and-tow would enter. He perceived that "the tug was coming down quickly." Elsewhere he says he thought its speed exceeded 5 miles an hour. Nevertheless, he had the speed of the *Honoreva* changed to "dead slow" and, in direct violation of Art. 25 of the rules of the road, he still maintained his course in mid-channel.

Daignault says that sometime after replying to the *Jackman's* signal for a starboard course he gave three short blasts of his whistle by which he intended to call upon the tug to moderate its speed, but that the tug did not reply. Those upon the tug deny having heard any such signal. Assuming that it

was given, Daignault must have known the difficulty and danger of slackening the speed of a down-going tug-and-tow owing to the current and, having received no response, he should not have assumed that the tug Captain would attempt anything of the kind. He should have made allowance for the tug's encumbered condition. *The Independence*, 14 Moore P. C., 103, 115-6. Without asserting that it was the duty of the *Honoreva* to have tied up below. (But see *Montreal Transportation Co.* v. *Norwalk*, 12 Ex. C. R., 434, 441-2; *The Talbot*, 15 P., 194, 195; *The Ezardian* [1911], P., 92; *Earl of Lonsdale*, Cook's Adm. Rep. 153,) or questioning her right to have proceeded through the bridgeway simultaneously with the tug-and-tow, if those in charge of her saw fit so to proceed they were bound to conform to Art. 25 of the rules of the road by keeping to the starboard side of the fairway. To do so was safe and practicable and they had themselves assented to the adoption of that course. There were no circumstances which excused, still less rendered necessary, a departure from the regulation. They maintained the mid-channel course at their own peril. They thereby put themselves in fault and must be held answerable for the consequences.

On the other hand, was there fault on the part of the tug-and-tow which contributed to the collision? Their right to pass through the bridge is clear. In doing so their duty was likewise prescribed by Art. 25—it was to keep to the starboard side of the fairway. That they did so seems, upon all the evidence, to be beyond question. From the moment that the tug entered the bridgeway the facts in evidence prove that neither tug nor barge was at all near the mid-channel. The *Honoreva*, by wrongfully occupying the mid-channel, took up 18 feet of the waters which should have been left open for the passage of the tug-and-tow. The latter were thus obliged to attempt the difficult feat of passing the up-coming steamer with a clear way only 32 feet wide, although the width of the barge was 26 feet, 4 inches. Assuming that she should succeed in exactly maintaining the middle of the 32 feet thus left to her, there would be only 2 feet, 10 inches on the port side between her and the *Honoreva* and only 2 feet, 10 inches on the starboard side between her and the bridge pier. Fitzpatrick, Captain of the *Honoreva*, gives this evidence :

Q. How close to the pier or wharf would it have been safe to go? A. Within 10 feet—within 5 feet—but as a general rule the further off the safer you are.

The *Honoreva* had no right to force the tug and barge into a position where they had only 32 feet of water in which to navigate. Complaint is made that the tug went farther to starboard when only 150 feet from the *Honoreva* and that the barge, owing to its having a single tow line, did not immediately follow but maintained its course or even sheered slightly to port. Assuming this to be the case, the manoeuvre of the tug was made when collision seemed imminent and in an attempt to escape. The *Honoreva*, whose fault created the critical situation, cannot complain of the failure of this manoeuvre. The captain of the tug did the best he could in an emergency which he had no reason to anticipate the *Honoreva* would create. The tug-and-tow were already so well to starboard that pilot Daignault, who, of course, knew that his own ship was in mid-channel, did not expect a collision until immediately before it occurred. Why should the captain of the tug have anticipated it earlier? In fact, notwithstanding the very small margin of safety left to him, he appears to have taken the step he did to avoid or minimize the impending collision before anything was done on the *Honoreva* for that purpose.

Complaint is also made of the speed of the tug. But there is no evidence that this was excessive. On the contrary the evidence is that she was travelling at the rate of about 5 miles an hour, whereas the canal regulations appear to contemplate a speed up to 7 1-3 miles an hour.

Again it is charged that the tug was at fault in not slackening speed in answer to the signal of the *Honoreva*. Upon the evidence I incline to the view that that signal, if given, was not heard. Not only has no specific rule been cited which imposed an obligation on the tug to slacken her speed, but had she in doing so lost control of the barge, as might not improbably have happened owing to the current, she would have laid herself open to a charge of negligent navigation. Under such circumstances the statutory rule requiring that steamships approaching one another so as to involve risk of collision shall slacken speed, or stop and reverse if necessary, cannot be invoked.

It is further urged that there was no person at the helm of the barge *Maggie*. There is some suggestion of this in the defence evidence—but it is rather a surmise than a statement of fact. The pilot Daignault merely says that he "did not remark anybody at the wheel of the barge." There is nothing more. On the other hand the evidence of Captain Gastonguay is perfectly clear and satisfactory on this point. He took the wheel from Laferriere when the tug signalled for a starboard crossing. His evidence is corroborated by Josephus Thauvette who had given over the wheel to Laferriere a short time before. The barge probably did not at once take the new direction given it by the tug just before the collision. But this does not prove either the entire absence of a man at the wheel, or that, if there, he neglected his duty, or that anything he could then have done would have prevented the collision.

On the whole, in my opinion, the only proven fault which clearly contributed to causing the collision was the flagrant breach by the *Honoreva* of the provisions of Art. 25 of the Rules of navigation, which required her to keep the starboard side of the fairway. While the utmost skill may not have been displayed in the management of the tug and the tow when collision was imminent, while it may be that if there had been a bridle between them as well as a tow rope, the collision would have been avoided, (I think this extremely doubtful) there is not, in my opinion, any sufficient proof of fault such as would impose liability upon them, *Marsden on Collisions*, p.3; *The Cape Breton*, 36 S.C.R., 564, 591; *The Arranmore*, 38 S.C.R. 176, 185.

I would, for these reasons set aside the judgment of the learned Judge of the Admiralty Court, and the confirmatory judgment in the Exchequer Court, and would direct that judgment be entered for the plaintiff declaring him entitled to the damages for which he sues and the costs of this action as well as of the appeals to the Exchequer Court and to this Court, condemning the defendant and its bail in such damages and costs, and directing that an account should be taken by the Registrar, assisted by merchants, of the amount of such damages, with the usual provisions for report, etc. The counter-claim should also be dismissed with costs throughout.

BRODEUR, J.—I am of opinion that the *Honoreva* should be held entirely responsible for the collision, therefore I would allow the appeal with costs.

Appeal allowed with costs.

SUPREME COURT OF CANADA. 24TH OCTOBER, 1916.

TRUSTS AND GUARANTEE CO. v. THE KING.

Revenue — Escheats — Rights of the Province—Rights of the Dominion.

Escheats:—Lands in the Province of Alberta escheated to the Crown for want of heirs belong to the Dominion and not to the Province.

Appeal on behalf of the Province of Alberta from a judgment of the Exchequer Court of Canada, holding that lands in that Province escheated to the Crown for want of heirs belonged to the Dominion and not to the Province.

The appeal to the Supreme Court of Canada was heard by Fitzpatrick, C.J., Davies, Idington, Anglin, and Brodeur, JJ., on the 5th & 6th May, 1916.

Frank Ford, K.C., (Edmonton) for the appellant.
W. D. Hogg, K.C., (Ottawa) for the respondent.

THE CHIEF JUSTICE—The Attorney-General by information filed in the Exchequer Court claimed a declaration that certain lands in the Province of Alberta of which one Yard Raffstaadt, who died intestate and without heirs, was formerly the owner, has escheated to His Majesty in right of the Dominion of Canada.

The claim is similar to that put forward in the Privy Council in the appeal of *Attorney-General of Ontario* v. *Mercer*, 8 App. Cas. 767, by the Dominion Government in the name of the respondent. In that case the lands of which the deceased, who died intestate and without heirs, had been the owner were situate in the Province of Ontario. By the judgment it was held that lands escheated to the Crown for want of heirs belonged to the province and not to the Dominion. The ground of the decision was that although section 102 of the B. N. A. Act 1867 imposed upon the Dominion the charge of the General Public Revenue as then existing of the Provinces, yet by sec. 109 the Casual Revenue arising from lands escheated to the Crown

after the Union was reserved to the Provinces—the words lands —mines—minerals and royalties therein, including, according to their true construction, royalties in respect of lands, such as escheats.

What is now the Province of Alberta was formerly a part of the N. W. Territories under the sole authority of the Dominion Government. Up to the time of the establishment of the Province by the Statute 4 & 5 Edw. VII. c. 3. there could be no doubt as to whom the lands and their revenues belonged. Lest there should be any doubt as to the position of the public lands in the Province of Alberta the Act by which it was established provided by section 21 that all Crown lands, mines, minerals and royalties incident thereto should continue to be vested in the Crown and administered by the Government of Canada for the purposes of Canada. The words are practically the same as those in section 109 of the B. N. A. Act 1867 from which they are doubtless taken whereby the like reservation was made in favour of the provinces. I do not myself understand how in face of the decision of the Judicial Committee it can be contended that the same words which were held to reserve to the provinces the Casual Revenue arising from lands escheated to the Crown should now receive the opposite meaning and be held not to include royalties in respect of lands such as escheats.

I am not sure that it is very necessary to deal with the arguments put forward on behalf of the province. They seem to be largely those urged and expressly negatived in the *Mercer Case*. The present appellant in his factum claims that the words "royalties" has relation back only to mines and minerals. This was perhaps the main contention put forward by the Dominion in the *Mercer Case* and their Lordships say "The question is whether the word "royalties" ought to be restrained to rights connected with mines and minerals only to the exclusion of royalties, such as escheats, in respect of lands. Their Lordships find nothing in the subject, or the context, or in any other part of the Act to justify such a restriction of its sense." It is useless to ask us to find now that the words in the same subject and contract has the opposite meaning to that placed upon it by their Lordships.

Judgment for the respondent on this appeal does not involve any decision as to the right of the Legislature of the

province to change the laws of inheritances. Lands escheat to the Crown for defect of heirs and this has nothing to do with the question who are a person's heirs. But altering the law of inheritance is one thing and appropriating the right of the Dominion on failure of heirs is quite another thing. This is what has been done by the Alberta Statute (1915), c. 5. The Statute in term deals with property of a person dying "intestate and without leaving any next of kin or other person entitled thereto." It is because there is no one who can claim the property that the Crown takes it. There is no possibility of getting at this property through the deceased. The Crown does not claim it by succession at all, but because there is no succession.

In the *Mercer Case* the Judicial Committee say "Their Lordships are not now called upon to decide whether the word "royalties" in section 109 of the B. N. A. Act 1867 extends to other Royal rights besides those connected with "lands, mines and minerals." It is not necessary in the present case either to decide this question. The right of the Crown to *bona vacantia* is a different one to the right to an escheat. No question as to the former right really arises in this case and I do not express any opinion as to whether it belongs to the Crown in the right of the Dominion or the province. The question will have to be decided if necessary in a proper case.

I would dismiss the appeal with costs.

DAVIES, J.—Concurred with Anglin, J.

IDINGTON, J.—*(Dissenting.)*—One Raffstaadt the registered owner of a quarter section in Alberta who had obtained a certificate of title therefor, under the Land Titles Act, died intestate without leaving heirs at law or next of kin.

The land had been granted to him on the 25th of July, 1911, by the Crown acting through the administration of the Department of the Interior of Canada.

The claim made that the said land escheated to and became vested in the respondent in right of the Dominion of Canada has been maintained by the Exchequer Court and the appellant, the administrator, having sold the land and administered the estate of deceased has been ordered by said Court to account to the respondent in right of the Dominion.

I respectfully submit that there seems to be thus presented a curious confusion of thought at the very threshold of this litigation.

If, as claimed by respondent and as held below, the Act, upon which the appellant acted as administrator is *ultra vires*, then nothing, which that Court can do, or we in reviewing its action and maintaining same view can do, will be of any avail.

The title to the land is in such view in respondent or liable to become so vested upon inquisition duly found. He certainly cannot desire that innocent persons purchasing from or claiming through the purchaser from the appellant, should suffer loss as they inevitably must when, if ever, it is finally determined that the Act apparently constituting the appellant owner was *ultra vires* and all it had done thereunder null and void.

If I were driven to entertain the same view I should feel much embarrassed in maintaining such a judgment fraught with such obvious consequences unless and until proper concurrent legislation had been enacted adopting and validating the appellants sale and remitting the trial of the right to the proceeds to the Courts to determine.

However praiseworthy saving costs and going directly to the point may be as a rule, there are some cases where it cannot be done properly. And if the correct conclusion is as held below the proceedings herein should be stayed or the action dismissed.

The respondent can have no claim to money improperly received by appellant or anyone else in Alberta unless under such circumstances that he can properly affirm the transaction and be no party to something detrimental to some of his subjects.

Passing that phase of this litigation and coming to the issues attempted to be raised and decided herein, let us ask ourselves what an escheat is and consider the definition thereof as given in Stroud's Judicial Dictionary, Vol. 2, page 639, condensed from Coke upon Littleton, as follows :

> Escheat is a Word of Art, and signifieth properly when, by accident, the lands fall to the lord of whom they are holden, in which case we say the fee is escheated.

Then let us bear in mind that the very basis of the argument in support of the view contended for by respondent here-

in, is the tenure by which the land is assumed to have been held and that it has to be presumed a grant had been made by the lord of an estate which for want of heirs has come to an end, and by reason thereof the land has fallen to the lord who had made the grant. Such is the theory rested upon.

The respondent, it is claimed, must be held in this case to be the lord so entitled.

To make no doubt of the theory and its resting upon tenure as the basis of this claim we have but to consider the illustrations furnished by cases where the estate is held upon a copyhold tenure when the title escheats to the lord of the manor. See in Watson's Compendium of Equity, the chapter on Escheat and Forfeiture, page 187 and cases cited there, especially *Walker* v. *Denne*, 2 Ves. Jun. 169 at page 187, where Lord Loughborough, then Lord Chancellor, expressly says the title would not escheat to the Crown but to the lord of the manor. See also the more recent cases of *Weaver* v. *Maule*, 2 Russell & Mylne, 96; *Gallard* v. *Hawkins*, 27 Ch. D. 298, and especially at pp. 306-7.

This last mentioned case brings forward another view dealt with in Watson's work at pp. 186-7, where it is explained that until 47 & 48 Vict. ch. 71, equitable estates did not escheat to the Crown for they were not the subject of tenure and where there was a conveyance or devise in trust and there was no heir of the grantor or testator the trustee held for his own use absolutely.

The case of *Burgess* v. *Wheate*, 1 Eden, 177, contains elaborate learning on the subject, and the much more recent case of *Cox* v. *Parker*, 22 Beavan, 168, presents the law in a very concise judgment of Sir John Romilly, Master of the Rolls.

These cases and many others make clear that the escheat of land is dependent on tenure and the title to the land only falls to the Crown in case by reason of the nature of the tenure thereof under the Crown such is the legal result when there is no one left to take the legal estate.

Let us now consider the nature of the tenure of the lands in question herein and see if and how it can ever produce such a result as contended for by respondent herein.

If ever legislation could sweep away such a right as escheat in relation to land so far as dependent on tenure surely the enactment of 51 V. ch. 20, sec. 3, did so.

It enacted as follows :

3. Section five of the said Act is hereby repealed, and the following substituted therefor :—

5. Land in the Territories shall go to the personal representatives of the deceased owner thereof in the same manner as personal estate now goes.

That was a comprehensive declaration of the Dominion Parliament relative to the doctrines of tenure upon which alone the escheat of land so far as dependent on tenure could rest. It was an absolute renunciation by the respondent, by assenting thereto, of any such possible claim.

It was repeated in sec. 3 of the Land Titles Act of 1894.

And in the same session in which the Province of Alberta was created and as declaratory of the policy of parliament in that regard, it was enacted by the respondent's assent given same day as the Alberta Act was assented to as follows :

1. Upon the establishment of a province in any portion of the North-West Territories and the enactment by the Legislature of that province of an Act relating to the registration of land titles, the Governor in Council may, by order, repeal the provisions of *The Land Titles Act*, 1894, and of any of its amending Acts in so far as they apply to the said province, and by such order, or by any subsequent order or orders, may adjust all questions arising between the Government of Canada and the Government of the province by reason of the provisions of this section being carried into effect.

In pursuance thereof the Alberta Legislature at its first session enacted a Land Titles Act carrying out the purpose so designed and by the language thereof put beyond doubt so far as it could the possibility of any such thing as escheat dependent on tenure. It enacted as follows :

Whenever the owner of any land for which a certificate has been granted dies, such land shall, subject to the provisions of this Act, vest in the personal representative of the deceased owner, who shall, before dealing with such land, make application in writing to the registrar to be registered as owner and shall produce to the registrar the probate of the will of the deceased owner, or letters of administration, or the order of the court authorizing him to administer the estate of the deceased owner, or a duly certified copy of the said probate, letters of administration or order, as the case may be; and thereupon the registrar shall enter a memorandum thereof upon the certificate of title; and for the purposes of this Act the probate of a will granted by the proper court of any province of the Dominion of Canada, or of the United Kingdom of Great Britain and Ireland, or an exemplification thereof, shall be sufficient.

2. If the certificate of title for the land has not been granted to the deceased owner the personal representatives before being entitled to be registered under this section shall bring the land under this Act in the ordinary way.

3. Upon such memorandum being made, the executor or administrator, as the case may be, shall be deemed to be the owner of the land; and the registrar shall note the fact of the registration by a memorandum under his hand on the probate of the will, letters of administration, order or other instrument as aforesaid.

4. The title of the executor or administrator to the land shall relate back and take effect as from the date of the death of the deceased owner.

Surely the respondent by acting upon this local legislation stipulated for in the enactment of Parliament above quoted must be taken to have assented thereto as if bargained for when in pursuance thereof he by Order-in-Council repealed the Land Titles Act of 1894.

The grant in question herein was made in pursuance of that policy and registered in conformity therewith.

Does it not seem repugnant to reason and common sense that such a claim as escheat by virtue of tenure could be permitted to spring from such grants and rest upon such a foundation? That legislation by Parliament and legislature adopted and carried into force by said Order-in-Council was, I submit, as absolute and final a renunciation by respondent in right of the Dominion as could be conceivable.

It is argued, however, that by reason of the Dominion having retained the control of the disposition of the Crown lands in Alberta, it must be taken to have intended to reserve to itself such incidental sources of revenue as might result from escheat.

The Alberta Act, by section 21 thereof, enacted as follows :

21. All Crown lands, mines and minerals and royalties incident thereto, and the interest of the Crown in the waters within the province under *The North-West Irrigation Act*, 1898, shall continue to be vested in the Crown and administered by the Government of Canada for the purposes of Canada, subject to the provisions of any Act of the Parliament of Canada with respect to road allowances and roads or trials in force immediately before the coming into force of this Act, and shall apply to the said province with the substitution therein of the said province for the North-West Territories.

When we are called upon to interpret and construe this enactment I think we can refer not only to the whole scope of

the Act but also as in *pari materia* the enactments passed in same session bearing upon the policy of Parliament in its relation to the powers to be conferred upon the Alberta Legislature and especially that enactment already referred to which provided for that legislature carrying out the policy of Parliament relative to the tenure of lands and their transmission in cases of intestates.

Having due regard not only to the Alberta Act itself but also these other enactments, it seems inconceivable that whatever Parliament intended, it could ever have sought to reserve to the respondent in right of the Dominion any such thing as escheat dependent upon tenure of the land.

There remains, however, the question of the right of the Crown to become possessed of *bona vacantia* quite independently of tenure. That sometimes is spoken of as a right to an escheat.

Of the existence of that right, call it what we may, there can, in light of the authorities such as *Taylor* v. *Haygarth*, 14 Sim. 8, and *In re Bond—Panes* v. *Attorney General*, [1901] 1 Ch. D. 15; *Dyke* v. *Walford*, 5 Moore, 434, and *In re Barnett's Trusts* [1902] 1 Ch. D. 847, be no doubt. Each is illustrative of the varying condition under which the right may exist.

And if the respondent had sued appellant to recover the proceeds of the estate left after its due administration the question would arise whether such balance could be treated as *bona vacantia* falling to respondent in right of the Dominion or in right of the Province of Alberta.

Then we should have to consider the neat point in light of the following provision of the Alberta Act, 5 Edw. VII. sec. 3, as follows:—

> 3. The provisions of *The British North America Act*, 1867 to 1886, shall apply to the Province of Alberta in the same way and to the like extent as they apply to the provinces heretofore comprised in the Dominion, as if the said province of Alberta had been one of the provinces originally united, except in so far as varied by this Act and except such provisions as are in terms made, or by reasonable intendment may be held to be, specially applicable to or only to affect one or more and not the whole of the said provinces.

Wherein do the provisions of the *British North America Act* differ from those thus made applicable to the Province of Alberta?

It is said the provisions of the section 21, above quoted, make a difference.

True the management of the Crown domain is reserved as a matter of public policy for the Dominion, but how can that touch anything turning upon the right of the respondent to recover *bona vacantia* on behalf of the Dominion?

There is nothing in the language of section 21 reaching so far as to require such a meaning to be given it.

There may arise cases similar to that which enabled the Court dealing with personal property in the hands of executors, in question in the case of *Taylor* v. *Haygarth* cited above. Can it be said in such a case that *bona vacantia* derived from or being mere personal property is to be held recoverable by the respondent on behalf of the Dominion, instead of by him on behalf of the province?

Surely the reservation of the revenue from the sales and leasing of lands, mines and minerals is rather a shadowy foundation for such a claim. Yet there is nothing else in this Alberta Act distinguishing the status and powers of the new province from others in that regard which can be relied upon.

The right of the other provinces to escheat had been long determined in their favour by the case of the *Attorney General for Ontario* v. *Mercer*, 8 App. Cas. 767, when the Alberta Act was passed and if there had been any such purpose as making a a distinction in that regard against the new province it would have found expression in the Act in some more explicit way than by such indirect language as used in section 21.

And when the claim to *bona vacantia* is made how can it rest upon the single line "All Crown lands, mines, minerals and royalties incidental thereto" for that is what the matter comes to?

There is nothing therein which in the remotest sense can extend to mere *bona vacantia* consisting of or derivable from personal property.

And with the claim thereto surely must fall also the claim to proceeds of real estate which had been declared at that time to become distributable as personal property.

And let us again observe the language of the first line of section 21 which defines nothing of that sort and only the word "royalties" therein can be taken to have any possible semblance of meaning applicable to what is involved in the claim.

And these royalties are not presented as *jura regalia* but as "royalties incident thereto" i. e. incident to the "Crown lands, mines and minerals."

In common parlance we all know how the term "royalties" is used relative to the timber dues and any share of the minerals extracted under and by virtue of leases of mines or mining lands. How can such a term be made to have such an extended meaning as claimed herein?

The moment the lands are granted by the Crown they cease to be "Crown lands" and how a royalty can attach thereto puzzles one.

Again we must never forget that the whole subject of property and civil rights is relegated to the jurisdiction of the legislature of the province which can change the whole law of descent and constitute whomsoever or whatsoever it sees fit the heir at law or next of kin entitled to take the estate of an intestate or indeed if it saw fit could revoke the power to make a will and distribute the estates of deceased in such a way as it might determine.

To say that a legislature possessed of such plenary powers cannot enact such a law as declared by the judgment appealed from to be *ultra vires* seems to me somewhat remarkable.

I think the appeal should be allowed with costs throughout and the judgment appealed from be reversed.

ANGLIN, J.—In this proceeding the Government of Canada seeks to recover from the administrator of one Yard Raffstaadt, who died in November, 1912, in the Province of Alberta, intestate and without heirs or next of kin, the proceeds left in his hands, after satisfying claims of creditors, of certain lands granted to the intestate in 1911 by Letters Patent issued from the Department of the Interior of Canada, of which he died seized.

The substance of an arrangement between the parties is that, if, upon the death of Raffstaadt, the Crown in right of the Dominion of Canada was entitled to the land owned by him, either as an escheat or as *bona vacantia*, the net proceeds of the sale of such land in the hands of the administrator shall for all purposes be deemed the property of the Crown in right of the Dominion—that they shall represent the land.

A doubt was suggested as to the jurisdiction of the Exchequer Court to entertain this action on the ground that the money in question is in fact neither land escheated nor property of the Crown in right of the Dominion. The relief claimed by the information, however, is primarily a declaration that the land owned by Raffstaadt upon his death "escheated to "and became vested in His Majesty the King in right of the "Dominion of Canada." That relief may properly be claimed in the Exchequer Court under 9 & 10 Ed. VII., (D.), c. 18, s. 2. The judgment has taken this declaratory form and a clause has been added, based upon the consent of parties, for the recovery by the Crown of the net proceeds of the sale held by the administrator.

The material facts were established by admissions and are fully stated in the judgment of the learned Judge of the Exchequer Court.

Counsel for the appellant urges several distinct grounds of appeal :

(1) That the right of property in the lands surrendered by the Hudson's Bay Company to Her late Majesty, Queen Victoria, was never vested in the Crown in right of the Dominion of Canada;

(2) That the right of escheat, if not vested in His Majesty in right of the United Kingdom, is vested in the Crown in right of the Province of Alberta.

(3) That the reservation made by s. 21 of the Alberta Act does not include the Royalties of escheat or *bona vacantia*;

(4) That under the Dominion Land Titles Act, 57-8 Vic., c. 28, (1894), the holder of a certificate of title obtained not merely an estate in the land but the full allodial rights therein and that it was, therefore, not subject to escheat;

(5) That under sec. 3 of that Act providing that

> land in the Territories shall go to the personal representatives in the same manner as personal estate now goes, and be dealt with and distributed as personal estate,

the real property of a deceased owner became for all purposes personalty, and, while a case of *bona vacantia* might arise in respect of it, a case of escheat could not.

(1) I doubt if the appellant, claiming through a grant from the Canadian Government, should be heard to raise the

first point, if it were otherwise tenable. But that all the property rights both of the Crown and of the company in those parts of the former Hudson's Bay Lands which were not reserved for the company were vested in the Crown in right of the Dominion of Canada is, I think, fully established. The original grant to the Hudson's Bay Company; the Rupert's Land Act, 31 & 32 Vic. (Imp.) c. 105; the surrender by the Hudson's Bay Company grant; the Addresses of the Senate and House of Commons of Canada to Her Majesty; and the Imperial Order-in-Council passed pursuant to the Rupert's Land Act contain the history of the arrangement and the steps by which the territory that had formerly been held by the Hudson's Bay Company (saving the reserved sections) became vested in the Crown and subject to the legislative control of the Parliament of Canada.

That Parliament exercised the power thus conferred upon it of legislating in regard to the Crown lands in the Territory thus acquired. The first Dominion Lands Act, passed in 1872 (35 Vic., c. 23), after designating them in the preamble as "certain of the public lands of the Dominion," enacted that the "lands in Manitoba and the North West Territories * * * "shall be styled and known as Dominion lands." The Act further provided for the administration and alienation of these lands in a manner consistent only with the assertion of the existence in the Dominion of the fullest proprietary rights therein. These provisions are continued in the R. S. C., 1886, c. 54, and the R. S. C., 1906, c. 55, and it is under the authority of that legislation that the patent or grant to Yard Raffstaadt issued. Sec. 21 of the Alberta Act (4 & 5 Ed. VII., c. 3) may also, if necessary, be invoked as legislation, within the power conferred on the Dominion Parliament by the Rupert's Land Act, declaratory of the title and interest of the Crown in right of the Dominion in the public lands within the territorial limits of the province of Alberta. On this branch of the case I concur in the conclusion reached by the learned Judge of the Exchequer Court.

(2) and (3) The second and third points can be conveniently dealt with together. By the 21st section of the Alberta Act (4 & 5 Ed. VII., c. 3) it is declared that

> All Crown lands, mines and minerals and Royalties incident thereto * * * shall continue to be vested in the Crown and administered by the Government of Canada for the purposes of Canada.

In *Atty. Gen. for Ont.* v. *Mercer*, 8 App. Cas. 767, the Judicial Committee considered the provision of s. 109 of the B. N. A. Act that

> All lands, mines, minerals and Royalties belonging to the several provinces of Canada, Nova Scotia, and New Brunswick at the Union * * * shall belong to the several provinces of Ontario, Quebec, Nova Scotia and New Brunswick in which the same are situated or arise * * *

Their Lordships held that "Royalties" in this context includes escheat. After discussing the meaning of the term "Royalties" and the nature of the objects which it covers, they say at p. 779 :

> Their Lordships are not now called upon to decide whether the word 'Royalties' in s. 109 of the B. N. A Act of 1867 extends to other Royal rights besides those connected with 'lands', 'mines,' and 'minerals.' The question is whether it ought to be restrained to rights connected with mines and minerals only, to the exclusion of Royalties, such as escheats, in respect of lands. Their Lordships find nothing in the subject, or the context, or in any other part of the Act, to justify such a restriction of its sense.

The restriction of the reservation of Royalties in the Alberta Act to those incident to Crown lands, mines and minerals, does not distinguish the case at bar from the *Mercer Case* since their Lordships there proceeded on the assumption that only Royalties "connected with lands, mines and minerals" are covered by s. 109 of the B. N. A. Act (p. 779) ; nor does the omission of the word "arise" from the section of the Alberta Act render the decision in the *Mercer Case* inapplicable. The right of escheat is a royalty incident to "Crown lands," or lands belonging to the Crown, and that Royalty or right is declared by the Alberta Act to continue to be vested in the Crown for the purposes of Canada. I am, therefore, of the opinion that escheats arising in the Province of Alberta, at all events in respect of lands which belonged to the Crown at the date of the creation of that province, were against the rights and sources of revenue excepted and reserved to the Dominion by s. 21 of the Alberta Act.

4. The grant by the Crown to the Hudson's Bay Company of the lands comprised in the territory granted to it was "in "free and common soccage." All lands in that territory con-

veyed by the company to settlers or others prior to the surrender by the company to Her late Majesty Queen Victoria and the subsequent transfer to the Dominion were held by that tenure. By an Act of the Dominion Parliament passed in preparation for the assumption of control of Rupert's Land by Canada it was provided that

> all the laws in force in Rupert's Land and in the North Western Territory at the time of their admission into the Union shall, so far as they are consistent with the B. N. A. Act, 1867, with the terms and conditions of such admission approved of by the Queen under the 146th section thereof, and with this Act, remain in force until altered by the Parliament of Canada or by the Lieutenant Governor under the authority of this Act. (32-33 Vic., c. 3, s. 5.)

This legislation, which left in force English law as it stood in 1670 the date of the Hudson's Bay Company's charter, subject possibly to some question as to the portions of the region which may have been first occupied by French settlers, (Clement on the Constitution, 2 ed., p. 54, n. 4.) was re-enacted after the actual admission into the Union, (34 Vic., c. 16). In 1886 the Dominion Parliament enacted that

> All the laws of England relating to civil and criminal "matters, as the same existed on the 15th day of July, 1670, shall be in force in the Territories in so far as the same are applicable to the Territories. (49 Vic., c. 25, s. 3.)

Since the Statute of Charles II. free and common soccage has been the ordinary tenure on which freehold lands are held in England and it is the tenure prescribed in all the early colonial charters or patents in America. (Blackstone, Lewis's edition, Vol. 1, p. 78, n. 1). The patent to Raffstaadt, put in by consent, was to him, habendum "in free simple," making it clear that his estate was a fee simple to be held in free and common soccage, to which the royalty of escheat has always been incident (11 Hals., p. 24).

In the second volume of his commentaries (Lewis' edition at p. 104-5) Blackstone wrote :

> 1. Tenant in fee simple (or, as he is frequently styled, tenant in fee) is he that hath lands, tenements, or hereditaments, to hold to him and to his heirs forever: generally, absolutely and simply: without mentioning what heirs, but referring that to his own pleasure, or to the disposition of the law. The true meaning of the word fee (feodum) is the same with that of feud or fief, and in its original sense it is taken in contradistinc-

tion to allodium: which latter the writers on this subject define to be every man's own land, which he possesseth merely in his own right, without owing any rent or service to any superior. This is property in its highest degree; and the owner thereof hath *absolutum et directum dominium*, and therefore is said to be seised thereof absolutely *in dominico suo*, in his own demesne. But feodum, or fee, is that which is held of some superior, on condition of rendering him service; in which superior the ultimate property of the land resides. And therefore Sir Henry Spelman defines a feud or fee to be the right which the vassal or tenant hath in lands, to use the same, and take the profits thereof to him and his heirs, rendering to the lord his due services: the mere allodial property of the soil always remaining in the lord. This allodial property no subject in England has: it being a received and now undeniable principle in the law, that all the lands in England are holden mediately or immediately of the king. The king therefore only hath *absolutum et directum dominium*: but all subjects' lands are in the nature of feodum or fee whether derived to them by descent from their ancestors, or purchased for a valuable consideration; for they cannot come to any man by either of those ways, unless accompanied with those feudal clogs which were laid upon the first feudatory when it was originally granted. A subject therefore hath only the usufruct, and not the absolute, property of the soil; or, as Sir Edward Coke expresses it, he hath *dominium utile*, but not *dominium directum*. And hence it is, that, in the most solemn acts of law, we express the strongest and highest estate that any subject can have by these words:—'he is seised thereof *in his demesne*, *'as of fee.'* It is a man's demesne, *dominicum*, or property, since it belongs to him, and his heirs forever: yet this dominicum, property, or demesne, is strictly not absolute or allodial, but qualified or feudal: it is his demesne, as of fee: that is, it not purely and simply his own, since it is held of a superior lord, in whom the ultimate property resides.

In any part of the King's Dominions where the English legal system prevails it would require legislation very clear and explicit indeed to take from the Crown its allodial interest and vest it in the subject. There is no such legislation in regard to land in Alberta, and, so far as it might affect the reservation in favour of the Dominion made by s. 21 of the Alberta Act, provincial legislation intended to have that effect would be *ultra vires*.

The appellant invokes the provisions of the Dominion Land Titles Act, 1894, (57-58 Vic., c. 28) making special reference to sections 3, 4, & 10, as indicating the purpose of the Dominion Parliament to have been that in the North West Territories a grant of land from the Crown followed by registration under

the Land Titles Act should vest in the grantee the absolute or allodial title and that land so granted and registered should for all purposes be converted into and be subject to the incidents of personal property. But the definition in the Dominion Land Titles Act of 1894 of the word "grant" as meaning "any grant from the Crown of land *whether in fee or for years,*" the definition of the word "owner" as meaning "any person or body corporate entitled to *any freehold or other estate or interest in land,*" the provision of s. 56 that

> the land mentioned in any certificate of title granted under this Act shall by implication and without any special mention therein, unless the contrary is expressly declared, be subject to (a) any subsisting reservations or exceptions contained in the original grant from the Crown,

and the provision of s. 57 that

> Every certificate of title granted under this Act shall * * * be conclusive evidence * * * that the person named therein is entitled to the land included in the same for the estate or interest therein specified, subject to the exceptions and reservations mentioned in the preceding section.

afford striking, and I think, conclusive, proof that it was not intended by this legislation to effect any such radical change as would be involved in vesting in the grantees of Crown lands in the North West Territories (as they then were) not merely the fee simple of the lands granted—

> the strongest and highest estate that any subject can have

but also the allodial rights of the Crown. While s. 4 dispenses with words of limitation in transfers and provides that, if used, they shall have the like force and meaning as if used in connection with personal property, this provision does not apply to Crown grants and the effect of a transfer is declared to be to pass "all such right and title *as the transferror has*"—not the allodial rights in the land. While s. 10 speaks of an "absolute estate," it so denominates an estate in fee simple, which may not be reduced by words of limitation to a limited fee or fee-tail. Far from indicating an intention to confer an allodial interest on grantees of the Crown these sections evince an intention that the greatest estate of a subject—that in fee simple—shall be the nature of the holding.

This statute was repealed as to Alberta by Order-in-Council of the 22nd July, 1906, authorized by statute 4 & 5 Ed. VII., c. 18.

(4) and (5) Section 3 of the Act so repealed—reproduced in the Alberta Land Titles Act—is as follows :—

> Land in the Territories (Alberta) shall go to the personal representative of the deceasd owner thereof in the same manner as personal estate now goes, and be dealt with and distributed as personal estate.

As originally introduced in 1886 (49 Vic., c. 26, s. 5) the prototype of this provision read

> All lands in the Territories which by the common law are regarded as real estate shall be held to be chattels real and shall go to the executor or administrator of any person or persons dying, seised or possessed thereof as other personal estate now passes to the personal representative.

But this section was repealed in 1888 (51 Vic., c. 20, s. 3) and the provision then substituted read

> Land in the Territories shall go to the personal representative of the deceased owner thereof in the same manner as personal estate now goes.

No substantial change was made by the Act of 1894, (57-58 V., c. 28, s. 3 above quoted). The omission from this enactment of the words "shall be held to be chattels real" is significant and shews that at all events since 1888, whatever may have been the case under the Act of 1886, land is still land and it is only for purposes of descent and distribution that it is to be regarded as personalty. Otherwise it remains land and subject to all the incidents of land. On the death of an owner of land intestate and without heirs he leaves nothing to be dealt with as a subject of descent or distribution. On his death his estate in the land comes to an end and *eo instanti* the Crown is seised of the land which had been his by virtue of the escheat. There is nothing to pass to a personal representative.

The legislation relied upon is, no doubt, effective to convert into personalty, and to attach to it all the incidents of personalty, for purposes of succession and distribution, whatever estate or interest the deceased owner held in his real property. But it leaves untouched, the allodial interest, or "ultimate property" which remained resident in the Crown after the grant of the fee and by virtue of which, on the death of the owner intestate and without heirs, the fee having determined, the Crown was again seised of the land as it had been before the grant. Nothing passed to the personal representative of the

owner. There was nothing upon which the provisions of s. 3 could operate. The owner's interest simply ceased to exist. As put in *Atty. Gen.* v. *Mercer*, at p. 767,

> When there is no longer any tenant, the land returns by reason of tenure, to the lord by whom or by whose predecessors in title, the tenure, was created * * * . The tenant's estate (subject to any charges upon it which he may have created) has come to an end and the lord is in by his own right.

While it is no doubt competent to the legislature of the Province of Alberta, subject to the restrictions of s. 21 of the Alberta Act, to determine the tenure of land in that province and to amend the law of descent, it cannot deal with either of these matters so as to affect the rights by that section reserved to the Crown in right of the Dominion, including *inter alia* the right of escheat. In so far as it may purport to do so c. 5 of the Alberta Statutes of 1915 is *ultra vires*.

I would, for these reasons, dismiss this appeal with costs.

BRODEUR, J.—*(Dissenting.)*—For the reasons given by Mr. Justice Idington, I am of opinion that this appeal should be allowed with costs throughout.

Appeal dismissed.

SUPREME COURT OF CANADA. 24TH OCTOBER, 1916.

CARRUTHERS & CO. LIMITED v. SCHMIDT.

Brokers—Purchase and Sale of Grain on Exchange—How Proven?—Mandate—Statute of Frauds—Arts. 1233 & 1235 C. C.

Authority of broker:—A contract between a client and his broker on the Montreal Corn Exchange is one of mandate and can be proven by parol evidence, and the sale and purchase of grain by the broker under that mandate is not a sale of goods within the meaning of Art. 1235 C. C.; it is a commercial matter within Art. 1233 C. C. and may be established by parol evidence.

Appeal by the plaintiffs from a judgment of Quebec Court of King's Bench, Appeal Side, (24 Que. K. B. 151; 24 D. L. R. 729) affirming the trial judgment of Weir, J., dismissing plaintiffs' action.

The appellants claimed that they bought and sold a certain quantity of oats for the respondent under his instructions; and that the net result of the transactions was a loss of $24,317.63, which they claimed from the respondent.

The respondent admitted some of the transactions but denied others, and claimed that the transactions which he had authorized resulted in a profit instead of a loss.

Weir, J., ruled that the transactions were sales of goods and under Art. 1235, which corresponds to the 4th section of the Statute of Frauds, and the plaintiff could not prove his case by parol evidence.

This judgment was affirmed by a majority of Quebec Court of King's Bench, Appeal Side, (Trenholme and Cross, JJ., dissenting.)

The appeal to the Supreme Court of Canada was heard by Fitzpatrick, C.J., Davies, Idington, Anglin and Brodeur, JJ., on the 2nd and 3rd May, 1916.

R. C. Smith, K.C., (Montreal) and *Geo. H. A. Montgomery, K.C.*, (Montreal) for the plaintiffs, appellants.

Hon. Albert W. Atwater, K. C., (Montreal) for the defendant, respondent.

THE CHIEF JUSTICE—The only point for our decision in this case is whether the plaintiff, the present appellant, was entitled to give oral evidence as to the transactions which the respondent commissioned it to carry out on his behalf.

In a number of similar cases including the case in the Privy Council of *Forget* v. *Baxter* [1900], A. C. 467, it has been pointed out that the onus is upon the plaintiff to prove, first, a mandate from the defendant to act for him in the several transactions which the plaintiff claims to have carried out on his behalf; and secondly, the due execution of that mandate.

Articles 1233 and 1235 of the Civil Code, which are both in Section III of Chap. 9, are, so far as is material, as follows :—

1233.—Proof may be made by testimony

(1) Of all facts concerning commercial matters

(7) In cases in which there is a commencement of proof in writing.

In all other matters proof must be made by writing or by the oath of the adverse party.

The whole, nevertheless, subject to the exceptions and limitations specially declared in this section and to the provisions contained in article 1690.

1235.—In commercial matters no action or exception can be maintained against any party or his representatives unless there is a writing signed by the former, in the following cases. * * *

(4) Upon any contract for the sale of goods unless the buyer has accepted or received part of the goods or given something in earnest to bind the bargain.

As stated by the learned Chief Justice delivering the judgment appeal from, it has been held by the Courts of the province of Quebec in similar cases that though the broker's authority may be proved by verbal testimony, yet article 1235 requires the purchase made thereunder to be proved by writing. I must with reluctance dissent from the latter of these propositions. The Chief Justice quotes the late Judge Cross saying in in the case of *Trenholme* v. *McLennan*, 24 L. C. J. 305.

The plaintiff as a broker could by a written contract, made out and evidenced by his own signature, bind two parties to a sale made by the one to the other through him, but when he attempts to bind one of the parties to himself, he requires, besides the verbal testimony as to his instructions, written evidence to establish the purchase, and this he cannot make for himself as against the party who instructed him to effect the purchase.

Article 1235 does not, however, say that there must be written evidence to establish the purchase; it says no action can be maintained against any party upon any contract for the sale of goods unless there is a writing signed by him. Now what writing can it be suggested the respondent could have given in a case like the present. No writing by him could be required for the purpose of the purchase which he had authorized the broker to make. Article 1235 is really only effective when the relations between the parties are those of seller and buyer and there is here no dispute between such; it is a question between principal and agent. Again I think it is necessary to distinguish between proving the purchase and proving the contract for sale; article 1235 is referring to executory not executed contracts such as are here in question.

I am assuming that the facts are as above stated and I desire to add that this judgment applies in such case. I say this because though I have not gone at any length into the facts of the case, yet I see that in paragraph 22 of the Amended Declaration it is alleged that on the arrival of a quantity of oats at Montreal

"the defendant failed to take delivery and to pay therefor".

Any case in which the respondent is sued as a purchaser for failure to carry out his contract is governed by article 1235 and is not covered by this judgment.

Subject to this reservation I am of opinion that it was competent to the plaintiff appellant to give oral evidence under the provisions of article 1233. The appeal must be allowed and the action referred back for further hearing and decision.

DAVIES, J.,—Concurred with Anglin, J.

IDINGTON, J.,—In an action like this by a broker for services rendered to a client in buying and selling grain for him, I do not think the article 1235 must necessarily have any application.

The action is not within the express language of the Act. It relates to executed or alleged executed contracts wherein the delivery not only of the part but of the whole has taken place within the meaning of what such parties as those concerned herein attach to the word.

It is not suggested that there has been any failure of respondent to reap what he bargained for by reason of any default on the part of the appellant to procure the contracts or

any of them in writing. I can conceive of a broker in failing to get for his client a written contract thereby leading him to make a loss. In such a case the question might come up under Art. 1235. There seems nothing of that sort in the alleged transactions in question. They have all been fully executed or their existence denied.

There is nothing illegal in carrying on business by means of a mere oral bargain. People may be foolish in not reducing their contract to writing, but the contract once executed it matters not in the commercial world whether in fact reduced to writing or not,

I think the appeal must be allowed with costs.

ANGLIN, J.,—With very great respect I am of the opinion that there has been in this case a misconception of the purview and effect of Art. 1235 (4) C. C. which reads as follows:—

> 1235. In Commercial matters in which the sum of money or value in question exceeds (fifty dollars), no action or exception can be maintained against any party or his representatives unless there is a writing signed by the former, in the following cases:
>
> * * *
>
> Upon any contract for the sale of goods, unless the buyer has accepted or received part of the goods or given something in earnest to bind the bargain.''

It should be noted that although this provision deals with contracts for the sale of goods it is in the form of the fourth section of the English Statute of Frauds, (no action shall be brought etc.) rather than in that of the old 17th section (''no contract shall be good''). The distinction in effect between these two provisions is illustrated in the well-known case of *Leroux* v. *Brown*, 12 C.B., 801. An action such as this to recover an agent's commission on a sale of goods is not, in my opinion, an action upon the contract for the sale and therefore is not within clause 4 of Art. 1235. Moreover, while it might be a defence to such an action that the contract made by the agent on behalf of his principal was unenforceable because it was not provable under Art. 1235 and that the agent had therefore not earned his commission, no such question can arise in the case of an executed contract such as that with which we are dealing. Indeed in an action upon the contract itself, where it has been executed, the statute will not afford a defence. *Green* v. *Sad-*

dington, 7 E. & B. 503, *Seaman* v. *Price*, 2 Bing., 437; Addison on Contracts, 11th ed., p.26; 4 Amer. & Engl. Encyc., p.982. I am unable to distinguish the decision of the Court of King's Bench in *Trenholme* v. *McLennan*, 24 L. C. J., 305, and I am, with great respect, of the opinion that it must be overruled.

The appeal should be allowed with costs.

BRODEUR, J.,—The appellants are brokers and members of the Montreal Corn Exchange and they claim from the respondent a sum of nearly $25,000 for the difference between the purchase and the sale price of oats made by them on behalf of the respondent.

The only question at issue before this Court is the admissibility of parol evidence.

The trial Judge decided that the transactions could not on the authority of Art. 1235 of the Civil Code and of a judgment rendered by the Court of Appeal in a case of *Trenholme* v. *McLennan*, 24 L. C. J. p. 305, be proved.

That decision of the trial Judge was confirmed by the Court of Appeal, Messrs. Justices Trenholme and Cross dissenting.

The appellant claims that the relations of the parties are those of principal and agent and not of vendor and purchaser and that the Statute of Frauds does not apply but that that question of evidence is ruled by the provisions of Article 1233 of the Civil Code.

There is no divergence of opinion between the parties as to the evidence of the contract of agency. They all admit that the plaintiff could prove by oral testimony the contract by which he was commissioned to buy and sell the goods in question. *Forget* v. *Baxter* [1900], A. C. 467, is authority for the proposition that the transactions by a broker in respect of sales and purchases of shares are "commercial matters" within Art. 1233 of the Civil Code and might be established by parol evidence.

In the case of *Trenholme* v. *McLennan* so much relied upon by the respondent the same proposition was also declared.

There is then no question as to the right of the plaintiff to prove by oral evidence his contract of agency.

But it is contended that if the transactions of the agent cover sales of goods, then a written contract or a memorandum as required by Art. 1235 (4) of the Civil Code or the Statute of Frauds is required.

I must say, at first, that the relations of the parties are not those of vendor and purchaser but those of principal and agent.

It is not alleged in the action that the plaintiff sold to the defendant some goods, but that the plaintiff in execution of his mandate bought and sold goods on behalf of the respondent. If the plaintiff can prove by witnesses that he was duly authorized or instructed by the defendant to purchase and sell oats it seems to me that he has established all the facts which are necessary for the existence of their contractual relations. I do not see how it is possible to separate those relations.

The Statute of Frauds and the provisions of Article 1235 provide that in commercial matters no action can be maintained unless there is a writing signed by the defendant upon any contract for the sale of goods. It has reference to actions taken by the vendor against the purchaser; but it has no reference to instructions or mandate given by a person to purchase goods.

It is a well established rule of law that authority for an agent to sign a memorandum need not be given in writing. It may be given in any way in which an authority is conferred by law on an agent. It has been decided in England in a case of *Rochefoucauld* v. *Bonstead*, 1 Ch. D. 196 that an agent to whom land purchased on behalf of his principal has been conveyed will not be permited to plead the statute against the principal for whom he is a trustee and the latter may give parol evidence of the trust.

Applying that decision to the facts in this case, it shews that Schmidt could by parol evidence establish that those sales of goods were made on his behalf. If he can prove that himself by parol evidence, why should not the plaintiff have the same power and authority?

I have given much consideration to the case of *Trenholme* v. *McLennan* and especially that part of the judgment where it is stated that the plaintiff as a broker could by a written contract made out and evidenced by his own signature bind two parties to a sale made by the one to the other through him; but when he attempts to bind one of the parties to himself, he requires besides the verbal testimony as to his instructions, written evidence to establish the purchase and this he cannot make for himself as against the parties who instructed him to effect the purchase.

What are the instructions which the broker received and which he has proved? It was to buy and sell goods for the principal. That was the contract alleged; that was a contract proved and I do not see how those instructions can be disjoined as it has been done in that case of *Trenholme* v. *McLennan*.

I may add that this question has also come up before the Courts in the United States and they have invariably decided with one exception that the oral evidence could be made of the mandate alleged by the broker. *McFarlane* v. *Lillard*, 2 Ind. App. 160. *Holden* v. *Starks*, 159 Mass. 503. *Bibb* v. *Allen*, 149 U. S. 481. But see *Wilson* v. *Mason*, 158 Ill. 304. American and English Encyclopædia of Law, 2nd Ed. p. 984. The fact that the contract entered into by the parties is not enforceable under the Statute of Frauds because not in writing does not affect the right of the broker to recover for his services.

I am of opinion that this appeal should be allowed with costs of this Court and the Court below and that the plaintiff should be permitted to adduce verbal evidence of the alleged mandate and of its execution.

Appeal allowed with costs.

APPELLATE DIVISION, S. C. O. 3RD NOVEMBER, 1916.

RE WATSON & CITY OF TORONTO

Expropriation—Compensation—Sufficiency of Amount Awarded —Findings of Abritrator—View of Premises by Arbitrator—Reasons for Award — Municipal Arbitration Act, R. S. O. (1914) c. 199, s. 4—Appeal to Increase Amount Awarded—Onus on Appellant—Evidence of Value—Advocate-Witnesses—Conflicting Opinions—Speculative Value—Bonus over full Compensation—Cases not Authoritative.

Advocate-witnesses: — The evidence of advocate-witnesses, who are carried away for the cause of the side on which they are enlisted, is not entitled to any special weight: An Appellate Court is mainly concerned in what the lands could have been sold for at the time they were expropriated, and a ton of conflicting interested opinions as to value, is less helpful to an Appellate Court in fixing compensation, than an ounce of dependable facts.

Bonus over compensation: — In awarding compensation for lands expropriated only full compensation should be allowed; there is no justification for adding anything in the nature of a bonus for compulsory taking.

Market value:—The price paid for one lot on a quiet market may well prove the value of others just like it, but a single sale on a boom market does not prove the value of adjoining lots.

Speculative lands: — Where lands are held solely for the purpose of making money out of them, on a sale or sales of them, the question to be determined is, how much would they have brought by sale, if sold to the best advantage, at the time they were expropriated.

Reasons for award: — Municipal Arbitrations Act, R. S. O. (1914) c. 199, s. 4, requires that where an arbitrator proceeds to make his award partly on view or upon any special knowledge or skill possessed by himself, he shall state such matters in his reasons for his award sufficiently full to enable an Appellate Court to determine the weight to be attached thereto, but when this is not done it is not a ground for setting aside the award; In such a case the appeal should be held over and the matter referred back to the arbitrator to allow him to supplement his reasons.

Cases not authoritative:—All cases as to compensation for lands expropriated depend so much upon questions of fact that any other case is of but little authoritative value: Each case must be decided upon its own facts, and care must be taken not to decide any case upon the facts of some other case.

Inadequacy of compensation: — When an Appellate Court is asked to increase the amount of compensation awarded by an arbitrator, for lands expropriated, the onus is upon the appellant to convince the Court of the inadequacy of the amount allowed by the arbitrator.

Appeal by a land owner, T. H. Watson, from an award of P. H. Drayton,, Official Arbitrator for the City of Toronto, dated 22nd December, 1915, allowing the appellant $52,550 as full compensation for lands expropriated by the City of Toronto for public park and boulevard purposes.

The appeal was heard by Meredith, C.J.C.P., Riddell, Lennox, and Masten, JJ., on the 16th October, 1916.

I. F. Hellmuth, K.C., and *J. W. Bain, K.C.*, for the appellant

Irving S. Fairty, and *C. M. Colquhoun*, for the respondent city.

MEREDITH, C.P.C.P.---This is a land owner's appeal against an award, made by the Official Arbitrators for the City of Toronto, fixing the compensation to be paid by the Corporation to him for lands taken by them, from him, for public park purposes.

The arbitrator is one who, if it be true that experience teaches, ought to be well-educated in the subject of land values in and about Toronto; from teaching not only had in his office of Official Arbitrator, though that has been great, but also, and doubtless more so, in his office of head of the Court of Revision, under the Assessment Act, of the same municipality and as some evidence that he is not quite onesided in his judgment of values it is but fair to say: that at least as many appeals come to us, from his awards, on the ground of overestimation of values as of underestimation of them.

Then the testimony given in the arbitration proceedings, in so far as it related to estimations of value, was of even more than the usual divergent character, running to extremes which seem to me to be well described by the word "wild."

The arbitration also was one of more than even the usual protracted character of arbitrations in which "potentialities," expectations, dreams, or whatever else they may be called, are made to absorb the whole, or the greater part, of the attention of those concerned: the arbitrator had several views of the place and all its surroundings; and has dealt with, in a thorough manner, all the evidence adduced and all the contentions made on each side, even some which seem to be of a far-fetched character.

In these circumstances we are asked, in the midst of conflicting opinions pretty evenly balanced as to value, to greatly increase the compensation awarded, and that we are asked

upon a number of grounds, which, as it seems to me, may be all comprised in the single demand for more, because the arbitrator has not given enough. Certainly, if upon the whole evidence, properly considered, as we must consider it whatever the arbitrator may have done or left undone, if anything, we are unable to say that the compensation awarded is inadequate then this appeal must be dismissed. The onus of convincing us of inadequacy is upon the appellant.

The main contention made for the appellant seems to me to be this, in short: that the arbitrator ought to have accepted the testimony of the appellant's main witness, and to have based his award upon it: but giving the fullest credit to this witness for sincerity, I am unable to preceive any very substantial reason for according any special weight to it: it is self-evident that the witness was an advocate-witness: and, as it seems to me, he was a witness carried away by his enthusiasm for the cause of the appellant in whose service he was enlisted: and it may be added services, in another case, recently before us, he in evidence excused the neglect of his own business, by his interest and services in this abritration. But it does not need any such circumstances to prove his enthusiasm for the appellant's cause.

On the other hand one of the main witnesses, of the land agent witness character, was a gentleman very largely interested pecuniarily and in spirit, in the public parks scheme of which the taking of these lands forms a part; and a very important part so far as this witness is concerned, because the land in question lies on each side of a highway lying between the splendid High Park of the municipality and the Humber river, a highway running through lands in which this witness is very largely personally concerned; and the lands in question so lying at the head of that highway—its portal—would give to the highway a bad "pair of black eyes" if, instead of being "beautified" for park purposes, they should be turned into grimy factory grounds.

As I have said, the opinions as to value were pretty evenly divided, and some of them go to extremes for which there is really no foundation except perhaps in dreams or desires: and, that being so, it is out of the question for us to interfere with the award upon such evidence only. Conflicting, evenly divided,

evidence a ton of which seems to me to be less helpful than an ounce of dependable fact.

Then apart from such evidence, what is there to go upon: there are a number of indisputable facts of more or less weight which make against the appellant: such as the price he paid for the lands in question, and other lands, not many years ago, a price which was a "mere song" in comparison with the sum he asks us to award him; such as the assessment of the lands always at a "mere song" value from the time of his purchase until they were taken for park purposes, as I have mentioned; such as that the only evidence given of any offer for, or proposed sale of, the lands in question, being evidence of an offer to sell to the respondent's witness, to whom I have referred as being so much interested in the acquisition of the land, at $1,000 an acre, less than one-fourth of the sum per acre awarded, and an offer which he declined at that price. The appellant denied that he was a party to that offer, but whether he was or not what difference does it make, we are not so much concerned with what the appellant offered or did not offer, we are mainly concerned in what the lands could have been sold for, and this offer being one made and rejected in good faith, it shews that at that time the man who most wished, and wanted it would not give $1,000 an acre for it: such as, though for several years before being taken by the respondent, it was placarded "for sale" by a Toronto land agent without having induced a bid of any kind, for the purchase of it or any inquiry respecting it, except from two boys who wished to "camp" upon it for a short time: it is quite immaterial that the owner did not give his consent to his lands being so offered for sale; the offer as an inducement to communications with the land agent respecting the purchase of it was just the same: and if a desirable purchaser had been thus procured the sale would have been made just the same; and such as the need of extensive and costly filling in and protection against flooding, work needed before the lands would be useful for any money-making purpose.

These facts seem to me to go a long way towards a complete answer to the contentions made for the appellant; such contentions as: that the lands in question were admirable sites for factories; and were really the only sites available at the time when they were taken by the respondents. With me

it is another case of an ounce of fact outweighing on overflow of conflicting interested opinions as to value. In saying interested opinions I intend to embrace land agents generally, whose interests are best served by high prices, even though bubble prices, and activity in land speculations. If these sites were all that were then left to the great, for Canada's, industrial city of Toronto, how is it possible that they were not sought for: that, though advertised, no enquiries regarding them were made? It is but a fanciful notion, quite devoid of any foundation in fact or in reason. As long, and as frequently, as factories come, places will be found for them at reasonable prices. No one has ever heard of the desire for, or the straining after, new factories having been crushed or curbed by want of sites. The conversion of the Ashbridge's Bay lands, in Toronto, into such sites is some evidence of this fact: a conversion about to be undertaken when these lands were acquired by the corporation and which lands, if they had not been taken by the corporation, would have left the locality open to private enterprise.

A still more unsubstantial contention is made in regard to the money-making adaptability of these lands to private enterprise, places of amusement. There is said to have been one in Toronto until very recent years, when another on the outskirts entered the field, but failed. I am obliged to say that contentions such as that, in the circumstances of this case, seem to me to be but a waste of time: and the more so as the value of the lands for such an exceptional purpose is about the same as that for the common and general purpose of industrial enterprise.

Then it was said that the arbitrator had taken an isolated case of a sale in a different locality as his sole guide in fixing compensation in this case. If he had done so, in this case and all its circumstances and evidence, I should have felt obliged to say that experience does not always teach wisdom. But no one knows better than this official referee how little generally, and how much very occasionally, a single sale may prove. Those who lay out lands into town lots do not always luxuriate in the wealth which the sale of all of them, at the same price as one may have brought, would have given them; whilst on the other hand, in a quiet market the price of one lot may well prove the value of another or others just like it. That which

the appellant contends that the arbitrator did, I have stated: that which the arbitrator did was: to state that the sale of the Kodak lands, which were further away from the lands in question than the lands embraced in another sale he was discussing, might be "looked at as having some bearing on at any rate the value of the easterly portion" of the "lands in question:" and in saying that he said something to which no reasonable objection can be made.

These observations apply also to the appellant's contention that the price of the Chapman land should be the guide. Very far from overlooking this transaction the arbitrator gave it due consideration, mentioning it in his reasons for his award: and, having been as I understood counsel to say, one of the arbitrators in fixing the price of that property he was especially well-qualified to determine how much bearing that transaction should have upon the question of value involved in this case.

It was said for the appellant that everything that happened affecting the value of the lands after they were taken must be excluded in fixing the compensation, and the arbitrator seems to have firmly held to that view: so I desire merely to say that it may, and should not, be carried too far. In case of reinstatement it may not be applicable. But this case is not one of this character, these lands were held solely for the purpose of making money out of them on a sale or sales of them, so the question is how much would they, sold to the best advantage, with all their possibilities, have brought by sale at the time when the respondents took them: and there being no market price proved or provable it is quite proper to take into consideration, for what it may be worth, the fact that many persons at that time believed that that which has happened since, and which greatly affects the saleable character of the lands, would happen as promulgated, belief which may have affected the price of land.

The abritrator went very carefully and fully into the subject of expenditure needed to make the lands in question suitable for factory sites; and he made an estimation of it with which I am unable to find fault, in the appellant's favour: but, on the other hand, he seems to me to have failed to take into consideration two things of some importance: the cost of maintaining a breakwater or dyke against river floods, and the pos-

sibility of flooding over or through the dyke or breakwater such as sometimes happens in this Province.

My own impression, from all the evidence, is that the appellant's greatest aid in increasing the value of his lands was the need of them for the purposes to which they are about to be put; and I cannot help saying that he has had the benefit of that aid to the fullest extent in the high price he is to get in the compensation awarded to him.

Upon the whole case I can find no good reason for saying that the appellant should have been awarded greater compensation: and so would dismiss the appeal.

Since the foregoing opinion was written, through the courtesy of the Chief Justice of Ontario, our attention has been drawn to several cases of appeals against awards of compensation for lands taken under the provisions of the Railway Act and we have been furnished with copies of the opinions of the Judges of the Supreme Court of Canada expressed in them; but they do not seem to me to require any change in the views already expressed by me in this case: and I mention them mainly so that it may plainly appear that, though not referred to upon the argument, nothing that was said in them has been overlooked.

All cases such as this depend so much, if not altogether, upon questions of fact, and so any other case is of little, if any, authoratative value: each must be decided upon its own facts, and care must be taken not to decide any case upon the facts of some other case in attempting to follow, or to give effect to, the views expressed by some other Court or Judge.

The general principles applicable to the fixing of compensation for lands taken are well settled, no difficulty lies in that direction; much difficulty generally lies in the estimation of such compensation amidst a great diversity of facts and circumstances, possibilities and probabilities and the widest of conflicting opinions as to value.

There can be no doubt as to what our powers and duties are upon an appeal such as this: they are fixed by statute and cannot be added to or taken from by opinion or adjudication. An appeal lies against such an award as this just as if it were an appealable judgment of a Judge, and in order that the Appellate Court may deal more fully and better with all questions arising upon the arbitration the official arbitrator is

required to state his reasons for the award he has made, and when the award is based on any special knowledge he may have he must inform the Appellate Court of it so that it too may have, as far as possible, that advantage.

No Court could be justified in giving effect to the arbitrator's judgment without exercising its own judgment on all points involved in the case. No Court could be justified in failing to hear the case as carefully and fully as if it were being heard for the first time: but that in no way prevents or is inconsistent with giving due weight to any advantages the arbitrator may have had over those which the Court may have in coming to a right conclusion, nor from declining to interfere with the award unless well convinced of some error in it.

It was, of course, a slip of the tongue, or of the memory, in saying that the award stands on the same footing as, or should be treated as if, a verdict of a jury. There is no appeal in this Province against the verdict of a jury, there is an appeal against a judgment of a Judge, and against such an award as this, expressly given. There is a wide difference between a verdict and an award.

In regard to the adding of any arbitrary amount to any sum fixed by the arbitrator, it is imposible for me to think that any Judge has expressed the opinion that after full compensation has been allowed, anything in the nature of a bonus addition is to be made to the sum of the full compensation. When power to take lands is given it is usual for someone to contend and urge that something more than full compensation should be paid to the land owner, whether 10, 20, 30, 40, or 50 per cent. but invariably the legislature has refused to sanction any such addition or to allow to the landowner anything but compensation: therefore for the Courts to do so would be legislation, not adjudication, and legislation of a most flagrant character. Even if it could be that any Court should so decree; I cannot see how any juror arbitrator, having regard for his oath of office, could give effect to it, could do otherwise than obey the statute and let the Court take the responsibility of giving the bonus addition.

In the case upon this point to which the Chief Justice has directed our attention I find nothing to warrant a contention that anything more than compensation should be awarded. In that case the arbitrator had added ten per cent. to a sum

estimated by him, not, as I understand it, as a bonus but as part of the compensation and a part not included in the estimated sum; that is to say that, having taken into account certain more easily calculated amounts of compensation, for other things not easily calculated and not included in the calculated amount, ten per cent. was added as a reasonable valuation of these things. In principle that is not wrong: whether right or wrong in that particular case as a matter of fact is unimportant in this case, for in that respect that case has no authoritative effect upon any other.

In this case full compensation has been awarded by the arbitrator; and so there could be no justification for adding a farthing to the amount awarded, unless taken off first for the pleasure of adding it again.

And it should be added that though mentioned in the reasons for appeal the point that ten per cent. should be added was not contended for or even mentioned by either counsel of the two heard on the appellant's behalf. In this case instead of adding anything for contingencies it would be much fairer to take off a large sum, for no one can doubt that had the respondents not taken the lands they would still be on the appellant's hands, burdened with the depressing effect of the war upon land speculations.

And I may add that no rule or practice of adding 10 per cent. or any other fixed amount prevails, or has prevailed in this province; but such method of computation has been more than once disapproved.

A ground of appeal which was both stated in the notice of the appeal and mentioned in the argument was: that the arbitrator had not set out in his reasons for his award the information which section 4 of the *Municipal Arbitrations Act* requires; but the Act does not require it except when the arbitrator proceeds partly on a view or upon any special knowledge or skill possessed by him; and so where not so set out no special advantage in either way is to be attributed him: and if the point had been well taken the case could not be one for setting aside the award but would be one for having it supplemented in that respect.

MASTEN, J.:—This is an appeal from the award of P. H. Drayton, official arbitrator, dated the 22nd day of December,

1915, by which he awarded payment by the City of Toronto to the claimant of the sum $52,550.00, with legal interest from the time of taking possession as full compensation for the taking of the lands and premises in question. The appellant contends that the sum so awarded is insufficient, and seeks to have it increased. The grounds set forth in the notice of appeal are as follows:

"1. That the award is against law and evidence and the weight of evidence.

"2. That the learned arbitrator failed to distinguish between the value of the evidence of properly qualified experts and the evidence of those who undertook to pass judgment upon the evidence that had already been given and who had no knowledge of the conditions and values in the neighborhood of the properties expropriated.

"3. That the learned arbitrator erred in holding that the evidence as to the values of the surrounding property had no bearing on the value of the property expropriated and based his award on the sale price of another manufacturing site situated over three miles away.

"4. That the learned arbitrator failed to pay proper consideration to the fact that the property having a frontage on the Humber river of about 880 feet had a value for amusement purposes, and also failed to even consider the evidence submitted that excursion amusement business could be profitably conducted.

"5. That the learned arbitrator has ignored the evidence shewing the small sum that would be required to be expended (upon the admission of both parties) to make the Watson Property available for industrial or any other purpose.

"6. That the learned arbitrator did not consider the great potential value of the property for industrial purposes nor the great scarcity of such sites at the date of expropriation.

"7. That the learned arbitrator failed to give weight to the evidence as to the enhanced value for either industrial or amusement purposes caused by the large extent of river frontage and did not consider the evidence as to leases and values of river frontage in the immediate vicinity.

"8. That the learned arbitrator failed to give any consideration to the fact that this property at the date of expropriating by-law was practically the only available site for manufacturing purposes with a river frontage.

"9. That he has ignored or has failed to consider the reasonable allowance that should be made, upon the compulsory acquisition of the property against the will of the owner, and that the By-law expropriating said property was passed in pursuance of an Agreement between one, Home Smith, and the City of Toronto, in pursuance of his private scheme.

"10. That the learned arbitrator has ignored every potentiality the property possessed and has erred in suggesting that it would be a long time before the lands would be available for industrial purposes without any evidence before him.

"11. The said arbitrator is a salaried official of the defendant Corporation, being, as he is in fact, the Chairman of the Court of Revision and that since the commencement of this arbitration he has been subjected to various attacks by the Mayor, Aldermen and Officers of the City as is evidenced by the newspaper reports and criticisms published during the progress of the said arbitration and after the evidence was concluded but before judgment was delivered, which attacks were calculated to affect the mind and judgment of the arbitrator and that by reason thereof the said arbitrator has failed to give proper consideration to the evidence adduced and therefore a reconsideration of values is justified."

Were I sitting as the Judge of first instance determining the matter I would, as the evidence at present appeals to me, award to the claimants a larger sum; but that is a very different thing from saying, when sitting in an appellate tribunal, that the award of the arbitrator is incorrect and should be set aside. On the contrary, the opinion at which the arbitrator arrived after viewing the property and after listening at length to all the evidence adduced before him and seeing the witnesses is, considering his extensive experience and local knowledge of values in the City of Toronto, more likely to be right than any opinion I could form by reading the record before this Court.

In the present case the appeal is not based on any misconduct of the arbitrator, on any improper admission or rejection of evidence, nor on any omission to value some element or thing they should have considered, or that the arbitrator has otherwise acted upon some error or wrong principle. On the argument in this Court the appellants contended that the arbitrator misapprehended the true effect of the evidence and the weight which ought to be accorded to the testimony of the various witnesses; and as a particular example counsel urged

that too great weight was given to one particular phase of the testimony (the sale to the Kodak Company) and too little weight attached to another phase of the testimony (the Chapman award). It thus becomes a question of the *quantum* of the award and the weight of evidence in a case where the award must depend upon an opinion or estimate, the amount of compensation not being accurately demonstrable.

The function and duty of an Appellate Court under such circumstances and the principle upon which it acts, has recently been the subject of very considerable discussion in the Supreme Court of Canada, and I have had the opportunity of reading in manuscript some of the judgments upon the matter recently given out, and which are not yet reported in the regular reports. I cannot more accurately express the view which under the circumstances here existing I entertain than by quoting the language of Mr. Justice Davies in the case of *Lake Erie & Northern Ry. Co.* v. *Muir*, S. C. R. That was an appeal from the judgment of this Court increasing the compensation which had been directed by the majority of the arbitrators to be paid by the railway company to Muir. The arbitrators allowed to the claimant the sum of $4,250. This Court did not accept either the award of the arbitrators or that of the dissenting arbitrator, but assessed the damages at $6,897.50. In that case the lands, in the same way as here, were vacant lands. After discussing the facts, Mr. Justice Davies proceeds as follows :

> In a mere question of valuation alone where no legal principal is involved and no legal error shewn, I do not think the Court should, except in a domonstrable case of injustice, substitute their own opinion for that of the arbitrators, more especially in a case such as this where a view and inspection of the lands taken and left seems essential to enable a fair valuation to be made. The Court is to 'examine into the justice of the award given by the arbitrators on its merits and on the fact as well as the law.' *Atlantic North West Ry. Co.* v. *Wood*, [1895] A. C. at page 263.
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> But this does not mean that they are entirely to supersede the arbitrators and to substitute their own valuation for those of the arbitrators in a case where in my humble judgment not possessing the great advantage of a view of the premises, they are not as well able to form as fair and reasonable a valuation as are the arbitrators.
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> In short, as the Privy Council say in the case above cited they are to "review the judgment of the arbitrators as they would that of a subordinate Court in a case of original jurisdiction, where review is provided for".

I confess that sitting here in a Court of Appeal, although I have gone over the evidence carefully and had the advantage of hearing the views of the contestants, ably presented by counsel and explained by maps and plans and coloured sketches, I do not feel myself competent to form a judgment which I should substitute for that of the arbitrators on a mere question of the valuation of a right of access to the river.

The question therefore in my judgment simply resolves itself into a question of *quantum* and as stated by Chief Justice Sir Charles Fitzpatrick in a recent judgment delivered by him in the Appeal to this Court of the *Can. North. Ry.* v. *Billings*, S. C. R. , "In cases of this nature the Court, as in reviewing the verdict of a jury or a report of referees upon questions of fact, will not reverse unless there is such a plain and decided preponderance of evidence against the finding of the arbitrators or commissioners as to border strongly on the conclusive."

He then distinguishes the case of *James Bay Ry.* v. *Armstrong*, C. R. [1909] A. C. 285: [1909] A. C. 624, and proceeds :

It seems to me in considering these appeals now becoming so very numerous from the awards of the arbitrators that in cases where it is not shewn that these arbitrators have erred in omitting to value some element or thing they should have considered, or that they have improperly considered some element or thing they should not, or that they have in their valuation acted upon some error or wrong principle, which satisfies the Court that the award is either insufficient or excessive, the Court of Appeal should not interfere. That is only another way of saying that in a pure matter of the valuation, not involving principles or demonstrable errors the Courts should not substitute their own valuations for that of the arbitrators unless indeed there is such a plain and decided preponderance of evidence against the finding of the arbitrators as to border strongly on the conclusive. And I would the more strongly submit that such rule be followed in cases where the evidence can only be properly appreciated from a knowledge of the locality gained by seeing and inspecting the lands taken and their surroundings.

The views so expressed by Mr. Justice Davies appear to have the concurrence of the majority of the Supreme Court as illustrated by the cases of *Can. North. Ry.* v. *Billings*, S. C. R. ;*Can. North. Ry.* v. *Ketcheson*, S. C. R. ; and *Toronto Eastern Ry.* v. *Ruddy*, S. C. R. ; and to be in accord with the views of the Privy Council as expressed in *Atlantic North West Ry.* v. *Wood* [1895] A. C. 263. In any case they appear to me to be binding upon us in the circumstances of the present case.

The cases above referred to were decided under the Rail-

way Act. In the present instance the authority and jurisdiction of the Appellate Court is determined by the Act Respecting Municipal Arbitrations, R. S. O. (1914) ch. 199, sect. 7, which reads as follows :

> 7. The award may be appealed against to a Divisional Court in the same manner as the decision of a Judge of the Supreme Court sitting in Court is appealed from, and shall be binding and conclusive upon all parties to the reference unless appealed from within six weeks after notice that it has been filed.

In my opinion the principles above laid down in railway cases apply at least as strongly, and perhaps more strongly, to an appeal under The Act Respecting Municipal Arbitrations.

For these reasons, no case having been made which demonstrates in any conclusive manner that the finding of the arbitrator is erroneous, I would base my conclusion on this phase of the appeal upon the plain footing that it is not a case where the Appellate Court ought to interfere with the finding of the arbitrator.

With respect to the possibilities of use of the lands in question as an amusement park, such a use appears on the evidence to be not only less likely but to give to the land a smaller value than their application to an industrial use. Consequently it does not appear to me to advance the plaintiff's case to consider and discuss that phase of the matter.

No doubt the evidence was admissible; but when the lands have been valued on the higher footing I fail to see what advantage can accrue from discussing a valuation on a lower basis.

Two further points remain for consideration.

By their ninth ground of appeal the appellants submit that the learned arbitrator ignored or failed to consider the reasonable allowance that should be made upon the compulsory acquisition of property against the will of the owner. I take it that this refers to what is sometimes known as the ten per cent. rule; that is the method of computing the compensation by first ascertaining the market value of the property and then adding ten per cent. for compulsory taking. That rule appears to have received the sanction of the Supreme Court of Canada in the case of *The King* v. *Hunting, Barrow & Bell*, S. C. R.

But the point was not discussed before us on the argument, and nothing has appeared to indicate that the arbitrator did not apply the rule when computing the allowance which he made.

Lastly, it was argued that the award was bad because the arbitrator viewed the property and failed to put in writing, as part of his reasons, a statement of the facts observed by him and relied on in whole or in part as the basis of his award.

The *Municipal Arbitration Act*, R. S. O. (1914) ch. 199, sec. 4, provides that :

> Where the Official arbitrator proceeds partly on view or upon any special knowledge or skill possessed by himself he shall put in writing as part of his reasons a statement of such matter sufficiently full to allow the Divisional Court to determine the weight which should be attached to it.

In the present case it does not appear whether or not the arbitrator did in fact rely upon any new facts discovered by him when viewing the property. In a case where it appears reasonable to suppose that any advantage would result therefrom, I would think that the determination in appeal should be held over and that the arbitrator should be requested to supplement his reasons; but where the subject matter is vacant land which has, I doubt not, been frequently viewed by every member of this Court, and where, so far as I can see, nothing new can have been gained by the arbitrator on his view, it appears to me to be an idle waste of time and costs to refer the matter back to the arbitrator for any such statement by him.

I would therefore dismiss the appeal with costs.

Appeal dismissed.

PRIVY COUNCIL. 23RD OCTOBER, 1916.

TORONTO ELECTRIC LIGHT CO. v. CITY OF TORONTO.

Electricity — Electric Light — Erection of Poles on Highways — Consent of Municipality — Condition Precedent — 45 Vict. (Ont.) c. 19, s. 2—"Only Upon."

Permissive franchise:—Companies supplying electricity for the purposes of light, heat, and power have under 45 Vict. (Ont.) c. 19, s. 2, a permissive right to conduct electricity through, under and along the streets, highways and public places of the municipality *only upon* the condition precedent of first having entered into an agreement with the municipality by which it shall be authorized so to do upon such terms and conditions as the municipality may impose. Such agreement need not be under seal, but it must be at least a formal agreement as distinguished from mere silent acquiesence or implied consent. The municipality may, however, with absolute impunity, refuse to permit such companies to erect any poles or wires whatever upon the streets, highways, or public places of the municipality.

Appeal by the plaintiffs from a judgment of the Supreme Court of Ontario (Appellate Division), 33 O. L. R. 267, reversing the judgment of Middleton, J., 31 O. L. R. 387, maintaining the appellants' claim to an overhead franchise.

The facts of the case are sufficiently set out in their Lordships' judgment.

The appeal to the Judicial Committee of the Privy Council was heard by Viscount Haldane, Lord Atkinson, Lord Shaw, of Dunfermline, and Lord Parmoor.

Sir John Simon, K.C., I. F. Hellmuth, K.C., (Toronto) and *A. W. Anglin, K.C.*, (Toronto) for the appellants.

Sir Robert Finlay, KC.., and *G. R. Geary, K.C.*, (Toronto) for the respondents.

Their Lordships' judgment was delivered by

LORD ATKINSON—This is an appeal from a judgment of the First Appellate Division of the Supreme Court of Ontario, dated the 15th March, 1915, whereby the judgment of Middleton, J., in favour of the appellant, the plaintiff in the suit, was set aside and it was ordered that, subject to certain declarations therein set out, the action should be dismissed with costs.

The case is not free from difficulty. This is due to a great degree to the fact that some important transactions which took place between the parties to this appeal were not evidenced by nor embodied in formal written instruments.

The appellant company was incorporated by Letters Patent dated the 20th September, 1883, under the provisions of one of the Revised Statutes of the Province of Ontario, entitled " An Act respecting the Incorporation of Joint Stock Companies by Letters Patent," R. S. O. (1877) c. 150, and of "An Act respecting Companies supplying electricity for the purposes of light, heat, and power," 45 Vict. (1882) c. 19.

The Letters Patent purported to confer upon the appellant company the following amongst other powers, namely power—

> To manufacture, produce, use, and sell electric light and power, to erect and construct plant, works, buildings, storehouses, and all other machinery for the production or manufacture of such electric light or power, and to lay down, set up, maintain, renew and remove in and upon and under the streets, squares, and public places of the said city of Toronto all lines, tubes, pipes, poles, posts, and all other apparatus and appliances to enable said company to supply and distribute such electric light and power, to supply electric light or power to such persons, companies, or corporations as may require the same on such terms as may be agreed.

By the second section of the above-mentioned statute (45 Vict., c. 19) it is enacted that—

> Every company incorporated under this Act may construct maintain, complete, and operate works for the production, sale, and distribution of electricity for purposes of light, heat, and power, and may conduct the same by any means through, under, and along the streets, highways, and public places of such cities, towns, and other municipalities but as to such streets, highways, and public places, only upon and subject to such agreement in respect thereof as shall be made between the company and the said municipalities respectively, and under and subject to any by-law or by-laws of the councils of the said municipalities, passed in pursuance thereof.

And by its third section it is provided that sections 50 to 60 and sections 62 to 85 inclusive of an Act of the Revised Statutes of Ontario, entitled "An Act respecting Joint Stock Companies for supplying cities, towns, and villages with gas and water" (1877) c. 157, should be used as part of the above-

mentioned statute (45 Vict., c. 19), the word "electricity" being substituted for the words "gas" or "gas or water" or "gas and water;" and the words "wires or conductors" being read after the words "mains and pipes" or "mains or pipes" where these words occur in those sections. On referring to the sections thus incorporated it will be found that compulsory powers are only conferred upon the company in respect of one or possibly two matters. It can undoubtedly under section 82 enter, if necessary, upon land outside but within 10 miles of the city of Toronto, and erect works thereon without the consent of the owner. Provision is made for arbitration on such occasions, and under sections 56, 57, and 58 the company may possibly have compulsory powers where the different parts of a building belong to different proprietors, or are in the possession of different lessees or tenants, to carry their wires or conduits over the property of one or more of those proprietors or tenants to the property belonging to or in the possession of another, or to break up and cut trenches in passages common to neighbouring proprietors or tenants and to erect works thereon or thereunder, making due satisfaction therefor, but in these two cases alone.

The company, however, is by section 69 prohibited from taking, using, or injuring any house or other building, or land set apart for a garden, orchard, yard, park, paddock, or such like, or from conveying from the premises of any person water already appropriated and necessary for domestic use, without the consent in writing of the owner or owners first had and obtained.

This provision thus incorporated into section 3 of the Act of 1882, touching the consent of the owners in writing required as a condition precedent, may afford some clue to the proper construction of the immediately preceding section of the same Statute dealing with the streets and highways under the control of municipalities.

The incorporation of a company, such as the appellant company, is, in the province of Ontario, by no means a matter of course. By the Ontario Stock Joint Companies' Letters Patent Act R. S. O. (1877) c. 150, the Lieutenant-Governor in Council is empowered to grant a charter to any number of persons, not less than five, who shall petition therefor, consituting them, and such others as may become shareholders in

the company about to be formed, into a body corporate for the purposes mentioned. Of the granting of the Letters Patent notice must forthwith be published by the Provincial Secretary in the "Ontario Gazette." The company so incorporated may, amongst other things, acquire, hold, alienate, and convey real estate subject to the restrictions and conditions imposed by the Letters Patent, and will also be entitled to all the powers, privileges, and immunities requisite for the carrying on of its undertaking as though it had been incorporated by a special Act of the Legislature embodying all the provisions of this Statute.

The appellant company, in exercise of the powers thus conferred upon it, established an extensive system for the distribution of electricity over almost the entire city of Toronto. It supplied current to private customers and to the respondents for the lighting of the street lamps. The system was in 1912 a composite one, partly overhead, partly underground, but intercommunicating. Much the larger part was overhead. It then covered 370 street miles, the wires being carried on 15,705 poles erected on the streets and public places of the city. These polls, the greater number of which were owned by the appellant company, the remainder used by it with the permission of their owners, carried 1,450 miles of wire. In the great majority of cases each of the poles carried wires supplying current for domestic lighting and power and also wires for street lighting. In a minority of instances the poles and wires were used for one service only, sometimes for street lighting alone, sometimes for domestic service alone.

The underground system at this period consisted of about 350 miles of single conduit laid in 28 to 30 street miles. Many of the circuits of the company are in part overhead and in part underground. At many points the overhead conductors feed the underground, and at many others the process is reversed. The two systems were in 1912 so interlaced, as it was styled, that if the overhead construction were removed, the underground, in some instances, would have no connection with the terminal stations or sub-stations of the company or with any source of power. It was not disputed that the cost of contructing underground conduits so far exceeds that of carrying wires overhead upon poles, that having regard to the prices obtained for current, the former system is only commercially possible of

adoption in a limited and favoured area in the city of Toronto where customers are both large and numerous. In this state of things the respondents, on the 6th February, 1912, passed a resolution, denying amongst other things, (1) the right of the appellant company to lay any underground conduits outside the limits of the city of Toronto as they existed on the 13th November, 1889, and (2) its right to construct pole lines within the city save for the purpose of implementing its contract with the respondents themselves for street lighting. They followed this up about the middle of October, 1912, by preventing by force the appellant company from erecting additional poles and wires, and also cut down and removed certain poles and wire, part of the appellants' overhead system, which had been erected and were in actual use for some three years previously. Thereupon the action, out of which this appeal arises, was on 26th October, 1912, instituted, claiming an injunction restaining the respondents, their servants, agents, and workmen from cutting down, removing, or otherwise interfering with the poles and wires of the appellant company situate on the street and other public places in the city of Toronto, and also claiming damages and further relief.

On the 26th October, 1912, an interim injunction in the terms of the claim was granted by Middleton, J. It was on the 4th November, 1912, continued by him till the trial; and on the hearing of the case was by the order of that learned Judge, dated the 14th May, 1914, made perpetual. It was referred to the Master in Ordinary of the Court to ascertain the amount of damages sustained by the appellant company by reason of the acts complained of.

On appeal from this judgment to the Appellate Division of the Supreme Court of Ontario, that Court, Garrow, J. A., dissenting, delivered judgment allowing the appeal, and by their Order dated the 15th March, 1915, set aside the judgment and order appealed from, and declared that, save in the cases therein specified, the appellant company had not any right to use any street, highway, or public place within the limits of the city of Toronto, as they then were or might thereafter be constituted, in order to conduct electricity for the purpose of supplying light, heat or power. Nor any right to erect, construct, maintain, complete or operate in, along, over, or upon any of the said streets, highways, squares, or public places any

pole, wire, line, tube, pipe, post or other apparatus or appliance whatever for the purpose of conducting electricity. The exceptions mentioned are three in number. First, the right to erect poles and wires for the distribution of electricity on the aforesaid streets and public squares, and public places secured to the appellant company by the terms of an agreement dated the 30th August, 1883, entered into by the respondents and one George D. Morton. Second, the rights secured to it by the provisions of certain agreements made during the years 1901 to 1911 inclusive, giving special permission to erect poles and string wires thereon for certain purposes on certain parts of certain streets or public places in the city of Toronto. And, third, the right under the terms of an agreement made between the appellant company and the respondents, dated the 13th November, 1889, to construct, lay down, and operate, &c., certain underground wires and conduits in any of the streets, lanes, parks and public places in the said city for the distribution and supply of electricity and also the right to distribute the same thereby.

The question for the decision of the Board is in effect which of these two orders, that of Middleton, J., or that of the Appellate Division is right. To determine that question it is necessary, in the first instance, to decide what is the true meaning of the words: "Only upon and subject to such agreement in respect thereof as shall be made between the company and the said municipalities respectively," as used in the second section of the statute of 1882 (45 Vict., c. 19). It is admitted by the respondents that this agreement need not be under seal. It is not expressly required even to be in writing. They contend, however, rightly their Lordships think, that it must be at least a formal agreement as distinguished from mere silent acquiescence or implied consent, and the one thing apparently certain about it is that by the use of the words "only upon" its existence is made a condition precedent, which must be fulfilled by the company before it becomes entitled to enter upon the streets and public places of the city to construct its works.

A provision somewhat analogous to this is to be found in the 69th section of the Act of 1877, incorporated into the third section of the Act of 1882, dealing with the owners of private property. It enacts that "nothing contained in this Act shall authorise any such company, or any person acting under the

authority of the same, to take, use, or injure for the purposes of the company, any house or other building or any land used or set apart as a garden, orchard, yard, park, paddock, plantation," etc., or "convey from the premises of any person any water already appropriated and necessary for his domestic uses without the consent in writing of the owner or owners thereof first had and obtained." The owner or owners could, of course, attach any conditions they pleased to their consent. It would be strange indeed if the second section of this Statute should confer upon municipalities, in respect of the streets and highways over which they had authority and control, protection altogether less effective than the succeeding section confers on the owners of the hereditaments thus mentioned, and that silent acquiescence or implied permission should be held sufficient to satisfy section 2 but insufficient to satisfy section 3. By holding that the actual making of a formal agreement is a condition precedent in the first case, just as the obtaining of consent in writing is a condition precedent in the second, the two sections are made to harmonise, and the construction which makes them do so is, in their Lordships' opinion, the true construction of the Statute.

It is next necessary to determine what is the character of the rights and powers, the nature and width of the so-called franchise conferred upon the appellant company by the Letters Patent and this Statute of 1882 taken together. Upon this point the parties are at right angles. Sir Robert Finlay contends on behalf of the corporation that, whatever the nature of the agreement mentioned in section 2 of this Statute, his clients have an absolute right to prohibit and prevent the company from constructing, maintaining, or operating any works under, along or upon the streets, highways, or public places of the city of Toronto for the production, distribution, or sale of electricity for any purpose whatever. While Sir John Simon contends on behalf of the company, on the other hand, that the franchise which it possesses entitles it to do all these and the other things mentioned in the Letters Patent and this Statute, and that the right of the respondents is confined to merely prescribing and regulating the mode and manner in which the franchise is to be exercised and enjoyed. He insists, that should the respondents absolutely refuse to permit his clients to exercise their so-called franchise, they could, by suit at law, restrain the corporation

from so doing, and compel them to confine themselves to their proper function of merely regulating the mode and manner in which the franchise should be exercised and enjoyed. That contention appears to their Lordships to mean, in effect, this: That the powers conferred upon the company are, in relation to this matter, really compulsory. But it is admitted that the Letters Patent do not, *per se*, confer compulsory powers; that they are only enabling in character and merely determine what is *intra vires* of the compay, as would a memorandum of association determine it in this country in the case of a limited liability company under the Companies Act. The language of section 2 of the Act of 1882 is permissive, not compulsory. It provides that companies incorporated under that Act "*may*" construct, maintain, complete, and operate works, etc. And by the Interpretation Act of Ontario, R. S. O. (1877) c. 1, it is provided that in any of the Revised Statutes of Ontario the word "shall" is to be construed as imperative, the word "may" as permissive, when not inconsistent with the context and object of the particular Statute. Again, some of the sections of the Act of 1877, incorporated into the 3rd section of the Act of 1882, confer, as has already been pointed out, compulsory powers; but these powers are confined to the matters already mentioned. In no other cases have the company compulsory powers.

Their Lordships cannot, therefore, find anything in the Act of 1882 which would require the word "may" in the 2nd section of that Statute to receive other than its permissive meaning. The very fact that special provision is made in the 82nd section of the Act of 1877 for dispensing with the consent of the owner of land outside the city and referring the matter to arbitration, furnishes a strong argument for holding that in all other cases the powers of the company are not compulsory. On the whole, their Lordships are of opinion that the Letters Patent, coupled with the Statute of 1882, confer upon the respondents the right to refuse, with absolute impunity, to permit the appellant company to erect any poles or wires for the production, distribution, sale, etc., of electricity on the streets, highways, or public places in the city of Toronto; and that the contention of the company on this point cannot be sustained. These conclusions necessitate a brief examination of the dealings of the appellant company and the respondents touching the

supply of electricity to the city of Toronto from the year 1883 to the date of the removal of the poles of the former in the year 1912. The agreement of the 30th August, 1883, mentioned in the order appealed from, was made between the respondents and promoters of the appellant company, and was adopted by the company after incorporation. It begins with a recital that the promoters had applied for a charter of incorporation of a company under the name of "The Toronto Electric Light Company" but that same had not yet been granted; that the promoters were the provisional directors to be named in the charter of incorporation when issued; that they were desirous of making all provisions and agreements necessary to enable them to proceed with the erection of poles and wires and all other apparatus for supplying electric light on the streets and public places, and in buildings, public and private, in the city of Toronto, so that the same might be in operation during the Annual Exhibition of the Industrial Exhibition Association of Toronto; and that they had applied to the respondents for permission to erect such poles and wires in the public streets and places of the city as might be necessary for those purposes. It then further recited that the respondents had held a meeting, and on the 6th August passed a resolution that permission be granted to the Toronto Electric Light Company to erect poles and wires temporarily, for the purpose of testing the electric light, within an area about 1 square mile in extent, bounded as therein described, upon condition that the poles be erected under the supervision of the city engineer, be not less than 150 feet apart and 30 feet high, and that they and all other appliances and apparatus erected on any of the public streets and places within the described area should be subject to removal after three months' notice from the respondents, until otherwise provided by special agreement. And it then provides that the permission be given to erect these poles and other apparatus within the area described for the purposes mentioned in, and in conformity with the terms of, the resolution; and that the respondents should allow the Toronto Electric Light Company, when incorporated, to erect, subject to the provisions and conditions therein contained, "upon or in the public streets, squares, and other public places within" the aforesaid area, all such poles, wires, and other apparatus as the company might require for the purpose of

lighting such streets, squares, public places, and public and other buildings within the same. It lastly provided that that agreement was only an interim agreement until the appellant company should receive its charter of incorporation, and should have duly executed an agreement similar to the present one in all its terms and conditions.

The appellant company having been incorporated on the 23rd September, 1883, in the month of December 1883 applied to the respondents, through their Fire and Gas Committee, for permission to erect poles within the area of the city for electric lighting purposes, and where necessary to replace those already erected with poles of greater height. This Committee made a report on this application recommending that permission should only be granted to place poles on Front Street as far west as Bathurst Street "on the same terms and conditions as the privileges already accorded" to the company. The respondents adopted this report with some amendments (not disclosed in the record), and an extract from it containing its substance was on the 13th December forwarded by the city clerk to the appellant company with an intimation that the respondents had adopted the report of their Committee. Now stopping there for a moment it is, in their Lordships' view, clear that the right asserted by the respondents in these early transactions with the appellant company was the absolute right to give or withhold permission for the erection on the streets, squares, and public places in this city of all poles and other appliances for the supply or distribution of electricity for the purposes of lighting the streets or any buildings, public or private, and to have any of these poles when erected removed when they so desire, on giving three months' notice. The appellant company do not appear to have ever challenged this right or asserted, as is now asserted on their behalf, that the right and power of the respondents was confined to the mere regulation of the mode and manner in which the company's franchise should be exercised. The requirement that poles actually erected should be removed without any permission being given to replace them with others seems inconsistent with the limited authority now contended to belong to the respondents, but is quite consistent with the absolute power they claim to possess. On the 8th March, 1884, less than six months after the incorporation of the appellant company, the respondents advertised for tenders for light-

ing the streets of the city. On the 28th March, 1884, the appellant company, in answer to this advertisment, sent to the chairman of the respondents' Fire and Gas Committee a tender for the work mentioned. That tender was on the 30th August accepted by the respondents; and on the 6th September, 1884, the first of a long series of contracts in writing for street lighting was entered into between the appellant company and the respondents.

This contract, after reciting the advertisement for tenders and the sending in and acceptance of that of the respondents, contains a convenant by the appellant company to supply for a term of five years from the 15th May, 1884, all the electric lights required by the respondents for street lighting purposes and for the lighting of public parks, squares, and other public places in this city. It also provides that the respondents may, on giving six months' notice, discontinue the use of any lights until their number is reduced to fifty; may upon a like notice cancel the contract; and, further, that the appellant company shall on receiving six months' notice (presumably on the cancellation of the contract) remove, at their own expense, all their wire, cables, poles, and other appliances from off the streets and other public places within the limits of the city, and restore these streets and public places to as good a condition as they were in when these poles and appliances were erected, and, further,that all the street lighting should be done to the satisfaction of the city engineer or such other officer as the respondents should appoint for the purpose. This agreement did not run its course. It was superseded by another agreement of 14th January, 1886. It is quite true that the company commenced their commercial lighting before their street lighting. They began to receive revenue from the former in the month of February 1884, and not from the latter till June, 1884, and the entire revenue obtained from the former in that year amounted to $7,323.61 and from the latter $4,805.62. As, however, the agreement of 1884 was not made till the 6th September more than half the latter sum, and more than two-thirds of the former must have been earned during the currency of the Morton Agreement adopted after incorporation. Mr. John Joseph Wright, who has been manager of the company for twenty-six years, was examined on this point. He stated that when he first became connected with the company about forty or fifty street lights were

in operation; that for ten to fifteen years the company put up its poles and carried its wires to any customer who wanted electric light; that in the year 1901, when litigation was threatened between the parties, and the respondents apparently wished to get rid of the appellant company on the ground that it had amalgamated with another company, permission for the erection of poles for private lighting was for the first time required, and that from that time forward it was generally, if not quite invariably, required. All this may well be. In Toronto, as in most other places presumably, electric lighting was looked upon as a boon, and those who provided it as public benefactors. Their Lordships are quite convinced that the respondents were perfectly cognizant of the loose practice which prevailed. They knew all about it. That is apparent from the reports of their City Engineer from the year 1890 to the year 1900. And if the implied consent of the respondents during this period to the erection by the appellant company of poles and apparatus to supply private customers was all the latter required to sustain their title to erect and indefinitely maintain them for that purpose, their case might be a strong one; but the former practice was practically abandoned during the eleven years from 1901 till 1912, and contemporaneously with its abondonment written agreements were entered into between the parties in reference to street lighting asserting the right of the corporation to insist on the removal of poles erected for that purpose most of which poles, according to the finding of Middleton, J., served for the purposes of both public and private lighting. It will only be necessary to examine the provisions of three of these agreements at any length. That of the 14th January, 1886, provided for the supply by the appellant company of electricity for from 100 to 200 lights, as might be required by the respondents for street lighting and for the lighting of public parks, buildings, squares, and other public places in the city of Toronto for a period of four years and six months from the 1st July, 1886, on the terms set forth in the specification therein mentioned. By it the company was bound to erect and place electric lights when and where they should be, by notice, required so to do, and at all other places in the said city besides the places where the same were then set up. The agreement, unlike that of 1884, does not contain any provision for the removal of the necesary poles and apparatus after termination of

the contract. Sir Robert Finlay contends, however, that this provision is implied, as the permission was only given to erect apparatus for the purposes of the contract, and therefore terminated with the contract.

That agreement was followed by an agreement of a somewhat different character, entered into between the same parties on the 13th November, 1889. It begins by reciting that the company had been engaged in the business of producing and supplying electric light in the city of Toronto, on the overhead system, and had plant, poles and material in use therefor, under which light was then being supplied to the city and to individual citizens thereof; that the company desired to extend their works for the production and supply of electricity for light, heat and power, and for other purposes, and had applied to the respondents for the *right* to lay down underground wires, conduits, and appliances for the further distribution and supply of electricity throughout the city, and that the corporation had agreed to grant such right. It is to be observed that both the Letters Patent authorise the laying down and maintaining *under* the streets, squares, and public places of the city, of tubes, pipes, and all other apparatus and appliances for the supply and distribution of electric light and power to such persons, companies, and corporations as may require the same; and that section 2 of the Act of 1882 also empowered the company to construct works for the distribution of electricity for the purposes of light, heat, and power by any means, *under, as well as* through and along the streets, highways, and public places of the city. The agreement proceeds to provide that the respondents thereby gave and granted to the company the right (in addition to their other works and plant in operation for the use of the city and individuals as aforesaid), to construct, and lay down, and operate underground wires, conduits, and appliances for the distribution and supply of electricity for the purposes already mentioned, with the right to take up, renew, alter, and repair the same. And further provides that the respondents should have the right at the expiration of thirty years from the date of the agreement, on giving one year's previous notice in writing, to purchase all the interests and assets of the appellant company, comprising plant, buildings, and materials used or necessary for carrying on its business. And that in case the respondents should fail to exercise this right of purchase

at the expiration of the said period of thirty years they should have the right to exercise it at each succeeding period of twenty years on giving a like notice.

This was the origin of the appellant company's underground system. It was not disputed that an absolute indefeasible right was by this agreement conferred upon the company to maintain, use, and enjoy their underground system until the respondent should exercise their right of purchase, but it was resolutely contended by the appellants that owing to the presence in the agreement of the words in brackets, namely, "in addition to their other work," etc., and to the provisions touching the purchase of all the "interest and assets" of the company, comprising plant, buildings, and material, a right equally absolute and indefeasible was conferred upon them to use, maintain, and enjoy their overhead system for the same period. This appears to their Lordships to involve a rather forced construction of the language of the agreement; but even if this were its true construction it would, of course, be competent for the parties by a subsequent agreement to rescind the agreement so far as its provisions relate to the overhead system, and to give up the rights claimed to be acquired by it in reference to that system. It is therefore necessary to refer to some of the subsequent agreements to ascertain whether or not this has been done.

Of the many contracts entered into between the parties that of the 10th December, 1900, may be taken as a specimen. It is signed by the President and Secretary of the appellant company, and by the Mayor and Treasurer of the Corporation. It begins by reciting that the respondents have by advertisement called for tenders for certain electric lighting for the streets and other public places of the city for five years from the 1st January, 1901, in accordance with certain printed specifications marked A, and that the appellant's tender had been accepted. It then provides that the appellants shall for five years from the above date supply such number of electric lights, not exceeding 1,100, as may from time to time during the contract be ordered in writing by the secretary of the Fire Department or other duly appointed officer, same to be located on the streets, squares, parks, and lanes of the city as may from time to time be specified by the said secretary, and also shall erect such additional arc electric lights over and above the

1,100 when and where required as therein mentioned in other places and streets in the city besides "'where the same are then already set up,'' that all poles (if any) erected or maintained for the purposes of the contract should be located and erected under the supervision of the secretary of the Fire Department, and that the location of any lights shall be changed from one place to another as directed by this officer. It was not suggested that these 1,100 lights did not include the lights supplied by the overhead system existing on the 13th November, 1889. An altogether new provision is then introduced (paragraph 12), to the effect that in case the appellant company should amalgamate with or enter into any pooling arrangements with the Consumers' Gas Company, the contract should be altogether forfeited. On referring to the specification it will be found that it is provided (paragraph 30) that at the expiration of the contract all poles and other appliances used by the contractor upon the city streets shall,at the option of the respondents,be removed by the contractor, and the road-bed and sidewalks restored as though the poles had not been erected thereon, or shall be purchased by the respondents at a price to be agreed upon or determined by arbitration, and if not purchased, that the respondents should, within three months after the expiration of the contract, be at liberty to remove the same at the expense of the contractor, in this case, the appellant company. These provisions, which manifestly applying to the overhead system existing on the 13th November, 1889, as well as the subsequent additions to it, are wholly inconsistent with the notion that by the agreement of that date the appellant company had acquired an absolute, indefeasible right to maintain and use the overhead system of supply then existing for a period of thirty years thence ensuing.

If such a right was conferred by that agreement it was by this later agreement of 1900 absolutely abandoned, and the right of the respondents again asserted to require the overhead system to be removed if they so pleased. The specification for the succeeding agreement, that of the 29th December, 1905, touching the supply of electricity for street lighting for five years from the 1st January, 1906, similarly requires that all the poles used by the contractor shall, at the expiration of the contract, be removed, or, at the option of the respondents, purchased. The absolute right conferred upon the respondents

by the second section of the Act of 1882 to permit or prohibit the erection or maintenance of an overhead system of wires for electric supply on the streets, squares, and public places of their city, has thus been asserted, guarded, and preserved, and in their Lordships' opinion the provision touching the purchase of overhead plant contained in the agreement of the 13th November, 1889, means no more than this, that the respondents shall be entitled to purchase, when they purchase the underground system, such poles and plant of the overhead system as may be then found lawfully erected on the streets and public places of the city. No estoppel arises in this case, as there is no evidence whatever that both the contracting parties were not fully aware of their respective legal rights. It may well be that the appellant company never anticipated that the respondents would insist upon the removal of posts carrying wires, erected with their implied consent but not in pursuance of any formal agreement. With the hardships (if any), or the moralities of the case this Board has no concern. It deals with the legal rights of the parties and those alone, and having regard solely to them their Lordships are on the whole case of opinion that the judgment appealed from was right and should be affirmed and this appeal be dismissed, and they will humbly advise His Majesty accordingly. The appellant company must pay the costs of the appeal.

Appeal dismissed.

APPELLATE DIVISION, S. C. O. 22ND SEPTEMBER, 1916.

COX COAL CO. v. ROSE COAL CO.

Judgment—Summary Judgment—Motion for under Rule 57—Counterclaim Set up in Affidavit of Merits under Rule 56—Stay of Proceedings under Rule 117 on Terms.

Counterclaim: — Where plaintiff moves under Rule 57 for summary judgment, it is not improper for the defendant to set up a counterclaim in his affidavit of defence on merits, under Rule 56, and where this is done the Court will, on terms, stay, under Rule 117, the proceedings respecting the claim until the counterclaim is disposed of.

Appeal by the defendant from an order of Masten, J., in Chambers, allowing an appeal from one of the Registrars, acting for the Master-in-Chambers.

The plaintiffs moved before the Registrar for summary judgment under Rule 57. The defendants in their affidavit of defence on merits under Rule 56, set up a counterclaim and the Registrar dismissed the plaintiffs' motion.

MASTEN, J. (31st August, 1916.)—Allowed the plaintiffs' appeal, varied the order of the Registrar, by allowing the plaintiffs summary judgment for $18,893.64, and ordered the two actions to be consolidated and the questions in the second action to be disposed of in the first action. Moneys realized to be paid into Court pending the result of the litigation. Stay for a week.

The appeal was heard by Meredith, C.J.C.P., Magee and Hodgins, JJ.A., and Lennox, J., on the 19th September, 1916.

W. N. Tilley, K.C., for the appellants.
J. Jennings, for the respondents.

Their Lordships' judgment was delivered by

MEREDITH, C.J.C.P.—The facts of this case are simple and there is no substantial contention as to them: and in such a case I should have thought the rights of the parties plain.

Order in question varied to this extent, execution of judgment for any amount in excess of $13,000 stayed pending disposition of the defendants' claims against the plaintiffs or other order of this or the High Court Division.

Parties to proceed to trial of defendants' claim, including all claims respecting State taxes, forthwith, with liberty to

apply to this or the other division to remove stay for any cause which may arise. If defendants successful in any of their claims amount awarded them to be set off or set off *pro tanto* against plaintiffs' judgment. Costs of this appeal to plaintiffs unless defendants reduce plaintiffs' judgment substantially below amount of it, otherwise to defendants.

That if the defendants choose to pay the money into Court they may do so and the execution will be stayed.

Annotation by Editor.

See discussions of this case by Riddell and Middleton, JJ., in *Henderson* v. *Henderson*, reported *post*.

MIDDLETON, J. (CHAMBERS) 16TH OCTOBER, 1916.

FORBES v. DAVIDSON.

Appeal—Leave to Appeal—From Order of Judge in Chambers—Rule 507—Discovery—Affidavit on Production.

Rule 507: — Under Rule 507, governing appeals from the decision of a Judge in Chambers, where the order in question does not finally dispose of the whole or any part of the action, an appeal shall not be had unless, firstly, there are conflicting decisions and it is in the opinion of the Judge desirable that an appeal should be permitted, or, secondly, there appears to be good reason to doubt the correctness of the judgment and the appeal would involve matters of such importance that, in the opinion of the Judge applied to, leave to appeal should be given.

Affidavit on production is conclusive, unless it appears from the examination for discovery of the party, or from admissions made by him, that it is untrue, or unless it is made to appear that the affidavit was sworn under a misapprehension as to what was in truth material and therefore proper to be produced.

Motion by the plaintiff for leave to appeal from an order of Riddell, J., 27 O. W. R. 151, reversing an order of the Master in Chambers which directed the defendant to produce the whole diary in which, he swore, only entries produced refer to matters in issue in this action.

Peter White, K.C., for the plaintiff.
T. R. Ferguson, K. C. for the defendant.

MIDDLETON, J.—No question of principle is involved. An affidavit on production is conclusive unless it appears from the examination for discovery of the party, or from admissions made by him, that it is untrue, or unless it is made to appear

that the affidavit was sworn under a misapprehension as to what was in truth material and therefore proper to be produced.

My brother Riddell having these principles plainly before him, and recognizing them, has carefully scrutinized the affidavit in the light of the examination, and has come to the conclusion that the production of the diary in question ought not now to be ordered. I am unable to see any reason why there should be an appeal from his decision. It must be borne in mind that under Rule 507, governing appeals from the decision of a Judge in Chambers, where the order in question does not finally dispose of the whole or any part of the action, an appeal shall not be had unless, firstly there are conflicting decisions and it is in the opinion of the Judge desirable that an appeal should be permited, or secondly, there appears to be good reason to doubt the correctness of the judgment and the appeal would involve matters of such importance that, in the opinion of the Judge applied to, leave to appeal should be given.

Here there are no conflicting decisions, and, even if satisfied that there is any reason to doubt the correctness of the judgment in question that would not be sufficient, for in my view there is no matter of such importance as to justify the granting of leave. I may add that I am far from thinking that there is any reason to doubt the correctness of the judgment in question.

In the consideration of a motion for leave to appeal from interlocutory orders, it must always be borne in mind that the settled policy of our practice is that the decision of the Judge in Chambers ought to be regarded as final save in very exceptional cases. If there are conflicting decisions and the practice is vague and uncertain, then an authoritative decision from the Appellate Court may well be regarded as desirable.

The second provision permitting an appeal is intended to cover exceptional cases where the matters involved are of such unusual importance as to justify an appeal. The cases must be rare indeed in which an appeal can properly be authorized from an interlocutory ruling upon a matter of discovery. It is sufficient that in my view this is not such an exceptional case.

The application will be dismissed with costs to the defendant in any event.

Leave to appeal refused.

MIDDLETON, J. (CHAMBERS.) 1ST NOVEMBER, 1916.

STOCKBRIDGE v. McMARTIN.

Discovery — Foreign Defendant by Counterclaim — Order Requiring him to Come Within Jurisdiction for Examination for Discovery—Rules 328, 329, 345 (2).

Resident out of jurisdiction:—A person for whose benefit an action is brought or the assignor of a chose in action can only be examined for discovery when such person is within Ontario; but a defendant by counterclaim, resident within a foreign jurisdiction, may under Rule 328, be ordered to come within Ontario and submit to examination for discovery upon matters relating to the counterclaim and if he fails to so attend his defence to the counterclaim may be struck out.

Appeal by the plaintiff from an order of the Master-in-Chambers.

A foreign Court appointed the plaintiff trustee in bankruptcy of Clinton W. Kinsella, a resident within the jurisdiction of the foreign Court. The plaintiff brought an action within Ontario, the defendant counterclaimed and moved before the Master-in-Chambers for an order for the examination of Kinsella for discovery.

MASTER-IN-CHAMBERS; (24th October, 1916)—Ordered that Kinsella, on four days notice and on payment of conduct money fixed at $40, be required to come within the jurisdiction and attend at Cornwall, Ontario, for examination for discovery in the action as well as the counterclaim. Costs reserved to the Taxing Officer.

Plaintiff appealed to Middleton, J., in Chambers, and the appeal was heard on 31st October, 1916.

W. Lawr, for the appellant.

J. Y. Murdock, jun., for the respondent.

MIDDLETON, J.—The only cases in which an examination for discovery of a person resident out of Ontario may be had are those specifically provided by rules 328 and 329. These provide for the cases of parties and of officers of corporations which are parties.

Examination for discovery of a person for whose benefit an action is brought and of the assignor of a chose in action is also permitted, but such examination can only be had when the person to be examined is in Ontario and can be served with a subpœna. Rule 345 (2). See *Perrins* v. *Algoma Tube Works* (1904), 4 O. W. R. 289; 8 O. L. R. 634.

The reason for the absence of any provision for the examination for discovery of a person not a party to the action who is beyond the province is the lack of any jurisdiction to enforce the order. A party who refuses to comply with the requirements of our rules may have his action dismissed or his defence struck out as the case may be.

When the person sought to be examined is in Ontario he may be punished for contempt if he fails to attend.

When evidence is sought for use at a trial and the witness is out of the jurisdiction the attendance before a commissioner may generally be enforced by the aid of the foreign Court but most countries know nothing of our system of examining for discovery.

The party to be examined here is a party defendant to the counterclaim and as such he is liable to be examined under Rule 328, and if he fails to attend his defence to the counterclaim may be struck out.

The order may stand so far as it directs examination for discovery as to the counterclaim but must be varied so as to confine it to this.

Costs in the cause.

Order varied.

SPECIAL ASSESSMENT COURT. 20TH OCTOBER, 1909

APPROVED BY APPELLATE DIVISION, S.C.O. 22ND MAY, 1916

RE SARNIA & LAMBTON COUNTY.

Assessment and Taxes—Equalization of Assessment — Fixed Assessment in Local Municipalities—Valuation of Such Properties for County Rates—"Actual Value"—Actual Assessable Value.

Equalization of assessment: — County equalized assessments should not be based upon the *actual value*, but upon only the *actual assessable value* of all properties in the local municipalities, therefore, the properties of companies whose assessments have been fixed for a term of years by a local municipality are not assessable for county rates beyond the amount of their fixed assessments, and for all purposes, except school rates, their fixed assessments must be considered as their actual value.

Appeal by the town of Sarnia against the equalized assessment of the county of Lambton.

In the previous year the town of Petrolia had appealed from the equalized assessment of the county and the Lieutenant-Governor in Council appointed a Board consisting of Judge Bell of Kent County Court, Judge Macwatt of Lambton County Court and Sheriff Flintoft of Sarnia.

THIS BOARD, (Judge Macwatt *dissenting*) held that the question of fixed assessments should be ignored in the equalization.

MACWATT, CO. C.J.—*(Dissenting.)*—The chief point and the only one we differ on is a very important one, that of fixed assessment. My colleagues have decided that the actual value of properties under fixed assessments should be included in the equalized values, while I am of opinion that only the fixed assessments should be included.

The power of municipalities to exempt manufacturing establishments (for this is the only class that can get fixed assessment) from taxation, was first conferred in 1868 by 31 Vict., cap. 30, sec. 44 and has been continued ever since.

Section 411 of the Municipal Act, R. S. O. (1897) cap. 223, was the governing section when the majority of the fixed assessments in this county were granted. It reads :

Every municipal council shall by a two-thirds vote of the members thereof have the power of exempting any manufacturing establishment, or any building for the storage of ice for commercial purposes or any water works or water company, in whole or in part, from taxation except as to school taxes, for any period not longer than ten years, and to renew this exemption for a further period not exceeding ten years.

The by-law must however receive the assent of the electors.

The present governing section is s-s. 12 of section 591 of the Consolidated Municipal Act, 3 Edw. VII, cap. 19, which reads :

For granting aid by way of bonus for the promotion of manufacturers within the limits of the municipality to such person or body corporate and in respect of such branch of industry as the municipal council may determine upon;

Then by section 591A, the word *bonus* is explained as follows (*inter alia*).

(G) A total or partial exemption from municipal taxation or the fixing of the assessment of any property for a term of years; but nothing in this Act contained shall be deemed to authorize any exemption for a longer period than ten years and the renewal of such exemption with the assent of the electors as provided in paragraph number 12 of section 591 and the clauses appended thereto from time to time for further periods not exceeding ten years at any one time nor any exemption, either partial or total from taxation for school purposes, nor any by-law or agreement which directly or indirectly has or may have the effect of such an exemption.

As to three of the properties in the town of Sarnia, which have fixed assessments, they cannot be considered as such by the Board, no by-law having been approved by the electors, hence they must be put at their actual value.

With reference to the Grand Trunk Railway Company of Canada, the St. Clair Tunnel Company, the Imperial Oil Company Limited and the Cleveland-Sarnia Saw Mills Company Limited, they are not only under town of Sarnia by-laws legally passed, but have besides, special Acts of the Legislature, confirmed them and are, 61 Vict. (1898) cap. 52; 62 Vict. (2), (1899) cap. 76; and 3 Edw. VII (1902) cap. 63. The Grand

Trunk Railway Company of Canada and the St. Clair Tunnel Company under the Act of 1898, 61, Viet. C. 52, are exempted from taxation of all kinds, save school taxes, for a period of 20 years.

The Imperial Oil Company under its Act, is exempted for all purposes, including school taxes, except as to the sum of $30,000.

The Cleveland-Sarnia Saw Mills Company, Limited, has a fixed assessment, $20,000 for a period of ten years from the 1st January, 1901, but is subject to school taxes. So all are under special Acts of the Legislature except the Sarnia Street Railway which has a fixed assessment under a by-law legally passed and approved by the electors.

The argument has been used that if fixed assessments only are to be considered a municipality could exempt three fourths or more of its assessable property, which would be unfair to the other municipalities. This is surely a use of the *reductio ad absurdum*. Fixed assessments can only apply to manufactures; but apart from this, most municipalities require all the taxes they can levy.

To paraphrase from a recent decision of our Supreme Court. The Legislature having given in plain language to the municipalities the right to grant fixed assessments, such right must not be limited by the Courts for fear of its improvident exercise by a municipality. Time and again the Judical Committee has declined to give effect to this anticipatory argument. Further, if at any time under the guise of exercising the power of taxation, confiscation would result, it would then be time enough to consider the question and not assume before hand such a suggested misuse of the power.

It seems to me that the Legislature having given Municipalities power to grant fixed assessments that is all we have to do with the question. The Legislature could not by the Assessment Act cover up such, as they do churches, etc. There, there is a total exemption, here it is only partial, and the Legislature had to delegate to the municipality the power of fixing the amount.

The Assessment Act 4, Edward VII cap. 23, sec. 80, gives County Councils the power to appoint valuators and defines the valuators' duties, that they "Shall not exceed the powers

possessed by assessors'' further, ''the valuation so made shall be made by the County Council the basis of equalization of the real property for a period not exceeding five years.'' Now I submit the assessors have no power to assess properties under fixed assessments except for school purposes, and in some cases they cannot even assess for school purposes. The clerk cannot alter the roll after it is handed in by the assessor except under sec. 65 s-s. 22, when he may do so, ''in accordance with the decision of the Court of Revision,'' or under sec. 69, when ''if the decision (of the County Judge) is not then given the clerk of the Court when the same is given shall forthwith alter or amend the rule according to the same.''

The Board unanimously decided to eliminate the business assessment and the taxable income amounting to $819,902 because in the former case only 17 out of the 21 municipalities were so assessed, and in the latter only 11 out of 21 were so covered.

That the assessment in case of some who returned figures is not a fair one is shewn by the income tax in two municipalities. Moore township, returns taxable incomes at $28,250 and Petrolea at $38,130. It seems to me that in the latter case the assessor has not done his duty, although the statute gives him full power to compel all liable to income assessment to swear to their income. To say that all taxable income in Petrolia is only $38,130 is exceeding ridiculous.

For the above reasons I am of opinion that the equalization should be as in the schedule attached hereto.

As to the costs I agree that each municipality should bear its own costs and that all other costs should be paid by the County of Lambton.

Dated at Sarnia, Ont., this 22nd day of December, 1908.

The town of Sarnia was not satisfied with the decision of the majority of the above Board and in 1909 appealed against the equalization for that year. The Lieutenant-Governor in Council appointed, Judge Macwatt of Lambton County Court, A. Maclean, Registrar of said county, and Judge Snider of Wentworth County Court, a Court for hearing and determining the appeal.

The appeal was heard by the Board at the Court House at Sarnia on the 18th October, 1909.

R. J. Towers, for the town of Sarnia.
E. Meredith, K.C., and *J. C. Judd*, for the county of Lambton.

A. Weir, for the town of Petrolia.
W. F. Fitzgerald, for the village of Watford.
R. V. LeSueur, for several municipalities in the county.

THE BOARD—We have come to the conclusion that all such properties should be rated for the purpose of the county equalization, on which the county tax or rate is apportioned among the local municipalities at the fixed assessments and not otherwise.

Applying this decision to the equalization made by the County Council this year, we deduct from the assessment which said Council made in each municipality wherein there are such fixed assessments, the sums which the County Council in equalizing added thereto. We make the equalization of the assessments of the county for 1909 as set out on the schedule hereto annexed.

Reasons for the above decision were delivered by

SNIDER, Co. C. J.—The town of Sarnia by various by-laws, which it is admitted by Counsel for the county and other local municipalities, interested, were all duly passed, has fixed the sums at which the property and works of several industries established or to be established in the town were to be respectively assessed for a certain number of years. This was done under Statutory provision which is now section 591 and 591a clause (g) of "The Consolidated Municipal Act 1903." In the finally revised assessment roll of the town for 1909 these properties are assessed at the sums thus fixed. On equalizing the assessments of the local municipalities of the county for 1909 the County Council added to the assessment of the town of Sarnia $462,500.00 as being the *actual value* of the properties in question over and above their fixed assessment and the county asks the town to pay the county rate on this additional sum. From

this action of the County Council the town has appealed and the Court established by Order-in-Council is asked by counsel to consider this question only, and in other respects to confirm the equalization made by the County Council.

No person has been, and it seems to me that no person could legally have been, assessed for this $462,500.00 by the town for the purpose of "county rates" or "general rates" but the Statute specially provides that fixing the assessment of any property shall not authorize any exemption either partial or total from taxation for School purposes. Section 591a clause (g) provides for a total or partial exemption from "municipal taxation" and in these cases the town by fixing the assessments at a named sum has given them partial exemption from "municipal taxation" as it had a Statutory right to do. Counsel for the town points out that sub-sec. 10 of Sec. 2 of the same Act gives a definition of "municipality" which includes a county (see also section 5) and that therefore partial exemption from "municipal" taxation other than school taxes is partial exemption from county taxation or the "county rates". If this is sound argument, and I think it is, it necessarily follows that in equalizing, the only way to secure the correct result in taxation is to accept the fixed assessments as the legally established actual value for all assessment purposes including equalization.

In *Canadian Pacific Ry.* v. *Winnipeg*, 30 S. C. R. at page 565 cited by Mr. Towers, Mr. Justice Sedgwick in considering whether or not "School taxes" came within the meaning of the phrase "municipal taxes" says that any taxation by a municipal body for the purpose of raising money to relieve itself from municipal obligation is taxation for a municipal purpose, that is municipal taxation.

It would therefore seem clear that the County Council in requiring the town of Sarnia to pay into the county funds the county rate of taxation for the year 1909 on this $462,500.00 as the County Council has done it has demanded from the town "municipal taxation" on the partial exemption created by the town by-laws.

It is argued by counsel for the county that though this conclusion be conceded and although it is true that the town has legally exempted these properties from this additional municipal taxation it does not follow that the town of Sarnia as between it and the other local municipalities of the county is to

have the benefit of this partial exemption, that it is only a bargain between the town and the persons in question in making which neither the county nor the local municipalities other than Sarnia had any voice and that the County Council cannot be thereby prejudiced or controlled in making the equalization. It seems to me this argument ably presented as it was, is fallacious.

Section 22 of chapter 23, Ont. Stat. 1904 "The assessment Act" is relied on by counsel for the county as authority for adding the $462,500.00 to the assessment to Sarnia on equalization. In column 13 of the roll the Assessor is required to put down opposite the name of each person the "*actual value*" of his parcel of real property exclusive of the buildings and in column 15 the "*actual value*" of the parcel of real property, that is both land and buildings. It is pointed out that he is not directed to put down the *fixed value* of any parcel. Further the assessor in his affidavit in verification of his assessment roll as he returns it, Schedule "G" must swear (paragraph 1) as follows:

> I have to the best of my information and belief set down in the above assessment roll all the real property *liable to taxation* situate in the Municipality of * * * * ; and I have justly and truly assessed each of the parcels of real property so set down at its *actual value*.

Here again it is argued that as the expression *actual value* is used the assessor for Sarnia should have added this $462,500.00 to the fixed assessments of these properties in question in order to comply with his affidavit that he had justly and truly assessed them at their *actual value*. As he has not done so it is argued that it was the duty of the County Council to add this sum when equalizing the assessments and leave it to the town Clerk when making out the Collector's roll to cause the rate on the fixed assessment only to be collected from the partially exempted properties.

Now let us see how the Assessment Act as a whole will work out in their respect. There is no doubt but that the Legislature intended that the assessment when finally revised, corrected, and equalized should be the basis of taxation. It is equally clear that there are to be certain exemptions of properties from such assessments. It is also certain that it is the intention that each owner of $1000 worth of assessable property shall

contribute exactly the same amount to the local municipal taxes as every other owner of $1000 worth of assessable property in the same local municipality. For the purpose of raising the county taxes the same assessment rolls are used; All the resident owners in the county are regarded as in one municipality and because some assessors may not have set down and assessed at its *actual value* all the real property liable to taxation situate in his municipality, provision is made for this equalization by which means the Legislature intended to bring it about that each owner of $1000 worth of assessable property in the county municipality should contribute exactly the same amount to the county municipal taxes as every other owner of $1000 worth of assessable property in the whole county.

In considering section 22 of the Assessment Act it is clear that the work the Assessor is required to do in making up his roll is not all *assessment*. Much of it consists of gathering information for statistical purposes. This in my opinion is the purpose of columns 13, 14 and 15. He would not necessarily put in column 16 all the property which he should include in column 15, for it might well be, and in fact is, the case in some instances that property properly set down opposite the owner's name in columns 15 would on account of its use for the time being come under section 5 sub-section 3, for instance. In that case he would have to mark it "exempt" in column 16, while at the same time giving its *actual value* in column 15 as distinguished from actual assessable value, but for purposes other than taxation. It is in column 21 of his roll that he puts down the "assessment" and it is on the figures in this column only that the town Clerk calculates each person's taxes both "County Rate" and "General rate." Now in this column he is not required to put *actual values* regardless of exemption. Nothing is there said of *actual values*. He must surely put down there only "*actual assessable values*" leaving out all that is legally exempt. In his affidavit, Schedule "G", he is required to swear that he has set down all the property "liable to taxation." He may have set down other properties as well, for other purposes, but must have set down all that is "liable to taxation." He is required in the same paragraph to further swear that he has justly and truly assessed (that is has set down in the assessment column 21) each of the parcels of real property "so set down" (that is set down as being liable to taxation) at its actual value. Now what of the properties in ques-

tion is liable to taxation? Surely not the $462,500.00. That part of these properties is legally exempt from municipal taxation excepting as by the section excepted. The assessor has put down in column 21 of his roll that part of these properties liable to taxation, and upon which only the town clerk can apply the rate, "justly and truly at their actual value." This assessment roll having been returned and finally revised the next step so far as the point under consideration is concerned is the equalization by the County Council of the assessments of the respective rolls of the local municipalities. This is done under sec. 80 and following sections of "The Assessment Act." If each assessor has in the opinion of the County Council "justly and truly" set down in his assessment roll all the real property (no other property is in question in this appeal) liable to taxation situate in his municipality at its *actual value* it adopts the assessments as returned to the County Clerk and nothing further is required to be done "in order that the County rate may be assessed equally on the whole *rateable* property of the county," the words of the Act.

If the County Council thinks the assessors or some of them have not done their duty in assessing, the Council may proceed under section 81 and make such changes as are necessary in order to make the valuation made by the assessors in each local municipality bear a just relation to each other. Instead of doing this they may appoint valuators under section 80. These valuators proceed as directed by sub-section 3 of section 80 and if after having done so they find that an assessor has adopted a valuation 10 or 20 per cent. or any other percentage below the true values of the real estate in his municipality they add that percentage to his assessment thereby bringing each persons assessment up to the actual value of his taxable property. The section says: "But the valuators shall not exceed the powers possessed by the assessors" Sec. 80 s-s 1. This clearly makes all that I have said, so far as I have been right, in regard to the duty of the assessor under Sec. 22 applicable to the valuators and I apprehend the same applies to the County Council and to this Court when equalizing the rolls. If this is so, neither the valuators, the County Council nor this Court can put in column 21 of the assessment roll or add to the total of that column, the value of any property or the value of that part of any property, which is not legally liable to the

municipal taxation under consideration, because the assessor had not the power so to do.

The County Council of Lambton acted this year under section 81, and added the $462,500.00 in question to the total assessment of Sarnia. Now if this sum represented a percentage of undervaluation generally of the real property in Sarnia liable to taxation it would be quite just to add it for then when the rate necessary to raise the town's share of the county rate was struck each owner of taxable property therein of the actual value of $1000 would only pay the same amount of the county tax as every other owner of a similar property through the county. If this sum represented certain taxable real properties left out by the assessor it would be just that the ratepayers of Sarnia should bear the loss of their officer's misconduct.

Now where is the county rate on this $462,500.00 to be got, for after all the county taxation becomes personal? By section 403 of "The Municipal Act 1903" the county rate shall be calculated at so much on the dollar upon the actual value of all the real (and personal) property *liable to assessment* therein, that means liable to assessment by the assessor in the first instance; on each dollar which he could and ought legally to have put down in column 21 of his roll as liable to municipal taxation generally. No one else can assess, there is nothing else in the Act called assessment, and no other property called assessable property. All any Council or Court can do is to do what the assessor should have done but has not done. Now could he have legally put this $462,500.00 part of this property in column 21 of his roll opposite the owners' name as liable to municipal taxation generally? Surely not, and if not then it cannot be defined as *liable to assessment* and so sections 403, 404, 405 which give the only power the county has to tax would not include it.

The Clerk of the town of Sarnia if he proceeds under section 94, sub-sec. 1 when he makes up his collector's roll for 1909 must put down opposite the *assessed value* of each property in one column headed "county rates" the amount *which the person who is chargeable therewith* had to pay towards the county rate. He must get the whole of Sarnia's share of the county rate from this column. Opposite whose name is he to place the county tax on this $462,500.00? He cannot place it or any part

of it against the property which this sum represents; for under no circumstances can this part of these properties be assessed to the owners of it nor can any municipal taxes be levied from them thereon. It cannot be justly charged to the owners of the other taxable properties in the town for they are admittedly assessed for the actual value of their properties and if a higher rate on the dollar is collected from them than from owners of real estate of the same value in other local municipalities in the county it would be a violation of the intention and enactment of the Legislature for all Sarnia is assessed at all the assessor could have set down in column 21.

For these reasons I am convinced that the fixed assessment must prevail for county rates as well as local municipal rates and that this appeal should be allowed.

MACWATT, Co. C.J., and MACLEAN, Co. Registrar—We concur.

Annotation by Editor.

MEREDITH, C.J.C.P., (37 O. L. R. at 163, 164)—A reference to *Re Sarnia & Lambton County* would have enabled him to obtain from his brother Judge of the County Court of a neighbouring county, the full facts of the judgment of a full Board upon the very question, delivered by a County Court Judge of great experience, giving reasons, in accord with the general interpretation of the Act and the long unvarying practice under it to which I have alluded; conclusive reasons, as it seemed to me, for reaching a conclusion the opposite of that contained in the ruling here in question. So, too, I have always hitherto thought, even a cursory glance through the statutes affecting the question—the Municipal Act and the Assessment Act—should have made it plain that the ruling of the Board in the *Lambton Case* was right and that that in question was wrong.

LENNOX, J., (37 O. L. R. at 178, 179.)—I have had the advantage of reading the judgment in the unreported *Sarnia Case*, pronounced by a Judge of exceptional judicial learning and experience, and who, as a Commissioner engaged in the last revision of the Ontario statutes, is peculiarly qualified to deal with questions of the character here under consideration.

PRIVY COUNCIL. 23RD OCTOBER, 1916.

TORONTO & YORK RADIAL RY. CO. v. CITY OF TORONTO.

Street Railway — Order of Ontario Railway and Municipal Board—Permitting Railway to Cross Sidewalk—Connecting Line of Railway with Terminal Station Property—Ontario Railway Act, R. S.O. (1914) c. 185, ss. 105(8), 250—Appeal —Findings of Fact—Raising Questions not Raised at Trial.

Crossing sidewalk:—Privy Council confirmed an order of the Ont. Ry. & Mun. Board, approving of certain plans of the Toronto & York Radial Ry., for the construction of a spur line, on the level across a portion of the sidewalk on the west side of Yonge street, Toronto, connecting its railway with a site purchased to provide necessary terminal accommodation.

Findings of Ont. Ry. & Mun. Board are conclusive on a question of fact.

Privy Council will not entertain a question not raised at the trial, and on which, if it had been raised, it was open to the other party to have called evidence in answer to the case made against him.

Appeal by the Toronto and York Radial Railway Company from a judgment of the Supreme Court of Ontario (Appellate Division), 35 O. L. R. 57, setting aside an order of the Ontario Railway and Municipal Board granting an application made by the appellants for the approval of certain plans of tracks connecting their line of railway with a site for a proposed terminal station.

The appeal to the Judicial Committee of the Privy Council was heard by Viscount Haldane, Lord Atkinson, Lord Shaw, of Dunfermline, and Lord Parmoor.

Sir Robert Finlay, K.C., and *I. F. Hellmuth, K.C.*, (Toronto) for the appellants.

A. C. Clauson, K.C., and *G. R. Geary, K.C.*, (Toronto) for the respondents.

Their Lordships' judgment was delivered by

LORD PARMOOR—The appellants applied, under section 250 of an Act respecting Railways, R. S. O. (1914), c. 185, to the Ontario Railway and Municipal Board for the approval of certain plans to provide the necessary switches and turnouts

to the appellants' property required by them for the purpose of operating their railway. The proposal was, in effect, to provide terminal accommodation on a site which the appellants had purchased, and to cross for this purpose a portion of the side walk on the west side of Yonge street by a spur line on the level. Although the appellants had authority to construct or extend their railway upon any highway or part of a highway, section 250 prohibits them from beginning the construction of their railway or of any extension thereof upon any highway or part of a highway without having first obtained the permission and approval of the Board. The section does not confer any additional powers on the appellants, but imposes a limitation to protect public interest. Section 105, sub-section 8, enacts that the Board shall not have power or authority to require or permit a company, without the consent of the Corporation of the Municipality, to construct or lay down within the Municipality more tracks or lines than, in its agreement with the Corporation or the by-law of the Council of the Corporation of the Municipality, it has authority to construct and lay down, but the agreement or by-law shall govern as to the number and locality of the tracks and the streets or highways upon which the railway may be constructed.

The Board approved of the plans of the appellants, subject to any modification that might appear proper to be made after hearing the objections of the respondents on engineering grounds. The plans were amended to comply with the objections on engineering grounds made by the respondents, and, as amended, were finally approved on the 2nd day of September, 1915. The respondents appealed to the Appellate Division of the Supreme Court of Ontario on two grounds: (1) that the appellants had no franchise in respect of the street and adjoining land proposed to be used, and (2) that in any event the consent of the Municipal Council of the city was necessary. After the general argument had concluded, a memorandum was sent by the Registrar of the Appellate Division, saying that the Court would sit on the 13th November, 1915, to hear what counsel had to say, if anything, on the point "what jurisdiction had the County of York under the circumstances" stated in the memorandum "over the portion of Yonge street in question." On the 13th November the counsel for the respondents asked for an adjournment, and the counsel for the

appellants objected that the question should not be determined without an opportunity to give evidence. On the 15th November the respondents informed the Court that they had decided not to submit any further argument in the matter of the question of the franchise of the appellant. In view of this notification the counsel for the appellants assumed that it would not be necessary to appear further before the Court. No argument was addressed to their Lordships in support of the opinion expressed in the judgment of Hodgins, J.A. Their Lordships think that the question of the franchise of the appellants was not properly before the Appellate Court, and they are unable to entertain a question not raised at the trial, and on which, if it had been raised, it was open to the appellants to have called evidence in answer to the case made against them.

On the first ground of appeal, that the appellants had no franchise in respect of the street and adjoining land proposed to be used, Garrow, J.A., with whom Maclaren, J.A., and Magee, J.A., agreed, does not pronounce a final opinion. The Metropolitan Street Railway Company of Toronto was incorporated in 1877. This company had no authority to construct or operate their railway along streets and highways within the jurisdiction of the corporation of the city of Toronto, and of any of the adjoining municipalities, except under and subject to an agreement thereafter to be made between the Councils of the city and of the municipalities and the company. In 1884 an agreement was made between the Metropolitan Street Railway Company of Toronto and the Municipal Council of the County of York. This agreement is scheduled to an Act of 1893 which changed the name of the company to the "Metropolitan Street Railway Company." In August 1894 a further agreement was made between the Municipal Corporation of the County of York and the Metropolitan Street Railway Company. This agreement is scheduled to an Act of 1897. The agreement and the privileges and franchises thereby created are confirmed in the Act, and declared to be existent and binding upon the parties to the same extent and in the same manner as if the several clauses and agreement were set out as part of the Act. The rights conferred under this agreement have been transferred to and are now vested in the appellants. There is a provision in the Act that, in the event of the city of Toronto ex-

tending its limits so as to include any portion of the railway, such extension of limits should not affect the rights of the company at the date of such extension, or its property then situate within such extended limits, and that the powers conferred on the company by the Act should remain as if the city limits had not been extended. The city of Toronto was subsequently extended to include the portion of Yonge street across which it is proposed to construct the spur line, and the ambit of the franchise which the appellants claim, and the conditions of its user, so far as are material to the present appeal, are to be found in the terms of the agreement of 1894.

The section of the agreement which determines the extent and nature of the appellants' franchise for the purpose of operating their railway—as distinct from its location and construction—is section 7. There is a difference in the sections which give powers to the appellants to locate and construct their railway and those which give powers to the appellants to operate the railway when located and constructed. For the purpose of operating the railway, sub-section (3) of section 7 confers a wide authority. It authorises not only the construction and maintenance of such culverts, switches, and turnouts as may from time to time be found necessary for operating the appellants' line of railway on Yonge street or leading to any of the cross streets leading from Yonge street, but also for the purpose of leading to any track allowances or rights of way on lands adjacent to Yonge street, where the line deflects from Yonge street, or to the appellants' power-houses, and car-sheds. The plan, which the Board approved, shews that the turnouts, or spur lines, which cross a portion of the side walk on the west side of Yonge street, are for the purpose of leading to track allowances or rights of way on land which is the property of the appellants, and to which there is a proposed deflection of the line from Yonge street. The works approved are therefore within the terms of the franchise which has been vested in the appellants under the statutory agreement, if they are acquired for the purpose of operating the railway of the appellants. There can be no doubt under this head, but in any case the finding of the Board would be conclusive on a question of fact. It is not necessary to decide whether the spur line in quesetion is for the purpose of leading to power-houses and car-sheds of the appellants, and the evidence under this head is not

satisfactory. Section 11 further gives a considerable power of constructing turnouts for the purpose of deflecting the line of railway from Yonge street in order to operate the same across and along private properties after expropriating the necessary rights of way. It was argued on behalf of the respondents that their Lordships had decide in the case of *Toronto & York Radial Ry. Co.* v. *City of Toronto*, 25 O. W. R. 315, in a sense contrary to the franchise which is claimed on behalf of the appellants. The decision of their Lordships in the above case was given on different grounds and is in no way inconsistent with their Lordships' construction of the franchise conferred by sub-section (3) section 7 of the agreement of 1894. Lord Moulton, in delivering the judgment of their Lordships, on page 319, says :—

> On the 11th May, 1911, the proceedings in this matter were commenced by an application being made to the Ontario Railway and Municipal Board on behalf of the appellants for the approval by the Board of 'a plan to deviate the track on the Metropolitan Division from Yonge street to a private right of way,' which was described as being about 125 feet to the west, running parallel with Yonge street. On looking at the plan, it is observed that this is a misdescription of the proposal, in that the proposed line lies only partially upon land proposed to be acquired by the railway company, and that it crosses in four or five places public highways which are not and necessarily cannot be described as portions of a private right of way.

Their Lordships therefore find that, for the purpose of operating the railway, the appellants have the franchise which they claim in respect of the street and adjoining lands proposed to be used, and determine in their favour the question on which Garrow, J.A., preferred not to give a final opinion.

The second point, that in any event the consent of the municipal council of the city was necessary before the Board could approve the plans submitted to them, remains to be considered. Garrow, J.A., bases his judgment on the necessity of such approval and holds that such approval is the very basis of all the work to be afterwards undertaken on Yonge street. The relevant sections of the 1894 agreement which determine the rights of the respondents in reference to works proposed to be constructed on Yonge street at the site in question, and to which attention was directed during the argument on behalf of the respondents, are sections 2, 3, 4, 5, 8, 9, 10, 17, 27, 28. Sec-

tions 2, 3, 4, and 5, apply to the location and construction of the railway and not to works which, after the location and construction, are required for the purpose of operating the railway so located and constructed.

It is clear that, before the work of construction is commenced, plans setting forth the proposed location of the tracks must be approved by the Committee appointed by the Council, and that such location cannot subsequently be altered without the consent of the Committee. There is a further protection that the line shall not be put in operation upon any section until the county engineer has certified that such section has been constructed in compliance with the terms of the agreement. Stringent limitations of a smilar character are inserted in the agreement of 1884 scheduled to the Act of 1893. It must be assumed that all these conditions were fulfilled before the line of the appellants was put in operation. Section 8 authorizes the appellants to change the location of its lines of track to any portion of Yonge street with the consent of the Committee of the Council, but there is no proposal in the approved plans to change the location of any lines of track already located and constructed to a different portion of Yonge street. Sections 9, 10, 17, and 27, relate to the method and conditions under which the appellants shall carry out works within their authority. They come into operation in the construction of works after approval, and it cannot be assumed that the appellants will not in every way adopt the prescribed method and comply with the prescribed conditions. Section 28 comes within the same category. It provides that the alignment of the tracks, the location of the switches, and the grades of roadbed shall be prescribed by the county engineer.

In the present case the Board, before approving the plans of the appellants, took care to ascertain whether they were satisfactory on engineering grounds to the city of Toronto. They considered the objections of the city of Toronto, on engineering grounds, procured a report thereon of their own engineer, and before approval amended the plans of the appellants to comply with the objections made on behalf of the city of Toronto. In effect, there was no difference on engineering grounds between the city of Toronto and the appellants when the Board finally approved the plans for carrying a spur line on the level across the sideway on the west side of Yonge street.

In the event of any difference arising between the city and the appellants as to any matter or thing to be done or performed under the terms of the agreement, the agreement contains an ample arbitration section.

Their Lordships are of opinion that the appellants succeed, and will humbly advise His Majesty that the appeal be allowed, with costs here and in the Court below.

Appeal allowed.

APPELLATE DIVISION, S. C. O. 30TH OCTOBER, 1916.

FOSTER v. MACLEAN

Discovery — Examination of Plaintiff — Time for — Rule 336 — Statement of Defence Delivered — Particulars Ordered but not Delivered.

Rule 336:—It was not intended by Rule 336 that the defendant should be allowed to examine the plaintiff for discovery immediately after delivery of the statement of defence, when particulars thereof had been ordered, but not delivered.

Part of pleadings:—When particulars are ordered, they necessarily form part of the statement of claim or the statement of defence, and such statement is not complete without them. Upon the particulars depend the issues to be tried.

Appeal by the defendants from an order of Britton, J. in Chambers, setting aside an order of the Master-in-Chambers.

The appeal was in connection with the libel action brought by a Controller of the city of Toronto against W. F. Maclean, H. J. Maclean, A. E. S. Smythe, and The World Newspaper Co. Ltd., arising from some pre-election articles published in the Toronto World.

MASTER-IN-CHAMBERS, (20th June, 1916.) ordered the plaintiff to re-attend before a Special Examiner for further examination for discovery and answer certain questions, as to his income assessment; put to him by counsel for the defendants, upon his examination, which questions the plaintiff refused to answer, on the ground that they were irrelevant. The Master also extended the time for delivery of particulars of the defence, ordered by an Appellate Division on 28th April, 1916, until after the attendance of the plaintiff for such further examination for discovery.

Plaintiff appealed from the above order to Britton, J., in Chambers.

W. E. Raney, K. C., for the plaintiff, appellant.
K. F. Mackenzie, for the defendants, respondents.

BRITTON, J., (24th July, 1916.) It was not intended by Rule 336 that the defendant should be allowed to examine the plaintiff for discovery immediately after delivery of the statement of defence, when particulars thereof had been ordered, but not delivered. When particulars are ordered, they necessarily form part of the defence, and the statement of defence is not complete without them. Upon the particulars depend the issues to be tried: *Bullen* v. *Templeman* (1896) 5 B. C. R. 43; *Zierenberg* v. *Labouchere* [1893], 2 Q. B. 183 (C. A.)

Appeal allowed and order of the Master set aside, with costs of motion and appeal to the plaintiff in any event.

The particulars of defence must be delivered within one week.

Defendants, on 19th September, 1916, moved before Sutherland, J., for leave to appeal to an Appellate Division, from above order of Britton, J.

K. F. Mackenzie, for the defendants.
W. E. Raney, K.C., for the plaintiff.

SUTHERLAND, J., (25th September, 1916.)—During the argument I expressed the view that the matters in question were somewhat important and the propriety of making the order which is in appeal before me was not free from doubt. Further consideration has confirmed my view as to this and the leave asked will therefore be granted.

Costs of this motion to be in the appeal.

Leave to appeal granted.

The appeal was heard by Meredith, C.J.C.P., Riddell, Middleton and Masten, JJ., on 30th October, 1916.

K. F. Mackenzie, for the defendants, appellants.
W. E. Raney, K.C., for the plaintiff, respondent.

THEIR LORDSHIPS (v. v.)—Dismissed the appeal with costs to the plaintiff in any event.

Appeal dismissed.

RIDDELL, J. (CHAMBERS.) 2ND NOVEMBER, 1916.

MIDDLETON, J. (CHAMBERS.) 12TH OCTOBER, 1916.

HENDERSON v. HENDERSON.

Process—Specially Endorsed Writ—Counterclaim to Answer to Action—Affidavit of Merits—Rules 56, 57, 117, 507.

Amending counterclaim: — Where a counterclaim has been set up there is no decision shewing that it cannot be enlarged or amended.

Practice cases:—Leave to appeal to the Appellate Division should be refused, except in cases of real importance and involving some substantial right; mere matters of practice should, (except in extraordinary cases) be disposed of in the High Court Division.

Counterclaim to specially endorsed writ: — The practice in Ontario is the same for writs specially endorsed as it is for writs not so endorsed, and a defendant is within his rights when he sets up a counterclaim to a specially endorsed writ, and it matters not that his counterclaim is, strictly speaking, really a set-off, so long as it is a claim which he desires to enforce over and above his defence, and he sets it out in his affidavit of defence on merits.

Special endorsement:—A writ may be endorsed specially and at the same time may contain another claim with respect to which there cannot be special endorsement; but plaintiff is not entitled to have speedy trial save in cases where the whole claim is specially endorsed.

Damages for wrongful dismissal is clearly not a subject of special endorsement of a writ.

Motion by the plaintiff for leave to appeal to an Appellate Division from an order of Middleton, J., dismissing an appeal from an order of the Master-in-Chambers refusing to strike out certain paragraphs of the statement of defence and counterclaim.

The appeal from the order of the Master-in-Chambers was heard by Middleton, J., in Chambers on the 10th October, 1916.

J. Grayson Smith, for the plaintiff, appellant.
A. W. Langmuir, for the defendant, respondent.

MIDDLETON, J., (12th October, 1916.)—Appeal by the plaintiff from an order of the Master-in-Chambers refusing to strike out paragraphs 11 and 12 of the statement of defence

and the counterclaim on the ground that under the practice in an action in which the plaintiff commences by a specially endorsed writ and elects to have a summary trial, it is not competent for a defendant to counterclaim.

The action is brought by the plaintiff to recover arrears of salary and commission, and damages for wrongful dismissal. The claims for arrears of salary and commission are adequately specially endorsed. The claim for damages for wrongful dismissal is clearly not the subject of special endorsement. A writ may be endorsed specially and at the same time may contain another claim with respect to which there cannot be special endorsement; but the plaintiff is not given the right to have a speedy trial save in cases in which the whole claim is specially endorsed.

In this case the defendant filed an affidavit shewing a defence to the claim, and a counterclaim for damages by reason of alleged misconduct on the part of the plaintiff; the same misconduct being relied upon as constituting a defence. The plaintiff thereupon made the election contemplated by Rule 56 (2), and set the action down for trial. No objection to this course was taken by the defendant; but the defendant not being satisfied that the affidavit adequately set up his defence, applied for leave to deliver a further defence under Rule 56 (5); and, leave being granted, delivered a statement of defence in which the allegations of misconduct were more fully set forth, followed by a clause in which it is said that the defendant by way of counterclaim repeats the allegations and asks for damages.

As I have said, I think the plaintiff's proceeding was irregular and that he has no right to a summary trial of his claim for damages in respect of which the writ is not specially endorsed; and possibly the adoption of this course may mean the abandonment of this claim.

The plaintiff now objects to the counterclaim relying upon *Davis Acetyline Gas Co.* v. *Morrison* (1915), 34 O. L. R. 155. The amended defence, as I understand Rule 56, does not supersede the defence set up in the affidavit; and in the affidavit the counterclaim is relied upon as an answer to the plaintiff's action. I regard the question as to whether a defendant can file an affidavit setting up a counterclaim as an answer to the

plaintiff's action as not being determined by the case referred to; for the Honourable Mr. Justice Riddell in his judgment says: "Whether the defendant can in his affidavit under Rule 56 (1) set up a counterclaim I do not consider;" and Mr. Justice Hodgins, who delivers the only other judgment says: "If the defendant's right to set up a conterclaim as a defence to the action were necessarily involved in this appeal, I should doubt whether he is debarred by the language of Rule 56 from obtaining leave to plead it."

In a more recent case of *Cox Coal Co.* v. *Rose Coal Co.* (1916), 27 O. W. R. 398, the setting up of a counterclaim is not regarded as improper, and the Court dealt with the case on the footing that the counterclaim was properly set up, and followed the practice indicated by Rule 117, and on terms allowed a stay of proceedings until the counterclaim should be disposed of.

Bearing in mind the policy of the Judicature Act that all claims between the parties arising out of the same transaction should be heard and determined in the one suit or proceeding, it is, I think, better to hold that a counterclaim is an answer to the plaintiff's claim within the meaning of Rule 56 (1) and that upon a motion for judgment under Rule 57 the Court may either award judgment or grant a stay of proceedings under Rule 117, as may be deemed proper, but that if no motion for judgment is made and the plaintiff elects to have a summary trial the affidavit which embodies the counterclaim is to be treated in the language of Rule 56 (2), as, with the claim endorsed upon the writ, constituting the record for trial. It follows, the affidavit having set up this counterclaim, it ought not to be stricken out merely because it has been reiterated in the formal defence which has been filed.

The appeal will therefore be dismissed. Costs to the defendant in any event.

After the judgment had been delivered my attention was called to the fact that the counterclaim in the pleading is wider than the counterclaim in the affidavit. This does not, it seems to me, make any difference as, there once being a valid counterclaim, there is no decision shewing that it cannot be amended or enlarged.

Appeal dismissed.

Plaintiff moved before Riddell, J., in Chambers for leave to appeal to an Appellate Division.

J. Grayson Smith, for the plaintiff's motion.

B. B. Osler, for the defendant, contra.

RIDDELL, J., (2nd November, 1916.)—On the 7th September, 1916, this action was begun by a writ claiming (1) arrears of salary; (2) commission on the sum of $7,331.56, being $336.57; (3) damages for wrongful dismissal. The usual warning to defendant was printed on the writ as being specially endorsed—and the writ was in "special endorsed writ" form.

The writ was, of course, irregular but was not moved against—the defendants looking upon it as a specially endorsed writ filed September 19th on affidavit setting up that: (1) they had a good defence on the merits; (2) they owed the plaintiff nothing; (3) they discharged him for cause; (4) instead of owing the plaintiff for salary he owed them for (a) $800 drawn by him from their funds; and (b) $138.02 also so drawn by him and lent to one Hunter—they "by way of counterclaim" claimed these two sums and interest.

September 19th, the action was set down for trial and notice served on the solicitor for the defendants.

September 27th, notice of motion was served by defendants for leave "to file a statement of defence in this action setting up further and other answer to the plaintiff's claim or for such further or other order as may seem proper."

September 29th, an order was made by the Master-in-Chambers allowing the defendants to "deliver a statement of defence setting up any further or other answer to the plaintiff's claim."

A statement of defence was served of which two paragraphs only are in question: paragraph 11 claiming by way of counterclaim the sum of $938.02 already mentioned, and 12, claiming by way of counterclaim damages against the plaintiff for improper conduct in his employment. A motion was made to strike these out which the Master-in-Chambers refused: an appeal from this refusal was dismissed by my brother Middleton—and I am now asked for leave to appeal to the Divisional Court.

There have recently been several *dicta* in the Appellate Division against allowing appeals except in cases of real importance and involving some substantial right—mere matters of practice should (except in extraordinary cases) be disposed of finally in the High Court Division.

With these *dicta*, I am completely in accord—and on that ground alone I might dismiss this motion. Or I might dismiss the motion on the ground that this is not wholly a specially endorsed writ and the rules governing specially endorsed writs are not applicable in their entirety—if the plaintiff desired to make it a specially endorsed writ he must move to amend his writ and on such leave being given, of course, conditions would be imposed allowing such a counterclaim as we have here to be set up. I prefer, however, to deal with the case as though the writ were specially endorsed.

The principles upon which leave to appeal should be granted, if at all, are laid down in *Robinson* v. *Mills* (1909), 13 O. W. R. 853 at pp. 856, 857; 19 O. L. R. 162 at pp. 169, 170; *Forbes* v. *Davidson* (1916), 27 O. W. R. 399, and I do not reiterate them though I venture to think that they have sometimes not been kept strictly in mind.

I do not think that there is in the present case "any good reason why the decision should be held to be wrong" 19 O. L. R. at p. 170; 13 O. W. R. 856.

The Appellate Division decided in *Davis Acetylene Gas Co.* v. *Morrison* (1915), 34 O. L. R. 155 (my brother Hodgins *dubitante* but not dissenting), that where the defendant does not set up a counterclaim in his affidavit Rule 56 (5) does not give power to grant leave to file a counterclaim.

We decline, however, to consider whether a defendant may set up in his affidavit a counterclaim—that has since been (in effect) held in the affirmative in *Cox Coal Co.* v. *Rose Coal Co.* (1916), 27 O. W. R. 398, and I so hold both on principle and on authority. There is, therefore, no case of conflicting decisions.

Mr. Grayson Smith, however, in his logical and concise argument, urged that the present case differs from that in 27 O. W. R. 398, he produces the affidavit and it appears that in the affidavit the defendant sets up a claim for damages for breach of contract by the plaintiff. Mr. Smith claims that in the present case there is set out in the affidavit of merits no real counterclaim at all but that what the defendants call a

counterclaim is really a set-off—he therefore contends that the case is precisely on all fours with *Davis Acetylene Gas. Co.* v. *Morrison* (1915), 34 O. L. R. 155.

I think that what the defendants call a counterclaim in their affidavit of merits is really a set-off: *Girardot* v. *Welton* (1900), 19 P. R. 162, 201; but there is no objection to the parties treating what is really a set-off as a counterclaim, Rule 115. The defendants set it up as a counterclaim, the plaintiff did not move against it as a counterclaim but set the case down for trial with this as a counterclaim.

There was, then, a counterclaim set up by the defendants—and I see no reason why this should not be amended or enlarged in the same manner as any other pleading. Rule 56 (5) has no application and indeed the order of the Master-in-Chambers allowing an amendment does not purport to allow a counterclaim or an amended counterclaim.

It may be that the defendants are not quite regular in enlarging their counterclaim without leave; but such leave would be granted as a matter of course as it would simply avoid the necessity of another action.

Reading the Rule 56 with the cases, I think the result is that when a defendant is served with a writ specially endorsed he must make up his mind whether (1) he intends simply to defend so that he will be quite satisfied with a dismissal of the plaintiff's claim; or (2) he intends to demand the payment by the plaintiff to him of damages or some other judgment against the plaintiff. If the former is made manifest by his affidavit of merits he cannot afterwards be allowed to change his election and set up any claim against the plaintiff but must bring another action. But if he has a claim against the plaintiff which he desires to enforce over and above the defence—if he has a claim which he desires to use not as a shield but as a spear—he must say so in his affidavit, and whether this be called a counterclaim or a set-off, it is in fact a counterclaim and should be treated as such.

This is, in my view, certainly the case where what may be called a set-off is treated by both parties as a counterclaim as here.

I dismiss the motion with costs to the defendants in any event of the action.

Leave to appeal refused.

APPELLATE DIVISION, S. C. O. 3RD NOVEMBER, 1916.

ROYAL BANK v. HEALEY.

Banks and Banking — Assignment of Book Debts — Money due from Fire Insurance Co. for Loss—Not ejusdem generis—Assignee for Benefit of Creditors Entitled to Insurance Moneys.

Assignment of book debts:—As at present worded, the usual cast-iron, all-including agreement called an "assignment of book debts, etc.," taken by banks from customers is of insufficient strength to justify the Court in holding that moneys due from insurance companies for loss by fire are book debts, or are *ejusdem generis* with book debts, or that in this case the bank had any claim to them in priority to the claim of the assignee for the benefit of the creditors of the insolvent customer.

Appeal by the plaintiffs from a judgment of Sutherland, J., dated 4th July, 1916, dismissing their action against the assignee for the benefit of creditors of Glassco & Co. to recover $5,660 and interest, being part of the insurance moneys paid for loss sustained by Glassco & Co. by fire, and claimed by the plaintiffs under a prior assignment. A note of which judgment is in 10 O. W. N. 424.

The appeal was heard by Meredith, C.J.C.P., Riddell, Lennox, and Masten, JJ., on 18th October, 1916.

S. F. Washington, K.C., and *T. H. Crerar*, for the plaintiffs, appellants.

E. H. Ambrose, for the defendants, respondents.

MEREDITH, C.J.C.P.—The single question involved in this litigation, and the only question which has hitherto been considered in it, is whether the moneys in question were dues or demands, howsoever arising or secured, which became due and owing to the defendant's assignors, in their business; that is, the rights of the parties depend altogether upon the meaning of the writing in question, given by the defendant's assignors to the plaintiffs, their bankers, as security for all their indebtednesses and liabilities to the bank.

At the trial some evidence was given as to the intention of the defendant's assignors, or their representative who made

the bargain and signed and sealed the writing for them in their name, and the manager of a branch of the bank who acted for the plaintiffs in taking the security; evidence which the trial Judge, at the time, considered inadmissible, but took, subject to the plaintiffs' objection, for what, if anything, it might eventually be considered worth; and evidence which it seems to me was plainly inadmissible. It was in no sense merely evidence of the circumstances surrounding the transaction; but was evidence which, if it were to have any effect at all in this action, was to have the effect of varying the written contract by parol evidence. If it accorded with the true meaning of the writing, it was unnecessary; if it contradicted or varied it, it was inadmissible obviously.

The action was in no sense one for the reformation of the writing; if it had been, the evidence adduced in it might have been, and doubtless would have been, of a much more extended character. Reformation was not suggested at the trial or even upon the argument here; so that, it seems to me, to give any effect to the testimony, as to the intention of the witnesses or of the parties, is now out of the question. On the writing each party has distinctly taken his stand, and on it each must stand or fall.

Then the first thing that strikes one is the obvious purpose of the parties to the transaction to make the security a wide one, a thing quite to be expected on the part of the bank and one which the customers are frequently not well able to resist, their business depending so much upon their money-borrowing facilities. "All book accounts, debts, due and demands, howsoever arising or secured and now due, owing or accruing due or which may hereafter * * * * become due and owing * * *" are words exceeding wide in their ordinary meaning.

Before the customers made the assignment to the defendants for the benefit of their creditors, if that time be of importance in determining the rights of the parties, the customers had become entitled to the moneys in question under certain policies of fire insurance; and the amount of their loss, for which the insurance companies were liable, had been adjusted by the proper officer representing the company, and part of the amount had been paid to the customers, but the larger part had not been paid.

In these circumstances it has been held, apparently in reliance largely upon the parol evidence which was admitted against the plaintiffs' objection, that the security does not cover the moneys which were payable but still unpaid, under the contracts of insurance.

Excluding that testimony, and dealing with the rights of the parties as evidenced by the writing in question, I am unable to agree in that conclusion.

After the adjustment there was, I have no doubt, a debt owing to the insured under the policies of insurance, whether or not it was then payable. The adjustment liquidated the amount payable under the policies, and so they became debts, and debts owed whether payable presently or only in the future.

And, if there had been no liquidation of the amounts, they would, in my opinion be "demands however arising or secured" from the time of the fire, and demands to which the word "owing" would be sufficiently appropriate; the insurers were owing the compensation, that is, they were, under their covenants contained in the policies, liable in law to pay it, and none the less so because the exact amount had to be ascertained, and though, after ascertainment, they may have been entitled to some delay before the amount became recoverable by action.

All this will hardly be questioned; the real point in the case is whether the writing contains some qualifications of the plaintiffs' rights.

It is said, in the first place, that as the writing assigns, in its first words, all "book accounts," all else that is assigned must be of the same character as "book accounts," in a sense reversing the *ejusdem generis* rule of construction; but no one has yet said what else of the same character would pass under the words following the words "book accounts," and I am quite unable to do so; nor can I understand why the single term book-accounts should control the generality of the several terms, "debts, dues and demands, howsoever arising or secured."

Again it is said that everything points to an assignment of business book debts only; but why so has not been very well explained; not because banks cannot, or do not, take security, or customers give it, upon anything else. But the document itself plainly refutes the contention, for, in it, the customers not only assign "all debts, dues and demands present and future" but also "all deeds, documents, writings, papers, books of account

and other books relating to or being record of such accounts, debts, dues and demands * * "Deeds and documents indicate a wider field than one containing books of account only."

There is, however, a limitation to the general character of all these words in the words immediately following them, namely, "due and owing to the assignor in his business or in connection with any other business."

So the debts, dues and demands must be business debts, dues or demands, that is, debts, dues or demands arising out of or connected with the business of the customers; which, obviously, I should have thought, the liabilities of insurers upon contracts of insurance of the customers' stock in trade, were: as mortgage debts might very well be even if given for the price of land sold by the firm in the way of, or as part of their business transactions.

And, as I have intimated, these liabilities were at least demands owing under the contract of insurance after the loss occurred. How else would they be described by the insured but as money owing to them by the insurance company? No one, not even a lawyer, would think of calling their rights: "claims for unliquidated damages under a contract of indemnity for loss by fire, after loss."

Nor is there anything in the surrounding circumstances to put the words in question out of their ordinary meaning; rather, perhaps, the contrary. The customers were manufacturers of and dealers in furs, and as they failed about a year after the security was taken, it is none the less likely that the bank would seek and would be able to exact all the security the customers could secretly give; and that which the bank did get was not something devised by the customers or the bank manager to give effect to this single transaction, but was that which was expressed in print in a general form, as a note upon it indicates evidently settled, if not drawn, by counsel, and self-evidently intended to be as comprehensive a net as the bank could, and dared, employ.

Nor is there, in my opinion, anything weighty in the fact that the bank did not take assignments of the policies of insurance: why should they if they could in this comprehensive security get the fruits of them. It may well be that the bank would rather get such security as this writing gives secretly than the more certainly expressed security which assignments

of the policies might give with the possible disadvantages, especially to the customers, which such an assignment, of which notice was given, might bring: if indeed it had been shewn that the insurance companies would have consented—if that were required—to such an assignment.

But if we were to take into account possibilities or to exercise our inexperienced views of what should have been done, why exclude these insurance debts or demands: not merely because the bank had no direct charge upon the insured goods: for it must not be overlooked that in the ordinary turn-over of the business they would have become book debts which would have passed to the bank: does it make any great difference that in the ordinary conduct of the business the insurance companies instead of other customers became the debtors to the extent of their value:

It is not necessary to consider whether an assignment of the policies before loss would have cut out any rights under the security in question; that is, would have prevented them from ever arising.

I would allow the appeal and direct that judgment be entered for the plaintiffs in the amount in question.

LENNOX, J.—The defendant is assignee, for the benefit of creditors, of G. F. Glassco and Company, wholesale hat and fur merchants in the city of Hamilton. In the autumn of 1913 Glassco and Company were indebted to the Royal Bank in about the sum of $15,000, and on the 2nd of October of that year executed an instrument called "An Assignment of Book Debts, etc." by way of collateral security for this indebtedness and subsequent advances; the provisions relevant to the determination of this action being as follows:

> In consideration of advances made or to be made by the Royal Bank of Canada to G. F. Glassco & Company carrying on the business of wholesale Hats and Furs, at Hamilton, hereinafter called "the assignor" the said Assignor hereby grants, assigns and makes over to the Royal Bank of Canada all book accounts, debts, dues and demands howsoever arising or secured and now due, owing or accruing due, or which may hereafter during the continuance of this security become due and owing to the Assignor in his said business or in connection with any other business in which the Assignor may be engaged or interested, it being agreed that this security shall continue etc. It is agreed between the Assignor and

the Bank that the said book accounts, debts, dues and demands, and whether present or future, shall be held by the bank as collateral security etc.

The firm's stock in trade was insured with twelve companies. All the insurance was effected through the same agents. The argument of the appeal proceeded upon the basis that the insurance was all effected before the date of the assignment to the bank, and I will assume that it was, although I do not find the date mentioned in the evidence. The stock was destroyed by fire on the 20th of September, 1914.

Glassco & Company assigned to defendant for the benefit of their creditors on the 31st of October, 1914. The total loss was adjusted at $7,711.82. Of this $2,051.82 has been paid. The bank claims the balance, $5,660.00, under the assignment in part above set out. The defendant denies that the assignment covers or includes the insurance, and claims it belongs to him for the payment of other creditors of Glassco and Company. This is the question for decision. The learned Judge at the trial held that the assignment did not cover or include insurance moneys and dismissed the action. I am of opinion that the conclusion of the learned Judge was right. Of the various matters dealt with in his reasons for judgment and questions argued by council on appeal I find it only necessary to discuss one, namely: the proper interpretation of the instrument of assignment given by Glassco and Company to the bank. We were referred to rules of interpretation and many more could be referred to but the initial question is what is the plain, ordinary meaning of the language used, construed in the light of attendant or surrounding circumstances; and, of surrounding circumstances, the first and most important question obviously is "what was the bargain?" It may not be so in all cases of contract but it is obviously so in this case for there is no dispute whatever as to what the plaintiff wanted and asked for, and what Glassco consented to and intended to give. This is clearly stated in the evidence of Mr. Orde the manager of the plaintiffs' bank at Hamilton and of Mr. Gayfer, the representative and agent of Glassco and Company, who signed the instrument on their behalf. This evidence with the statements of admitted facts I have already set out, I think disclose pretty well all the relevant surrounding circumstances.

Mr. Orde said on cross-examination :

Q. You got a statement? A. Yes.

Q. You took this assignment on that date? A. Yes.

Q. At that time how much did they owe you—about? A. About $15,000 I think.

Q. Was that ever paid off? A. It was reduced I think subsequently. The account fluctuated.

Q. How much did they owe you at the time of the assignment? A. About $15,000.

Q. The bank instructed you to obtain an assignment of the firm's book debts? A. Yes.

Q. They wrote you a letter to that effect? A. Yes.

Q. You spoke to Mr. Gayfer, who was the financial man of the firm, and shewed him the letter from Head Office and told him what the Bank wanted? A. Yes.

Q. You then told them what was required, and I suppose you and they were dealing at that time with the same thing in mind; you had in mind of course the trade accounts of the firm? A. Yes.

Q. And presumably they had the same thing in mind? A. Very likely.

Q. Now, in your practice as a bank manager, Mr. Orde, you have often taken security by way of insurance; you take from a customer his insurance as security? A. Yes.

Q. You invariably do that by having him assign to you the policy, transfer it by indorsement? A. Yes.

Q. That is the usual and general practice of a bank? A. Yes.

The re-examination does not, in my opinion, put the matter in any different light.

Re-examined:

By Mr. Washington: Q. You were instructed to get an assignment of book accounts? A. Yes.

Q. Is this (ex. 1) the usual form used by the Bank in all its transactions? A. Yes.

Q. When you speak of an assignment of book accounts that is what you and Head Office mean? A. That is what it refers to.

I take this from Mr. Gayfer's examination in chief :

Mr. Ambrose: Q. Mr. Orde asked you for an assignment of book debts and Mr. Glassco and you had an interview with Mr. Orde and it was arranged that it should be given? A. Yes.

Q That was in September, 1913? A. Yes.

Q. What next took place with reference to the giving of the assignment? A. Before it was given?

Q. After you had promised to give it? A. I had to refer the matter to Mr. Glassco at that time. Mr. Glassco and I visited Mr. Orde in his office at the Bank and we finally agreed the assignment should be given.

His Lordship—Properly admissible. But sometimes I find a higher Court thinks I am in error in some of these suggestions and rules. I will let you get it on the record. I do not say it is evidence—rather the contrary. It will be there in case it is needed later on.

Mr. Ambrose: Q. Did you read the document over before signing it? A Not in detail, No.

Q. What did you do? A. I simply took the heading of the thing for what it was worth, because I had signed them before and knew what they were.

Q. Signed what? A. I had signed a similar document at * * * *

Q. Then of course the firm had a considerable number of trade accounts on their books? A. Yes; we had quite a lot at that time.

Q. Did you discuss those with Mr. Orde? A. From time to time. Occasionally accounts would crop up that would be discussed.

His Lordship: It is said there was some statement asked for. I suppose that would shew the book debts?

Mr. Ambrose: Q. The statement would shew the book debts? A. It would shew the total book debts at the time.

Q. Would it shew insurance in a separate item? A. No.

Q. After the fire did you make any entry in the firm's books with reference to the claims against insurance companies?

Mr. Washington: What he did in his books is not evidence against us.

His Lordship: I don't see how it would.

Mr. Washington: It couldn't alter its character anyway.

Mr. Washington could hardly be said to be of this opinion on the argument of the appeal. Mr. Gayfer was not cross-examined and there was no evidence in reply.

Now what is the scope and meaning of the assignment considered simply as a matter of verbal construction? "Book debts" is a term well known and understood in commercial life. Were it not for the able and earnest arguments of Mr. Washington I would have had no hesitation in saying that it means the outstanding assets appearing on the books of the firm resulting from sales in the ordinary carrying on of their business, and nothing more: and careful reading and consideration of the terms of the instrument satisfies me, even without the aid of the evidence at the trial, that it is impossible to read it as including the insurance moneys in question. There is no reference to either the stock in trade or the policies or insurance thereon.

It was not argued, and it could not be said, that the assignment created a lien upon the stock. The value of the stock in trade of a firm—if fully paid for—may be a gauge of the firm's ultimate ability to meet its obligations, but in a credit business the credits of the firm appearing upon its books are the day to day record of the volume of its business and the gauge of its ability to meet its obligations *as they become due*, and, in this sense, the "liquid assets" of the business as a going concern. Could it be said that this assignment would entitle the plaintiffs to appropriate, to the prejudice of creditors, insurance moneys, arising from the destruction of buildings, or the sale of real estate, or moneys secured by mortgage of real estate? I would not think so, and if not, I cannot see a difference in principle in favour of the claim here set up. It is true that the plaintiffs have a right to the moneys arising from the sales in the ordinary way of trade, and possibly, though I am not by any means prepared to say that it is so, from a sale *en bloc*, but the goods were not sold, and the plaintiffs obtained no lien upon them, nor any direct or specific right to them. It is sometimes smartly said that *an accidental fire* is the most adroit and servicable salesman of an embarrassed trader, but destruction by fire is an essentialy different thing from a sale and is in no true sense a sale of property real or personal.

It would be most unjust to question the good faith of the plaintiffs and I speak in the abstract in the case I am about to put and for the purpose of illustration only. If a customer connected by marriage or otherwise with persons of large financial means obtained from a bank the continuance of a line of credit by making a statutory declaration alleging that the book debts of his business then amounted to, say, $25,000, and assigning his then existing and future book debts, and his explanation of his figures, after a collapse was: "It is true the credits upon my book then actually amounted to only $7,000 but the deficiency, $18,000, was made up by then current policies of insurance on my stock or stock and buildings aggregating that sum," would the bank accept this as a legitimate explanation, and listen as to an honest man, or would the customer be promptly told "that's sheer nonsense, and you know it"—accompanied perhaps, and such cases are of record, by a diplomatic intimation that the timely intervention of a wealthy wife or father-in-law would possibly avert the disagreeable nec-

essity of instituting criminal proceedings, and, on the other hand, if criminal proceedings were taken in such a case would the Judge at the trial feel justified in directing the jury that, these facts being established, they were at liberty to find that "the statutory declaration was true in substance and in fact?" The Judge would be bound so to instruct the jury in effect, if book debts and insurance moneys, contingently payable, are the same thing.

Taken simply as a matter of interpretation of the language used, and without the aid afforded by surrounding circumstances, I am of opinion that the assignment to the plaintiffs cannot be read as including, or indicating an intention to include, the insurance moneys either absolutely or in the events that have happened. And the claim of the assignee, representing the unsecured creditors, is, I think, infinitely stronger when the assignment is interpreted in the light of undisputed evidence as to the facts and circumstances preceding and surrounding the giving and taking of the security under whch the plaintiffs claim.

The understanding of both parties here, what they agreed upon, and what they mutually intended to do, and understood they were doing is put beyond any question whatever by undisputed evidence, in fact by the evidence for the plaintiffs and defendant alike. The plaintiffs were not looking to a termination but to a continuance of the Glassco business upon terms mutually advantageous according to ordinary legitimate and well understood methods of everyday banking, advances and repayments from time to time, money going out to make money for both customer and banker, and money as certainly coming in from a controlled and ascertained source, liquid assets, movable money, something they could keep track of, supervise and control; and they did in fact enquire into and supervise the company's credits by examination of their books; and they did nothing else. There were no enquiries as to insurance or notices to the companies, insurance was never mentioned or thought of, in fact there is nothing to shew that they knew the goods were insured. They asked for an assignment of book debts, they asked for what they wanted, and they got what they asked for. They selected their own form of assignment, out of the many forms used by bankers. They often took assign-

ments of insurance but *never* by this method, and assignments of book debts too *and always by this method.*

If after the execution of this assignment Glassco and Company, being in need of further assistance in carrying on their business, informed a dealer in furs of all the facts and circumstances in connection with the execution of this assignment exactly as the facts are revealed in the evidence of Mr. Orde and Mr. Gayfer, and furnishing him with a copy of the assignment offered him the security of the insurance moneys for goods to be supplied, and the fur dealer accepted the offer, took an assignment of the Policies and the insurance moneys contingently payable and thereupon supplied goods pursuant to the agreement, could it be held in a contest between the plaintiffs and the fur dealer that as to insurance moneys, in the circumstances of this case, the fur dealer could only rank upon the balance remaining after payment of the plaintiffs, or that, by reason of the doctrine of parol evidence of intention or otherwise, the assignee of the subsequent assignment would be precluded from giving evidence of all the facts surrounding the execution of the earlier assignments—in other words, not of the mere *conjectural intention*, but of the actual bargain between the plaintiffs and their assignors, what was admittedly the mutual agreement of the parties and the true and only basis of the instrument under which the plaintiffs claim? I think not. Rules of evidence are for the protection of litigants and not for the perpetuation of unilateral fraud or mutual mistake. Take the same main facts, as I have stated them, and for the offer and acceptance of the security of the fur dealer alone, substitute an offer and acceptance of an assignment of the insurance moneys to him as trustee for himself and other creditors of Glassco and Company, or substitute the defendant, the assignee under the Act, and why, in any case, should the plaintiffs take more under the assignment, whatever may be the accident of its wording, than was ever contemplated by the parties, more than was ever asked for or agreed to. This upon construction of the assignment in the light of the circumstances which induced it and the basic conditions of its execution.

This disposes of the appeal in so far as I need refer to any point raised upon the argument.

But there is a more formidable obstacle in the plaintiffs' way, independent of the mere question of interpretation, and

going to the root of the whole matter, namely: "What was the bargain?" It is true that the ordinary meaning of the language of a signed instrument, is *prima facie* the sense in which the parties used it, but it is equally clear and true that the sense in which the parties actually used and understood the language of a written contract, is best ascertained by ascertaining, if you can; What did the parties finally agree to before the preparation an execution of the writing intended to evidence and validate their agreement. Once this is definitely ascertained by clearly satisfactory testimony or admissions, and, as here, that there was no discussion, variation or examination when the writing was signed, and it matters not in what language the document is couched, and subject to the rights by estoppel of a purchaser or assignee for value without notice, the parties are absolutely tied to the terms of the actual agreement so ascertained. In such case, though the language of the writing may be broader, what was discussed and verbally agreed to being ascertained, there is cogent and irresistable evidence that what was not referred to or discussed was not contemplated, agreed to, or mutually intended to be included; equally irresistible is the conclusion that, if the written document verbally interpreted goes further, it happened through the fraud of one or the mistake of both of the contracting parties. It is not the case here of reformation or amendment of the assignment. Reformation was not asked for, and reformation is not needed. The defendant is assignee for the benefit of creditors and the money is in his hands. The plaintiffs come into Court for assistance and ask to have it declared that the money is theirs. The answer is obvious: "all that you have a right to is your bargain, and what was mutually contemplated and agreed to is not in doubt. All you can take by the writing, you prepared for the purpose of carrying out the agreement, is what was actually agreed to—all else remained in the insolvents and vested in the assignee for creditors."

The appeal should be dismissed.

RIDDELL, J.:—The facts of this case have been stated and lie within a very small compass—there is no need of restating them.

At the conclusion of the argument I was of the impression that the appeal could not succeed and further consideration has not caused me to change my mind. I cannot (with great respect for my brethren of a different opinion) read the assignment as carrying the right to secure insurance moneys as and when payable. I agree in the result arrived at by my brother Lennox and would dismiss the appeal with costs.

MASTEN, J.—The plaintiff is an incorporated bank and the defendant is the assignee in insolvency of G. F. Glassco and Company who formerly carried on business in the city of Hamilton as manufacturers of and wholesale dealers in hats and furs.

On the 20th September, 1914, the stock in trade of G. F. Glassco and Company, then covered by policies of insurance in different companies issued in favour of G. F. Glassco and Company, was injured by fire. The insurance companies admitted liability and certain of them before the 31st of October, 1914, paid to G. F. Glassco and Company the amount of the loss which on adjustment was payable by them.

On the 31st day of October, 1914, Glassco and Company made a general assignment for the benefit of creditors pursuant to the statute, to the defendant in this action.

The plainiff alleges and the defendant denies that the balance of the said insurance moneys amounting to $5,660 not paid to Glassco before the 31st of October, 1914, belongs to the plaintiff by virtue of a transfer made to it by Glassco and Company on the second day of October, 1913. The transfer is as follows:

ASSIGNMENT OF BOOK DEBTS, ETC., BY INDIVIDUAL OR PARTNERSHIP

In consideration of advance made or to be made by The Royal Bank of Canada to G. F. Glassco & Co. carrying on the business of Wholesale hats and furs at Hamilton hereinafter called "the Assignor," the said Assignor hereby grants, assigns, and makes over to the Royal Bank of Canada all book accounts, debts, dues and demands howsoever arising or secured and now due owing or accruing due, or which may hereafter during the continuance of this security become due and owing to the Assignor in his said business or in connection with any other business in which the assignor may be engaged or interested, it being agreed that this security shall continue and remain in force so long as the Assignor is indebted or liable to the Bank for any sum and in any manner whatsoever, and the said Assignor further assigns and transfers to the Royal

Bank of Canada all deeds, documents, writings, papers, books of account and other books relating to or being records of said accounts, debts, dues and demands, by which all debts, accounts, dues and demands hereby assigned are or may hereafter be secured, evidenced, acknowledged, or made payable, all of which evidences of indebtedness or records therof are to be delivered to the General Manager of the said Bank whenever demanded by him for the purposes of this security.

It is agreed between the Assignor and the Bank that the said book accounts, debts, dues and demands, and whether present or future, shall be held by the Bank as collateral security for all and every indebtedness and liability of the Assignor now or hereafter existing or accruing to the Bank until full payment or satisfaction of such indebtedness or liability has been made by the Assignor.

The premises to be held by the Bank and its successors and assigns, as collateral security for all present and future indebtedness and liability of the Assignor to said Bank, direct or indirect, and whether as principal or security, and whether alone or jointly with any other or others, and the Assignor hereby specially authorises and empowers the General Manager of the said Bank for the time being, in the name of the Assignor and from time to time as he may deem it necessary, to sign, seal and deliver to the said Bank further assurances of the premises hereby assigned or intended so to be, with power of substitution, and the Assignor hereby authorizes the said Bank to use the name of the Assignor whenever and wherever it may be deemed necessary or expedient for the purpose of recovering, enforcing payments of, or otherwise realizing the said accounts, debts, dues and demands. It being understood that the Assignor shall be entitled to a release of this security at any time upon payment or satisfaction of all indebtedness of liability aforesaid.

Signed, etc.

The learned trial Judge is of opinion that the assignment does not cover the insurance moneys in question and that instead of going to the plaintiffs they must go to the defendant as the assignee of the debtor, and he dismissed the plaintiffs' action with costs.

The appeal is brought on the ground (1) "that the learned trial Judge erred in taking into consideration the oral testimony of the Manager of the plaintiff Bank, and of one Gayfer, called on behalf of the defendant, for the purpose of interpreting the true meaning of the assignment under which the plaintiff claims the insurance moneys sued for herein.

(2) "That the words used in the assignment from G. F. Glassco and Company to the plaintiff Bank are sufficiently broad and comprehensive to cover any debt whatsoever which might be owing to the said G. F. Glassco and Company.

It is entirely probable that at the time when the security in question was agreed upon between the Bank and its customer neither the local manager of the bank nor the representative of Glassco and Company adverted in their consideration of the question or in their own minds to the insurance policies here in question, or to the moneys that might become payable under them.

But as this record is framed and as the case has been presented, both at the trial and before this Court, the only question to be determined is the meaning of the words used in the document signed by the parties, not the intention which those who represented the respective parties had in their minds when the agreement was negotiated.

No claim is made to reform the assignment, and for the reasons stated by my lord I am of opinion that, if sought, an amendment setting up a claim to reform the assignment ought not now to be permitted. Consequently the evidence tendered with respect to the intention of the parties was inadmissible, and the first ground of appeal taken by the appellants must be held valid.

I think the claim in question is plainly within the words of the assignment: "dues and demands * * * which may hereafter during the continuance of this security become due and owing to the assignor in his said business or in connection with any other business in which the assignor may be engaged or interested."

And I am unable to agree that these general words are to be construed as *ejusden generis* with "book accounts." The whole tenor of the assignment seems to me to evince an intention to give to the bank the broadest security possible, not limited to book debts in the narrow sense of that term.

The document might perhaps be well described as a general assignment of every chose in action then owned or thereafter to be acquired by the customer in connection with his business rather than as a mere assignment of book debts. The heading of the document might be cogent evidence in an action to reform the agreement and make it accord with the intention of the parties, but I cannot see how it is relevant to interpret the meaning of the words used in the body of the agreement which it heads.

It has been held that the rights under an Insurance Policy are by an appropriate instrument validly assignable as a chose in action, even before a loss occurs : *McPhillips* v. *London Mutual*, 23 A. R. 524; but in the present case it is not necessary to go so far because, I think, the moneys became potentially due and owing—in other words, a chose in action—within the meaning of this assignment not later than the 20th of September, 1914, when the fire occurred. Neither the fact that the precise sum payable by the insurance companies was unascertained until a later date nor the fact that the insurance companies had the right to expend the moneys in re-building, destroys or derogates from the claim which thus accrued to the plaintiffs on the 20th September, 1914.

If the insurance company had objected to pay and had successfully defended themselves against a claim, or if they had exercised their right to expend the moneys in rebuilding, the plaintiffs could not have complained. But in the circumstances that here exist, their right, it seems to me, attached when the fire occurred. These subsequent occurrences might have shewn that nothing was ultimately payable; but the claim which is being asserted by the bank is not a legal right to present payment on the 20th September, 1914, but an equitable right to receive whatever might become ultimately payable to the Glassco Company.

The case of *Simpson* v. *Chase*, 14 P. R. 285, was relied on by the respondents but it is to be observed that the decision in that action turned on the interpretation of the provisions of the Division Courts Act with respect to attachment of debts. Here the question turns on the interpretation of the terms of the document above recited. As is said by Lord Macnaghten in *Tailby* v. *Official Receiver*, 13 A. C. at 547,

> The truth is that cases of equitable assignment or specific lien, where the consideration has passed depend on the real meaning of the agreement between the parties .When that is ascertained you have only to apply the principle that equity considers that done which ought to be done, if that principle is applicable under the circumstances of the case.

If I am right in this view, the question which has been somewhat elaborately discussed and considered at the trial and before us, as to when the fund in question became a debt payable by the insurance companies, is beside the mark.

One other question remains for consideration, though it was not argued before us, namely as to whether the assignee for the benefit of creditors obtained priority from the bank in consequence of any failure on the part of the bank to give to the insurance companies notice of claim prior to the assignment to the defendant Healey, or whether such assignment to the defendant is an innocent assignment only enabling the assignee to take subject to all equities. It is elimentary law that in order to perfect an equitable assignment whether voluntary or for value as between the assignor and assignee no notice to the debtor or fund-holder is necessary, and the provisions of our statute, R. S. O. (1914) ch. 109, sec. 49, do not affect the principle of equitable assignments: *Sovereign Bank* v. *International Portland Cement Co.* 10 O. W. R. 161; 14 O. L. R. 511. The omission to give notice in writing to the debtor will not enable the execution creditor of the debtor to acquire priority over the assignee: *Rennie* v. *Quebec Bank*, 1 O. L. R. 303. Nor is notice necessary as against third persons who stand in the same position as the assignor, such as persons claiming under a subsequent assignment as volunteers: *Justive* v. *Wynne* (1866), 12 Ir. Ch. Rep. 289; or an order appointing a receiver, or a garnishee order; *Re Bristow* [1906] 2 Ir. Rep. 215; *Arden* v. *Arden* (1885), 29 Ch. D. 703; or the trustee in bankruptcy of the debtor: *Re Wallis, ex p. Jenks*, [1902] 1 K. B. 719. It is true that a trustee in bankruptcy may lose his priority over subsequent assigns by failing to give notice of the bankruptcy and may gain priority over such assigns by giving notice, but he cannot obtain priority over prior assigns by giving prior notice, for he takes subject to all equities, as is held in the case of *Re Wallis* above mentioned. I think that the principle there stated applies to the present case and that an assignee for the benefit of creditors is in the position of a volunteer and takes subject to all equities; that is, in the present case, subject to the prior equitable assignment in favour of the bank.

For these reasons I think that the appeal should be allowed and judgment should issue in favour of the plaintiffs.

Appeal dismissed.

SUPREME COURT OF ONTARIO. (TRIAL.) 24TH OCTOBER, 1916.

CRAGNOLINE v. SOUTHWICK.

Mechanics Lien—Owner Neglecting to Make Interim Payments—Abandonment of Contract by Builder — Right to Lien — Quantum Meruit.

Interim advances unpaid:—Where the owner fails to make the builder *interim* payments as provided for in the contract, the builder is entitled to abandon the contract and collect for what he has done as a *quantum meruit*, and he may enforce a Lien to recover the same.

Action by a builder to enforce a Merchanics Lien. The facts are sufficiently set out in the judgment herein reported.

J. A. Scellen, (Kitchener) for the plaintiff.
A. L. Bitzer, (Kitchener) for the defendants.

READE, JR. CO. C.J.—This is an action to enforce a Mechanics Lien brought by the plaintiff, a contractor, against Vernon E. Southwick and others for work and materials done and supplied under an agreement with defendant Vernon E. Southwick for the erection of two houses on certain premises situated in the city of Kitchener, in the County of Waterloo.

There is also a calim of Lien for work and materials by H. Dunker & Sons in connection with these same buildings, but no dispute arises in regard to same.

Under agreement dated the 16th day of March, A.D., 1916, made between the plaintiff and defendant, Vernon E. Southwick, it is provided that certain work and materials shall be done and provided for the erection of certain houses aforesaid, for the sum of $1775.00, and that the said amount shall be paid as follows: namely, "Seventy-five per cent. of the value of the work done and materials in place shall be paid at the completion of the brickwork of each house, and again at the completion of the plastering and cellar cementing, and the remainder when the building is all complete and after the expiration of thirty days and when all these drawing and specifications have been returned to C. E. and W. C. Cowan, Architects."

The plaintiff proceeded under his contract and completed the brickwork on one house, and the foundation of the other,

and thereupon demanded from the defendants the amount of first payment as provided for by the agreement, but the defendants refused or at any rate neglected to make such payment upon which the plaintiff refused to proceed further under the contract and abandoned same.

Although ordinarily a lien holder cannot enforce payment for work and materials until completion of the contract entitling him to payment, yet, when the owner on his part prevents the performance by the contractor of his work, or fails on his part to perform his contract in some matter which was contemplated to be done by him before the contractor completed the whole contract, the contractor is entitled to refuse to proceed further under his contract and to abandon same, and collect for what he has done as under a *quantum meruit.* And while the payment of seventy-five per cent. of the value of the work and materials done and placed is not expressly stated to be a condition precedent to the continuance by the contractor of his work, it seems very evident to me that it would properly be so intended between the parties, and should be so construed. It might easily be, in fact in some cases it is so, that a contractor relied upon such payment wherewith to purchase materials and pay wages as he went along and could not proceed without it. A contractor in some cases, indeed in most, has many contracts running at the same time, and cannot wait till all are completed for payment, but must have *interim* payments to carry him along. I therefore find that by reason of the defendant's default in making the payment under the contract, the plaintiff was justified in abandoning the contract and is entitled to payment for what he has done.

I find the value of the work done in respect of Lot 13 to be $650, and in respect to lot 14 to be $300 and that $200 was paid on account of this latter amount, leaving a balance of $100 owing on that lot.

I find also that the vacant lots in question would be of the value of $50 each, and that the selling value of the lots is increased by the amount of the value of the work and materials placed thereon.

Lien allowed.

SUTHERLAND, J. (WEEKLY COURT.) 1ST NOVEMBER, 1916.

FARR v. KERT.

Landlord and Tenant—Improper or Illegal Distress—Continued on Terms—Interim Injunction Restraining — Otherwise Injunction Dissolved — Payment into Court of Value of Goods Seized.

Resisting improper distress: — Where a tenant desires to resist what he considers improper or illegal distress, his ordinary remedy is by replevin: It is questionable whether the remedy by injunction is open to him, but in this case the tenant was allowed to continue an interim injunction until trial on terms of paying into Court the value of the goods distrained.

Motion by the plaintiff (tenant) to continue until trial an *interim* injunction granted by the Local Judge at Ottawa, dated 20th October, 1916, restraining the defendant (landlord) from selling goods distrained.

The motion was heard in the Weekly Court at Ottawa.

T. D. McGee, for the plaintiff's motion.

J. E. Caldwell, for the defendants, *contra*.

SUTHERLAND, J.—The action is by a tenant for alleged damages for illegal trespass, distress and seizure of his goods by his landlord, and is brought against the landlord and his bailiff.

The material discloses a dispute between the landlord and tenant as to whether the tenant was a monthly tenant or for a term which at the time of the seizure had a considerable period yet to run. The tenant was advertising certain of his chattel property for sale, and it is suggested that if he had completed the sale thereof enough chattels would not have remained in the premises in question to satisfy the claim of the landlord. The landlord claimed and was attempting to exercise the right of seizure and sale under a clause in the lease which she claims to be still in force and to the effect that if the lessee "shall attempt to abandon the said premises or to sell and dispose of his goods and chattels so that there would not be in the event of such sale or disposal, a sufficient distress on the said prem-

ises for the then accuring rent, then and in every such case the then current and next ensuing rent for the then current year shall immediately become due and payable, and the term hereby granted shall, at the option of the said lessor, forthwith become forfeited and determined."

The rental which had been paid by the month was $175 and the amount claimed by the landlord under the said clause and for which she was proceeding to distrain and sell was about $1,555.

On the examination of the plaintiff on an affidavit filed by him, he said among other things :

"Q. To put it shortly this way, were you proposing to sell on that day, the 14th of this month, all those goods, the chattels, all the furniture, the fixtures and everything in the hotel building except those that belonged to the landlord? A. Yes sir, all of my own."

And elsewhere: "Q. Why were you intending to close at the end of this month? A. Because I couldn't see where I could pay this man $175 a month, I couldn't see my way clear.

"Q. And you proposed to move out and leave it? A. Yes.

"Q. Going over to Hull, in the Province of Quebec? A. Yes sir."

The ordinary course for a tenant desiring to resist what he considers an improper or illegal distress is by way of replevin, and it has been considerably questioned whether an injunction restraining an attempted sale after seizure of the landlord is a remedy that he is entitled to obtain. *Neil* v. *Rogers* (1910), 17 O. W. R. 1070; 22 O. L. R. 588 and cases therein referred to. See, however, *Keay* v. *City of Regina* (1912) 22 W. L. R. 185; 5 Sask. L. R. 372 at 375.

It does not seem to me that upon the facts disclosed in the material now before me it would be appropriate for me to continue the injunction until the trial of the action, at all events without some security being given. The tenant placed a valuation of about $600 on the goods seized. If he will, within five days, pay this sum into Court to abide the result of the action, the proceedings in the nature of distress may be restrained to the trial; if not, the injunction will be dissolved.

The costs of the motion may stand to be disposed of by the trial Judge.

RE WALMSLEY.

Will — Construction — Distribution among Children of two Families—Question per Capita or per Stirpes? — Unborn Children at Period of Distribution.

Per capita or per stirpes?—The direction in a will, "to divide and distribute the said principal sum equally between and among the children of my half-brother, namely, Joseph, Donald and Annie, and the daughters of Mrs. Nellie Peterman, one equal share to each child," *held*, that the words *one equal share to each child* shewed it was the testator's intention that the beneficiaries should take per capita and not per stirpes.

Unborn children:—Children born after the time has arrived for the distribution of an estate have no claim upon the estate.

Motion by Joseph Walmsley, trustee under the will of the late Thomas Walmsley, for an order determining whether a sum of $6,000 should be distributed per capita or per stirpes.

The motion was heard in Toronto Weekly Court, on 30th October, 1916.

H. S. White, for the trustee's motion.

J. B. Clarke, K.C., for the children of James Walmsley.

S. W. McKeown, for the adult daughters of Nellie Peterman.

F. W. Harcourt, K.C., for the infant daughter of Nellie Peterman.

MIDDLETON, J.—By clause 16 of his will the late Thomas Walmsley, who died on the 28th March, 1912, directed the sum of $6,000 to be paid to Joseph Walmsley in trust to invest and pay the income to James Walmsley during his life, and upon his decease (which occurred on the 1st September, 1916) "to divide and distribute the said principal sum equally between and among the children of my said half-brother, namely, Joseph, Donald and Annie, and the daughters of Mrs. Nellie Peterman, one equal share to each child. Should any of the said daughters die before attaining the age of twenty-one years without leaving issue her surviving, her share is to go to her surviving sisters equally. The child or children of any

deceased child are to receive the share which the deceased parent would have received if living.''

The question which is raised is whether the testator intended that this fund should be divided into four equal shares, the daughters of Mrs. Peterman together taking one share, or whether there should be a *per capita* division, each of Mrs. Peterman's daughters taking an equal share with the children of the half-brother James.

In some cases the question is one of great difficulty and nicety, and it is difficult to determine whether the testator's intention is that those whom he described as the children of the named person, and constitutes members of a class, are to take between them only one share; and in the cases various circumstances have been regarded as *indicia* pointing to the true intention of the will.

In this case I find no difficulty whatever, because the testator has himself said *One equal share to each child.* It is true that Joseph, Donald and Annie are named, but they are named as being children of the testator's half-brother James, and I think that the word ''child'' is used advisedly to indicate all the beneficiaries taking upon a distribution. They are all either the children of James or the children of Mrs. Peterman, and the last clause, which provides for a substitutional gift in the event of any ''child'' dying, leaving issue, is I think intended to apply to all. There is the further provision, intended to be for the benefit of the daughters of Mrs. Peterman, by which, in the event of any of these daughters dying under age without issue, her share is to go to her surviving sisters. Nothing in this conflicts with the theory that the testator's intention was an equal division *per capita.*

At the hearing it was asked whether any daughters who might hereafter be born to Mrs. Peterman would share. The class was probably determined on death of the testator. The period of distribution has now arrived, no children having been born in the meantime. Clearly a distribution was contemplated on the death of James; and children who may hereafter be born can have no claims.

Costs of all parties to come out of the fund.

CLUTE, J. (TRIAL.) 14TH NOVEMBER, 1916.

NORCROSS BROTHERS CO. v. HENRY HOPE & SONS OF CANADA LIMITED.

Contract—Building Contract—Breach of Contract—Delay by Sub-contractor—Reasons for Delay—Waiver of Delay—Reasonable Time for Sub-contractor to deliver Materials and Complete Work—Damages—Measure of—Grossly Exaggerated Claim—Refusal of Costs.

Measure of damages:—Where a sub-contractor failed to furnish the contractor the steel sash required for a large building, in time to enable the building to be closed in before the frost came, and the contractor was compelled to enclose the building himself to avoid damage, the measure of damages is what would be a reasonable charge for doing that which the sub-contractor failed to do, not what the contractor suffered from imperfectly enclosing the building.

Exaggerated claims:—Where plaintiff made grossly exaggerated and fictitious claims amounting to $12,235 and recovered judgment for only $905.78, he was refused costs on the ground that there could be but little doubt that had a reasonable bill been presented it would have been paid.

Action to recover $12,235 for damages and in addition general damages for breach by defendants in fulfilling a sub-contract to furnish steel sash required in exterior and court walls of Central Technical School, Toronto, within the time limited.

The action was tried at Toronto Non-jury sittings, on the 23rd, 24th, 25th, 26th, 27th and 28th of October, 1916. The facts of the case are fully set out in the judgment herein reported.

R. McKay, K. C., for the plaintiffs.
George Wilkie, for the defendants.

CLUTE, J.,—Action for damages for default in fulfilling a sub-contract within the time limited.

The plaintiffs are building contractors in a large way with their head office at Worcester, Mass., and engaged in the construction of buildings in the United States and Canada.

The defendants are incorporated under the laws of Ontario, and carry on business at Toronto.

On the 29th April, 1913, the plaintiffs entered into a contract with the Board of Education for the city of Toronto for the erection of a Central Technical School Building; and on the 19th of June, 1913, the plaintiffs entered into a sub-contract with the defendants whereby the defendants agreed to furnish the steel sash required in the exterior and court walls of the Central Technical School at Toronto as described in the "flyer" attached to and forming part of the contract, and blue-prints 483-1 and 483-2 of Hope and Sons, otherwise as shewn on the drawings and described in the specifications prepared by Ross and Macdonald, architects, for said building for the sum of $19,500, to be delivered "at such time as will not delay the construction of the building." "All the casement sashes required for the exterior to be your 4C section as shewn on pages 28 and 29, with a T-iron frame going entirely around the opening as illustrated in your catalogue page 51."

The sub-contractors also took the option to set complete in place all their work for the additional sum of $2,000. This option was subsequently accepted by the sub-contractors.

Articles 2 provides that the work included in the contract is to be under the direction of the architect and his decision as to the true construction and meaning of the drawings and specifications shall be final. It is also agreed that such additional drawings and explanations as may be necessary to detail and illustrate the work are to be furnished by said architect, to which the sub-contractors are bound to conform and abide, so far as they may be consistent with the purpose and intent of the original drawings and specifications referred to in article 1.

By article 3 no alterations shall be made in the work except upon written order of the contractors.

By article 6 the sub-contractor agrees to commence shipment by January 1st, 1914, and all to be delivered on or before February 1st, 1914. Nothing is said as to time within which the sub-contractor, if he accepts the option, shall set the sash in place.

It is in respect of the delay in delivering and setting the sash and the damages claimed to have been caused to the plaintiff thereby that this action is brought. The contract price for

the sash and setting has been paid. The plaintiffs claim that the defendants continuously failed to deliver the sash so that the delivery of the same was not completed so as to enable the building to be closed before the frost came in the latter portion of 1914. They further charge that the defendants were well aware and were notified by the plaintiffs that the failure to deliver the sash was causing delay and loss and would cause delay and loss if not delivered in time to enable the building to be closed in before the frost came, notwithstanding which the defendants failed to make such delivery; and claim $12,235 damages.

The claim as stated was amended at the trial and the amount of damages claimed slightly reduced.

The defence is that the delays, if any, in carrying out and completing the contract were created by the plaintiffs and their architects who required certain changes to be made in the form, description and details of the sash. Such change had reference to the T-iron frame which the architect required to be changed and altered so as to have the frame correspond to plans and details given by him; which details required a new and special section called the long flange section. The defendants endeavoured to have the changes made as requested, but were delayed in so doing, and were ultimately instructed by the plaintiffs and their architects to proceed with the work as provided for in the original contract; and by insisting on the defendants doing such work not included in the contract, that is procuring the measurements of glass required for such sash, the procuring of which measurements was not part of the duty of defendants, they hindered and delayed the defendants and the closing of the building, and the defendants deny that they were responsible for the delay in delivery of the sash or the delay in the closing in of the building and damages in respect thereof.

Delivery was not commenced or completed within the time stated in the contract, nor did delivery commence until September, 1914, and it was not completed until December of the same year.

The delivery provided for in the contract I find was waived by the parties owing to the delay in the endeavour to get the long flange in place of the T-frame, and a new date for delivery was fixed for June following; the contractors still asking for, and the defendants endeavouring to supply the long flange.

What took place appears mainly from a long correspondence and several interviews, the result of which, plaintiffs contend, established a default on the part of the defendants for which they are liable for the damages claimed. The defendants claim that the time for delivery mentioned in the contract having been waived it became then a question of delivery within a reasonable time and that, having regard to circumstances over which the defendants had no control, they did deliver within a reasonable time, and that in any event the plaintiffs did not suffer loss by reason of any default on the part of the defendants.

It will be necessary to refer at some length to the correspondence between the parties in order to make clear what took place and to place the responsibility, if any, where it belongs.

The day after the contract was signed, and on the 20th June, 1913, the architects, Ross & Macdonald, wrote to Mr. Young, the defendants' manager at Toronto, referring to the proposed change, in which they state that they have learned from Mr. Gross, the plaintiffs' manager, that he has closed with defendants for the supply and erection of the metal sashes and that it is (Gross') understanding that defendants will provide for necessary flange section frames similar to the blue print which indicated the wide flange for the windows.

> This is essential on account of the windows going into the stone masonry, which cannot be built to as accurate measurements as can be done with brick work, and as the frames will be placed in the opening after the masonry has been erected it is necessary that there should be sufficient flange on the frames to obtain an absolutely weather-tight job.
>
> Before the order goes through for these frames, we would be glad to be supplied with detail, so that we may be advised as to your intentions in advance.

What took place between Gross and the defendants before the contract was signed is referred to in the letters of the 2nd and 6th of June from the defendants to the architects, Ross & Macdonald, and their reply. Upon the terms of these letters the contract was entered into. The letter of the 3rd of June written by the defendants states that:

> We have figured to give you for the casement windows a T-iron frame which goes entirely around the opening the same as illustrated in

our catalogue at page 51, with the privilege as given us by Mr. Macdonald, of using an extended flanged section to our No. 4C along the lines of the one in the blue print shewn the writer by Mr. Macdonald *if we find that we can do this at a saving to ourselves.* We will undertake that the section furnished in this way will be satisfactory to yourselves.

The reply states that the matter as outlined in the proposal of May the 19th and the letter of the 3rd June, supplementing the proposal is satisfactory.

On the 8th July, 1913, the plaintiffs, by their foreman on the job, Wilson, wrote to the defendants:

In regard to the revisions and revised details of windows which the architects have asked you for. Will you kindly advise us when we may expect this as you probably realize time is going on.

On July 21st a further letter was written, asking:

when we may expect revised details from you in regard to the windows at the above building, because we understand that until you get the revised details approved you will not be able to proceed with your work and we do not want your starting on this work delayed any more than is necessary. Kindly give this your immediate attention.

And on the 31st a further letter from Wilson:

We have written you continually with regard to getting revised details as promised Mr. Gross and Mr. Macdonald, but up to the present writing have had absolutely no answer from you. As it is impossible for us to delay the work any longer, any changes or cutting of brick or masonry or other work * * * we will have to charge back to you etc.

I do not find a reply to these letters.

On the 11th August, 1913, the defendants wrote to Ross & Macdonald:

Regarding the casement sash to be used on the above named job we wish to say that we have decided that we would prefer to furnish the T-iron frame as originally proposed by us in our estimate rather than give you an extended flanged section such as you gave us the privilege of using if we could do it at a saving to ourselves.

We assume that this will be quite satisfactory to yourselves this being optional with us in accordance with our quotation and your acceptance.

On the 5th September defendants wrote architect Macdonald at Winnipeg referring to the original tender and option to vary the T-frame.

After submitting the matter to Birmingham they decided that they would prefer to furnish a sash in accordance with our original scheme * * We must ask you to accept the T-iron frame in accordance with our proposal * * * The additional member shown on the blue print now furnished by your office is unnecessary for making the windows satisfactory and weathertight and has not been figured on by us.

The architects wrote the defendants on the 17th September; I quote:

Following our Mr. Macdonald's and Mr. Carswell's interview with your Mr. Young last week, we desire to confirm our understanding on the question of using either your standard section or extended flange, which we have had under consideration. We understand that Mr. Hope is on his way to Toronto and as soon as he arrives the question will be discussed further with you on account of the necessity of an extended flange or some other provision other than is furnished by your standard section in placing windows in rubble masonry. We believe that if this standard section is used, it will be found that the half inch covering to the joint will vary considerably and that sufficient protection against weather will not be afforded, especially for the basement windows. If it is found necessary to have a large flange for the basement, we understand that the same section can be furnished for the whole building, without additional cost to you. It was clearly our Mr. Macdonald's understanding following the acceptance of your price, that while the section was optional it was rather optional on account of the possibility of the large flange affecting a saving by its use.

This was admitted in the interview on Friday last and we believe that when the whole matter is considered further that the advisability of the wide flange will be admitted and immediately accepted.

Mr. Hope, President of the Birmingham Company, and a director of the defendants, was expected over to take the matter up, and on November 7th, 1913, the defendants wrote the architects, Ross & MacDonald. I quote in part:

We are in receipt of a personal letter from Mr. H. D. Hope in connection with the special flanged section asked for by you for the above job. Mr. Hope says that he does not anticipate that there will be any difficulty in providing the special flanged section similar to that shown on the detail which we sent him, although he does not think it will be possible to get it made quite so deep. He is enquiring into the matter now and will be prepared to give me the exact information when he arrives in Toronto. He has been delayed in starting but his passage is booked for the Lusitania sailing on the 22nd of this month. He wishes you to leave the

whole question until he arrives, when he will inspect the openings which are already built and he says that he imagines he will have no difficulty in satisfying you that we will give you an absolutely good job and one fully up to our reputation no matter what is decided on.

The architect replied on the 10th November, acknowledging receipt of the letter of the 7th and also advising of the receipt of a letter from the plaintiffs repeating their request that this question should be settled immediately.

We have been considerably hampered on the job, of late, owing to the fact that we have no definite information as to the exact section to be used. It is now five months ago since you closed your contract with the Norcross Brothers Co. to supply these windows, and during these five months we have been waiting on you to give us a definite decision on the type of section to be used. We think you will agree with us that the Norcross Brothers Co.'s request to have this matter closed immediately is very reasonable, and we must therefore ask you to give us a definite reply to our letter of Septmber 17th by return mail.

A further letter from the architects dated November 15th, 1913 :

Confirming our conversation with your Mr. Young yesterday, it has been agreed that you will give us a definite decision on the question of the type of sash to be used in this Building not later than Monday the 17th instant.

Mr. Hope came, and there was an interview on the 4th December, 1913, between Mr. Gross, plaintiffs' manager, Carswell, the local architect, Hope and Young. Mr. Young says with reference to this interview that Mr. Hope knew of the difficulty in getting the long flange section, but in view of the plaintiffs wanting it he would get it in a modified form, and thereupon they submitted a modified form as shewn in exhibit 76. This is dated December 8th, 1913, drawing 983-5. The leg of the flange is shorter than that indicated by the architect. Mr. Hope said he could get it but it would require new rolls made in order to get it out. He expected to obtain it so that it could be delivered by a time satisfactory to the plaintiffs. It was to be obtained through the Birmingham firm. The defendant company kept asking the English firm in regard to it, and urging for its delivery as soon as possible.

On the same day (4th December) plaintiffs wrote defendants this important letter :

In confirmation of our conversation today we desire to state that we shall expect you to commence shipment and erection of frames about June 1st, 1914, furthermore that you are to take your own measurements for all the basement windows. For the windows above the basement you are to work to architects' measurements and also give us your shop drawings at the earliest possible moment so that our masons can work to them. Also please submit immediately for approval the details of the window which you have arranged to supply.

On the 15th December the plaintiffs asked for the blue prints of the latest window section, and on the next day the blue prints of the details of the steel casements were sent.

On the 11th March, 1914, the plaintiffs asked the defendants for a report on the condition of the windows as they wish to know in what condition the work now stands. The defendants replied on the 12th stating that they had no definite information as to how the casements stood.

As regards the sash for the Court would say that we will have these in ample time for you, as our plant in Peterboro will be starting operations about 1st April and this will be the first thing we do. We will be able to make shipments if necessary within a week or ten days after starting.

I may mention that the casement sash were to be obtained through Birmingham, whereas the sash for the Court were to be made by defendants at their factory which they were about starting at Peterborough.

On the 11th April the plaintiffs again wrote the defendants:

About a month ago we wrote you asking for a report on the window for the Technical School and you advised us that you were receiving a report on this but up to the present writing we have heard nothing in regard to this matter. Kindly advise us immediately.

The defendants replied on the 13th April that Mr. Young was out of town. On April the 18th the plaintiffs asked if Mr. Young had returned, and on the 20th they again wrote to the defendants asking if Mr. Young had returned, and wishing :

to know if you are doing anything in regard to the windows for the Central Technical School as understood betweeen you and the architects and ourselves as incorporated in our letter to you of December 4th, 1913, * * * Up to the present time nobody from your office has been to

the work to take any measurements and neither have we received from you any details for our masons to work to and on account of your delinquency in this matter we are going ahead building these windows as per architects' details and expect your work to fit.

This letter also states

that shipments and erection must commence the first of June, 1914, and as you have taken no measurements and submitted no details we wish to impress upon you the fact that you will need to start something at once as we certainly will not give you any extension of time as we consider that months have gone by and you have done absolutely nothing.

To this the defendants replied on the 29th April :

In answer to your inquiry regarding the casement sash for the Technical School would say, that we are in receipt of a cable from Birmingham, stating that they have not yet received the special flanged section ordered by them to make these casements.

In explanation of this cable would say, that this was one of the reasons why our people did not want to have a special flanged section used on account of the delay that would occur in getting the section, this type of section not having been made by the rolling mills for any one of the sash makers up till the time that we ordered the section. We are following it up by another cable asking them what promises they have from the makers for this section, and on receipt of their cable will advise you.

To this the plaintiffs replied on May 1st :

Your letter seems to indicate that no work has been done whatever on these casements. We were extremely surprised to hear of this, and on receipt of your letter we immediately telephoned the Norcross Brothers Co. and found they had been pressing you to do something in this matter for the past few months. They also inform us that as far as they are aware the factory sashes have not yet been started either.

We are at a loss to understand what appears to us to be gross neglect on your part. You have signed a contract with the Norcross Brothers Co. to deliver these casement sashes on the 1st June, and we are now told that you have neither taken measurements on the job or submitted to the Norcross Brothers shop drawings of the sizes to which you are working.

We would impress upon you the fact that the boilers in this building are now completely erected and tested out, ready for operation, that in a few months the heating lines will be finished throughout the building, and that by the month of October we expect to have heat on and the whole building closed in with the permanent sash, glazed, complete. No provision has been made for temporary sashes in this building, and if such has to be restored to, the entire cost will naturally fall on your shoulders.

Kindly let us have some explanation by return mail, and in the meantime we must demand that you cable your head office in England to commence operation on these sashes without a moment's delay.

Your explanation that you have not yet received the special flanged section, seems to us to bear little weight, as this matter was discussed with your Mr. Hope in January, on his visit here some four months ago.

An acknowledgment of this letter is asked for on May 8th.

On the 14th May, 1914, the architects advise the defendants:

In reply to your favor of the 11th instant, and confirming conversation with your Mr. Rea, please note that we have decided to accept the T-section for the casement sash, instead of the long flanged section as originally contracted for.

And on the 15th the plaintiffs advised the defendants to the same effect, stating that the architects:

decided to change from the long flanged section to the T-section originally specified on your windows and would ask you to send us four copies of your detail on this section as the original details were destroyed when the change was made.

and asking for other details.

On the 18th the plaintiffs wrote to the defendants:

Your seeming inattention to our contract with you on above work is beginning to be alarming.

We shall expect as per our letter of December 4th, 1913, that you will have basement frames in place June 1st, 1914. You were also ordered to take measurements for this work, which to the best of our knowledge you have not yet done.

Also we wish at once glass sizes for all your work. We wish it distinctly understood that we shall hold you strictly to contract in regard to time—every minute's delay on your part will be charged against you. We are serious in regard to this time matter and shall enforce it. We do not think your treatment of this contract merits our showing you any consideration whatsoever.

Your delay penalty starts June 1st, 1914.

On the 22nd May the defendants enclose a letter from Mr. Hope bearing date May 13th, 1914, and also express regret that they have not been able to get what the plaintiffs wanted and think it wise to have made the change, back to the T. flange as originally contracted for. They draw attention to the fact that Mr. Hope states that they will be able to have the sash here by September.

In the enclosed note Mr. Hope explains that every effort had been used to expedite the supply of these special flange sections. After his arrival in England there was considerable preliminary work to be done in connection with the flanged sections, the mills raising practical difficulties, in fact refusing to roll the sections as designed: with further explanations, stating that they had never anticipated this difficulty and never before had such delays from the steel mills, and glad to learn by cable that the architects will accept the T-frames, etc.

So that the result is that down to the 14th May, 1914, practically nothing had been done. The time limit had been extended from February to June 1st, and now, on May 14th, the hope of obtaining the long flange is abandoned and the parties have agreed to go back to the original T-frame, the plaintiffs still insisting upon delivery by June 1st.

On the 26th May the architects acknowledge this letter and note that the casement sash will be here by September, and trust :

that you will be able to live up to these promises, as even with a September delivery it is quesionable if you can close in this building in time to prevent any damage by frost.

On the 28th May the architects further write that :

The letters do not state the 1st of September, which is absolutely necessary to get the building enclosed this winter. Messrs. Norcross Brothers and ourselves have been counting upon it. If we had been advised earlier that there would be any uncertainty regarding it we certainly would have taken some action either by changing the type of window or otherwise, so that the building would have been entirely enclosed. We understand that it is the General Contractors' intention to enclose the building completely, so that the plastering and woodwork may be carried on and so that there will not be the slightest cessation of activity on the building. If this is not possible with your sash we expect that the cost of enclosing by other means will be charged against your contract with Norcross Bros.

We must say that we are disappointed and not satisfied in accepting the tee-section frames and it will be necessary for us to see that the General Contractors put the same security and wethertight value that we expect to obtain from the long flanged section.

If there is any doubt as to the delivery of these frames ready for installing not later than the 1st of September, kindly advise us immediately."

And on the 29th the architects again wrote:

* * * "I trust, however, that now you have the 'T' flange approved,

that we will see all of such completed and delivered by the first of September, as now promised. If this last promise is broken, I am afraid it will break the last remnant of my faith in Henry Hope & Sons.

During June and July a large number of letters were written by the defendants to the plaintiffs as to the delivery of the sash and urging that there be no further delay, and in the letter of July 15th, the defendants inform the plaintiffs that they have a report from Birmingham that they would be able to ship by the 11th July; that a good consignment will be got off by the 15th July; and on August 5th defendants ask again as to the casement sash, and also the factory sash, and point out that they learned through the architects that the Peterborough plant was scarcely running, and ask for definite information in regard to both sections.

On the 8th August defendants replied that they expected delivery of a large shipment of casements in a week or so :

and the same remarks apply to the steel sash being made at Peterboro.

On August 8th, also, the defendants send a list for sash for which they have received invoices from Birmingham shewing the date of shipment as of July 28th, to the architects.

On the 11th August the defendants write the plaintiffs that the sash for 576 openings was shipped on the 29th July.

The writer believes that there is nothing to warrant you in being so much concerned as since the change in section was made the works have made rapid progress, but not as rapid as they themselves thought or promised.

With regard to the sash for Courts (that is sash for the inner windows) ;

would say that we were waiting a special rolled section made necessary by the long flange being required for inside to enable the trim to finish to. Birmingham ordered the sections for our Peterboro factory and thought we could get along without this particular section and did not order it, forgetting that we needed it for you. We insisted on its being ordered but in the meantime the other sections were made and delivered and these are being used in the sash we are now making * * * It will not take long to make the entire court sash and our superintendent at Peterboro has instructions to push the making of these to the exclusion of all other orders.

On the 17th August the plaintiffs wrote to the defendants that :

your sash must be all set in the above building so that there will be ample time to glaze so that the entire building will be enclosed not later than October 1st, 1914. Otherwise on that date we shall be obliged to put temporary enclosures in all the windows at your expense and sincerely trust that you will not drive us to this contingency. The plaster is now going ahead and the heat will be on that time and it is necessary for us to have the building thoroughly dry so that painting can follow the plastering, which is impossible unless the enclosures are all protected.

On the 8th September the plaintiffs wrote :

In about thirty days we must screen in the entire work at the Technical School. By your delay in not furnishing the sash and the glass sizes as we have previously told you this work comes rightly up to you to do. Kindly let us know if you intend doing this yourself or will give us an order to do this for you. Any neglect on your part in not having these windows well screened, causing any damage whatsoever, will be charged against you.

To this the defendants replied on the 10th of September :

" * * * As regards the sash would say it is our expectation that the sash will be all on the job and most of them installed before the time mentioned in your letter, and we would therefore not be willing to consider any screening at all at our expense."

The plaintiffs replied on the 11th September:

We are in receipt of your letter of September 10th and note what you have to say and you can rest assured that if your windows are not all in and glazed by the first of October that screening will be done at your expense. Your reference to having furnished us the glass sizes is correct but we have been writing you on an average of once a week since the first of March to turn these glass sizes over to Mr. Hughes, to give him time to order this material and not until August 10th have you considered it at all, when you informed us that your Birmingham office was turning glass sizes over to Pilkington, which was absolutely contrary to all our wishes. It is now absolutely impossible to buy any glass, of sufficient quantity or quality to do this glazing, in either Europe, Canada or the United States, whereas if you had furnished us with these sizes, making it possible to buy the same, when we asked for them the glass would now have been delivered, and you can rest assured that any expense for any delay caused by this will not be borne by The Norcross Brothers Company. We can also assure you that both Mr. Ross and Mr. Macdonald

are thoroughly disgusted with the way you have handled the whole contract.

A further letter on September 14th was sent by plaintiffs' secretary, Mr. Gross, referring to the letter of September 10th, and saying :

Mr. Young, if the matter were not so serious, I would really consider your letter of September 10th as somewhat of a joke, as we are on record not once but many, many times in regard to this matter, and you can rest assured that the Norcross Brothers Company are not going to lose any money through the negligence of Henry Hope & Sons not fulfilling the terms of their contract. We will do everything in our power to adjust things in an amicable and fair manner, but, as you very well know, when the contract was let for this work, that Mr. Donald Hope was present, considerably over a year ago, I stated then that from previous experience with you, I feared you would not be on time. You both considered that ridiculous, but you see my fears have beeen realized * * *

On the 18th September the following letter was written by plaintiffs to defendants :

"Kindly see that a larger force of men is employed at the above School setting your sash. There are quite a number of these on the ground and the work is going along altogether too slow.

On the 22nd September the defendants wrote :

In compliance with your request we have pleasure in stating that all of the sash for the exterior elevation are coming from Birmingham. Of this sash there are 769 fixed sash already delivered at the building. There are 108 casements on the way, they having been shipped ex s. s. Megantic which sailed 12th Sept. from Liverpool.

Under date of Aug. 31st Birmingham have stated that all of the casements for this job would be finished end of September, so that we expect that there are other shipments on the way of which we have as yet got no notice.

As regards the Court sash, these are all being made in Peterboro, and we expect a carload of them in early next week.

On the 23rd the plaintiffs wrote the defendants :

In confirmation of our conversation today we understand the condition of your work in the above building as follows:

Out of a total of 771 pieces of fixed sash 769 are now on the job.

Out of a total of 433 casement sash 108 pieces were shipped from England on the 12th instant.

Out of a total of 631 pieces of factory sash for the court lights none have yet been shipped.

In addition to this there are certain sash for the sub-basement and basement, none of which have yet been shipped.

Your promise of today is as follows:

That the shipments of sash for the courts from Peterboro will begin this week and the complete delivery made not later than October 15th. This also includes the sash of the sub-basement and basement.

That the final shipment of casement sash from England will be not later than September 30th.

Now if you will refer to our contract you will see you are far behind on your promised deliveries. The condition now is extremely serious from both a mechanical and financial standpoint. In a very few days the plasterer will have completed his work and we wish to commence on our interior trim. Further than this we are obliged to supply temporary heat for this enormous building and our object in giving you this contract over a year ago was to assure ourselves that all your openings would be completed and glazed before temporary heat was necessary.

The temporary screening of this building not only will entail the cost of the screens but will oblige us to use excessive heat, which we estimate will cost at least the additional sum of Fifteen Hundred Dollars ($1500.00) a month should your work not be installed in sufficient time for us to have it glazed before heat is required. Consequently should it be necessary for us to put temporary enclosures in the windows we think it would be more economical for you if we put in temporary glazed sash rather than cloth screens as the cost of the extra heat to you would certainly be a great deal more than the cost of the temporary glazed sash. We intend to hold you responsible for any costs to us occasioned by the non-fulfilment of your contract and we advise you to use every effort to escape this penalty, which would certainly be a severe one.

On the 26th September, Mr. Young, having returned from Peterborough, writes to the plaintiffs that :

it is his expectation that in the car which will come next week from Peterboro to have at least 250 of the sash for the job.'' And on the same day by a subsequent letter he advises that 100 casement sash are being shipped on the next boat available to September 30th, with a further consignment of 50 each week until completed, and stating that they are handicapped owing to a large number of their men having joined the colours and are still continuing to be so, with the result that they are experiencing difficulty in keeping their promises.''

On the 1st October, 1914, defendants delivered as account :

''Setting 425 sash,—$500.00.''

On the 6th October the plaintiffs notified the defendants that

"you have only three men and two laborers on your work . . . and must insist that this force be increased at once as there are enough of your frames on the ground to take care of more men."

There appears to be no answer to this letter.

On the 7th the defendants notified the plaintiffs that they are advised by Birmingham that they have ninety of the windows for the above job which are being shipped on the nearest boat available to October 2nd; and on the 13th they advise the plaintiffs that they have received the invoices and shipping bill for one hundred of the windows.

On the 16th October the architect writes the defendants quoting from the Superintendent's weekly report of the 10th instant :

"Henry Hope and Sons continue to make very poor progress with the placing of sash, no great endeavor is even being made to fix such sash as is on the job." The architects further say that they visited the job and "the above condition was noted and we were very much disappointed to find such poor progress in the placing of your work.

The cold weather will be upon us at any moment and there is still a great deal of work for you to do.

The whole building operation was laid out in the full anticipation of the building being enclosed with your sash completely glazed, before cold weather set in.

It would seem from present conditions that it will be necessary for the plasterer to stop work for a time, thus losing most favourable weather for drying out, and setting back the date for placing the interior wood finish.

On the 19th October the plaintiffs wrote the defendants:

We hereby inform you that on November 1st, 1914, we will close in with temporary glazed sash all the openings in the above building, which are not filled in with your sash, and glazed, and will charge you for the cost of such work. This you will consider as final as we have warned you often on the above ever since the work has started, and you have practically taken no cognizance of these.

The defendants replied on the 21st October :

The writer (Young) thinks that we are now doing very well in the matter of deliveries and the setting. We have a great deal of work on at

present in the City and it is impossible for us to put any more men on that can set properly than those now there. We are doing the casements in Hart House, Toronto University for Sproatt & Rolph, Bishop Strachan School for Sproatt & Rolph, Methodist Book Room * * The Excelsior Life Bldg. * * On the first three of these jobs the casements are arriving and the owners and architects of the building are anxious to have the work closed in for the winter for the same reason that you are yourselves on the Technical School.

The writer trusts that you will bear with him in the matter as he is doing the best that can be done under the circumstances. We do not wish to put inexperienced men on the setting. We asked the privilege of Norcross Bros. to do the setting in order to have it done right. It could not be guaranteed if we had to put on men who are not in our opinion sufficiently versed in this class of work.

To this the architects replied :

These conditions are evidently due to your undertaking more work than you are able to handle expeditiously. This is unfortunate for you, but it does not concern us, and we feel that we have prior claim.

We believe the whole of the work enumerated in your letter was taken after you received the contract for the "Central Technical School." You have mentioned work therein which is not yet above the street level, and we cannot see how work on casements for these buildings should, in any way, affect the delivery and placing of casements in the "Technical School" which has been waiting to receive them for several months.

Our reports show that out of a total of 1,900 openings, Mr. Eadie found only 700 filled

We, therefore, have lost all hope of your being able to get the building enclosed before severe weather comes along; and we must ask Messrs. Norcross Brothers to enclose the openings for the protection of the work done by other traders.

On the 23rd November, 1914, the plaintiffs wrote quoting from a letter from Hughes & Co. in answer to plaintiffs' request that they hasten the glazing, and said that any delay or damages caused by the defendants' failure to furnish sash in time would be charged back.

On the 25th they wrote again :

on account of your metal sash not being installed and glazed several plastered ceilings in the above building have been frozen and will have to be removed, and we will naturally charge the cost of replacing these back against you. We have repeatedly warned you in regard to the

damage being done on account of your repeated delay in furnishing your material and if we continue to have trouble you can see our suit for damages against you will be very heavy and we therefore suggest that you see that the remaining sash in your contract are delivered and set at once.

To this the defendants replied on the 25th :

We repudiate * * * any responsibility for delay for if we had been allowed to make the casements as they are now being made and furnished and which was in accordance with our rights under our contract which calls specifically for Tee Iron Frames, then the frames would have been made, delivered, and installed months ago. It was owing to the architects' desire to have an extended flange section and their insisting on us furnishing it and our inability to get it, and afterwards having to revert to what we wished to furnish originally which caused the delay.

Under these circumstances we cannot, and will not, be held responsible for the delays in delivery.

To this the plaintiffs replied on the 26th November, declaring the position of the defendants was ridiculous. Here the plaintiffs apparently take the position that they are not responsible for the delay, if any, made by reason of the architects. I quote :

In the first place we wish to inform you that your contract is with The Norcross Brothers Company and not with Ross & Macdonald.

The letter then refers to the contract and the repeated demands for delivery, and that the first sash was not received until August 13th, 1914, fourteen months after the signing of the original contract, and on this date (26th November) ;

you have not yet delivered your work complete, seventeen months after the signing of your contract and seven months after your change. On your factory sash where there was no change from the original contract it was over fifteen months before you commenced to deliver these.

On the 7th January, 1915, the plaintiffs wrote the defendants referring to the receipt of a letter from the architects which states :

Kindly have Henry Hope & Sons attend to the adjusting of the open casements. The water is getting in through these adjustable casements and will cause damage if not attended to at once.

When we visited the job yesterday we found that Henry Hope & Sons had not a single man on the job. This we think is adding insult to injury.

The windows of the boiler room are also required immediately. We cannot conceive why these should not have been installed months ago.

On the same day the plaintiffs again wrote that there were three sash short. They add :

We don't see how you can ever expect us to get this building finished at all if you do not do your part to help us out.

Again, on the 19th January this is referred to, asking definitely when the delivery may be expected to be made. To this there was no reply, and on the 26th January the plaintiffs again wrote :

although we distinctly asked you to answer this, and not simply lay it aside you have not seen fit to do so.

This letter was apparently crossed by defendants' letter on the 27th, in which it was said :

We do not anticipate that the three sash still to come from Birmingham will be here before six weeks.

and again, on the 27th, the defendants replying to the letter of the 26th, said :

it is not on account of us wishing to ignore your letter, but rather that we had nothing to report as yet, we not having heard from Birmingham as yet as to when these casements and additional sash will be here.

On the 31st March, 1915, the plaintiffs wrote the defendants that :

a crate of your windows was delivered on Saturday, March 27th, and is still lying on the exact spot where it was left. If these are some of the windows we are waiting for will you kindly see that they are erected.

and on April 1st, 1915, the defendants say in their letter to plaintiffs :

There are two steel sash missing yet for a room on the Lippincott St. elevation. We have not got the invoice of these yet. We cabled today to Birmingham to see where they are.

The foregoing references to the correspondence shew pretty fully what took place under the contract. There was, I think,

a waiver of the delivery of the sash called for by the contract and under the arrangement with Mr. Hope when he came over on the 4th December it was agreed to commence shipping and the erection of the frames about the 1st of June, 1914. This appears as well from the evidence as from the letter of 4th December, 1913, from plaintiffs to defendants. It is true that Mr. Young says that he would not accept a change which would not give him seven months to deliver the sash, but this arrangement was that shipment should commence about the 1st of June.

The contract called for the delivery of the sash "at such time as will not delay the construction of the building." The fact that article 6, calling for the commencement of shipping on the 1st January and complete delivery on or before the 1st of February, was waived and a new date fixed does not, in my opinion, amount to a waiver of that part of the contract which appears on "the flyer" (part of contract) that delivery should be made at such time as will not delay the construction of the building. I think that, although this change was made and the time extended to June, it was in the contemplation of both parties that this change would not delay the construction of the building. There was no waiver as to this.

But it is urged by the defendants that the parties having reverted by consent to the T. frame, the time for delivery being now past, they were only bound to deliver within a reasonable time; and that they did, having regard to all the circumstances, deliver within a reasonable time. I cannot take this view of the case. The defendants should, I think, having regard to all that took place, and particularly to the frequent demands made by the plaintiffs for fulfilment of their contract, have sought at an earlier date to put in the T frame, seeing the difficulty which there evidently was from the beginning of procuring the long flange. It is true that this delay was largely, if not wholly, caused by the architects' insisting upon a modification of the T frame; but in my opinion they had a right to modify the nature and quality of the work, and, whether they had or not, the defendants, through Mr. Hope, accepted the responsibility of delivering the new flange.

To this extent the original contract was modified, and even if the letters upon which the contract was based could be referred to, which I think they cannot, as giving an option to the defendants in delivering the long flange instead of the T frame,

they cannot help the defendants, because the contract took the place of the letters, calling for the T frame; and this was changed, by request of the architect and consent of the defendants, to the long flange.

It will be noted from the foregoing correspondence that the defendants could not procure the long flange which was to be delivered, and that later the architects suggested a further change, still adhering to the long flange; and that finally, the time advancing for the completion of the building, the architects reverted to the original T frame.

What caused the parties to revert to the original T frame in the contract was this. On the 1st May, 1914, the architects wrote a very strong letter to the defendants stating that there appeared to be no work as yet done on the casement sash; and that the plaintiffs were complaining of the delay; and that the factory sash had not yet been started; and that they are at a loss to understand what appears to be gross neglect on defendants' part etc. On the 8th May the defendants' attention was called to the fact that this urgent letter was not answered, and on the 11th May in answer to the letter of the 8th it was stated that Mr. Young was called away, and in reply to this letter the architects, apparently losing all hope that they could obtain the long flange as desired by them, decided to accept the T section for the casement sash instead of the long flange section, as originally contracted for, and so notified the defendants. This, of course, was another change, but again the plaintiffs did not waive, nor did the parties, I think, intend to waive, that part of the contract calling for delivery at such time as will not delay the construction of the building. I have no doubt that at this time the defendants hoped and intended to deliver in time so as not to delay the completion of the building within the time contracted for by the plaintiff.

On the 18th of May, 1914, the plaintiffs wrote the defendants:

> Your seeming inattention to our contract with you on above work is beginning to be alarming. We shall expect as per our letter of December 4th, 1913, that you will have casement frames in place June 1st, 1914.

The letter referred to of December 4th does not so state, but there is no reason why delivery of the basement frames should not have commenced on June 1st and proceeded as provided by

the letter of the 4th December, inasmuch as the change in frame and flange did not affect the basement frames.

Mr. Wilkie strongly contended that, the time fixed by the contract for delivery having ceased to be applicable owing to the change to the long flange and back again to T frame, the contractor is bound to complete in a reasonable time, and that the reasonableness must be measured by the circumstances arising at the date when the contract time has ceased to be applicable instead of at the time when the contract was entered into; and he referred to Hudson on Building Contracts, 4th edition, p. 503, and the cases there quoted: *Attwood* v. *Emery* (1856), 26 L. J. C. P. 73; *Hydraulic Engineering Co.* v. *Mc Haffie* (1878) 4 Q. B. D. 670; *Lyle Shipping Co.* v. *Cardiff Corporation* [1900], 2 Q. B. 638. He also urged that time for completion might be affected not only by the circumstances arising at the date when the contract time had ceased to be applicable, but also during its performance by current changes affecting the contract, and for this he relied upon *Sims & Co.* v. *Midland Railway Co.* [1913], 1 K. B. 103, and *Hicks* v. *Raymond & Reid* [1893], A. C. 22. In the *Hicks Case* a cargo was shipped under a bill of lading for delivery in London, and no time was specified within which discharge was to be completed. It became, therefore, the duty of the consignees, to discharge the cargo within a reasonable time. There was a strike and serious delay. It was held that the consignees were not liable in damages to the shipowners for the delay. The question was, what was reasonable under the existing circumstances, assuming that in so far as the existing circumstances were extraordinary they were not due to any act or default on the part of the respondents. Lord Watson said that

> when the language of a contract does not expressly, or by necessary implication, fix any time for the performance of a contractual obligation, the law implies that it shall be performed within a reasonable time. The rule is of general application, and is not confined to contracts for the carriage of goods by sea. In the case of other contracts the condition of reasonable time has been frequently interpreted; and has invariably been held to mean that the party upon which it is incumbent duly fulfils his obligation, notwithstanding protracted delay, so long as such delay is attributable to causes beyond his control, and he has neither acted negligently nor unreasonably.

Both in the *Hicks Case* and the *Lyle Shipping Case* no time for completion was fixed by the contract. In *McDonell* v. *Canada Southern Railway Co.* (1873), 33 U. C. R. 313, 320, both parties to a railway contract continued to work under it after the time limited for completion. It was held that work done after the date fixed for completion was done under the terms of the contract so far as they could properly and reasonably be applied to the new or prolonged contract.

In *Hydraulic Engineering Co.* v. *McHaffie*, *supra* where the contract was to be performed "as soon as possible," Lord Bramwell said:

> To do a thing as soon as possible means to do it within a reasonable time with an undertaking to do it in the shortest possible time.

It was proved in that case that both the plaintiffs and the defendants knew that the machine was wanted at the end of August. The delay on the part of the defendants was owing to the circumstances that at the time of the undertaking to manufacture the gun they had not a foreman competent to prepare certain patterns without which it could not be made. It was held in effect that the reasonableness was to be measured, not by the particular existing staff and appliances of the contractor's business, but by the time which a reasonably diligent manufacturer of the same class as the contractor would take to carry out the contract.

In the present case the steel frames were of recent introduction into Canada, having been first introduced by the defendants, and were not manufactured here, and certain portions were not manufactured in England; they had to be obtained from Germany. It would appear that the plaintiffs had knowledge of this at the time, for reference was made to an offer from Wolffe & Co., a portion at least of the material of which had to come from Germany. There was delay in this case owing to the shortage of steel, which was difficult to get, and still more difficult, owing to press of work, to get it rolled in the required form, which was done either in England or in Canda. Notwithstanding all this, having regard to the form of the contract, I think there was undue delay, both in the delivery and setting; the one no doubt largely on account of the other; and that there was therefore a breach of the contract in that regard.

The defendants contended that their delay, if any, did not prevent the plaintiffs from completing the building within the time limited by their contract, namely by the 29th April, 1915; that if the building was not completed within that time it was not from any fault of theirs. The defendants further contended that the plaintiffs' delay in completing the trim was owing to the non-delivery of the material for the same and that no trade was in fact delayed by reason of the delay of the defendants. It does not appear that any of the other trades under the sub-contracts made claim for delay or that plaintiffs have paid or been put to any expense in reference thereto, except possibly in the case of trim and of plastering, which I will refer to in dealing with the claim for damages.

The evidence, generally, as to damages was very indefinite and uncertain, and before and at the close of the evidence I stated that I would, if counsel so desired, dispose of the questions of law arising in the case, and if I found that there had been default causing damage I would refer the case; but both counsel after consideration desired me to dispose of the question of damages upon the evidence such as was given.

The building was accepted on the 4th June, 36 days after the contract was to have been completed, but some work remained to be done to perfect completion.

I was dissatisfied with the nature of the evidence offered by the plaintiffs in regard to their claim. It was stated by Mr. Gross, their general manager, that they adopted it as a rule in their practice to make a record of any loss from time to time from any delay by any sub-contractor, and that it was the duty of their foreman to see that such loss was noted and a record kept. During the course of the trial I suggested to plaintiffs' counsel that I should be better satisfied if the ledger or other book or books shewing a record of these losses were produced. Nothing was produced until after the close of the argument, when a sheet from a loose-leaf ledger, exhibit 82, was produced. No evidence was offered by the plaintiffs in explanation of this document. It is headed:

The Norcross Brothers Co. Sub-contractors Ledger.
Job Technical High School Name Henry Hope & Sons
Trade Steel Sash.

Under date of June 1st, apparently from folio page 2000, the following items are entered:

$ 906.00
300.00
3,000.00
200.00
3,000.00

These are all the items under the head of "Charges" except two, one for $9.90 and the other for $2.16. Under the column "Payments" there are a number of items apparently rubbed out, but as the defendants do not allege payment of any of these claims the erasures are probably not material. The items small and great under the heading "Charges" amount to $7,417.06. Wilson, the foreman in charge of the work, in his letter of January 6th, 1915, to the general manager, Gross, wrote:

Henry Hope has sent in a bill practically asking for all of his money less fifteen per cent., which amounts to about $3,300. I should like to know, before we authorize Worcester to pay him, how much you want back charges made out for. We know the cost of the screens up to date, also extra wood trim, but we don't know what Dancy will charge back or Hughes for having to buy glass in Canada instead of in England. Also in a letter from you you mentioned charging back Hope $1,500.00 a month for heating. I am afraid to ask Hughes and Dancy for their back-charges for if Hope won out we should have to pay them and they probably will not soak us. What do you think?

We understand from local glass men here that glass has increased since we put in our bid 55 per cent. and there is about $2,600.00 of exterior D. D. glass here, making $1,430.00 Hughes might claim. Of course I don't know but what Pilkington has let him have this at same cost.

Then follows in pencil:

Screens	905.78
Wood	180.00
Dancy	300.00
Heat	3,000.00
Hughes	2,000.00
	6,378

This clearly is a mistake in addition; it should be $6,385.78.

On May 1st the plaintiffs sent a statement to their head office in which they state:

Hope has finally got his windows all in and we are now ready to have them finally adjusted.

(It will be noticed that this was the day after the building was to be completed under plaintiffs' contract).

We are also ready to send in back charges. Kindly look this over and advise us:

Screens cost us	$ 905.78
Plaster frozen and replaced ..	300.00
Heat	3,000.00
Hughes, (delay and glass) ..	3,000.00

This is totalled to $6,205.78, should be $7,205.78. Then there is more in pencil:

Add $180 for section—and extra wood trim.

The typewritteen part of the letter then proceeds:

Of course Daney has not yet put in any charges; he may and he may not; neither has Hughes. Probably you would rather notify these and make a claim for delay and expense.

On the 7th of May the plaintiffs' Toronto office wrote to Head Office stating that:

Mr. Donald Hope was here yesterday and they are to finish the job at once. We think it better to hold back our charges until they are completely done. Here is the bill we intend to send them if you approve same. Kindly advise us or mark revisions and return.

Extra cost of screening windows	$ 906.00
Plaster frozen and replaced on account of windows not being in and glazed	300.00
Extra Heat required to allow work to progress	3,000.00
Extra wood trim required on account of your sections not being according to details submitted by you	200.00
Delay, making it impossible to complete the building by May 1st, 1915, on account of your work being delayed 14 months.	3,000.00
	$7,406.00

It will be seen that these accounts are substantially for the same amount, barring a difference of $20.00 increased on the wood trim, and a few cents on the first item.

On May 31st formal accounts were made out to Hope & Sons covering these items; amounting to $12,235.00. In this account

instead of the amount as mentioned in the former accounts, the screening is charged at $1,085.00 instead of $906; the plastering at $650 instead of $300; the extra heating at $4,500 instead of $3,000 and the failure of the defendants to deliver the sash thus retarding the finishing of the building, and plastering, glazing interior painting, flooring and trimming $6,000.00, no extra window trim being charged.

At the trial the plaintiffs asked leave to strike out the particulars as given in the statement of claim and to substitute therefor the claim as it appears in the letter from the plaintiffs' solicitors to the defendants' solicitors. This information apparently was given as the letter states in answer to the information asked for on the examination of plaintiffs' foreman, Wilson. It differs so largely in form and matter from the particulars, from the letters and from the statement of loss by the general manager that for convenience I give it in full:

The Cost of screening of operations and protecting buildings.

Actual net cost paid	$ 905.78
Overhead cost and profit	135.85
	$1,041.63

Plaster was broken in rooms 73, 74, 396, 300 and on the stair to tower November 17th, 1914

Pulling down and removing 640 yards plaster	$ 160.00
Protecting finished work in these rooms	320.00
Overhead cost of superintendence, etc	81.00
	$621.00

Extra temporary heating required on account of permanent windows not in, arrived at as follows:

Maximum direct heating lode for this building properly enclosed 325 H. P.

Fair average heating lode throughout the season 163 H. P.

On the basis of 4 1-2 pounds of coal per H. P. hour properly enclosed building would use in 24 hours 8.8 tons.

The record shews building heated Nov. 26th, 1914, to May 8th, 1915, 164 days.

For properly enclosed building actual consumption should have been 164 x 8.8 tons equals 1,443 tons;

Actual consumption was 1,980 tons.

Balance difference on account of building not enclosed owing to delay of Hope & Sons—537 tons.

537 tons of coal at $3.50	$ 1,880.00
For extra heating, cost supts., etc	372.00
	$2,252.00

Extra expense occasioned by intermittent work of carpenters and temperature conditions while carpenter engaged in putting up trim, estimated at $690.00

Cost of delay of three months in completing building due to Hope & Sons default:

Contract time of completion April 29th, 1915.

Actual time of completion July 29th, 1915.

Cost per month:

Superintendent	$ 250.00	
Asst. Superintendent	175.00	
Foreman Carpenter	100.00	
Clerk	112.00	
Timekeeper	50.00	
Watchman	120.00	
Expense of office on the work	25.00	
Manager's expenses etc	100.00	
	$932.00 x 3	$2,796.00
Liability insurance on $2,721.00 at 2.2 per cent		59.00
Bond premium for three months		677.00
Interest for 3 months on $166,325.00, amount held in reserve by Board of Education		2,495.00
Three extra trips of Supt. Mr. Gross		175.00
		$6,202.00
Overhead expenses, head office, etc. 10 per cent		600.00
		$6,802.00

I will deal with these by taking the items separately.

Item 1, cost of screening, etc; actual net cost paid $905.78, overhead cost and profit, $135.85, $1,041.63. Wilson says this work was done under his direction, and some evidence was given as to cost of cotton used for the screens which was in part controverted by the defendants' evidence as to price. Particulars appear in exhibit 34. I think the amount of this bill as shewn in the particulars should be allowed, $905.78. I do not allow over-

head cost and profit $135.85, for the reason that it did not appear that by the erection of these screens there was any increase in overhead costs.

Item 2, plaster replaced on account of frost, $620.00. I disallow this item in toto. It will be remembered that the plaintiffs first put this charge upon the ground that it would be an amount they might have to pay Dancy; but Dancy was neither asked what his amount was before he was settled with, nor has he made any claim for any sum whatever, and he has been fully paid under his contract and the defendants discharged from any obligation so far as he is concerned.

Item 3, the charge for heating, $2,252.00, is made up on a calculation from information said to be received from experts; they are not called, nor was there any evidence to shew how their account was made up. The method was this. On the basis of 4 1-2 pounds of coal per horse power hour a properly enclosed building would use in twenty-four hours 8.8 tons. Then it is said the record shews the building was heated from the 26th November, 1914, to the 8th of May, 1915—164 days— and that for a properly enclosed building the actual consumption should have been 164 x 8.8, equalling 1,443 tons; whereas the actual consumption was 1,980 tons. The building has been used for over a year since its completion and there could have been no difficulty in getting accurate information as to the actual consumption of coal during the winter of 1915-1916. It might have varied somewhat from the previous winter, but it would be a reasonable basis to go upon, and possibly an accurate basis; yet no evidence of this kind was given. In fact, there was no evidence at all that 1,443 tons would have been sufficient to heat the building. It may be, for all that I know to the contrary, that no extra coal was used at all on account of some of the windows being enclosed by cotton instead of by glass. It was shewn in some cases that a single transom or upper window was left unglazed in certain rooms. I drew attention to this at the time as it pointed to the inference that it was left purposely in order that cotton might be used instead of glass for venilation; and there was some evidence given, and it is a matter I think of common knowledge, that buildings are frequently enclosed in the first instance during plastering with cotton instead of glazed for the very purpose of ventilation, a certain amount

of heat being used. This item has been left for me to guess at. I pointed this out during the trial, and I understood counsel not to controvert this view. I decline to guess, and, no evidence having been given shewing an increased cost, I allow nothing on this item.

Item 4, extra expense occasioned by intermittent work of carpenters, and temperature conditions while carpenters engaged in putting up trim. There is no evidence to justify this charge. I disallow it. It would have been easy to put carpenters in the box to shew that this delay was caused by defendants' default. As a matter of fact the trim was delivered very slowly and not until defendants' work was well advanced. The plaintiffs reserved the trim work for themselves to do and in the Progress Report by the Superintendent, Eadie, of the 24th December, 1914, it is stated that:

> The interior trim is coming on the job very slowly. Not sufficient on the job to justify a start being made in the erection of same.

In the next report of January 2nd, 1915, the Superintendent states that:

> So far no more trim has come on the job, and until this comes along a bit faster nothing is to be done in the erection of same.

In the next report nothing is mentioned about the trim. By the report of January 16th:

> A start was made on window trim on the second floor, east corridor windows and on trim of room 261. Very few carpenters are employed on trim at present, but more will be started in a few days.

On January 23rd the report says:

> Have now commenced * * * trim to windows on north fire stair and 2nd floor.

The report of January 30th says:

> Very little has been done so far to window trim. With the exception of corridor windows and windows to tower stairs, which are practically finished.

On February 6th the report says:

> The wood trim is now coming freely to hand and the carpenters' squad is being increased daily. Most of the trim to windows facing the court corridors and class-room has been mounted.

On February 13th the report says that

> trim to basement windows * * * is now complete.

On the 20th February it is said in the report that they were making good progress with the interior trim, and again on February 27:

> Engaged * * on trim

March 6th.

> 80 per cent of all blackboards have now been set and trimmed * * * the window trim is now fairly well finished.

Other references of a like nature are made, but there is no suggestion so far as I have found in any of the reports that there was any delay or increased expense caused by the defendants' default; and I find that there was not. This item should be disallowed.

Then comes the item, (5) cost of delay of three months in completing the building due to Hope & Sons' default, and charges are made amounting to $932.00 for the cost per month for the Superintendent, Assistant Superintendent, etc., making for the three months $2,796.00. The building was accepted on the 4th June by the Board, but there was considerable work done after that. Mr. Gross explained that this three months did not mean the last three months that the plaintiffs were working on the building, but that they would have finished the building three months earlier than they did had it not been for the defendants' default. It was a curious thing if this were so that not one of the sub-contractors of the other trades arising under the contract was called to shew when and where and how the defendants' default delayed them. It should be remembered that in the earlier accounts of supposed loss to the plaintiffs on account of defendants' default two of the contractors mentioned were Hughes and Dancy; the one furnished the glass and the other did the plastering. These men have been settled with and have made no claim and were not called to prove that any claim in fact existed. But the plaintiffs' evidence was offered as tending to shew that although the other subcontractors did not complain and have asked no damage and have been settled with, yet in fact there was a delay which necessitated the plaintiffs' keeping up their staff and officers for three months longer than

would have been necessary but for the defendants' default. I do not think I should be left to guess at this. If such were the case and delay was occasioned it could have been shewn beyond reasonable doubt by the subcontractors, but it was not shewn and I have not been satisfied that defendants' default caused such delay and alleged damage. I disallow this item.

The next two items, 6 and 7, for insurance $59.00 and bond premium for three months $677.00, I also disallow for the same reason.

Item 8, interest for three months on $166,325.00, amount held in reserve by the Board of Education $2,495.00. There was no such amount held in reserve by the Board of Education for three months, but Mr. Gross explained that what it meant was that, the plaintiffs' contention being that they would have finished the job three months earlier than they did finish it, they would have received that amount three months sooner than they did, and therefore he claimed that they were entitled to charge interest upon it. In view of what I have said before, I do not think this amount, or any amount under this charge should be allowed.

Item number 9, three extra trips of the Superintendent, Mr. Gross, $175.00, has relation to this charge. There was no evidence before me that extra trips were made by Mr. Gross owing to delay or default of defendants. What I presume he meant was that if the defendants had committed no default, the plaintiffs having completed the job three months earlier, the three trips which were made would not have been necessary. I do not accept this view.

The same remarks may be made with reference to the next charge, 10, overhead expenses with head office, etc., 10 per cent., $600.00. I disallow this item also.

Speaking generally of the whole bill, in addition to what I have already said, I take the view that the plaintiffs knew at an early date that the building must be enclosed if the trades under the other subcontracts were not to be delayed. It is quite clear from their numerous demands and notices that they intended to enclose the building themselves if it were not done by the defendants in order to avoid damage; that they took the responsibility; and if they failed to properly enclose it, that was their default, and not the defendants', and having taken that course, in my view, the measure of damages would be, not what they suffered from their enclosing the building imperfectly, but

what would be a reasonable charge for doing that which the defendants had failed to do. I think that no real effort was made by the plaintiffs to place before the Court such evidence as might have been adduced, shewing the real loss, if any, by reason of the defendants' default, and from the evidence in the whole case and the manner in which it was given I think that the various bills presented were gross exaggerations and all of them except that for enclosing the building by screens were fictitious, resting upon no foundation in evidence. For this reason, and to mark my disapproval of the course taken by the plaintiffs in regard to the extravagant claims made by them against the defendants, I allow the plaintiffs no costs. I can scarcely doubt, as was said by counsel for defendants, that had a reasonable bill been presented it would have been paid.

Let judgment be entered for the plaintiffs for $905.78, without costs.

PRIVY COUNCIL 2ND NOVEMBER, 1916

OTTAWA SEPARATE SCHOOL TRUSTEES v. CITY OF OTTAWA

OTTAWA SEPARATE SCHOOL TRUSTEES v. QUEBEC BANK

Constitutional Law—Separate Schools—Suspension of Powers of School Board—Powers Conferred upon Commission—5 Geo. V. (Ont.) c. 45, s.3—Ultra vires—U.C. Separate Schools Act (1863)—B. N. A. Act (1867).

Commission in lieu of School Board:—Ont. statute 5 Geo. V. c. 45, s. 3, providing for the suspension of the powers of Ottawa Separate School Board and conferring such powers upon a Commission, held *ultra vires* of the provincial legislature as prejudicially affecting certain rights and privileges with respect to denominational schools conferred by U. C. Separate Schools Act, 1863, and reserved under provision 1 of sec. 93 of the B. N. A. Act, 1867.

Imperial Parliament has the sole power of passing an Act which prejudicially affects the rights or privileges reserved to denominational schools under B. N. A. Act, 1867.

Members of Separate School Boards are in no different position from other Boards or bodies of trustees entrusted with the performance of public duties and if they fail or decline to perform their statutory duties they are liable to process of the Supreme Court of Ontario.

Parliament of Canada has no jurisdiction in relation to education except under B. N. A. Act (1867) s. 93 (4).

Consolidated appeals by the Ottawa Separate School Trustees from the judgment of the Supreme Court of Ontario, reported in 34 O. L. R. 642. The facts of the case are sufficiently set out in their Lordships' judgment.

The appeal to the Judicial Committee of the Privy Council was heard by Lord Buckmaster, L. C., Viscount Haldane, Lord Atkinson, Lord Shaw of Dunfermline and Lord Parmoor.

Sir John Simon, K. C., and *Hon. N. A. Belcourt, K. C.* (Ottawa) for the appellants.

W. N. Tilley, K.C., (Toronto) and *Hon. Malcolm Macnaghten*, for the respondents.

Sir Robert Finlay, K. C., and *McGregor Young, K. C.* (Toronto) for the Attorney-General for Ontario.

Their Lordships' judgment was delivered by

THE LORD CHANCELLOR,—The question raised in these consolidated appeals is whether section (3) of 5 George V, c. 45

(1915) Ontario, is valid and within the competency of the provincial legislature. The appellants contend that this section prejudicially affects certain rights and privileges with respect to denominational schools reserved under provision (1) of section 93 of "The British North America Act, 1867."

The preamble of the Act of 1915 recites that an action was then pending in the Supreme Courts of Ontario between R. Mackell and others and the appellants. This action has now been finally decided adversely to the appellants 27 O.W.R. 502 Their Lordships see no reason to anticipate that this judgment will not be accepted and obeyed. There is a further recital that the appellants have failed to open the schools under their charge at the time appointed by law, and to provide or pay qualified teachers for the said schools, and have threatened at different times to close the said schools and to dismiss the qualified teachers duly engaged for the same. So far as this appeal is concerned, the accuracy of these recitals was not questioned by the counsel for the appellants. Section (1) of the Act does not come into question in this appeal; section (2) is a declaration of the duties of the appellants.

Section (3) is as follows:—

If, in the opinion of the Minister of Education ,the said Board fails to comply with any of the provisions of this Act, he shall have power with the approval of the Lieutenant-Governor in Council—

(a.) To appoint a commission of not less than three nor more than seven persons.

(b.) To vest in and confer upon any commission so appointed all or any of the powers possessed by the Board under statute or otherwise, including the right to deal with and administer the rights, properties, and assets of the Board, and all such other powers as he may think proper and expedient to carry out the object and intent of this Act.

(c.) To suspend or withdraw all or any part of the rights, powers, and privileges of the Board, and whenever he may think desirable to restore the whole or any part of the same, and to revest the same in the Board.

(d.) To make such use or disposition of any legislative grant that would be payable to the said Board on the warrant of any inspector for the use of the said schools, or any of them, as the Minister may in writing direct.

The Acting Minister of Education expressed the opinion that the trustees had failed, and were failing to comply with the provisions of the Act, and submitted the appointment of a Commission for the approval of the Lieutenant-Governor in Council. The respondent Commission was duly appointed under an Order in Council on the 25th July, 1915.

The powers conferred on the Minister of Education in sub-sections (*b*) and (*c*) of section 3 are expressed in very wide terms. At the instance of the Minister, with the approval of the Lieutenant-Governor in Council, all or any part of the rights, powers, and privileges of the appellant Board may be suspended or withdrawn without limitation in time, and only subject to restoration at the discretion of the Minister. The powers withdrawn from the appellant Board may be vested in and conferred upon an appointed Commission, a nominated body, in the selection of which the ratepaying supporters of the Roman Catholic Separate Schools have no voice. There is no exception to the universality of the extent to which all the rights, powers, and privileges of the appellant Board may be suspended or withdrawn and vested in and conferred upon this nominated body. Is this legislation consistent with provision (1) of section 93 of "The British North America Act, 1867"? Section 93 enacts that in and for each province the Legislature may exclusively make laws in relation to education, subject and according to certain specified provisions. This section has been recently under the consideration of their Lordships in the case of the appellant Board and R. Mackell and others. The effect of the section and of sections 91 and 92 is to give an exclusive jurisdiction to the Legislature of each province to make laws in reference to education subject to the specified provisions. The Parliament of Canada has no jurisdiction in relation to education, except under the conditions in provision (4), which are not in question in this appeal. The rights or privileges reserved in provision (1) cannot be prejudicially affected without an Act of the Imperial Legislature.

There is no question that the impeached section of the Act of 1915 does authorise the Minister of Education to suspend or withdraw legal rights and privileges with respect to denominational schools. The case of the respondent Commission is that the appellant Board does not come within the category of "a

class of person," and that no right or privilege with respect to denominational schools, which the appellant Board had by law in the province at the union, has been prejudicially affected. It was argued that the protection given by provision (1) related to rights or privileges possessed by all the adherents of the Roman Catholic schools in the province, and that the appellant Board only represented the minority of a larger class. The status of the appellant Board depends on the provisions contained in "The Separate Schools Act, 1863." Section (2) of that Act confers the right of electing trustees for the management of a separate school for Roman Catholics, not on all the adherents of Roman Catholic schools in the province, but on any number of persons, not less than five, being heads of families and freeholders, and householders, resident within any school section of any township, or corporate village, or town, or within any ward of any city or town, and being Roman Catholics. The right of electing managers is thus conferred on the supporters of a separate school or schools for Roman Catholics within one or other of the designated areas. In the present case the appellant Board are the elected trustees for the management of Roman Catholic Separate Schools within the city of Ottawa. They represent the supporters of the Roman Catholic Separate Schools within the area of the city, and as such elected trustees enjoy the right of management which was conferred under the Separate Schools Act, 1863. Apart therefore from any words of limitation or any implication to be drawn from the context, the appellant Board represent a section of the class of persons who are within the protection of provision (1). Their Lordships can find neither limiting words nor anything in the context which would imply that they are excluded from the benefit of the provision. They are not the less within the provision that any other Board similarly constituted would have similar rights and privileges. They would be entitled to the protection of the provision, though they were the only Board of trustees in the province constituted under "The Separate Schools Act, 1863." But if the appellant Board represent people who come within the protection of provision (1), it is difficult to apppreciate the argument that no legal right or privilege existing in the province at the union with respect to denominational schools has beeen prejudicially af-

fected. It is possible that an interference with a legal right or privilege may not in all cases imply that such right or privilege has been prejudicially affected. It is not necessary to consider such a possibility, and this question does not arise for decision in the appeal. The case before their Lordships is not that of a mere interference with a right or privilege, but of a provision which enables it to be withdrawn *in toto* for an indefinite time. Their Lordships have no doubt that the power so given would be exercised with wisdom and moderation, but it is the creation of the power and not its exercise that is subject to objection, and the objection would not be removed even though the powers conferred were never exercised at all. To give authority to withdraw a right or privilege under these conditions necessarily operates to the prejudice of the class of person affected by the withdrawal. Whether or not a different policy might have been preferable, either in the opinion of the provincial Legislature, or in that of the Courts, is not a relevant consideration. It was argued that no evidence on behalf of the appellant Board had been called to prove that the withdrawal of their rights, powers and privileges, operated to their prejudice. In the opinion of their Lordships no such evidence was necessary.

For the purpose of these appeals it is unnecessary to say more. The decision depends on a question of construction. During the argument the Counsel for the respondent Commission pressed on their Lordships the difficulty of providing any adequate alternative in order to ensure the proper education of the children of Roman Catholic parents in the city of Ottawa. Their Lordships realise the great importance of this consideration, and there is no doubt that considerable temporary inconvenience must be involved if the appellant Board, as representatives of the supporters of the Roman Catholic Separate Schools in Ottawa, fail to open the schools under their charge at the time appointed by law, and to provide and pay qualified teachers. It may be pointed out, however, that the decision in this appeal in no way affects the principle of compulsory free primary education in the province established under the School Law of 1850, and that if the appellant Board and their supporters fail to observe the duties incident to the rights and privileges created in their favour, the result is that the children of Roman Catholic parents are under obligation to

attend the common schools, and thus lose the privileges intended to be reserved in their favour under provision (1) of section 93 of "The British North America Act, 1867." The history of this question is thus accurately summarised in the judgment of Meredith, C. J. O.:—

> The ground upon which we based the claim of the Roman Catholics to separate schools was the injustice of compelling them to contribute to the support of schools to which, owing to the character of the instruction given in them, they could not for conscientious reasons send their children because in their view it was essential to the welfare and proper education of their children that religious instruction according to the tenets of the Roman Catholic Church should be imparted to them as part of their educational training.
>
> This injustice, it was claimed, was greatly aggravated when, by the School Law of 1850, a system of compulsory free primary education in schools supported partly by Government grants, but mainly by taxation, to which all ratepayers were liable, was established.

Their Lordships do not anticipate that the appellants will fail to obey the law now that it has been finally determined. They cannot, however, assent to the proposition that the appellant Board are not liable to process if they refuse to perform their statutory obligations, or that in this respect they are in a different position from other Boards or bodies of trustees entrusted with the performance of public duties which they fail or decline to perform.

From what has been said it apears that in their Lordships' view the Act as framed is *ultra vires*, and accordingly liberty will be reserved to the plaintiffs, should occasion arise, to apply to the Supreme Court of Ontario for relief in accordance with this declaration, but their Lordships do not anticipate that it will be necessary for the plaintiffs to avail themselves of this right.

Their Lordships will humbly advise His Majesty that the appeals be allowed with costs to be paid by the respondent Commission here and below and the respondent Commission will pay the costs of the Corporation of the City of Ottawa and the Quebec Bank.

Appeal allowed.

APPELLATE DIVISION, S. C. O. 3RD NOVEMBER, 1916

REED v. ELLIS

Negligence—Master and Servant—Servant Contracting Tuberculosis—Fumes and Dust in Factory—Lowering Disease Resisting Power of Servant—Reasonable and Probable Consequences—Proximate Cause—Latest Devises for Care of Servants—Medical Evidence—Knowledge of Risk Assumed—Workmen's Compensation Cases not Authoritative in Common Law Cases.

Fumes and dust in factory:—Notwithstanding that a jury found that a servant's disease (tuberculosis) was "the reasonable and probable consequences" of his employer's negligence in "not taking proper and reasonable precaution by some mechanical or other device for disposing of fumes and dust" in his factory, the Appellate Division *held*, that there was no evidence on which the jury could find that the employer's negligence was the proximate cause of the disease, and, therefore, he could not recover damages.

Knowledge of risk assumed:—A servant cannot be heard to say that he did not know, appreciate and voluntarily assume the risk of employment, when he had been for 14 years previously engaged in the same employment, in the same factory and for the same master.

Latest devices:—A master is not bound to provide all the latest devices for the care or benefit of those he employes; he is bound to take reasonable means to protect them from injury in his service; and if a manufacturing company it should have the advice of competent men as to the proper methods of carrying on their business in regard to fumes and dust, and their effect upon the workmen, and should, in good faith, act in accordance with that advice. If this has been done no jury should be permitted to find that they did not take reasonable means to protect their workmen, even if a case should arise in which it turned out that such means were not sufficient to prevent a particular injury.

Lowering disease resisting power:—In all cases in which the negligence of a master lowers the disease resisting power of a servant, the master is answerable in damages for the loss sustained by the servant through any and all ailments that flesh is heir to, attributable to impaired resisting power so caused, providing that the negligence is the proximate, not a remote, cause of the injury: The difficulty lies in the proof, which must be convincing.

Medical evidence:—The question as to gases and dust and their effect upon human beings cannot be answered out of common knowledge; it must be dealt with by those skilled in chemistry and pathology.

Workmen's Compensation Cases are of but little authoritative value in deciding negligence cases under the common law.

Appeal by the defendants from a judgment of Latchford, J., dated 26th May, 1916.

Plaintiff's action was to recover $5,000 damages for injury to his health alleged to have been caused by fumes of acids, dust of metals polished, and insanitary condition of the premises in which he worked for the defendants from 1888 to 1914, with the exception of two years.

LATCHFORD, J., entered judgment for the plaintiff for $3,000 damages and costs of the action, upon the findings of the jury in his favour.

The appeal was heard by Meredith, C. J. C. P., Riddell, Lennox, and Masten, JJ., on the 17th October, 1916.

H. E. Rose, K. C., for the defendants, appellants.

T. N. Phelan, for the plaintiff, respondent.

MEREDITH, C. J. C. P.:—A perusal of all the reporter's notes of the trial of this action makes it very plain that, excepting in one respect nothing was left unsaid upon the argument of this appeal that could be helpful to either party, and that the ground taken by Mr. Phelan in the plaintiff's behalf then—differing from that taken at the trial—and that ground only, gave any support to an argument in favour of the plaintiff's right to recover in this action; and that the most that could be made of that ground was made by him in the plaintiff's behalf. Yet I am of the opinion that the action is a hopeless one, if it be dealt with, as it must be, according to the law only.

The plaintiff is by trade a jewellery polisher, and as such worked for the defendants, and those whom they succeeded in carrying on the business which is now carried on by them, from the year 1888 to the year 1914, with the exception of one or two intervals of comparatively short duration; certainly one beginning in the year 1896 and lasting a year and a half owing to illness from which, as he testified, he had recovered so well that before going back to the work of his trade again he had worked "with pick and shovel" "for two months." This illness he described in examination in chief as "inflammation of the stomach." Throughout his employment by the defendants, and those whom they succeeded in the business, the plaintiff seems to have had, as he certainly had most of the time, the position of foreman of the polishers.

He left the defendants' employment finally in the year 1914, in consequence of a hemorrhage of the lungs; and then, as he

testified, for the first time learned that he had that wide-spread disease now-a-days commonly called tuberculosis, but better defined in this case by the older name consumption or phthisis, the seat of the disease being in his lungs; and he is now said to be in an advanced stage of that disease.

The case was tried by a jury, and they found that this disease was "the reasonable and probable consequence" of the negligence of the defendants in "not taking proper and reasonable precautions by some mechanical or other device for disposing of fumes and dust."

For the defendants it is now contended that no evidence was adduced at the trial upon which reasonable men could find that the plaintiff's present state of illness was caused by the breach of any duty the defendants owed to him. No observation was made regarding the peculiar form of the verdict.

The ground which Mr. Phelan now takes in support of the verdict is not that the disease was directly lodged in the plaintiff's body through any want of care on the defendants' part, but that their business was carried on in breach of their duty to take reasonable care of their servants, and that that breach of duty, as found by the jury, was so long continued as to lower the man's vitality, and in consequence of such lowered vitality the germs of this disease were able to find a lodgment in his body and to begin and carry on to its present stage their destructive work, and all also that may follow.

The proposition put plainly is this: that in all cases in which the negligence of a master lowers the disease-resisting power of a servant the master is answerable in damages for the loss sustained by the servant through any and every ailment that flesh is heir to, attributable to impaired resisting power so caused.

Speaking generally, perhaps no fault can be found with that proposition, provided that the negligence is the proximate, not a remote, cause of the injury; the difficulty lies in the proof, which should be convincing.

Such cases as *Morrison* v. *Pere Marquette &c.*, (1913) 28 O. L. R. 319, *Coyle* v. *John Watson Limited*, [1915] 1. A. C. 1, and *Glasgow &c.* v. *Welsh*, [1916] 2 A. C. 1, are cases of proof: see also *Kerr* v. *Ayr &c.*, [1915] 1 A. C. 217; the disease followed hard upon the negligence which quickly caused the physical

depression; but there may be cases in which proof may be impossible, and this case may be one of them, or may be one in which complete proof would shew no cause of action. However that may be it is quite certain the plaintiff might have given much more evidence than was adduced in his behalf on this question. And I must add that cases decided under Workmen's Compensation Legislation must be applied with care to such a case as this, in which common law rights only are involved, it being said in the highest British tribunal that "the distinction of proximate from remote cause is not to be vigorously pressed in the application of the Workmen's Compensation Act."

In all cases tried by a jury there must be such evidence, on the question of proximate cause as well as of negligence, that reasonable men could conscientiously find both; and short of such evidence the action should be dismissed without going to the jury for determination in any respect; and having regard to the great number of other possible causes, in such a case as this, there should be no laxity in the performance of the duties of the trial Judge upon the question whether there is or is not evidence to go to the jury.

If a plaintiff in such a case as this can recover, so, too, could a plaintiff, no matter what the injury said to have been sustained through the lowered resistance might be, whether headache, stomach ache, typhoid fever or any other of the thousand and one possible injurious effects; and if, upon evidence such as that adduced in this case, a plaintiff could always go to a generally sympathetic jury, cases of this kind would be very numerous; yet the plaintiff has not been able to point us to a successful one.

The defendants contend that there was no evidence to go to the jury either upon the question of negligence or of the proximate cause of the plaintiff's condition; but as the latter is perhaps the stronger of these two grounds of appeal—at all events has thoroughout been treated as such—it may be as well to deal with it first.

The first thing that strikes me as to it is the paucity of the testimony, in the plaintiff's behalf, adduced with a view to connecting the admitted illness with the alleged cause of it. The plaintiff's family physician alone was called to give professional evidence upon the subject; and he was not asked even to state

that in his opinion the negligence complained of was the cause of the plaintiff's present diseased condition. In the circumstances of the case, and having regard to the nature of the disease, it is hardly possible that any intelligent, truthful person could say more than this witness did in his patient's behalf; that the things complained of by the plaintiff would make one more liable to the disease by producing an irritated condition of the throat and that they would interfere with normal resistance, and that the evidence which struck him most was the quantity of dust, and people expectorating who had tuberculosis, that allowing that sputum to dry and become mixed with the dust is an ideal condition for producing tuberculosis and is recognized as the most common cause. But the jury have not found in the plaintiff's favor in the latter respect, though it was alleged as a distinct cause of action; and the evidence did not warrant any such finding; it was that the floors were swept daily at noon after being first sprinkled with water.

The physician who attended the plaintiff in his illness in 1896-7 was not called to say whether or not it was tubercular in character, though the uncontradicted testimony of a professional witness called for the defence was, as common knowledge is, that the disease the plaintiff now suffers from may be very long continued or of short duration—from thirty years to a few days this witness said—before causing death in cases where it so ends. It will not do to say that the plaintiff was not called upon to prove a negative; he was relying entirely upon circumstantial evidence, and in his own interests should have excluded as many other possibilities as he could; and, being bound to prove a cause of action arising within six years, should have given evidence upon this subject, and doubtless would have given it if helpful to him.

The evidence at the trial was directed chiefly to gases given off by chemicals used in the defendants' trade, and dust from a polishing powder also used in the trade, and to the means of carrying off these gases and such dust.

In regard to the gases the testimony of an eminent chemist called as a witness for defendants was, speaking generally, that they were practically harmless as used properly in this trade, and could not well be charged with having any part in bringing about the plaintiff's present condition. And perhaps it may

be taken for granted that if these gases had such an effect as some of the witnesses described, upon human beings, they could hardly have given much aid to a mere germ struggling to penetrate the human being's mucous membrane; and certain it is that some statistics shew the death rate of chemists from tuberculosis is extraordinarily low. And in passing I may say that this witness testified that it was impossible that any one could be "lock-jawed," as one of the plaintiff's witnesses testified he was, by the chemical fumes.

So, too, it is common knowledge, in these days, that inanimate dirt does not breed disease, nor is it the lurking place of the germs of disease; but that such germs are bred in animate beings and distributed by those who are possessed of them; and so none, no matter who or what or where they are, can be sure of avoiding them. Also, it is impossible for any reasonable person to say more than it may be that lowered resistance caused by some of the things complained of, or caused by other of very many things which might have a depressing physical defect, may have been a cause of the plaintiff's present diseased condition—and may not have been. Whether too remote a cause in such a case as this need not be considered until proved to be more than a possible or probable cause.

So too, much evidence as there was upon the subject indicated that the death rate from tuberculosis of the persons employed in this factory while the plaintiff was employed there was a good deal below the death rate from the same cause throughout the Province.

Therefore, if the jury meant that lack of proper and reasonable precautions by some mechanical device for disposing of fumes and dust was the proximate cause of the plaintiff's disease, I have no hesitation in saying that there was no evidence upon which reasonable men could so find: see *Finlay* v. *Tullamore*, [1914], 2 I. R. 233.

I am also of opinion that there was no evidence upon which reasonable men could find the defendants guilty of actionable negligence towards the plaintiff.

No witness who had any special, or general, knowledge of the subject was called to condemn the defendants' workshop or the manner in which their work, as far as they had control over it, was carried on. Only the plaintiff and two other workmen

gave evidence in the plaintiff's behalf on the subject. For nearly a quarter of a century the plaintiff worked there, much if not all of the time as foreman of the work in regard to which the most fault is found by the plaintiff's witnesses; the dust from the polishing. Some complaints were made by him, but few, chiefly about the misconduct of his fellow-workmen; and it may be added that a good deal of that which is now complained of is attributable to such misconduct, and some was such as the plaintiff himself, as foreman of polishers, would be answerable for.

No action was brought or claim made for the illness of 1896, though he then had a right of action if he now has one. It was always open to him to leave, or to threaten to leave, his employment, as he doubtless would have done if, during all these years, his employers had been guilty of wronging him, and wronging him in a manner that was undermining his health and strength. In this country, in these days, it is not true, and it is doubly unjust, to say that a workman is not a free man because he is in fear of losing his employment or in fear of his master's ill-will if he left or complained. It might just as well be said of the employer that he is not a free man because of fear of losing his workmen, if not more than that, suffering from their ill-will. So, too, it was always open to the plaintiff to complain to the medical officer of health, secretly if he chose, in order to have the premises examined under the provisions of The Public Health Act, so much relied upon by him now.

A master is not bound to provide all the latest devices for the care or benefit of those he employes; he is bound to take reasonable means to protect them from injury in his service; and if a manufacturing company, such as the defendants are, should take care to have the advice of men as competent as the witnesses Dr. Ellis and Dr. Ferguson, as to the proper methods of carrying on their business in regard to fumes and dust, and their effect upon the workmen, and should, in good faith, act in accordance with that advice, they assuredly do take reasonable means for the protection of their workmen; and no jury should be permitted to find that they did not, even if a case should arise in which it turned out that such means were not sufficient to prevent a particular injury. The question as to the gases and dust and their effect upon human beings cannot be

answered out of common knowledge, but need to be dealt with by those skilled in chemistry and pathology.

In this case such advice was not obtained or sought beforehand, but, these same persons now testifying to the sufficiency of the means which were adopted, is a jury to be permitted to say, without any like evidence to the contrary, in effect, that the defendants must adopt some other method as well as pay $3,000 damages, and without having that which is commonly called "the proof of the pudding"—proof that any disease was really caused by present conditions.

I am in favour of allowing the appeal and directing that the action be dismissed.

Before parting with the case I feel in duty bound again to call attention to the unwisdom of departing from the usual and well-understood questions submitted to the jury in negligence cases. No point has been raised in this respect—it hardly could be, as all alike are accountable for the form of the questions; all alike having apparently approved of them; at all events no one seems to have disapproved. Yet I feel bound to say that if I had been upon the jury I should not have understood just what the words, "the reasonable and probable consequences" of the negligence, meant. "A probable consequence" would be plain, but would not be enough, nor would " a reasonable consequence," even if one knew just what was meant by the words "reasonable consequence." "Reasonable" and "probable" are words quite appropriate to some actions, as, for instance, actions for malicious prosecution, but they seem to me to be inappropriate here. "The consequence," if sufficient emphasis were put on the word "the" would be nearer the mark; but why not "Was any negligence of the defendants the proximate cause of the plaintiff's disease?"

No one can reasonably deny that in this case, as in all cases of tuberculosis, there is, in one sense, but one cause of it—the germ; but that also, in another sense, there are many, very many, "probable causes" and "reasonable" causes for lowered vitality, but so there may be many of infection without lowered vitality.

LENNOX, J.—If this is to be treated as a common law action we have to consider whether upon the evidence twelve or ten reasonable men could fairly answer "No" to the question: "Did

the plaintiff voluntarily incur the risks incident to his employment with the defendants?" and I am strongly of opinion that the evidence did not support this finding. When the plaintiff returned from England and re-entered the defendants' service he had consulted with and been advised by his physician as to the probable or possible effect of his doing so, and with this and his own knowledge of the conditions existing in the defendants' factory it is quite impossible for anyone who looks at the matter fairly and dispassionately to say that he did not then and thereafter know and appreciate and voluntarily assume the risks, if any, he was liable to encounter in the defendants' service. The fact, if it is a fact, that he made occasional complaints does not weaken, but rather emphasizes this conclusion. *Thomas* v. *Quartermaine* (1887), 18 Q. B. D. 685, C. A.

The maxim *volenti non fit injuria* does not apply where the plaintiff can establish a cause of action arising out of breach of a statutory duty; *Baddeley* v. *Granville (Earl)* (1887), 19 Q. B. D. 422; and Mr. Phelan contends that The Public Health Act, R. S. O. (1914) ch. 218, confers a right of action upon persons injured through infraction of its provision. It may be so. It is a question in each case whether the legislature so intended or not. The Imperial Public Health Act (1875), 38 & 39 Vict. ch. 35, sec. 66, provided that the position of fire plugs was to be indicated. No penalty was imposed for default, and in *Dawson & Co.* v. *Bingley Urban Council* [1911], 2 K. B. 149, it was held that the statute gave a right of action to a party injured. On the other hand a penalty does not necessarily import a right of action as well, especially if the only penalty is a fine; *Institute of Patent Agents* v. *Lockwood* [1894],A. C. 347; and again a penalty is not inconsistent with there being a right of action under the statute. *Clarke* v. *Holmes* (1862), 2 H. & N. 937. Section 66 of The Imperial Public Health Act above referred to was an enactment primarily for the benefit of the public generally. There is more ground for inferring that a statute securing the safety of a class, even with express penal provisions, also confers a right of action. The question generally, including statutes involving distinct criminal liability, is discussed and cases collected in Halsbury's Laws of England, vol. 21, p. 420 et seq., and the distinction between protection of the public generally and protection of a class is dealt with at pp.

422-3. It is a very interesting question but in the view I entertain of this action it is not necessary for me to decide, and I do not propose to indicate an opinion as to whether the plaintiff has or has not an independent statutory right of action under The Public Health Act. Statutes are not unalterable and the point now raised may never have to be determined.

I am of opinion that whether the remedy is at common law or under the statute the judgment cannot be upheld, for the plaintiff has failed to shew, rather he has failed to give *evidence*, that the disease he is suffering from, tuberculosis, was occasioned by the defendants' negligence or the alleged condition of their factory or their system of carrying on their operations or business therein. The point is not that upon the evidence as to how the disease was contracted I would have come to a different conclusion; it is, and I say it with great respect, that *there was no evidence*, as to how or through what agency the disease was contracted—nothing to connect the plaintiff's injuries with the defendants' acts or omissions, assuming that the defendants were negligent. Mr. Phelan's contention that it was not necessary to shew that the germs of tuberculosis were taken ino the plaintiff's system in the factory, that he was only called upon to shew that the conditions there lowered the plaintiff's vitality, that the lowered vitality exposed him to attack, and the disease and the defendants' liability resulted, was ingenious, and well and logically reasoned out, and, granted that there was evidence to support the predicated facts, is, I would think, a correct expression of the law. The defendants would in that case be responsible for the natural sequence of events, the negligence would be efficient cause of it all. Negligence may be the effective cause of an injury although it may not be the proximate cause at the time. *Romney Marsh* v. *Trinity House Corporation* (1872), L. R. 7 Ex. 247. It is the effective cause when it has brought about the injury as a direct and natural consequence, and when the negligence is established as the cause liability follows for all the natural consequences of it. *Sneesby* v. *Lancashire & Yorkshire Rail Co.* (1879), 1 Q. B. D. 42, C. A.; *Haback* v. *Warner* (1823), Cro. & Jac. 665; *Smith* v. *London and South-western Rail Co.* (1870), L. R. 6 C. P. 14. The fault is not in the argument but the premises, the lack of evidence, not merely the weakness or uncertainty, but absence of

evidence to connect the plaintiff's condition with the defendants' negligence. There must be something beyond mere conjecture, a link strong or weak to connect cause and event. It is not enough to establish a possibility and stop there.

I cannot but regret the result, particularly in this case, where the plaintiff's long service with the same employers indicates a man of exceptionally good character. Sympathy for a deserving man so dreadfully afflicted is inevitable, but impulse must be subjugated in determining the rights of litigants.

The appeal should be allowed and the action dismissed; and with costs if asked.

RIDDELL, J.—I agree in the result.

MASTEN, J.—This case was presented before us with great skill and ability by counsel on both sides, and the Court has thereby been greatly aided in reaching a conclusion.

I am of opinion that the appeal must be allowed, and base my opinion on the absence of evidence to establish a causal connection between the alleged failure of the defendants to furnish "proper and reasonable precautions by some mechanical or other device for disposing of fumes and dirt" as a cause, and the condition of ill-health from which the plaintiff is suffering as a result.

On the argument before us counsel for the plaintiff very ably and ingeniously put his case on the footing not that there was evidence that the plaintiff became infected with the germs of tuberculosis in defendants' factory through the conditions there existing, but on the ground that by such conditions the plaintiff's vitality was lowered and his vigour so undermined that he became incapable of resisting the inroads of these ever-present bacilli; in other words, that the defendants deprived the plaintiff of the power of saving himself. The jury were asked: "1. Was the disease from which the plaintiff suffers the reasonable and probable consequence of any negligence on the part of the defendants? A. Yes."

I can find no evidence to support that finding. Assuming that defendants' factory came within the purview of R. S. O. (1914) ch. 218, sec. 73 and 74, s-s.i., as a factory which was not ventilated in such a manner as to render harmless as far as practical any gases, vapours, dust or other impurities generated therein which are injurious or dangerous to health, and that a condition existed in the factory which was a nuisance, yet there

is no proof that such nuisance occasioned the plaintiff's present condition. The most that can be said is that while plaintiff was working in a place where this nuisance existed he sickened.

It is a case of two things occurring simultaneously and in juxtaposition, without any proof that the one is the cause of the other.

Not only is there no evidence that plaintiff's condition was the result of conditions in the factory, but the one admitted fact points strongly in the opposite direction, viz., that from 1898 till 1912, during a period of fourteen years, the plaintiff worked in this very factory and was throughout in good health.

I refer to the plaintiff's evidence where he says :

Q. And your condition from 1897 until 1912, fifteen years—what was your condition of health? A. Good.

Q. Ever have any illness during that period at all. A. Only simple things.

Q. What is that? A. No illness; not until these pains started.

Q. Any cough? A. Yes; the cough started with the pain about 1912.

Q. How long were you there, after your return from England, before you thought you health was at all impaired? A. 1912 and 1913 was the worst for the pains.

Q. Did you work from 1898 to 1912 or 1913 without observing that either the fumes or the dust or anything else had affected your health? A. Yes.

Q. So it was only in 1912 or 1913 that you observed any ill effect from the work you had been doing or the conditions that existed? A. Yes.

Q. During all those years 1898 to 1912—that is fourteen years—you worked down there without thinking that your health was being impaired to any extent? A. Yes.

It is suggested that about 1912 the conditions changed so that the alleged harmful conditions became more accentuated; but I fail to find evidence to support such a contention.

It thus appears that not only is there no evidence that the conditions complained of by the plaintiff produced tuberculosis in his system or lowered his vitality so that he was unable to resist the disease, but, on the contrary, the evidence is that for fourteen years he retained good health under these same conditions, and that being so I fail to see how in the absence of any positive and direct proof there is any basis on which the jury could attribute to these conditions the disease which he first contracted after the lapse of fourteen years. If

the facts so warranted, evidence might have been given that these conditions had produced an abnormal number of cases of tuberculosis among the other 250 employees of the establishment, but no such evidence is adduced.

It therefore seems to me that there is no evidence on which the jury could reasonably find that the disease from which the plaintiff suffers is the reasonable and probable consequence of any negligence on the part of the defendants.

The appeal must be allowed and the action dismissed.

Appeal allowed.

BOYD, C. (CHAMBERS.) 30TH OCTOBER, 1916.

RE DURNFORD ELK SHOES, LIMITED.

Contract — Lease of Machinery — Cancellation of Lease on Insolvency of Lessee—Payment for Deterioration and to put Machines in Order — Fairness of Conditions — Fraud on Insolvency Laws.

Fraud on insolvency laws:—An agreement for the lease and hire of machinery which provides for the cancellation of the lease upon the insolvency of the lessee and for the payment of sums certain to put the machines in suitable order and condition to lease to another lessee and for deterioration, is not a fraud on insolvency laws and the contract may be enforced in the winding-up of the lessee company.

Fairness of provisions: — The Court should ascertain from the contract itself its force and effects quite irrespective of any consideration of the fairness of its provisions, and so long as it represents the bargain actually made, and no case or fraud or undue influence is made out, it is the duty of the Court to give effect to the contract.

Motion by the liquidator for leave to appeal from an order of Middleton, J., 27 O. W. R. 152, holding the above propositions, in an appeal by the United Shoe Machinery Company from an order of the Local Master at Stratford, made in the winding up of Durnford Elk Shoes, Limited, under the Dominion Winding-up Act, R. S. C. (1906), c. 144. The Master disallowed two items of the appellants' claim against the assets of the insolvent company. Boyd, C., approved of the order of Middleton, J., and refused leave to appeal.

W. Lawr, for the liquidator's motion.

J. Jennings, for the United Shoe Machinery Company, *contra*.

BOYD, C.—As the effect of my judgment is to confirm the over-riding of the local Master beyond possibility of appeal, I will shortly discuss the matters on which he seems to have erred.

I. As to allowance for repairs: he has disallowed the whole claim not so much on the ground of insufficient evidence as on the ground that it could not be unravelled as to how much the lessees, the company in liquidation, ought to pay.

The lessees engage at the close of the tenancy to pay "such sum as may be necessary to put the machinery in suitable form and condition to lease to another lessee." Because the machinery had been in use by a former tenant and turned over to the company as it then was: the Master holds that the scope of the engagement should be enlarged by inserting the words "such sum as may have been occasioned by and from its use by the lessee" (i. e., the company in liquidation). He regards the cost as it stands as unconscionable, as the lessee would have to pay for the misuse or negligence of others. (That is, the former lessee). But, looking at the facts, it appears quite proper to hold the company so bound. The former lessee was one Durnford, and on 12th February, 1912, he agreed with two others to turn the concern into an incorporated company in which each of them was to put in capital $6,000. Durnford was to make up account of assets and liabilities and the assets to be assigned to the company and the company to pay all liabilities. It was recited that large orders were on hand to be filled by 1st April, and the letters of incorporation issued in that month. The company undertook to pay two items due to the lessees amounting to $307, but it was ruled (rightly enough) that the new company was not bound by this pre-incorporation private arrangement. It may well be assumed that the company, by its constituent members, well knew the condition and state of repair of the plant for which new leases were given by the new company, and that it was contemplated that the tenancy of the new concern should be as if it were a continuance of the old business, and the new company undertook, on getting the 20 years' leases, to answer for what would be needed to put the machines in good shape for a new tenant even though some of the waste and user may have been in the time of Durnford's lease. However, this is the tenour of their engagement,

and no case is made to alter, add to, or diminish the effect of the language of the lease.

I agree with my brother Middleton that the evidence, though meagre, was enough to confirm the verified account of the accountant and warrant the allowance of $675, if not $692, as Middleton, J., puts it.

II. As to the claim for "deteriorations" etc., the Master has held that when the machines were put in good repair, there cannot be a claim for deterioration. He puts it that the need for repairs arose from deterioration, and, having repaired, the deteriorations ceased to exist.

The common phrase in leases "to keep in good repair reasonable wear and tear excepted" implies that there is a process of deterioration going on in spite of repair.

There is a recognisable loss in value of machinery owing to the result of ordinary "wear and tear:" e. g., invisible destruction of surface and of parts from friction or exposure or lapse of time, not susceptible of repair, but diminishing the value of the plant. It is the usual course of accountants, no matter how well the repair is maintained, to write off something on account of this depreciation of value. The parties have here agreed that $100 should stand for the amount of depreciation for 20 years. It was treated as a distinct thing from repairs (as it is), and they agreed that that sum should be paid if the lease was sooner determined as in this case by insolvency. It is not the business of the Court to interfere with this term of the contract. Allowing for the repairs and allowing for the deterioration, the sums fixed are not double payments in respect of the same thing, nor were they so regarded by the contracting parties.

Upon both points I come to the same conclusion as my brother Middleton, and therfore do not see my way to grant leave to appeal under sec. 101 of the Winding-up Act R. S. C. (1906), ch. 144.

The application is dismissed with costs out of the estate.

Leave to appeal refused.

PRIVY COUNCIL. 2ND NOVEMBER, 1916.

MACKELL v. OTTAWA SEPARATE SCHOOL TRUSTEES.

Schools—Separate Schools—Constitutional Rights under B. N. A. Act, (1867) — Determined According to Religion not Race or Language—Language of Instruction—Qualification of Teachers — Regulation No. 17. of Department of Education 1912-13.

Contitutional rights:—The class of persons to whom the right or privilege of enjoying seperate schools in Ontario is reserved in the B. N. A. Act (1867), is a class to be determined according to religious belief, and not according to race or language.

Language of instruction: — The power of determining what language shall be used as a medium of instruction in the schools of Ontario is vested in the provincial legislature, and Regulation No. 17 of 1912-13 of the Department of Education requiring teachers in certain schools to understand the English language is not an infringement of any constitutional right which the supporters of those schools enjoy under the B. N. A. Act, 1867.

Qualification of teachers in Ontario schools is a matter within the exclusive jurisdiction of the provincial legislature, and school boards have no authority to engage teachers who do not possess the qualifications prescribed by the Department of Education.

Appeal by the defendants from a judgment of the Supreme Court of Ontario (Appellate Division) 34 O. L. R. 335, affirming a judgment of Lennox, J., at trial, 32 O. L. R. 245.

The facts of the case are sufficiently set out in their Lordships' judgment.

The appeal to the Judicial Committee of the Privy Council was heard by Lord Buckmaster, L.C., Viscount Haldane, Lord Atkinson, Lord Shaw, of Dunfermline, and Lord Parmoor.

Sir John Simon, K.C., and *Hon. N. A. Belcourt, K.C.*, (Ottawa) for the appellants.

W. N. Tilley, K.C., (Toronto) for the respondents.

Sir Robert Finlay, K.C., and *McGregor Young, K.C.*, (Toronto) for the Attorney-General of Ontario.

Their Lordships' judgment was delivered by

THE LORD CHANCELLOR—This appeal raises an important question as to the validity of a Circular of Instruction issued by the Department of Education for the Province of Ontario on the 17th August, 1913.

The primary schools within the Province are for the purposes of this Circular separated into two divisions: public schools and separate schools, the latter, with which alone this appeal is concerned, being denominational schools, established, supported, and managed under certain statutory provisions to which reference will be made. The population of the province is, and has always been, composed both of English and of French-speaking inhabitants, and each of the two classes of schools is attended by children who speak, some one language some the other, while some, again, have the good fortune to speak both, so that distinction in language does not and cannot be made to follow the distinction in the schools themselves. The Circular in some of its clauses deals with all schools, but its heading refers only to English-French Schools, which are defined as being those schools, whether separate or public, where French is a language of instruction or communication, which have been marked out by the Minister for Inspection as provided in the Circular.

The object of the Circular is to restrict the use of French in these schools, and to this restriction the appellants, who are the Board of Trustees of the Roman Catholic Separate Schools of the city of Ottawa, assert that they are not obliged to submit. The respondents, who are supporters of the same Roman Catholic schools, desire to maintain the Circular of Instructions in its integrity, and upon the appellants' refusal to abide by its terms the respondents instituted against them the proceedings out of which this appeal has arisen, asking, among other things, a mandatory order enforcing against the appellants obedience to the Circular.

The Supreme Court of Ontario granted the injuncion that was sought and their judgment was affirmed by the unanimous opinion of the Judges of the Appellate Division of the Supreme Court.

The appellants' defence of their action rests in substnce upon the contention that the instructions were, and are wholly unauthorised and unwarranted and beyond the powers of the

Minister of Education, because they were contrary to, and in violation of, the British North America Act of 1867.

In order to confer legislative authority upon the instructions an Act of the Province of Ontario (5 Geo. V., cap. 45) has been passed during the litigation, declaring that the regulations imposed were duly made and approved under the authority of the Department of Education and became binding according to the terms of their provisions on the appellants and the schools under their control, and containing consequential provisions. It is obvious that the validity of the Statute depends upon considerations similar to those involved in determining the validity of the instructions, but this Statute is the subject of another proceeding, and the present appeal is confined to the question whether the Minister of Education had power to issue the Circular. The number of schools which are affected by the dispute is considerable, for of 192 Roman Catholic schools under the charge of the appellant, 116 have been designated English-French schools.

The material sections in the British North America Act upon which the appellants rely are sections 91, 92, and 93. Section 91 authorises the Parliament of Canada to make laws for the peace, order, and good government of Canada, in relation to all matters not coming within the classes of subjects by the Act assigned exclusively to the Legislatures of the provinces. Section 92 enumerates the classes of subjects in relation to which the Legislatures of the Provinces may exclusively make laws, and includes therein generally all matters of a merely local or private nature in the province. Section 93 deals specifically with education, and enacts that in and for each province the Legislature may exclusively make laws in relation to education, subject and according to the provisions therein contained. It appears, therefore, that the subject of education is excluded from the powers conferred on the Parliament of Canada, and is placed wholly within the competence of the Provincial Legislatures, who again are subject to limitations expressed in four provisions. Provision (1) is in these terms :

> Nothing in any such law shall prejudicially affect any right or privilege with respect to denominational schools which any class of persons have by law in the province at the Union.

Provision (3) contains an important safeguard, which gives an appeal to the Governor-General in Council from any

act or decision of any provincial authority affecting any right or privilege of the Protestant or Roman Catholic minority of the King's subjects in relation to education. Provision (4) provides machinery for making the decision of the Governor-General in Council effective. If a Provincial Law which seems to the Governor-General in Council requisite for the due execution of the provisions of the section is not made, or any decision of the Governor-General in Council is not duly executed by the proper provincial authority, then, and in every such case, and so far only as the circumstances of each case require, the Parliament of Canada may make remedial laws for the due execution of the provisions of this section, and of any decision of the Governor-General in Council under the section. These provisions contain a procedure of great value to the Protestant or Roman Catholic minority in relation to education. They do not affect or diminish whatever remedy the appellants have under provision (1), and cannot operate to give the Legislature of Ontario authority to legislate in matters specially excepted from their authority.

Accordingly it would require an Act of the Imperial Legislature prejudicially to affect any right or privilege reserved under provision (1), and if the regulations which are impeached do prejudicially affect any such right or privilege, to that extent they are not binding on the appellants.

There is no question that the English-French Roman Catholic Separate Schools in Ottawa are Denominational Schools to which the provision applies, and it has been decided by this Board that the right or privilege reserved in the provision is a legal right or privilege, and does not include any practice instruction or privilege of a voluntary character which at the date of passing of the Act might be in operation, *City of Winnipeg* v. *Barrett* [1892], A. C. 445.

Further the class of persons to whom the right or privilege is reserved must, in their Lordships' opinion, be a class of persons determined according to religious belief, and not according to race or language. In relation to denominational teaching, Roman Catholics together form within the meaning of the section a class of persons, and that class cannot be subdivided into other classes by considerations of the language of the people by whom that faith is held. The appellants and the respondents, therefore, are members of the same class, but

this fact does not affect the appellants' position on their appeal, for their case is that even to the class so determined there was preserved by the Statute and vested in them as trustees rights or privileges which include the right of deciding as to the language to be used as a means of instruction; and the question, therefore, that arises, is: What were the rights and privileges that were protected by the Act, and were they invaded by th Circular according to its true meaning?

Now it apears that at the date of the passage of the British North America Act of 1867, a Statute was in operation in Upper Canada by which certain legal rights and privileges were conferred on Roman Catholics in Upper Canada in respect to separate schools, and so far as the facts of this case are concerned this was the only source from which the rights and privileges could have proceeded.

This Act enabled any number of people, not less than five and being Roman Catholic, to convene a public meeting of persons who desire to establish a separate school for Roman Catholics, and for the election of trustees for the management of such schools; by section 7 it is enacted that the trustees of such schools should form a body corporate under the Statute, should have power to impose, levy, and collect school rates or subscriptions from persons sending children to, or subscribing towards the support of, such schools, and should have "all the powers in respect of separate schools that the trustees of common schools have and possess under the provisions of the Act relating to common schools." A special clause also related to the appointment of teachers, who, before the passing of this Statute, had been arbitrarily appointed by Boards of Trustees, and this power was regulated and restricted by section 13, which provided that the teachers of the separate schools should be subject to the same examinations, and receive their certificate of qualification in the same manner as common school teachers; while section 26 provided that the schools should be subject to inspection, and should be subject also "to such regulations as may be imposed from time to time by the Council of Public Instruction for Upper Canada."

In order, therefore, to ascertain the true extent and limit of the powers conferred by this Statute, it is necessary to see what were the powers enjoyed by trustees of the common schools. These are to be found in another Statute of Upper

Canada, 22 Vict., cap. 64, known as the Common Schools Act of 1859. This Statute conferred upon trustees for common schools certain powers, the most important of which are to be found collected under several heads in section 79. A mere glance at this section will shew that such powers are undoubtedly wide. They include under sub-section 7 power to acquire school sites and premises, and to do what may seem right for procuring text-books and establishing school libraries, while sub-section 8 places in the hands of the trustees the determination of "the kind and description of schools to be established," the teachers to be employed, and generally the terms of their employment. These powers are, however, to some extent limited by sub-sections 15 and 16, the first of which in effect requires that the text-books should be a uniform series of authorised text-books, while the latter compels the trustees to see that all the schools under their charge are conducted according to the authorised regulations.

Counsel for the appellants naturally place great reliance upon these provisions, and in the wider aspect of their argument they contend that "the kind of school" that the trustees are authorized to provide is a school where education is to be given in such language as the trustees think fit.

They urge that it was a right or privilege possessed with respect to denominational schools in 1867 in determining the number and kind of schools to say within what limits the French language is to be used; for, according to their contention, "kind of school" means a school where the French language, under the direction of trustees, may be used as a medium of instruction on terms not less unfavourable than the use of English. Their Lordships are unable to agree with this view. The "kind" of school referred to in sub-head 8 of section 73 is, in their opinion, the grade or character of school, for example, "a girls' school," "a boys' school," or "an infants' school," and a "kind" of school, within the meaning of that sub-head, is not a school where any special language is in common use.

The schools must be conducted in accordance with the regulations, and their Lordships can find nothing in the Statute to take away from the authority that had power to issue regulations the power of directing in what language

education is to be given. If, therefore, the trustees of the common schools would be bound to obey a regulation which directed that education should, subject to certain restrictions, be given in either English or French, the trustees of the separate schools would also be bound to obey a regulation of the same character affecting their schools, provided that it does not interfere with a right or privilege reserved under the Act of 1867, *i. e.*, a right or privilege attached to denominational teaching.

The objections to the instructions which were urged before their Lordships, however, were not chiefly based on the allegation that they prejudicially affected in any special manner denominational teaching, but on the wider ground. Their Lordships appreciate the affection which the French-speaking residents in Ottawa feel for the French language; but it must not be forgotten that, although a majority of the supporters of the English-French separate schools in Ottawa are of French origin, there are other supporters to whom French is not the natural language. This fact has no doubt caused great difficulty in adjusting fairly as between the different inhabitants the natural rivalry as to the languages to be used in the education of the children, and the care with which this difficulty has been considered, is evidenced in the terms of a valuable report which is printed in the record, and to which their Lordships would direct attention:—

> As was stated in our former report, while all classes of the French people are not only willing but desirous that their children should learn the English language, they at the same time wish them to retain the use of their own language, and there is no reason why they should not do so. To possess the knowledge of both languages is an advantage to them. And the use of the English language instead of their own, if such a change should ever take place, must be brought about by the operation of the same influences which are making it all over this continent the language of other nationalties as tenacious of their native tongue as the French. It is a change that cannot be forced. To attempt to deprive a people of the use of their native tongue would be as unwise as it would be unjust, even if it were possible. In the British Empire there are people of many languages. The use of these does not affect the loyalty of the people to the Crown, and the English language remains the language of the Empire. The object of these schools is to make better scholars of the rising generation of French children, and to enable

them to do better for themselves by teaching them English, while leaving them free to make such use of their own language as they please.

It therefore becomes necessary to examine closely the terms of the Circular in order to ascertain the nature and extent of the restrictions it imposes. Unfortunately it is couched in obscure language, and it is not easy to ascertain its true effect. It opens with a definition of English-French schools, and it was argued on behalf of the appellants that even this definition was not within the power of the Department; but there is no weight in this objection, provided that the selected schools are so dealt with as not to impeach any legal right or privilege of the appellants. The second paragraph of the Circular is important. The regulations and courses of study prescribed for the public schools, which are not inconsistent with the provisions of the Circular, are applied to the English-French schools, with the following modifications:—

> The provision for religious instruction and exercises in public schools shall not apply to separate schools, and separate school boards may substitute the Canadian Catholic readers for the Ontario public school readers.

These modifications bring the instructions into agreement with the provisions as to regulations affecting religious instruction in the Common Schools Act and the Separate Schools Act. The only reference to religious instruction to which their Lordships were referred in these Statutes is section 129 of the former Statute. This section provides that no persons shall require any pupil to read or study in or from any religious book or join in any exercise of devotion or religion objected to by his or her parents or guardian, and this provision preserves these rights. Indeed this clause, in their Lordships' opinion indicates that the whole course of religious teaching in the separate schools is outside the operation of the Circular, for the Circular applies to public schools and separate schools alike and impartially, and if it contained provisions with regard to religious instruction in the public schools, by virtue of this clause those provisions would not apply to the separate schools; throughout the whole of the Circular, however, there is nothing whatever to indicate that it is intended to have any application, excepting it may be in the case of public schools, to any-

thing but secular teaching, and it is in this connection that clause 3 must be read. This is the paragraph which regulates the use of French as the language of instruction and communication, and it is against these provisions that the complaint of the appellants is mainly directed. The paragraph refers equally to public and separate schools, and directs that modifications shall be made in the course of study in both classes of schools subject to the direction and approval of the Chief Inspector. In the case of French-speaking pupils, French, where necessary, may be used as the language of instruction and communication, but not beyond Form I, except on the approval of the Chief Inspector in the case of pupils beyond Form I, who are unable to speak and understand the English language. There are further provisions for a special course in English for French-speaking pupils, and for French as a subject of study in public and separate schools.

Mr. Bellcourt urged that so to regulate the use of the French language in the separate Roman Catholic schools in Ottawa constituted an interference, and is in some way inconsistent with a natural right vested in the French-speaking population; but unless this right was one of these reserved by the Act of 1867, such interference could not be resisted, and their Lordships have already expressed the view that people joined together by the union of language and not by the ties of faith do not form a class of persons within the meaning of the Act. If the other opinion were adopted, there appears to no reason why a similar claim should not be made on behalf of the English-speaking parents whose children are being educated in the Roman Catholic separate schools in Ottawa. In this connection it is worthy of notice that the only section in the British North America Act, 1867, which relates to the use of the English and French languages (sec. 133), does not relate to education, and is directed to an entirely different subject-matter. It authorises the use of either the English or French language in debates in the Houses of Parliament, in Canada, and the Houses of Legislature in Quebec, and by any person, or in any pleading or process in, or issuing from, any Court of Canada, and in and from all or any of the Courts of Quebec. If any inference is to be drawn from this section, it would not be in favour of the contention of the appellants.

Further objections that are taken to the Circular depend upon these considerations, that it interferes with the right to manage which the trustees possess, and that it further infringes a right on the part of the trustees to appoint teachers whose certificates are provided by a Board of whom the trustees can appoint one.

In their Lordships' view, there is no substance in either of these contentions. The right to manage does not involve the right of determining the language to be used in the schools. Indeed, the right to manage must be subject to the regulations under which all the schools must be carried on; and there is nothing in the Act to negative the view that those regulations might include the provisions to which the appellants object. If, therefore, the regulation as to which the trustees of the common schools were bound to carry on the class of school committed to their charge did, in fact, under the Act of 1859, enable directions to be given as to the medium of instruction, the power possessed by the trustees of the separate schools would have been subject to the same limitations, and the question as to interference with the powers of management does not arise as an independent question.

So far as the teachers are concerned the words of Subsection 8 of Section 79 empower the trustees to determine the teacher or teachers; but this merely means that they are to be determined out of the number who are duly qualified, and it is for the Board of Education to impose what conditions they think fit as to the necessary qualification of such a teacher. Under the Statute of 1859 the Body for examining and giving certificates of qualification for the teacher was constituted by three members of the Board of Public Instruction, including a local superintendent of the schools; and it is argued that, under the power of appointing the local superintendent—a power conferred on the trustees—the provisions in the Circular, which impose as a necessary condition of qualification of the teachers that they must possess a knowledge of the English lanugage, interfered with the trustees' right in this respect. To accede to this argument would involve the removal of the condition as to the necessary qualification of the teachers from the Board of Education. This might be a serious matter for the cause of education in the Province of Ontario; but there is no need to

consider that the Statute compels this view. Even assuming that the provision of Section 96 as to the granting of certificates to teachers might be still revived; yet even then there is nothing to prevent the establishment of special conditions as conditions with which the teachers must comply before any such certificate can be given.

In the result, their Lordships are of opinion that, on the construction of the Acts and documents before them, the regulations impeached were duly made and approved under the authority of the Department of Education, and became binding according to the terms of those provisions on the appellants and the schools under their control, and they will humbly advise His Majesty to dismiss this appeal.

The appellants will pay the costs.

Appeal dismissed.

APPELLATE DIVISION, S. C. O. 3RD NOVEMBER, 1916

Re TORONTO GENERAL HOSPITAL TRUSTEES & SABASTON.

Landlord and Tenant—Lease for 21 Years—Renewable Term—Arbitration to Fix Rent Payable — Motion by Assignee of Lease to set aside Award — Disclaimer of Interest in Lease by Assignee on Appeal — Question Raised on Argument of Appeal — Basis of Award — Industrial Possibilities —Splitting the Difference—Taxes.

Interest of Assignor of lease:—Where an assignee of a renewable lease assigns his interest in the lease less one day, he still retains a substantial interest in the leasehold property.

Industrial possibilities:—In arbitration proceedings to determine the rent of a renewable lease, it is open to the landlord to offer evidence shewing the demised premises to be of greater value for industrial or other purposes than for which it has been used in the past.

Question raised on argument of appeal:—An assignee of a renewable lease appointed an arbitrator, took part in the arbitration proceedings, moved to set aside the award and appealed to an Appellate Division, but not until the argument of the appeal did he raise the question that he had assigned his interest in the lease and therefore he had no interest in the matter, and therefore the award was a nullity. *Held*, that it was quite too late to then raise any such point even if there were something substantial in it.

"**Splitting the difference**":—In arbitration proceedings to determine the renewable rent of leasehold property it was alleged that arbitrators did not really make an award; that in truth two of the arbitrators were wide apart in their estimation of a proper rental and that the third arbitrator, without exercising any judgment in the matter had induced or forced the other two to "split their difference" and agree upon a sum half-way between the amount which each had found to be the proper sum. *Held*, that if this had been proven it would be improper, but in this case the attack failed it having been met by the evidence of the third arbitrator—a County Court Judge—and there was no ground for believing that any improper methods or principles had been used in making the award.

Court of Appeal:—There is only one Court of Appeal in Ontario and, however constituted from time to time, it will follow its own decisions until reversed by a higher Court.

Taxes:—Where a renewable lease provides that taxes are to be paid by the lessee in addition to rent, the renewal rent is the only thing for arbitrators to determine. They have no right to consider or adjust taxes.

Appeal by Robert A. Sabaston from an order of Falconbridge, C.J.K.B., 10 O. W. N. 331, dismissing the appellant's motion to set aside an award.

The appeal was heard by Meredith, C.J.C.P., Riddell, Lennox, and Masten, JJ., on 19th October, 1916.

W. Laidlaw, K.C., for the appellant.
H. E. Rose, K.C., for the respondent trustees.

MEREDITH, C.J.C.P.—It may be that the points now raised for the first time in this case, are, as Mr. Laidlaw assures us points involving questions of great importance: but certain it is that so far as this appeal is concerned they present no great difficulties and are easily well-disposed of.

The appeal is against an order of the High Court Division dismissing the appellant's application to set aside an award fixing the rent for a new term of a renewable lease.

Mr. Laidlaw's first point, taken now for the first time and not even mentioned in his notice of this appeal, for elsewhere hitherto, is: that the appellant, having been merely an assignee of the lease and he having in turn assigned it, though only as security for a debt he owed, has no interest in the matter, and that, therefore, the award is a nullity.

But if so why all this litigation? If a nullity , how is he hurt by it? Or indeed, if valid, what can he expect to gain by setting it aside, except a new arbitration, in which he now says

he has no concern. Or how can it harm him, if he have no interest in the lease; and indeed if he have, it is optional with him whether it is renewed or not.

And it is quite too late to raise any such point even if there were something substantial in it. The appellant became a party to the arbitration proceedings at their inception, the party on the one side, and after conducting ,on that side, a long-drawn-out arbitration, including an application to the Courts for an opinion on a question of admissibility of evidence, appealed against the award on other grounds, and only now, at the last moment, takes this point stultifying himself in regard to all his earlier conduct in the matter.

If the appellant had taken this ground at the outset, if he had then disclaimed any interest in the lease, all of these costly proceedings might have been avoided: but that he did not because in truth he had, and has, a substantial interest in the lease, and had the arbitration been favourable to him would have taken a renewal of it: but being against him, as he thinks, and having been moved against unsuccessfully, on consistent grounds, and that motion having failed, this ground is taken doubtless in the forlorn hope that it may upset the award and give the appellant the costs of the motion, and this appeal against it, if not a chance—some are exceedingly hopeful—of another arbitration upon a new discovery that after all the appellant really has an interest in the lease, a chance supported by an acceptance of the reassignment of the lease to him which has already been made by the company to whom he assigned it as security only, but apparently not formally accepted by him.

It seems to me to be a pity to waste time on such a point as this; and that it would have been, even if it had been taken in the notice of this appeal.

The next point is that the arbitrators wrongly admitted evidence adduced with a view of shewing the rental value of the property for factory purposes: and it was on this very point that the arbitrators and parties sought and obtained the opinion of this division of this Court, and acting upon it the arbitrators admitted the evidence: but it is now contended that upon this motion the question is open to the appellant again, and that the opinion then given by this Division was wrong and should be disregarded: relying upon the case of *British Westinghouse*

Electric & Mfg. Co. v. *Underground Electric Ry. Co.* [1912], A. C. 673.

But, without considering whether section 32 of The Judicature Act is or is not applicable, it is hardly reasonable to ask this Division of this Court to reverse its conclusion upon the very point, in this very matter, very recently: and if it were, I should be obliged to say that I find it difficult to understand how it can be contended, reasonably, that the landlord, in such a case as this, may not give evidence for the purpose of shewing the demised property to be of greater value for some other uses than that to which it has in the past been put, uses to which it may, and can, be put by the tenant, and to go fully into all matters bearing upon the question, subject, of course, to reasonable powers of restriction of evidence for remoteness, etc.

The next point is covered by what has been said as to the last one. It is that the new rental was computed on the basis of the property being used for industrial purposes, when in fact it could not be "made so available." But that was a question of fact upon which the arbitrators might reasonably find as they did: and there is no appeal against the award. Nothing like a ground for setting the award aside, because of anything done or left undone by the arbitrators in this respect, has been shewn.

The next point is that the arbitrators did not take the subject of municipal taxation into consideration. If anything substantial had been by the arbitrators omitted from their consideration, it would be proper to refer the matter back to them to consider it: but there is nothing to shew, the contrary appears, that they did omit this or any substantial material matter from due consideration. I understand Mr. Laidlaw's point to be that though fixing the rental upon use of the land for new purposes the arbitrators did not take into consideration the question of higher taxation being imposed for such uses.

And the last point is that the arbitrators did not really make an award; that in truth two of the arbitrators being wide apart in their estimation of a proper rental, the third arbitrator, without exercising any judgment in the matter, induced, or forced, them to agree upon a sum half-way between the amount which each had found to be the proper sum.

But all this is denied by the third arbitrator who has testified: that before any attempt was made to agree upon any

amount, he had exercised his judgment independently and had concluded that the amount which has been fixed by the award was the right amount.

The fact that the amount upon which the arbitrators agreed was precisely midway between the two amounts that the other arbitrators had reached, and held out for, and the affidavit of one of the arbitrators, that the amount awarded was not the sum that the judgment of any of the arbitrators had found to be right, but was the result of merely "splitting the difference" between the amount which he, and the arbitrator appointed by the respondents, considered right, gave ground for an attack upon the award on this ground, but that attack has been met and fails upon the evidence adduced from the third arbitrator—a County Court Judge.

I would dismiss the appeal.

LENNOX, J.—This is an appeal from the judgment of the Honourable the Chief Justice of the King's Bench dismissing a motion to set aside the award, and four grounds of appeal are taken.

1. There is no privity of contract or estate between Sabaston and the trustees, and we are referred to *Jamieson* v. *London & Canadian Securities Co.*, 27 S. C. R. 435. I find it difficult to see how this objection can be open to the appellant at this time. He appointed his arbitrator, took part in the arbitration proceedings, moved to set aside the award and appealed to this Court but never raised this question until the argument of the appeal. More than this, Mr. Laidlaw contends that by reason of this the proceedings are a nullity; and, if the facts are as alleged it may be so—if it is so the appellant has only to resist enforcement of the award.

But the point having been taken it is just as well to deal with it. As to privity of contract I find that the appellant is the assignee of the lease, that it could not be assigned without the consent of the trustees, by endorsement on the assignment, by which the appellant acquired the rights of the original lessee, the trustees consented to the transfer, but subject to all terms of the original demise, and in and by this assignment the appellant agreed to carry out all the provisions and covenants of the lease. When he mortgaged the leasehold, by which it is argued he divested himself of all estate in the land, he again bound himself to observe and perform the covenants and obli-

gations of the lease and remained entitled to possession until default in payment of the mortgage moneys. Neither does the objection as to privity of estate appear to be well taken, and if either question is important this is the important one. Sabaston has not, as I interpret the mortgage, parted with his entire leasehold interest, and if he has not the principle upon which the *Jamieson Case* was decided does not apply. That case turned definitely upon the single question "was any part of the term reserved to the original lessee" and it was held in the Supreme Court that there was nothing to indicate a reservation except in the habendum, and this was indefinite, that by the earlier provisions of the instrument he had already granted and conveyed the lease, the lands, and entire residue of the term of years without reservation and as the habendum cannot cut down the grant and was repugnant the instrument must be construed as an out and out assignment and not as a sub-lease. Where the lessee reserves to himself or excepts any residue of the term, his estate as to everybody else is as it was before, as to his grantee it is subject to what he has granted. The grant in this case is better drawn than in the *Jamieson Case*, but I would not like to say that it is consistently worded throughout.

I think this objection fails.

2. Evidence was admitted pursuant to a decision of this Court (1st Division) on a reserved case and the Court erred. This point has the merit of novelty at least. There is only one "Court of Appeal" in this Province and, however it may be constituted from time to time, and even without statutory direction, it will endeavour to follow its own decisions until reversed by a higher Court. To do otherwise would be a scandal and lead to endless confusion. It is not at liberty to do otherwise, Judicature Act, section 32. *British Westinghouse Electric & Mfg. Co.* v. *Underground Electric Ry. Co.* [1912], A. C. 673, was cited as authority for the intervention of this Court. It is quite the other way. There a Divisional Court directed the arbitrator to accept certain properties or goods as elements in determining his award and that other matters could not be considered. The arbitrator set out the stated case and the decision of the Court upon the fact of his award and of course accepted and acted upon the opinion. Motion was made to

another Divisional Court to set aside the award upon the ground that the opinion upon which the arbitrator acted was contrary to law. The Court dismissed the appeal without argument on the manifest ground of co-ordinate authority. It went to the Court of Appeal and in a divided Court the appellant failed on the merits. In the House of Lords Viscount Haldane at p. 686, explains that as a higher tribunal, and the error appearing on the face of the award, the decision could be reviewed.

3. The arbitrators did not consider or adjust the taxes. They had no right so to do. The lease provides that the taxes are to be paid by the lessee in addition to rent and the renewal rent is the only thing referred for consideration by the arbitrators.

4. Misconduct of the arbitrators. There is no satisfactory evidence of misconduct. The position of arbitrators is quasi-judicial, each should exercise his own judgment but not dogmatically or arbitrarily, and each may allow his judgment to be influenced to some extent by the opinion of his associates—it is an argument that he may be in error and should be thoughtfully and seriously examined into and weighed. The valuation of property is not an exact science. It can seldom be ascertained by mathematical calculation. The evidence was startlingly divergent in this case. Judge McGibbon alone knows how he arrived at $1,400 a year as a fair rental, and the method he describes was reasonable and proper. He did not, he says, fix upon this sum because it was half way between $800 on the one hand and $2,000 on the other. "Splitting the difference" does not sound well, and where it results from disregard of the evidence or failure of the arbitrator to exercise his best judgment, is necessarily improper. But facts, not phrases, is the important consideration here and I find no ground for believing that improper methods or principles obtained in the making of this award.

In *Kerr* v. *Ayr Steam Shipping Co.* [1915], A. C. 217, an arbitration case, Earl Loreburn, at p. 222 says :

> This class of case has led to much refinement. I do not find it very profitable to consider whether the arbiter's award proceeded upon inference or on some kind of speculation which was described in argument by four words successively, namely, conjecture, probability, guess and surmise. I am not qualified to draw a precise line between the thoughts suggested by those several words. They seem to me to run into one another.

It is not necessary for me to characterize Mr. Garland's conduct, if he acted as he says he acted. Fortunately it is an unusual thing for an arbitrator to concur in an award which he knows to be; wrong and in this case on his contention, seventy five per cent. higher than the annual payments ought to have been. That his judgment may have in fact been at fault, does not alter the quality of his act. The tenant may not in fact be paying an excessive rent. But if it should happen that Mr. Garland is ever again called upon to act as an arbitrator, it may be salutary, although not gratifying, for him to reflect that, assuming the correctness of his valuation, by his conscious deliberate neglect of his plain duty as an arbitrator, he has committed, or assisted in committing, the man who appointed and trusted him to gross annual overpayments of rent for 21 years, and amounting, with legal interests at annual rests, to more than $22,000. Comment is idle. I leave Mr. Garland in the limelight he has turned upon himself.

The question as to whether a fair rental was fixed and whether the award is binding upon the appellant, does not arise upon this appeal. I have referred to the question of privity. There may be other grounds of objection or defence open upon proper proceedings or in answer to proceedings. By the lease the arbitrators were to be appointed and the renewal rent fixed during the currency of the first term. This may be merely directory and I express no opinion either way. The lease does not in express terms bind the lessee to accept a further term. But these are matters that we are not called upon or at liberty to deal with upon this appeal.

The appeal should be dismissed.

MASTEN, J.—I agree.

Appeal dismissed.

BRITTON, J. 4TH NOVEMBER, 1916.

WATSON v. MORGAN

Action — Premature — Judicial Notice of Fact that Action was Premature — Action to set aside Sale of Business and to Recover Purchase Money Paid — Fraud and Misrepresentation not Proven.

Premature action: — Where an action was commenced on 24th Nov., 1915 to recover the money paid to purchase a business, which the defendant, vendor agreed to return to the plaintiff, purchaser, within three months from the date of the sale (25th Oct. 1915), if the purchaser was dissatisfied and found the business not as represented, *held*, that on the face of the agreement the money was not payable (if at all) until three months from the 25th Oct., and notwithstanding that no objection had been taken in the statement of defence and that no application had been made to stay proceedings, still the Court would take Judicial Notice of the fact that the action was premature. *Held*, further, that there had been no misrepresentation and the action should be dismissed on merits as well.

Action to recover $1,000 paid by the plaintiff to the defendant as the purchase price of a confectionery business. Plaintiff alleged misrepresentation by the defendant.

The action was tried at Toronto Non-jury sittings.

W. D. McPherson, K.C., for the plaintiff.
H. R. Moses, for the defendant.

BRITTON, J.—The defendant carried on, in Toronto, the business of confectioner; the plaintiff was a baker. The plaintiff knew the business of the defendant fairly well, and approached the defendant with a view to purchasing from the defendant the defendant's business. The defendant had not either publicly or privately before this expressed any desire to sell, but in the negotiations with the plaintiff he said he would accept one thousand dollars cash. The defendant would not accept any less, so the plaintiff verbally accepted the offer. Before the money was paid by the plaintiff, he, the plaintiff, prepared a form of agreement in writing. This the defendant knew nothing about until shewn to him by the plaintiff, but the defendant did not object to it and so signed it. This written agreement therefore stands as the contract between the parties and is as follows :

Memorandum of agreement this 25th day of October, 1915, made in duplicate between George H. Morgan, 482 Bloor Street west, Toronto, confectioner, hereinafter called the vendor, (of the first part) and Charles W. Watson, 380 Lippincott Street, Toronto, baker, hereinafter called the purchaser, (of the second part):

Whereas the said vendor having agreed to sell his entire business, oven, utensils, fixtures, and effects, including loose stock used in carrying on said business, to Charles W. Watson for the sum of One Thousand dollars ($1,000) in cash.

Now it is expressly agreed by and between the parties hereto that the vendor shall not, either directly or indirectly, carry on or be engaged as principal, partner or servant, in the business of a baker or confectioner for a period of five years from the 25th day of October, 1915, in that portion of the city of Toronto having for its boundary the streets now known as Yonge Street, St. Clair Avenue, Ossington Avenue and College Street, and in case of a breach of this clause he shall pay to the purchaser the sum of Five Hundred Dollars ($500) as liquidation damages and not as a penalty.

And we do further agree that if the purchaser is not satisfied with this business and finds it not as represented the Vendor will refund and return to him all the One Thousand Dollars ($1000.) within a period of three months from this 25th day of October, 1915.

This agreement shall be binding upon the parties hereto, their heirs, executors, administrators and assigns respectively.

In Witness Whereof the said parties of the First Part have hereunto set their hands and seals.

This contract is dated 25th October, 1915. The money was paid to the defendant, and the plaintiff went into possession of the property he purchased.

The defendant felt so sure of the plaintiff being satisfied that he, the defendant, looked about for another business property, outside of the area prohibited by the agreement. The plaintiff soon became dissatisfied with his purchase, and on the 15th November gave to defendant formal notice of dissatisfaction, and demanded his thousand dollars. The defendant alleged that there had been no misrepresentation and denies any liability.

Apart from any other consideration, as to construction of agreement, the plaintiff, in order to succeed in this action, must shew misrepresentation and dissatisfaction because of such misrepresentation. The misrepresentation complained of is that defendant stated the weekly receipts from the business had

averaged $200 a week or more. If this representation was made it was apparently not true, but the plaintiff did not, until a considerable time after the 15th November, 1915, know that any such representation, if made, was untrue. The plaintiff ascertained only the amount of actual receipts per week after this action was commenced and when examination of the defendant took place.

I find that the plaintiff's demand of a return of the $1,000 was not because of alleged misrepresentation of amount of weekly receipts, even if there was in fact such misrepresentation. It is clear that there was no fraud by the defendant. Everything was plain and clear, and every opportunity was given to the plaintiff for inspection and enquiry, and the plaintiff had for some time the thought of being a possible purchaser.

The onus of establishing misrepresentation was upon the plaintiff. The defendant strongly denies that he stated that his receipts for past months average $200 a week. What he did say, according to his evidence, was that the plaintiff combining his bakery business with the confectionery business he was buying, was getting a business from which $200 a week of gross receipts could be realized.

I am of opinion that the defendant's version of what occurred is the correct one, and I must dismiss the action.

The plaintiff's claim is for repayment of the $1,000. By the terms of the agreement that money did not become payable, if at all, until three months from the 25th October, 1915. This action was commenced on the 24th day of November, 1915. That objection was not taken in the statement of defence, nor was there any application to stay the proceedings; but it is an objection on the face of the agreement—the agreement prepared by the plaintiff—that ought to be taken notice of by the Court.

No doubt the plaintiff honestly thinks that the defendant made the representation as plaintiff states. The defendant is, in my opinion, perfecly honest and fair in his defence.

There will be judgment dismissing this action, with costs fixed at fifty dollars. It is a case in which the amount of costs should be so fixed.

Twenty days' stay.

APPELLATE DIVISION, S. C. O. 3RD NOVEMBER, 1916.

LASELLE v. WHOLEHAN

Police Magistrate—Stupid Conviction of Father for Offence of Son—Bona Fides of Magistrate—Appeal.

Order for protection:—Where a Police Magistrate convicted a father for an offence committed by his son it was held that an unqualified order for protection should not be given the Magistrate; it should not extend to things done (if any) maliciously and without reasonable and probable cause.

Order quashing conviction: — There is a right of appeal to the Appellate Division from an order quashing a conviction and providing protection to the convicting Magistrate.

Appeal by Lemuel Laselle from an order of Middleton, J., 27 O. W. R. 51, quashing the conviction of the appellant, by Thomas Wholehan, the Police Magistrate of Chesterville, for an offence committed by the appellant's son, and granting the Police Magistrate on order for protection on terms. The appeal was from that part of the order granting the Magistrate protection.

The appeal was heard by Meredith, C. J. C. P., Riddell, Lennox, and Masten, JJ., on 16th October.

Geo. A. Styles, (Cornwall) for the appellant.

J. A. MacIntosh, (Toronto) for the respondent Magistrate.

MEREDITH, C.J.C.P.—The appellant, treating the "conviction" in question as a conviction which, under section 4 of The Public Authorities Protection Act, R. S. O. (1914) ch. 89, must be quashed before any action can be brought against the respondent for anything done under it, moved, under section 63 of the Judicature Act, R. S. O. (1914) ch. 56 to quash it, and, upon that motion, it was quashed; but at the instance of the respondent, it was provided by the order quashing the conviction, under section 8 of The Public Authorities Protection Act, R. S. O. (1914) ch. 89, that no action should be brought against the respondent, who is a Police Magistrate and who made the "conviction."

The appellant desires to retain the quashing order, but to get rid of the protection provision of it; the respondent is con-

tent that the quashing order stand, provided that his protection under it stand also; and so the only questions in which we are now concerned are: (1) whether an appeal lies against the protecting provision of the order, and, if so, (2) whether that provision ought to stand. The question whether section 4 of the Protection Act R. S. O. (1914) ch. 89, applies to the case is not raised.

If section 4 be appliable to the case, it takes away the common law right of action which the appellant would have if that which was done by the respondent was done in a matter in which by law he had not jurisdiction, or in which he had exceeded his jurisdiction, until the conviction or order has been quashed; but, under section 8, the Court quashing the conviction, "may provide that no action shall be brought against the Justice of the Peace who made the conviction."

It is difficult to suggest any good reason why an appeal should not lie against such a provision depriving a person of a right of action which otherwise he would have. It hardly can be that it was intended to confer the power to deprive a person of such right of action without any right of appeal.

Under section 26 of The Judicature Act, R. S. O. (1914) ch. 56, subject to two exceptions not in point, an appeal lies to this Court from any judgment, order or decision of a Judge of the High Court Division in Court, and from any judgment, order or decision of a Judge in Chambers in regard to a matter of practice or procedure which affects the ultimate rights of any party.

Under section 63 of The Judicature Act R. S. O. (1914) ch. 56, a motion to quash a conviction is to be made in Chambers, and the like practice applies to a motion to quash a conviction for a crime, under rules of Court made under the provisions of the Criminal Code.

Under section 8 of The Public Authorities Protection Act, R. S. O. (1914), ch. 89, it is the Court which may provide that no action shall be brought.

So it may be that in strictness of practice the conviction should be quashed by order in Chambers and the protection afforded by order in Court; but, for the purposes of this appeal, that is immaterial.

Then should the unqualified protection, which the order in appeal affords, stand?

If it should, then the respondent is in a better position than if he had acted within his jurisdiction, and so had the benefit of section 3 of the Protection Act R. S. O. (1914) ch. 89, he seems to be protected against malice and want of reasonable and probable cause; and that should not be.

The case is by no means as favourable for the appellant as a mere statement that he was convicted for an offence committed by his son would indicate. According to his own testimony, given upon his summary trial, he was only across the road from his son, who is said to be only eight years of age, when the son was pestering the complainant, an old woman. If the complainant's story were true it may be possible that the father might have been well-convicted of the offence as an accessory; he would unquestionably have been morally much the more blamable; and if that be so the father might also have been prosecuted for a more serious offence, having testified that his son was innocent—on the occasion when the father was there—of the complaint made against him. Besides that, the man seems to have made no objection to the charge being laid against him instead of against his son, nor any attempt to pay or get rid of the fine imposed upon him.

In all the circumstances of the case, protection to some extent seems to me to have been properly given, but it should not have been unqualified, it should not have been extended to things done, if any, maliciously and without reasonable and probable cause.

I would vary the protection to that extent, and in other respects dismiss the appeal, without costs.

RIDDELL, J.:—I agree.

Order varied.

MIDDLETON, J. (CHAMBERS.) 6TH NOVEMBER, 1916.

REX v. ON KEE.

Intoxicating Liquors—Selling or Keeping for Sale—Restaurant Keeper Convicted for—Liquor found on Premises—Building Divided into Sections with Inter-communications — Whole Building one Premises.

Building divided into sections:— On motion to quash the conviction of a restaurant keeper for selling or keeping liquor for sale, it was shewn that he occupied one part of a building which was divided into sections with inter-communications and that liquor was found in a closet opening off a chamber and in proximity to the door between the "chamber" and a store and opposite to the door leading from the "store" to the "restaurant", and that the defendant had the key to the closet. *Held* that the magistrate could properly find that the whole building was one "premises," and in the absence of any explanatory evidence ignore the suggestion that there were separate holdings of the different sections. Conviction confirmed.

Motion by the defendant to quash his conviction by the Police Magistrate at Windsor, for unlawfully selling or keeping liquor for sale.

Heard by Middleton, J., in Chambers, on 3rd November, 1916.

D. L. McCarthy, K.C., for the defendant's motion.
J. R. Cartwright, K.C., for the Crown, contra.

MIDDLETON, J.—The only question argued was whether there was any evidence upon which it could be held that the accused was the person who kept the liquor; or who kept the premises upon which the liquor was found; or whether under the circumstances sec. 102 (2) of the Act applies so as to raise the presumption that the liquor was kept for sale.

The accused has filed an affidavit and produced a plan of the premises. The affidavit cannot be used. The plan seems to have been before the Magistrate. It shews a large building subdivided by main walls into three sections but in these walls there are doors which enable access to be obtained to all the rooms without resort to outside communication. The east section is marked "Restaurant." The centre "Store" and the east "Chambers."

The liquor was found in some quantity in a closet opening off a "Chamber" and in proximity to the door between the "Chambers" and the "Store" and opposite to the door leading from the "Store" to the "Restaurant."

The Magistrate might well find that this whole building constituted one "premises" and in the absence of any explanatory evidence ignore the suggestion that there were separate holdings of the different sections.

One Frank Lee at one time ran the Restaurant and imported 23 cases of spirituous liquor and in December he was convicted of selling liquor without a license. The liquor in question here was part of the same shipment.

The evidence here is of an officer of the Police force who "made a search of the defendant's premises at 61 Sandwich street and found the defendant there with other Chinamen * *" Then follows some details of search and request made of defendant to open the door between the "Store" and the "Chambers." Accused "said the man was not there that had the key. Then a man came with the key who unlocked the door. We found nothing in the two rooms. Afterwards we asked Kee to open the door under the stairway." On this being done the liquor was found.

On cross-examination the witness said "On Kee seemed to be in charge of the place. I cannot say positively that On Kee is the owner of the place."

Another constable says: "On Kee appeared to be in charge on both occasions."

On this evidence the Magistrate could, I think, convict the accused. The motion is dismissed with costs.

Conviction confirmed.

SUPREME COURT OF CANADA. 11TH DECEMBER, 1916

WALTON v. STONEHOUSE

Deed—Voluntary Release of Interest in Land—Action to Set aside Deed—Lack of Independent Advice—Misrepresentation — Undue Influence — Laches and Acquiescence.

Relief from voluntary release:—After the expiry of the life interests of her foster parents, plaintiff became entitled, under the will of a person who died in June 1902, to a life interest in a farm. In July of the same year, plaintiff was induced to execute a document whereby she covenanted with defendant (to whom the farm had been devised after plaintiff's death) and the other executors under the said will, that she would upon marrying or "leaving the property", give up possession of the farm to defendant. Plaintiff was paid nothing and she had no independent advice and had no opportunity to secure it and at the time she executed the document she was under the influence of the foster mother who induced her to sign the same. She married in 1908 and left the farm. Her foster mother died in 1913 and her foster father was still alive on 3rd April, 1914, when this action was begun to set aside the document. *Held*, that plaintiff had satisfied the onus which was cast upon her of shewing some substantial reason for setting aside her voluntary deed, and her remedy had not been barred by her long continued acquiescence and laches. *Held*, further, that mere lapse of time unattended by any circumstance which gives rise to an equity in the defendant's favour will seldom, if ever, bar a plaintiff who has a strong equity to relief, otherwise clear.

Appeal by the defendant from a judgment of Supreme Court of Ontario, Appellate Division, 35 O. L. R. 485; 9 O. W. N. 417; varying the judgment of Sutherland, J., at trial, 35 O. L. R. 17; 9 O. W. N. 222.

The facts of the case are sufficiently set out in the reports of the judgments in the Courts below.

The appeal to the Supreme Court of Canada was heard by Fitzpatrick, C.J., Davies, Idington, Duff, Anglin and Brodeur, JJ., on 23rd November, 1916.

J. E. Jones, for the appellant.

W. Laidlaw, K. C., for the respondent, was not called upon.

THE CHIEF JUSTICE:—This appeal is dismissed with costs.

DAVIES, IDINGTON and DUFF, JJ.—Concurred in dismissing the appeal.

ANGLIN, J.—I find it difficult to imagine the mental process by which the appellant persuaded himself that he had an arguable case to bring before this Court. Notwithstanding its forceful presentation by the learned counsel who appeared for him, a more hopeless appeal can scarcely be conceived.

Shortly after the death of a testatrix who had left her an interest in a farm to arise after the death of both her foster parents, the plaintiff, a young lady, was induced by misrepresentation as to his late mother's intentions made by the testatrix's son to whom the farm was devised in remainder, to execute gratuitously an instrument in the form of a covenant, which, in its effect, was tantamount to a relinquishment in his favour of the interest devised to her. Indeed the false representation is recited in the very instrument itself as one of the reasons for its execution.

The learned trial judge, upon evidence which admits of no other conclusion, found that the plaintiff would have been entitled to have the instrument set aside had she brought suit more promptly. But he thought that her delay of twelve years disentitled her to equitable relief. The Appellate Division, while fully agreeing with the trial judge on the first branch of the case, unanimously held that the plaintiff's delay in bringing action, there having been nothing amounting to acquiescence (which indeed was not pleaded) and no countervailing equity, did not afford a defence. It was upon laches that the appellant chiefly relied in this Court.

At bar counsel conceded that there was no evidence that the plaintiff had become aware of the untruth of the representation by which she was induced to execute the impeached instrument until immediately before the present suit was instituted. Indeed the probability would seem to be that she first obtained proof of its falsehood in the course of this litigation. That fact alone is complete answer to the defence of laches. Other obvious grounds for rejecting it are that the delay was reasonably accounted for; that the plaintiff's foster father still survives; that the instrument which she executed passed nothing to the defendant—it is not even a release, but a mere executory covenant; and that the defendant in nowise altered his position in consequence of obtaining it. Where an unrighteous advantage has been obtained by the defendant and the plaintiff's equity to be relieved is undoubted, only some countervailing equity which would render this intervention unfair and un-

just will stay the hand of the Court. There are, no doubt, circumstances under which delay in instituting proceedings will raise such a countervailing equity—and a prolonged delay, if not satisfactorily accounted for, is in itself a circumstance of importance. But mere lapse of time unattended by any circumstance which gives rise to an equity in the defendant's favour will seldom, if ever, bar a plaintiff who has a strong equity to relief otherwise clear. In every case where laches without acquiescence is relied on as a defence, the justice or injustice of granting or withholding the remedy sought must be weighed and the result should determine the judgment. Here that result is so palpably in favour of the plaintiff that the weight in the defendant's scale is negligible.

The appeal fails and should be dismissed with costs.

BRODEUR, J.—By her action the plaintiff, Edith Stonehouse seeks to set aside an agreement procured by the defendant appellant from her and she alleges that this agreement was attended by fraud, deceit and misrepresentation.

It is mostly a question of fact and the concurrent finding of the two Courts below is to the effect that the plaintiff has shewn substantial reason why this deed should be set aside.

The trial judge, however, came to the conclusion that the plaintiff had been barred by her long acquiescence and laches and dismissed the action.

The Appellate Division, however, came to the conclusion that she was not too late to claim her rights.

In view of the concurrent finding of the two Courts below, I don't think it is necessary for me to deal with the facts of the case on which this finding has been based.

As to the question of laches, it appears that she was a woman that was not quite her own mistress. Immediately after signing the agreement she seems to have expressed her dissatisfaction to her foster parents, who had induced her to sign it. They seemed to agree with her and her foster mother repeatedly told her that she would see that justice would be done to her. As she was dependent upon those foster parents she did not make a move by herself.

It is true that some years later she got married and she still remained without taking any action for several years. However it is equally true that her right to the property had not yet arisen and no prejudice has been caused to the appellant by the delay.

It is stated in Halsbury's Laws of England *Vol. Equity*, No. 207, that twenty years may be taken as the period which, in practice, will bar a claim on the ground of delay. The application of the doctrine of laches depends upon the nature of the claim which it is sought to enforce.

In this case, a covenant that she would give possession of the property in question to the defendant has been passed. His right to enjoy the property has not yet arisen and may never arise. It does not appear that the action has been taken by the defendant on the renunciations or agreements signed by the plaintiff respondent. In those circumstances, I don't think that the doctrine of laches applies and no injustice will arise in compelling the appellant to abandon his advantage.

The action has been properly maintained by the Court below and the appeal should be dismissed with costs.

Appeal dismissed.

SUPREME COURT OF CANADA. 11TH DECEMBER, 1916

SHARKEY v. YORKSHIRE INSURANCE CO.

Insurance—Live Stock—Conditions of Policy—Commencement of Liability—Question as to—Mala Fides.

Commencement of Liability: — Where a policy of insurance issued on the life of a horse provided that the death of the animal must occur "from a disease occuring or contracted after the commencement of the company's liability" and the policy further provided that the company's liability commenced after payment of the premium and receipt of policy or protection note by the insured, *held* that the company was not liable for the death of the horse which died on the same day as the policy was delivered and premium was paid, from a disease contracted before the delivery of the policy.

Appeal by the plaintiff from a judgment of the Supreme Court of Ontario, Appellate Division reported in 37 O. L. R. 244

The appeal to the Supreme Court of Canada was heard by Fitzpatrick, C.J., Davies, Idington, Duff, Anglin and Brodeur, JJ., on 20th November, 1916.

Sir George Gibson, K. C., for the appellant.

Macdonnell, K. C., and *Oscar H. King*, for the respondent company.

THE CHIEF JUSTICE:—I find myself obliged though with great reluctance to concur in dismissing this appeal.

The proposal was for an insurance for the season against the death of a stallion from accident or disease and I cannot see what right the respondent company had to insert without notice the provision in the policy limiting the liability to death from accident or decease occuring or contracted after the commencement of the company's liability. The provision was of great importance involving, of course, in this case the whole liability under the insurance.

In the proposal the appellant declared as no doubt was the fact that the horse was then in perfect health, and it was examined and reported on by the Inspecting Veterinarian on behalf of the company. The policy was issued within ten days after. Counsel for the respondent said that this provision was

the only way in which live-stock insurance companies could protect themselves. I cannot in the least understand what he meant. There is no reason why they should not issue in accordance with their own form of proposal against death from disease whenever contracted, whilst the risk of disease being contracted during the few days elapsing between the dates of the proposal and the policy could hardly, one may suppose, have been sufficent to prevent their accepting the insurance. Of course, they were at liberty to make this or any other stipulation they pleased, provided they did so in a proper manner and with due notice to the insured. What they were not at liberty to do was to accept the proposal, declare it to be the basis of the policy and then surreptitiously introduce a limitation of their liability and deliver the policy leaving the issured to suppose she had such an insurance as she applied for. It is precisely to guard against such practices that the Insurance Act (R. S. O. ch. 183) by the 8th Statutory Condition in Section 194 provides:

8. After application for insurance it shall be deemed that any policy sent to the assured is intended to be in accordance with the terms of the application, unless the copy points out in writing the particulars wherein the policy differs from the application.

Unfortunately the appellant has not raised this point and since it is not pleaded this Court cannot give any effect to it. The appeal must therefore be dismissed.

DAVIES, J.—The real substantive question in dispute here is the exact time when "the liability of the company commenced" under the policy. Sir George Gibons contended strongly that it began at noon on the date of the execution of the policy by the company, 7th June, and that as the sickness and death of the stallion insured happened after that date the company was liable to pay. The Court of Appeal, on the contrary, held that, on the true construction of the policy itself, the company's liability did not commence until after delivery and acceptance of the policy and that as at that time, on the 8th June, the horse was 'sick unto death' and actually died within a few hours afterwards no liability on the part of the company attached.

The language of the policy reads as follows:

"If after receipt hereof and payment by the insured to the company of the under noted premium for an insurance up to noon on the date of

expiry of this policy, any animal described in the schedule below, shall during that period die from any accident or disease hereby insured against as after mentioned, and occurring or contracted after the commencement of the company's liability hereunder, and otherwise defined in the aforesaid proposal the company shall be liable to pay * * *''

The date of the expiry of the policy was stated in the policy as the 7th September, 1915. Sir George contended that although no specified term was mentioned in the policy itself the proposal or application made by the plaintiff had written on its margin by the plaintiff's agent in pencil the words "term 3 months" and that as the expiry of the policy was definitely fixed as the 7th September in the policy it must be construed once it came into operation as covering the whole period of three months and definitely fixing the commencement of defendants' liability as arising on the 7th June. But while the Insurance Statute, chap. 183, R. S. O., in its 156th sec. enacts "that the proposal or application of the assured shall not *as against him* be deemed a part of or be considered the contract of insurance" except in a case not arising here it is manifest that if the plaintiff himself invokes the terms of that proposal of application as definitely fixing the time from which the policy was to run the Court must look at the whole of that document and not at a part only. So looking, we find the application which has dated 29th May expressly providing: "The company's liability commences after payment of the premium and receipt of policy or protection note by the insured." In this case there was no protection note and the plaintiff did not receive her policy or pay her premium until the afternoon of the 8th June. The horse died a few hours after such delivery of a disease which it had contracted before such delivery and if the application can under the circumstances I mention be referred to, it would conclusively settle when the company's liability commenced.

Apart from that however, I concur with the reasons given by the Judges of the Court of Appeal that the language of the policy itself apart from the application settles the question. I have already quoted it.

As I construe that language, it covers insurance not for a period of three months but for such period from a time after delivery to and receipt by the insured of the policy up to the date of its expiry. No question arises as to this time of delivery.

The insurance covers the period between those dates and the date the policy expires. The death of the animal must occur during that period, from a disease occurring or contracted after the commencement of the company's liability and that liability, I hold under the words of the policy, did not commence until the delivery of the policy.

I would therefore dismiss the appeal.

IDINGTON, J.—The appellant sues upon a policy of insurance issued by respondent, insuring her against loss by death of a stallion from accident or disease.

The operative covenant sued upon is as follows:—

"NOW THIS POLICY WITNESSETH, that if after receipt hereof and payment by the Insured to the Company of the under noted premium for an Insurance up to noon on the date of the expiry of this policy, any animal described in the Schedule below, shall during that period die from any accident or disease hereby insured against as after mentioned, and occurring or contracted after the commencement of the Company's liability hereunder, and otherwise defined in the aforesaid proposal the Company shall be liable to pay to the Insured, after receipt of proof satisfactory to the Directors, Two-Thirds of the loss which the said Insured shall so suffer, but pro rata only with other existing insurance or sums recoverable from other parties and not exceeding the amount for which such animal is insured."

The stallion died from a disease clearly contracted before the payment of the premium and before the delivery of the policy.

I am unable to expand the tolerably clear and explicit terms of this covenant whereby its operation is directed to something happening after its receipt and the payment of the premium, to cover a death which did not result from a disease contracted after the commencement of the company's liability thereunder, but from some disease contracted before the commencement of such liability.

The argument that the premium was obviously to cover three months and that as the policy was to expire on a day named which would make the policy operate retroactively a day or more before the time when its very clear terms indicate that it was the intention of the contracting parties that it should only begin to run after both the delivery of the policy and payments of the premium, seems clearly untenable.

The same line of argument, if maintained, might render the company liable to pay in case of the death of an animal weeks before the delivery of the policy or payment of the premium, which might well happen if the animal were at a long distance from the insured and insurer.

Such policies might exist and be effective as in analogous cases in marine insurance.

It all depends on the frame of the contract.

It is idle to rely upon dicta from authors or judges in relation to contracts in a form that lent another possible meaning than that which can fairly be put upon this one.

As I read this contract it does not offend in its operative part against the clauses in the Insurance Act relied on by counsel for the appellant.

The recital, however, in this policy, I may be permitted to suggest, is not what I could rely upon as a compliance with section 156 of the Insurance Act.

Indeed I think it unjustifiable but I cannot in this case see how I can, save by discarding it, give any effect to the section.

If we tried to go further, as invited by the argument of counsel, in the way of applying subsection 1 of section 156, we could only destroy the contract but would be unable to construct another unless by unduly straining that clearly intended by the language used.

If, for example, the policy had been delivered, then even without payment, we might have an arguable case presented by virtue of subsection 1 or section 159, whereby to set up or make operative the contract so amended by that subsection. I pass no opinion thereon—indeed have none—and am merely trying to illustrate what may, by virtue of the statute be possible, but here is impossible.

The appeal must be dismissed with costs.

DUFF, J.—Concurred in dismissing the appeal.

ANGLIN, J.—In view of the explicit directions of s-s. 1 of s. 156 and of s-s. 1 of s. 193 of the Insurance Act (R. S. O., 1914, c. 164) and of the express prohibition of s-s. 3 of the former I am, with the appellant, unable to understand the reference of the learned Chief Justice of the Common Pleas to the proposal or application made by the assured for the purpose of defining the term of the contract of insurance sued upon, or for that of

interpreting the phrase, "commencement of the company's liability" used in the policy. With respect I am of the opinion that under the statutory provisions above cited, the term of the insurance must, as against the insured at all events, be found in the language of the policy itself unaided by anything in the application or proposal for insurance. That, I think, is the clear effect of the legislation to which I have referred. Although the insured is not debarred from invoking the application in so far as he can derive aid therefrom in other respects, inasmuch as the statute by s-s. 1 of s. 193 (made applicable by s. 235) requires that "term of the insurance" shall appear on the face of the policy, I doubt whether even he can invoke the application to extend the terms as stated in the policy.

With the other learned Judges of the Appellate Division I find it unnecessary to resort at all to the application in order to ascertain the beginning of the term of the insurance. With them I find the beginning of that term fixed in the policy as to the occurrence of death to be the time of the receipt of the policy and payment of premium, and as to the accident or disease occasioning the death to be "the commencement of the company's liability hereunder," i.e., under the policy. Sir George Gibbons argued that the use of these distinct phrases indicates that "the commencement liability" was meant to describe a moment of time different from and necessarily earlier than that at which the contract was made by delivery of the policy. Inasmuch as by s. 159 of the statute the contract of insurance when delivered is "as binding on the insurer as if the premium had been paid" and this "notwithstanding any agreement, condition or stipulation to the contrary", the risk attached from the moment of the delivery of the policy although the premium was not paid until afterwards. The contention that the use of two distinct descriptive phrases necessarily excludes an intention thereby to deal with the same event proceeds on the assumption that the policy was framed by a skilled draughts man. A very cursory perusal of the document suffices to dispel any such illusion. Brief as the operative clause is, tautology is perhaps its most striking feature. It is therefore, not surprising to find in it the same idea expressed—the same thing described —in different language.

Delivery of the policy took place on the 8th of June, before the death of the animal insured, but after it had contract-

ed the disease which proved fatal. That disease, however, had only manifested itself on the morning of the 8th and the case proceeds on the footing that it was then first contracted. The policy bears date the 7th of June and was certainly executed on or before that day. The date of expiry of the risk is stated on the face of the policy to be the 7th September and in a table of "risks", likewise printed on the face of the policy, we find the item "Stallions as against death from accident or disease during the currency of the policy." It is at least questionable whether the adjectival phrase "during the currency of the policy," in this item qualifies the words "accident or disease." I think it does not, but applies only to the word "death". At all events it should not in the case of disease be read as meaning disease first contracted during the currency of the policy. But I cannot think that this somewhat vague clause can affect the clear and explicit limitation of the rick in the operative provision of the policy to death from "disease contracted after the the commencement of the company's liability hereunder." The question is purely one of interpretation of the latter phrase.

Now there can be no doubt that there was no liability of the company before the delivery of the policy. Up to that moment there was no contract of insurance. The company might have entirely declined the risk. The applicant might have refused to accept the policy or to pay the premium. By force of the statute liability began upon delivery of the policy, though it should not otherwise arise until payment of the premium. Granted that it was possible for the parties to have provided by express stipulation on the face of the policy that the risk should be deemed to have attached before its delivery, they have not done so. Sir George Gibbons contended that it sufficiently appears that the premium paid to and accepted by the company was based on a full three months' risk. I find nothing in the policy to indicate that to be the fact—nothing which justifies a conclusion that upon a basis either of contract or of estoppel the respondents can be held to have undertaken a risk or liability ante-dating the delivery of the policy. It is true that on the applicaion—not in its body but in a marginal note on he upper left-hand corner—we find the words "Term 3 Mos." But, while that is so, we also find in the body of the same document this clause

The company's liability commences after payment of the premium and receipt of policy or protection note by the insured."

It is this latter clause which is referred to by the learned Chief Justice of the Common Pleas as an aid in determining the limitation of the risk and defining "the commencement of the "company's liability" as against the insured. While in my opinion it may not be so used on behalf of the insurer, on the other hand if, notwithstanding the explicit requirement of s-s. 1 of s. 193 that the term of the insurance shall appear on the face of the policy, the insured may invoke the application in support of his contention that the risk was for a full period of three months (necessarily beginning on the 7th of June since the date of its expiry is fixed as the 7th of September) he must take that document as a whole and cannot escape the effect of its very clear and precise provision fixing the commencement of the risk as, in the absence of a protection note, the time of receipt of the policy. In the light of this provision the marginal note on the application form, "Term 3 Mos." must, I think, be regarded as a classification of the risk rather than as intended to define its precise duration. In this view the 8th statutory condition which might otherwise though not invoked by the appellant, present a somewhat formidable difficulty to the respondents, (See *Laforest* v. *Factories Ins. Co.*, 53 S C R., 296) is inapplicable to this marginal note on the application.

On the whole case the conclusion reached in the Appellate Division seems to me to be right. The appeal should be dismissed with costs.

BRODEUR, J.—The application for insurance in this case is dated the 29th day of May 1915 and was a proposal applying to the respondent for insurance on a horse for a sum of One Thousand Dollars ($1,000).

In the body of the application there was a note that the Company's liability would commence after the payment of the premium and the receipt of the policy by the insured.

No payment was made by the applicant when the application was signed. The policy was issued by the company in Montreal on the 7th day of June, 1915, and was mailed to their agent in Petrolia, the place of residence of the appellant. It appears that on the morning of the 8th the horse became sick. In

the afternoon of the same day the policy was delivered and the premium paid and a few hours after the horse died.

The policy contained the following provision:

"If after receipt hereof and payment by the insured to the company of the under noted premium for an insurance up to noon on the date of expiry of this policy, any animal described in the Schedule below shall during that period die from any accident or disease hereby insured against as after mentioned, and occurring or contracting after the commencement of the company's liability hereunder, and otherwise defined in the aforesaid proposal the Company shall be liable to pay, etc."

When the policy was issued on the 7th of June the horse was in good health; when it was delivered, however, it had become sick and the question is whether the company's liability began on the date of the policy or when the premium was paid and the policy delivered.

The stipulation above quoted shews that there was no liability on the part of the company until the policy was delivered. Then if the sickness existed at the time of the delivery of the policy the company would not be liable because it was formally stated that if the horse dies from a disease not contracted after the delivery of the policy there will be no liability. That contract could not in my opinion be construed in any other way.

It was contended, however, by Sir George Gibbons in his argument that if the horse died before the delivery of the policy there would be no liability; but if the horse simply took sick before the delivery then, in such a case, the company would be responsible for the amount of insurance.

I am unable to find any such distinction in the clause above quoted. It seems to me clear that the liability begins at the time of the delivery of the policy and at the time of the payment of the premium and the condition of the policy was that if the horse died before the delivery of the policy or the payment of the premium, of if he died after but from a disease which had been contracted before the delivery of the policy, then in such a case the loss would be not for the insurance company but for the owner of the horse.

It may be then, as a result of that construction, that the plaintiff was not fully insured for the three months which she contemplated; but we have a declaration in the application it-

self that the policy would not be in force before it was delivered and before the premium was paid. The appellant was aware of that condition, because it was on the document which she signed.

I am unable to come to any other conclusion than that the action of the plaintiff was properly dismissed by the Appellate Division and that this appeal should be dismissed.

Appeal dismissed.

APPELLATE DIVISION, S. C. O. 8TH NOVEMBER, 1916

OAKLEY v. WEBB

Nuisance — Stone-cutting and Sawing — Noise and Dust Caused thereby—Character of Locality—Reasonable use of Property —Appeal—Findings of Trial Judge.

Character of locality:—An arbitrary standard cannot be set up which is applicable to all localities; there is a local standard applicable in each particular district, but though the local standard may be higher in some districts than in others, yet the question in each case ultimately reduces itself to the fact of nuisance or no nuisance, having regard to all the surrounding circumstances.

Stone-cutting:—The business of a stone cutter and sawyer is not a nuisance when carried on, on premises adjoining railway tracks and situate in a city block which has by city by-law been excepted from residential districts, and the residents within such a block cannot restrain said business, notwithstanding that the residents suffer considerable annoyance from noise and dust.

Wrong conclusions:—Where an Appellate Court finds evidence on which the trial Judge might have arrived at a different result, still, his findings of facts should not be reversed unless the evidence is sufficient to convince the Appellate Court that he came to a wrong conclusion.

Appeal by the plaintiff from the judgment of Britton, J., noted in 10 O. W. N. 339.

The appeal was heard by Meredith, C. J. O., Maclaren, Magee, and Hodgins, JJ. A., on 12th and 13th October, 1916.

W. N. Tilley, K. C. for the appellant.

G. H. Watson, K. C., and *S. J. Birnbaum*, for the respondent

HODGINS, J. A.—Appeal by plaintiff from judgment of Britton, J., dismissing action to restrain defendant from carrying on his business as a stone cutter and sawyer so as to interfere with the health and comfort of the appellant and his family.

The appellant bought, fifteen years ago, on the north side of Summerhill avenue and built on the lot a frame house which he rented but never lived in. In 1913 be built his present residence on the east side of the lot, a solid pressed brick house costing $4,500 with nine rooms and a sun parlor on top of the kitchen which forms the north end of the house. This house was rented for ten months after it was finished, but the appellant has lived in it since July, 1914. His lot has 50 feet front by a depth to the railway right of way of 115-130 feet.

The respondent bought the adjoining hundred feet to the east in 1913, just after the appellant began to build, and put on it, in the spring of 1914,

(1) an office building in the southwest corner on the street line;

(2) a lean-to for chiselling stone and using the compressor, 14 feet by 60 on the western boundary north of the office and close to the back part of the house;

(3) north of the lean-to a shed in which the air compressor is placed;

(4) on the north-east part of the lot a brick building called the machine shop, with tin roof and wooden front, in which machines are working.

The work in numbers 2, 3 and 4 is complained of, as also the chopping of stone in the yard. The trouble is said to be noise and dust; the noise being caused by the air compressors and the planer and saws in the machine shop. The saw is working more constantly than the planer. It is a gang saw, in which the respondent has had from one to six saws cutting.

In the lean-to there is chopping and planing of stone done, producing noise from the hammers and chisels and compressed air.

The action was begun in May, 1915. The operations of the respondent begin generally at 8 a.m., and are over for the day at 4.45 p.m. Both parties have lots in a block fronting on Summerhill avenue and backing on the C. P. R. track. The block extends from Maclennan avenue, where it is a mere point, east-

ward, widening as it goes till lot 11 is reached, where the depth is 225 feet. The whole of it is excepted from by-law 5977 of the City of Toronto, passed 18th March, 1912, which makes the lands south and east of it a residential district.

Not far from the appellant's house, about a hundred or a hundred and fifty feet, Nelson, the sanitary excavator and house mover, has a yard where he keeps his horses and waggons and from which when there was a rain a smell emanated—the appellant says from the manure pit and not from the waggons and barrels. Nelson also had a lumber yard there, filled with big, heavy lumber used in moving buildings. The C. P. R. line runs just at the rear of the appellant's property. Across Summerhill avenue the houses are so built that their backs are towards the street until east of Nelson's property. There is a small grocery store to the west, in a private house, with a display window.

The right of the respondent to carry on his business is a legal right; so is that of the appellant and his family to enjoy their life in reasonable comfort. To enjoin the respondent it is necessary to shew that his right wrongfully invades that of the appellant; in other words, that his business is so carried on as to amount to a nuisance, and so is an unlawful invasion of the competing right of the appellant.

The character of the neighbourhood is an important element in determining the standard of comfort which may be insisted upon. This strip along the railway right of way has been excluded by the municipal authorities from the adjoining residential area. It offers facilities for sidings, and is perhaps the only spot within a large area where shops may be put. It includes a somewhat unpleasant and unsightly storage yard within its boundaries. Those who settled there must and do accept the railway noise and smoke as part of the conditions of their residence; and the indifference of all those who live near by to the discomforts caused by the operation of freight and passenger trains is significant of the dulling effects of constant familiarity with the clatter and smuts regularly distributed by those agencies. Levy, one of the appellant's witnesses, says that the block is a business block.

Apart from the evidence of the appellant and his daughter no one was called by him who spent the days at home, except Burns, who testifies to hearing noise—what he calls excruciat-

ing. He says that he does not hear it much when the windows are closed. His testimony is the more important because he lived in his house for six months while the respondent's operations were in full swing, and then exercised his option to buy it, paying therefor $12,000. Mrs. Mack and her mother, called for the respondent, lived near from January, 1914, to May, 1915, and say they could not hear the noise in their home nor in the yard behind. The other witnesses for the appellant leave their homes in the morning and so are not able to speak of the effects of the noise except for an hour or so in the morning. The appellant's daughter is the only one affected in health, and her complaint is that the noise gets on her nerves on account of its continuousness.

The respondent's witnesses, except Mrs. Mack, afford examples of those who, like all the local residents in regard to railway noises, have become insensible to the noise produced by the sawing and chipping, from being accustomed to it or from not listening for it.

The respondent says his machinery operated from April, 1914, until December, 1914, without any objection as to noise, etc., but that when he started building his office, which is out on the street line, objection was made to its location, and that the only comment made by anyone before the action was begun was a casual remark of the appellant's that the saw made quite a noise. The respondent admits that if persons were looking for noises and listening for them the noise of his machines might be heard two hundred feet away, but says that ordinarily they would not be noticed, though they could be heard on the street.

I think the rule stated by Middleton, J., in *Appleby* v. *Erie Tobacco Co.* (1910) 17 O. W. R. 931, at page 932; 22 O. L. R. 533, at page 536, and adopted by Sutherland, J., in *Beamish* v. *Glenn* 36 O. L. R. 10, as correct, is the proper test to be applied in this case. It is that

> an arbitrary standard cannot be set up which is applicable to all localities There is a local standard applicable in each particular district, but though the local standard may be higher in some districts than in others, yet the question in each case ultimately reduces itself to the fact of nuisance or no nuisance, having regard to all the surrounding circumstances.

In dealing with the local standard or surrounding circumstances, Lord Selborne, L. C., in *Ball* v. *Ray*, L. R. 8 Ch. 467, 469, insisted that the Court must consider whether the defendant was using his property reasonably or not, *e. g.*, whether the in case of a building it was being used for purposes for which the building was not constructed. Buckley, J., in *Sanders-Clark* v. *Grosvenor Mansions*, [1900] 2 Ch. 373, follows this view.

The uncertainty of the test makes the question of nuisance or no nuisance a question of fact, and it is so stated by the House of Lords in *Polsue & Alfieri, Ltd.* v. *Rushmer*, [1907] A. C. 121. In *Gaunt* v. *Fynney* (1872), L. R. 8 Ch. 8, Lord Selborne, L. C., in speaking of nuisances by noise, says:

> Such things, to offend against the law, must be done in a manner which, beyond fair controversy, ought to be regarded as excessive and unreasonable.

In view of these and other cases, and after perusing the whole of the evidence, while I think there was evidence from which the learned trial Judge might have arrived at a different result, I am not sufficiently certain that he came to a wrong conclusion to enable me to assent to a reversal of his finding. He had to consider not only the evidence as to the noise but also the character of the neighbourhood, the reasonable use of the respondent's property, and the weight of testimony offered.

The appeal will have to be dismissed with costs.

MEREDITH, C.J.O., MACLEAN and MAGEE, JJ.A.:—We agree.

Appeal dismissed.

APPELLATE DIVISION, S. C. O. 8TH NOVEMBER, 1916

NIAGARA GRAIN & FEED CO. v. RENO

Sale of Goods—No. 1 Timothy Hay—Not Mere Warranty Condition—Time for Rejection— Rejection After Re-sale.

No. 1 Timothy:—The representation that hay is No. 1 Timothy is not a mere *warranty* in the narrow sense of that term, but is what is known in law as a *condition*, and in case of a breach the purchaser has a right to reject the hay if exercised within a reasonable time: He need not have the hay sold and sue for the difference in price.

Rejection after re-sale:—Where a vendor knows that a purchaser is buying goods for re-sale, the purchaser is not estopped from rejecting the goods because he re-sells them, providing that inspection and rejection takes place within a reasonable time.

Time for rejection:—A car load of hay arrived in Toronto on 24th Dec. Christmas day and Sunday immediately followed, then the car was moved to North Toronto where the hay was inspected on 30th Dec. On 31st Dec. purchaser wired the vendor rejecting the hay. *Held*, that the inspection and rejection were within a reasonable time.

Appeal by the defendant from a judgment of York County Court, dated 24th June, 1916.

The facts of the case are sufficiently set out in the judgment below.

The appeal was heard by Meredith, C. J. O., Maclaren, Magee, and Hodgins, JJ.A., on 27th September, 1916.

F. B. Davis (Windsor) for the defendant, appellant.
H. Ferguson, for the plaintiff, respondent.

MACLAREN, J. A.:—This is an appeal by the defendant from a judgment of Coatsworth, County Court Judge, Toronto, awarding the plaintiff company $225.06 with respect to a car load of hay, bought by the company from the defendant as No. 1 Timothy and refused by them on the ground that it was not No. 1 but was No. 3 Timothy, a much inferior article.

The defendant alleges that the plaintiffs, after inspection, accepted the hay, informed the defendant that they had done so, paid for it, and resold it; and claims that they were thereby estopped from rejecting the hay and suing for a return of the money they had paid.

From the evidence it appears that the hay arrived at Toronto on the 24th of December, 1915, that the plaintiffs opened

the car doors and found that the hay which could be seen from there was No. 1 Timothy, and they resold the car load as such. They paid the defendant's draft for $173.83 which was attached to the bill of lading, and also paid the freight. The defendant says he was in the plaintiffs' office on December 27th, and asked about this hay. Plaintiffs' manager says he then asked the defendant if the whole car load was as good as what was in the doorways, that the defendant told him it was, and that he then said in reply, "It will be all right."

The defendant's evidence as to what took place at this interview is that the above question was not asked and that the manager's statement as to its being all right was voluntary and unqualified.

The trial Judge does not expressly say which of these statements he believed, but from his conclusion he must have accepted the version given by the plaintiffs' manager. This is the only point as to which there was any dispute concerning the facts.

The railway company on instructions placed the car upon the siding of the plaintiffs' purchasers, who proceeded on December 30th to unload the hay. They found that whereas the 18 or 20 bales visible from the doorways were No. 1 Timothy, the remainder of the car load was so inferior as to reduce the average of the whole car to No. 3. They at once notified the plaintiff of the fact and that they refused to accept. The plaintiff on December 31st wired the defendant of the result of the inspection, and that they would reject unless the price was reduced. The defendant did not make any reply. The plaintiffs had the hay examined by the Government Inspector, who graded it as No. 3 Timothy. They then notified the defendant that the hay was at his risk, and brought their action. The price of hay having risen largely before the trial, an order for its sale was obtained, and the net proceeds, $210 were paid into Court.

It was strongly urged on behalf of the defendant that the plaintiffs' action should be dismissed, and that even if the hay was only No. 3, the plaintiffs had no right to reject or to recover back the money paid, but that their rights at the highest were to have sold the hay and sued for the difference.

I am of opinion that the representation that the hay was No. 1 Timothy was not a mere *warranty* in the narrow sense of

that term, but that it was what is known in law as a *condition*, and that its breach gave to the plaintiffs the right to reject in case that right was exercised within a reasonable time. Pollock says in his work on Contracts (8th ed.), at p. 563 :

> The so-called warranties of *quality*, fitness and condition of goods sold are really conditions; if the goods tendered in the performance of the contract do not satisfy these conditions, they may be rejected. But the buyer may, if he thinks fit, accept the goods and claim damages for the defect; in other words, he may treat the breach of condition as a breach of warranty.

See also 25 Halsburg, p. 154, ad note (p).

The law upon this subject was fully discussed and very clearly laid down in a recent English case, *Wallis* v. *Pratt*, [1910] 2 K. B. 1003, in a dissenting judgment by Fletcher Moulton, L.J., which was approved and adopted by the House of Lords [1911] A. C. 394. It arose from a contract for the sale of common English sainfoin seed "without any warranty express or implied" where the vendor supplied a different and inferior but indistinguishable article known as giant sainfoin seed, which the purchaser accepted and sowed, not discovering the difference until it grew up. He points out the difference between a condition which is vital and goes to the substance of the contract, and a warranty which is not so vital, that a failure to perform it does not go to the substance of the contract. In the former case the purchaser has (if he takes the proper steps) the alternative remedy pointed out by Pollock; in the latter he is not entitled to reject but is limited to his claim for damages for the breach.

I do not think the fact of the plaintiffs having resold the hay precludes them from rejecting. The defendant was aware that they were buying to sell again, and if the resale, inspection and rejection took place within a reasonable time the plaintiffs were entitled to exercise this right. The plaintiffs might even have first sold the hay and then purchased from defendant or some other vendor to implement their contract, without imperiling their rights. One must look at all the facts. In this case the hay arrived in Toronto on December 24th; Christmas and a Sunday immediately followed. The car was moved to North Toronto and the hay inspected on the

30th, and the next day the plaintiffs wired the defendant the result of the inspection and their rejection.

In the circumstances this was, in my judgment, within a reasonable time.

I am consequently of opinion that the appeal should be dismissed.

MEREDITH, C.J.O., MAGEE and HODGINS, JJA.—We agree.

Appeal dismissed.

APPELLATE DIVISION, S. C. O. 12TH DECEMBER, 1916.

MIDDLETON, J. (CHAMBERS.) 9TH NOVEMBER, 1916.

SIMPSON v. BELLEVILLE BOARD OF HEALTH

Costs—Security for—Insolvency of Plaintiff—Affidavit Shewing—Insufficient Material—Action under Fatal Accidents—Public Authorities Protection Act—Defence of Action Assumed by Municipality.

Insufficient material: — An affidavit shewing insolvency of plaintiff is insufficient material upon which to make an order for security for costs.

Public officials:—Where an action is brought under the Fatal Accidents Act, against any of the persons mentioned in the Public Authorities Protection Act such persons are entitled to security for costs.

Municipality assuming defence:—Even though a municipality, under s. 26 of the Public Health Act, R. S. O. (1914) c. 218, assumes the defence of an action brought against the local board of health, still the board has the right to demand that plaintiff give security for costs as provided by the Public Authorities Protection Act.

Appeal by the plaintiffs from an order of Middleton, J., dated 9th November, 1916, dismissing the plaintiffs' appeal from an order of the Local Judge at Belleville, ordering the plaintiffs to give security for costs.

The facts of the case are sufficiently set out in the judgment of Middleton, J.

The appeal to Middleton, J., was heard in Chambers on the 13th October, 1916.

W. C. Mikel, K.C., for the plaintiffs, appellants.
A. A. Macdonald, for the defendants, respondents.

MIDDLETON, J., (9th November, 1916)—The plaintiffs sue under the Fatal Accidents Act to recover damages for the death of their daughter, eight years of age. The defendants are the Local Board of Health and the Medical Officer of Health. The allegation is that in January, 1916, the child was taken ill with diphtheria, and that the Board of Health and Medical Health Officer isolated her but failed to supply her with proper medical attendance, medicine and assistance, and that as the result the child died. The order appealed from was made upon the theory that the case is one falling within the provisions of the Public Authorities Protection Act, R. S. O. (1914) ch. 89 sec. 16, That section gives protection not merely to Justice of the Peace but to any "person" where an action is brought "for any act done in pursuance or execution or intended execution of any statute or of any public duty or authority, or in respect of any alleged neglect or default in the execution of such statutory duty or authority."

By the Interpretation Act "person" includes "any body corporate or politic;" and I think it is clear that this action falls within the purview of the statute. There is no room for any suggestion that there was malice or that the action of the Medical Officer of Health and the Board was only colourable within the Act.

The allegation is that the defendants acted negligently in failing to discharge the duties imposed upon them by the statute and acted negligently in the discharge of their duties.

It is next argued that inasmuch as this action is brought under the Fatal Accidents Act the provisions of the Public Authorities Protection Act cannot apply.

I do not so understand the law. The Fatal Accidents Act is a general statute, giving a right of action which did not exist at common law. The Public Authorities Protection Act confers upon certain individuals the right to security for costs where their conduct is attacked. It is an act for protection of these individuals; and it seems plain to me that the two statutes stand

together and that there is no conflict between their provisions. If there is a cause of action under the Fatal Accidents Act, an action will lie; but if the defendants are entitled to the protection of the other statute that protection must be accorded to them.

Then it is argued that there is no liability for costs, as authority is given to the municipality under section 26 of the Public Health Act where an action is brought against a local Board of Health or any officer to assume the liability of the defence of the action and to pay any damages which may be awarded. By material which has been filed since the argument of the motion it is shewn that the municipality here has assumed the defence of the action, and it is said that the effect of this assumption of the defence is to relieve the defendants from the necessity of incurring any costs in their own defence and that inasmuch as they can incur no costs they need no security for costs.

It is by no means clear to me that if the action is dismissed with costs the plaintiff will escape liability merely because under this statutory authority the municipality has seen fit to undertake the burden of the defence of the action. It may possibly be so, but this is a question yet to be determined, and it should not now be entered upon. If the circumstances exist which entitled the defendants to an order for security for costs I think the order should be made and that the other question should be left to be determined when it arises. If there is no liability for costs upon a judgment awarding costs, then the sureties may escape; but the defendants ought not to be placed in jeopardy as to the possible outcome of the litigation upon this question when the statute entitles them to security. It may wll be that the municipality undertaking the defence is subrogated to all the defendants' rights as against the plaintiffs.

Finally, it was argued, and I so determined, that the affidavit shewing insolvency was not sufficient; but as no good purpose could be served by discharging the application with liberty to renew the motion on other material, as done in *Roberston* v. *Morris*, 11 O. W. R. 559; 15 O. L. R. 649, it was arranged that further material on both sides should be put in; and this has been done. On this material insolvency is abundantly established.

The appeal failing on all grounds is dismissed, but costs are to be in the cause to the successful party.

Appeal dismissed.

The appeal from the above order was heard by Meredith, C.J.C.P., Hodgins, J.A., Lennox, and Masten. JJ., on 12th December, 1916.

W. C. Mikel, K.C., for the plaintiffs, appellants.
A. A. Macdonald, for the defendants, respondents.

THEIR LORDSHIPS (v. v.) reduced the amount of security to $100 in money to be paid into Court, or for a bond for $200. Liberty given defendants to apply, if so advised for an increase. All costs to be costs in the action. Security to be given within four weeks from this date.

Otherwise Appeal dismissed.

FALCONBRIDGE, C.J.K.B. (TRIAL.) 10TH NOVEMBER, 1916.

SWIFT CANADIAN CO. v. DUFF & ALWAY

Bills of Exchange and Promissory Notes — Waiver of Notice of Dishonour—Acknowledgement in Writing—Onus on Defendant of Shewing that it was Given under Mistake of Fact.

Waiver of notice of dishonour:—Where no notice of dishonour is given to the endorser of a promissory note, but he unequivocally promises to pay or admits liability he is deemed to have waived notice of dishonour and protest.

Promise to pay:—The onus is upon the defendant of shewing that he gave a promise to pay dishonoured note, which he had endorsed, or made an admission of liability under a mistake of fact.

Action to recover from the defendants as maker and endorser, respectively of a promissory note for $776.18, and interest. Tried at Hamilton.

FALCONBRIDGE, C.J.K.B.—The plaintiffs sue defendants as maker and endorser respectively of a promissory note. Judg-

ment by default has been signed against Alway, the maker, and the only defence of the present defendant, Duff, is that no notice of dishonour was given to him.

It is undoubted that no notice of dishonour was given to the defendant Duff, and the only question is whether a sufficient waiver of notice is shewn by the following letters. Alway told Duff to write to A. Black, who is the manager of plaintiffs' credit department:

Binbrook, November 27th, 1915

Mr. A. Black,
Toronto, Ont.

Dear Sir:—

I saw John H. Alway yesterday and he requested me to write you regarding the note you hold against him, which I endorsed. He said he would like you to wait a few days till he had his arrangements completed for getting the money for you. If you could do this he said he would be very much obliged to you, and I also hope you can give an extension of time.

I remain,
Yours truly,
Jas. Duff,
Glanford Sta. R. R. No. 1
Ont.

Toronto, December 9th, 1915

Mr. James Duff,
R. R. No. 1,
Glanford Sta. Ontario.

Dear Sir:—

Answering your letter of November 27th regarding account against Mr. J. H. Alway, would say we wrote him under date of November 23rd, but to date he has not found it convenient to answer our letter.

We are thoroughly disgusted with his method of doing business, and feel it only just to notify you as endorser on his note, that we intend taking legal action unless Mr. Alway's account is satisfactorily reduced by Monday, December 13th.

Yours respectfully,
Swift Canadian Co., Limited
Per - "

CREDIT DEPT.
FWB—SPP

Binbrook, December 11th, 1915

Mr. A. Black,
Dear Sir:—

Your letter to hand and think you are giving me rather short notice about recovering amount due you from J. H. Alway. I think you might have deferred action for a time longer as the note is only six weeks past due, but if that is your only course why I will have to see what I can do myself but it is hardly possible to raise that amount at two days' notice. But I think I can promise you that you will receive it in a short time.

Yours truly,
(Signed) Jas. Duff
R. R. No. 1
Glanford Station, Ont.

Toronto, December 14th, 1915

Mr. James Duff,
R. R. No. 1,
Glanford Sta., Ontario.
Dear Sir:—

ACCOUNT J. H. ALWAY

Answering your note of the 11th inst. would say we do not wish to be any more aggressive after this money than is necessary but you must not lose sight of the fact that the account in question dates back to Spring 1914, and we dislike very much carrying it over into 1916. Mr. Alway telephoned us yesterday promising to let us have at least half of the money by December 23rd, and we hope that you will be able to raise the other half in order that this account may all be settled before December 31st, as otherwise we very much fear that we will have to transfer the matter to the hands of our Legal Department. We feel that we have been extremely lenient with Mr. Alway so far and cannot think that he has shown a very marked appreciation of our kindness.

Yours respectfully,
Swift Canadian Company Limited
Per —

CREDIT DEPT.
FWB—MLT

Toronto, Jan. 8th, 1916

Mr. James Duff,
R. R. No. 1,
Glanford Sta., Ont.
Dear Sir:—

J. H. ALWAY

Not having received any reply to our letter of the 14th inst., and not having received any of the promised payments from Mr. Alway,

please accept this as a last notice that suit will be instituted if payment has not been made, or the account satisfactorily arranged for with us in this office by January 15th.

Swift Canadian Company Limited
Per —

CREDIT DEPT.
FWB—OIS

Even if the defendant had written merely the letter of 27th November, 1915, the case would hardly have been so favourable to him as that of *Britton* v. *Milsom* (1892), 19 A. R. 96, 99, because, although this letter was written at the request of the maker, it contained an admission of the endorser's liability. Some of the cases cited in *Britton* v. *Milsom* shew that if there is an unequivocal promise to pay or admission of liability on the endorser's part he is deemed to have waived notice of protest; and the defendant's letter of 11th December, 1915, especially when read along with the earlier letter, is reasonably plain both as to the admission of liability and as to the promise to pay.

The onus of shewing that the defendant gave the promise or made the admission under a mistake of fact was upon him, and he failed to discharge such onus. See Maclaren, 5th ed., 302; Falconbridge on Bills of Exchange, etc., 2nd ed., 670; Byles on Bills, 17th ed., 283.

The Statute of Frauds has no application to the case. There will be judgment for the plaintiffs for the amount of the note with interest and costs.

Fifteen days' stay.

Judgment for plaintiffs.

SUTHERLAND, J. (CHAMBERS) 18TH NOVEMBER, 1916

RE SOVEREIGN BANK v. WALLIS

Discovery—Examination of Wife of Judgment Debtor in Aid of Execution—Property Paid for by Judgment Debtor—Deed Taken in Wife's Name—Ex parte Order set aside—Rules 582-3.

Wife of judgment debtor:—Where a judgment debtor had supplied his wife with the money to purchase a house and the deed was taken in her name, an order directing her to attend for examination in aid of execution should not be issued *ex parte*.

Appeal by Martha Wallis, the wife of Thomas Wallis, a contributory, against whom the liquidator of the bank had recovered judgment in the winding-up proceedings, and placed an execution in the hands of the sheriff, from an order of the Master-in-Chambers, the Official Referee before whom the proceedings were pending, directing the appellant to attend for examination, at instance of the liquidator, for discovery in aid of the execution against her husband.

W. Lawr, for the appellant.
M. L. Gordon, for the liquidator.

SUTHERLAND, J.—Appeal from an order of the Master in Chambers, directing the applicant to attend for examination on behalf of the bank, a judgment creditor of her husband, in aid of execution. The order was made *ex parte*, and the ground of objection thereto, as alleged in the notice of motion, is that the Master had no power to make it "*ex parte* or otherwise."

The judgment debtor on his examination touching his estate and effects and as to the property and means he had when the debt or liability which was the subject of the case or matter in which judgment has been obtained against him was incurred, testified that in April, 1909, his wife bought a house, that it cost $1,600, which he gave to her to pay for the property, that he made a cheque for the amount to the vendor, that the deed was taken in her name and that it is in this property that he and she have since resided.

The order of the Master is said to have been made under Rule 583. It is contended on the part of the judgment creditor

that it may have been made and could be made under either Rules 582 or 583. It seems to me, however, that under either rule it was not proper to make the order without notice to the wife. *Blakeley* v. *Blaase* (1888), 12 P. R. 565.

There is no evidence before me that the purchase was made after the date when the liability to the judgment creditor on which the judgment is based was incurred.

It is contended that what the judgment creditor is really endeavouring to secure is discovery before action brought to set aside the deed referred to. I express no opinion as to whether an order in the circumstances can be obtained under either Rule mentioned, I think, it was not properly obtained *ex parte*, and must be set aside with costs.

Appeal allowed.

MASTER-IN-CHAMBERS. 18TH NOVEMBER, 1916.

WARE v. HENDERSON

Discovery—Refusal to Answer Questions—Motion to Strike out Defence—Ingredients of Secret Process.

Ingredients of secret process:—Plaintiff sold a certain process to defendant and brought action alleging that this process was re-sold by the said defendant to his co-defendant. The defendant upon his examination for discovery, stated the process sold by him to his co-defendant was altogether different from that which the plaintiff sold him. *Held*, that the defendant in refusing to divulge the process and the ingredients thereof sold to his co-defendant was strictly within his rights.

Motion by the plaintiffs for an order striking out the defence of the defendant R. J. Henderson upon the ground of his refusal to answer the questions put to him upon his examination for discovery relating to his secret process and the ingredients thereof and the disposal or dealings of the said defendant in connection with the said secret process.

MASTER-IN-CHAMBERS:—The plaintiffs in this action were the owners of a certain process for the manufacture of steel, and on the 15th March, 1910, sold this process to the defendant R. J. Henderson and J. Henderson on certain terms and conditions

set out in an agreement in writing. The plaintiffs claim that this process was sold by the said defendants to their co-defendants and sue for specific performance of the agreement and for an account, damages and an injunction. The defendants R. J. Henderson and J. Henderson in their defence say that the process purchased by them from the plaintiffs on investigation turned out to be worthless and also that the process sold by them to their co-defendants was a process altogether different from the process sold by the plaintiffs to them. On the examination for discovery of defendant R. J. Henderson, he refused to divulge the process and the ingredients of the process sold to his co-defendants and also refused to divulge the sale of same or any particulars thereof. In refusing to answer these questions I think he was strictly within his rights. At this stage of the action he cannot be compelled to disclose his secret process.

The defendant R. J. Henderson should reattend for examination and should state whether the defendant used the formulas supplied by the plaintiff or any of the ingredients thereof. Whether they make any addition to these materials and whether the addition makes any difference in the process, but he is not compelled to disclose the nature and quantity of the additions. The plaintiffs are entitled to have this information on discovery. The affidavits filed on this motion cannot be used at the trial. Costs of application in the cause. See *Benard* v. *Levenstein*, (1864) 10 L. T. R. N. S. 94.

MIDDLETON, J. (WEEKLY COURT.) 20TH NOVEMBER, 1916.

ANDERSON v. ANCIENT ORDER UNITED WORKMEN

Insurance—Life insurance—Friendly Society—6 Geo. V. ch. 106 Secs. 5, 6, 9—Construction of Statute—Reduction of Amount of Certificates—Election to Continue Policy at Increased Premium—Tender—Death of Assured before Amount Payable Ascertained.

A. O. U. W. rates:—6 Geo. V. (Ont.) ch. 106 provided that the amount of the certificates of the A. O. U. W. outstanding on the 1st of July, 1916, should be reduced to the amount justified by the assets of the association. Sec. 5 provided that any member might maintain his insurance at the original amount by paying the additional premium proper upon his attained age upon the difference between the new and the original amount of his insurance. The statute required a statement to be filed before a certain day from which would be ascertained the amount of premium to be paid. After the 1st of July and before the statement was prepared and filed, plaintiff notified the society that he was willing to continue his policy and to pay the increased premium. Sec. 9 provides that where death takes place between the 1st of July and the filing of the statement, the amount to be paid shall be the reduced amount. *Held*, that the assured had exercised the right given him by Sec. 6. Therefore Sec. 9 did not apply to his case.

Special case, heard in the Weekly Court at Toronto.

G. F. Henderson, K.C., for the plaintiff.
A. G. F. Lawrence, for the defendant.

MIDDLETON, J.—This case turns upon the construction of the statute 6 Geo. V. ch. 106.

The A.O.U.W. had conducted insurance upon too low a schedule of premiums, the result being that unless some drastic remedy could be found, insolvency would inevitably result. To remedy this situation the Act provides that from and after 1st July, 1916, the amount of the then outstanding certificates shall be reduced to the amount justified by the assets of the association, each certificate being proportionately cut down, but (by sec. 5) the right is given to any member to maintain his insurance at the original amount, paying the additional premium proper upon his attained age upon the difference between the new and the original amount of his insurance.

The amount of the reduction in the insurance represented by the certificates and consequently the amount of the prem-

iums to be paid could only be ascertained by actuarial calculation and a statement is required to be prepared and filed on or before 1st October, 1916.

Anderson died on 17th July, before this statement was prepared, but after 1st July he stated to the Society his intention to continue his policy at the larger amount and his readiness to pay the increased premium—and this case has been argued upon the footing that there was a tender of any sum which could be demanded by way of increased premium.

The statute provides that when death takes place between 1st July and the filing of the statement the amount to be paid shall be the reduced amount—(sec. 9).

This is in conflict with the absolute right conferred by sec. 6, to the member to maintain his certificate at the original amount, paying the increased premium. The sections can best be reconciled by holding that sec. 9 does not apply where the assured has exercised the right given him by sec. 6.

The election to maintain the policy at the increased amount coupled with the readiness to pay as soon as the increased amount could be ascertained and the tender of any increased sum is, I think, enough to bring the assured within the provison of sec. 6.

I cannot think that the legislature intended that there should be a period between the 1st July and the filing of the list during which the members, notwithstanding readiness to pay the increased premium, should be compelled to carry decreased insurance.

The question submitted is therefore answered in favour of the plaintiff.

MULOCK, C.J. Ex. (CHAMBERS) 21ST NOVEMBER, 1916.

GOODMAN v. BRULL.

Process—Service of Writ of Summons—Within Jurisdiction—Defendant Outside Jurisdiction— Substituted Service.

Substituted Service:—Where a defendant is out of the jurisdiction and a writ for service within the jurisdiction is issued, service of the said writ cannot be effected indirectly by substituted service.

An appeal by the plaintiff from order of the Master-in-Chambers setting aside the service and an order authorising substituted service of the writ of summons upon the defendant, Albert B. Brull.

C. M. Herzlich, for the plaintiff, appellant.
M. L. Gordon, for Albert B. Brull, respondent.

MULOCK, C.J. Ex.—The action was begun by writ of summons in the form applicable to the case of a defendant within the jurisdiction although at the time of the issue of the writ the defendant was out of the jurisdiction, and a writ for service upon him without the jurisdiction could not have issued except on an order of the Court.

The plaintiff, being unable to serve the defendant personally, applied for an order for substituted service of the writ in question, which was refused, and the appeal is from that order.

It was not competent to the plaintiff to serve the defendant out of the jurisdiction with a writ issued for service within the jurisdiction, but the plaintiff's contention in effect is that what he may not do directly, he may do indirectly. I cannot assent to this view. In my opinion where the defendant is out of the jurisdiction, you cannot effect substituted service upon him of a writ which the plaintiff was not entitled to serve personally: *Field* v. *Bennett* (1886), 56 L. J. O. B. 89; *Fry* v. *Moore* (1889), 23 Q. B. D. 395.

I therefore think the Master's order was right and this appeal should be dismissed with costs.

By inadvertence the Master by his order gave costs against both defendants although Albert B. Brull alone appealed. The order should be amended by giving costs to Albert B. Brull only. *Appeal dismissed.*

MASTEN, J. (CHAMBERS.) 22ND NOVEMBER, 1916.

CANADIAN HEATING & VENTILATING CO. v. THE T. EATON CO. & GUELPH STOVE CO.

Appeal—Leave to Appeal—Extension of Time—Rule 176—Duty of Officer of Company to Submit Question of Appeal to Board of Directors—Delay—Special Circumstances.

Delay caused by submitting question of appealing to Board of Directors:—Where it was the duty of an officer of a company to deal with the question of appealing from judgments given against the company and the said officer was prevented, within the time limited for appealing, by special circumstances, from taking the necessary steps of submitting the question of appealing to his Board of Directors although he had the *bona fide* intention of doing so, leave to appeal was granted.

Motion by the plaintiff company under Rule 176 for leave to appeal and to extend the time for appealing to the Appellate Division of the Supreme Court of Ontario from the judgment of Sutherland, J., dismissing the action, 10 O. W. N. 439.

H. W. Mickle, for the plaintiff company.

H. S. White, for the defendant, the Guelph Stove Co. Limited.

The plaintiff did not desire to appeal as against the other defendant.

MASTEN, J.—Judgment having been delivered on the 14th of July, dismissing the plaintiff's action, he should, if he desired to appeal, have brought his appeal by the 15th of September.

The excuse put forward to account for the slip is that he did not receive notification of the judgment until July 20th and that within a day or two thereafter he was obliged to depart to the north-west and the Pacific Coast on an extended business trip of great importance; that before going he was unable to get his Board of Directors together; that there was no officer of the company to take up the matter in his absence; that he went away without knowing exactly when an appeal had to be brought but expecting to be back by September 1st,

and was advised that it would be time enough to consider the appeal when he returned; that his return was delayed until September 15th and immediately after returning he was ill and confined to bed for two weeks; and that when he recovered he endeavoured to get his Board of Directors together at various times between October 1st and 25th but failed in being able to do so; that he had no authority to appeal without the approval of his Board; and that no conclusion was reached as to whether to appeal or not until Octber 25th, though there was always the intention to formally consider the question.

The objection most strongly urged against the motion is that the applicant has not shewn a *bona fide* intention to appeal while the right to appeal existed, and a suspension of further proceedings by reason of the special circumstances shewn. The decision in *Smith* v. *Hunt* (1902), 5 O. L. R. 97, indicates that the onus is upon the applicant of establishing such a situation, and if the view there expressed is to be applied categorically and literally it is manifest that the applicant has failed in the present instance to shew any intention respecting the matter, formed by the plaintiff company prior to the 15th of September. But the words of the rule under which the application is brought do not contain any such limitation and the situation with respect to a limited company, where it is necessary before an intention can be formed to gather together the Board of Directors, is very different from the situation in *Smith* v. *Hunt*, where all that was necessary was for the appellant to make up his mind to appeal.

I think that in such a case as the present it is sufficient if the officer of the incorporated company whose duty it is to deal with the matter entertained within the time allowed for appeal the *bona fide* intention of submitting the question of appealing to his Board and is prevented by special circumstances from so doing. I do not think that, under the circumstances of this case, I am bound by the rule laid down in *Smith* v. *Hunt*, but that the broader rule, that to do justice in the particular case is above all other considerations, ought rather to be applied.

So far as it is an element for consideration on such an application I am clearly of opinion that the subject matter of the action covers large and substantial interests involving some thousands of dollars, and the questions that here arise upon the

proper interpretation of The Trade Marks and Design Act are difficult in law, and of very considerable general importance. I should, however, add the further statement that I have by no means reached the view that the judgment of the trial Judge is erroneous. The delay is not long and the appeal can be speedily disposed of. While the inconvenience and loss to the respondents consequent on granting the leave may be considerable, yet, full indemnity can be provided.

With very considerable hesitation I have concluded that upon the applicant's paying, as a condition precedent, the costs of this application and giving security to the satisfaction of the registrar for the payment of all costs up to and including the judgment in the action and upon the plaintiff's filing a written undertaking under the seal of the company that in the event of his success on the appeal no claim will be made against the defendant in respect to the damages claimed in this action arising out of anything done between the 15th day of September last and this date or out of the sale hereafter of goods manufactured during that period, and also undertaking in the event of success to indemnify the defendant The Guelph Stove Company, Limited, against any outlay lost, thrown away or incurred between the 15th of September and this date in consequence of their supposing that the judgment was final, and also undertaking to facilitate the restoration of exhibits or duplicates of the exhibits delivered out, I grant leave to appeal and direct all extensions of time necessary for that purpose. Notice of appeal to be given, evidence to be orderd forthwith, and the hearing of the appeal to be expedited.

It is to be noted that the leave so given extends only to an appeal against The Guelph Stove Company, Ltd. No application is made for leave to appeal against the T. Eaton Company, Limited.

Leave to appeal granted.

APPELLATE DIVISION, S. C. O. 8TH NOVEMBER, 1916.

REX v. SINCLAIR.

Criminal Law—Theft—Summary Trial—Conviction Under Sec. 777 (5) — Motion to Quash — Right of Appeal — Secs. 797 & 1013 of Criminal Code.

Right of appeal:—The summary convictions provisions of the Criminal Code do not apply to prosecution under Sec. 777 (5), the only appeal lying from a summary conviction for theft under the said sub-section is that given by Sec. 1013.

Appeal by the defendant from the order of Clute, J., 36 O. L. R. 510, dismissing the defendant's motion to quash his conviction made by the Police Magistrate of Toronto on the 17th March, 1916. The defendant was charged before the Magistrate with the theft of $5 and was tried summarily under Sec. 777 (5) of the Criminal Code and was convicted.

The appeal was heard by Meredith, C.J.O., Maclaren, Magee, and Hodgins, JJ.A., and Riddell, J.

J. G. O'Donohue, for the appellant.

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

MEREDITH, C.J.O.—The motion before Clute, J., and the appeal are misconceived, as the summary convictions provisions of the Criminal Code do not apply to a prosecution under Sec. 777 (5). See 8 & 9 Edw. VII ch. 9. It is only where the trial has taken place before two Magistrates that an appeal lies in the same manner as from a summary conviction under Part XV (Sec. 797). The only appeal which lies in a case such as this is that given by sec. 1013 of the Criminal Code, which provides that an appeal from the verdict or judgment of any Court having jurisdiction in criminal cases, or of a magistrate proceeding under section 777, on the trial of any person for an indictable offence shall lie upon the application of such person if convicted, to the Court of Appeal, in the cases hereinafter provided for and in no others.

The appeal must therefore be quashed.

The same conclusion was reached in *Regina* v. *Racine*, (1900) 9 Que. Q. B. 134; 3 Can. Crim. Cas. 446.

Appeal quashed.

MIDDLETON, J. (WEEKLY COURT.) 10TH NOVEMBER, 1916.

RE WILLIAMSON.

Will — Construction — Dower — Election of Widow — Direction to Sell and Realize — Blended Fund — Annuity of Widow out of Fund "After Payment of Debts" —Rights of Creditors—Priority.

Election of Widow to take Dower: —There must be some clear indication that a widow is to be deprived of her dower if she takes under her husband's will. Where a widow accepts the benefits given to her by her husband's will, neither a direction to sell and realize nor the formation of a blended fund are sufficient indication of the husband's intention to deprive his widow of her right to dower.

Motion by the executors of the will of Edmund Schofield Williamson, who died on the 30th October, 1915, for an order determining questions arising upon the construction of the will

A. M. Denovan, for the executors.

S. H. Bradford, K.C., for the widow.

M. H. Ludwig, K. C. and *A. C. Heighington*, for the execution creditors.

F. W. Harcourt, K. C., for infants.

MIDDLETON, J.—At the time of his death the testator owned certain lands in the town of Brampton, and certain chattel property. By the will of the testator's father, William Schofield Williamson, now deceased, his property, which largely consists of lands in the province of Manitoba, was given to the Toronto General Trusts Corporation upon trust to realize and divide into seven separate trust funds, one of which is to be held for the benefit of Edmund Schofield Williamson; and it is provided that upon the death of any of the testator's children his trustee shall deliver to such person or persons as the child shall name or appoint by his will the *corpus* of the fund allotted to such child. In the event of the child dying intestate or without having made any appointment there is a gift of the fund for the benefit of the children of the child.

By the will of the son, Edmund Schofield Williamson, he directs that this share of his father's estate should be paid over

to his executors and trustees. The testator directs, after certain specific devises, that all the rest and residue of his estate, including any property over which he has any power of appointment and his interest in the estate of his late father, be held by his executors and trustees upon trust, first to sell the house at Brampton and out of the proceeds to pay his debts and then follows a clause which gives rise to one of the questions now to be determined: "And in case there be a shortage for this purpose out of this property it is my will if it be at all possible that the unpaid balance of my debts be paid out of my father's estate, if possible out of the principal, and if this be not possible then out of income, but in such a way that my wife be not deprived of any of her income as hereinafter provided. To invest after payment of debts all that is left, including the interest of my father's estate* * *to pay my wife during her lifetime $150 monthly* * *"

The Brampton land has been sold, and its produce will not be enough to pay the debts. There was a mortgage on the land which exhausts a substantial part of the purchase money. The surplus is now held subject to the determination of the question raised. This sale was effected under the terms of an order providing that the sale shall not in any way prejudice or affect the wife's claim for dower, which is to be determined as though the land had not been sold.

The first question asked is whether the widow is put to her election under the will. It is suggested that she is, although no express provision to that effect is to be found in the will because, first, there is a direction to sell, and secondly, there is a provision for the widow arising out of a blended fund. It is said that the whole scheme of the will is inconsistent with the wife asserting any dower right. With this I cannot agree. In earlier cases suggestions are found which lend colour to the argument advanced; but the more recent cases establish the necessity for some clear indication that the wife is to be deprived of her dower if she takes under the will; and it has been held that neither a direction to sell and realize nor the formation of a blended fund are sufficient indications of the testator's intention to deprive the wife of her right to dower if she accepts the benefits given by the will. These cases are familiar and need not be reviewed. See *Leys* v. *Toronto General Trusts*, 22 O. R. 603; *Re Shunk*, 31 O. R. 175; *Re Hurst*, 11 O. L. R. 6.

Those opposed to the widow naturally rely upon *Re Ouderkirk*, 5 O. W. N. 191. The case is very like the one in hand but I cannot regard it as overruling the earlier, and now weighty, decision, but rather as an attempt to apply the established principles to the will then under consideration.

The first question will therefore be answered in favour of the widow.

The second question, as propounded relates to the right of the creditors as against the fund to be derived from the father's estate. The widow claims priority over the creditors up the theory that this being an appointed fund the creditors can have no greater right than that given to them by the will, and that under the will their right is made subordinate to that of the wife. I do not so understand the will. The wife's annuity is to be derived from a fund to be invested "after payment of debts;" and the testator's intention was that the principal of the money derived from the father's estate should be resorted to for this purpose but that if this is not possible then the income, in such a way as not to prejudice the wife in respect of her income. This fund cannot be resorted to until there is realization of the father's estate. As and when that falls in, it will probably not be found impossible to so arrange as to enable some scheme for the payment off of the creditors to be devised which will not bear too hardly upon the widow.

Costs of all parties may come out of the estate.

MASTEN, J. (CHAMBERS.) 11TH NOVEMBER, 1916.

LONELAND v. SALE.

Appeal—Leave to Appeal to Supreme Court of Canada—Delay in Bringing Appeal—Sec. 69 of Supreme Court Act, R. S. C. 1906 ch. 139—Rules of Court, 9 & 119—Effect of Vacations on Prescribed Time—Merits—Findings of Fact Identical in Two Courts—Arguable Case for Appeal.

Vacations:—The period of 60 days prescribed by Sec. 69 of the Supreme Court Act is not suspended during the vacations of the Court.

Findings of Fact:—Where there have been concurrent findings of fact by two successive tribunals before which a case has come and the applicant for leave to appeal to the Supreme Court of Canada bases his reasons for leave to appeal upon his intention to upset those findings leave will be refused on the ground that said reasons do not shew a reasonably arguable case for appeal.

Motion by the plaintiff Murphy, under sec. 71 of the Supreme Court Act, R. S. C. 1906 ch. 139, to allow an appeal to the Supreme Court of Canada from 10 O.W.N. 238, although not brought within the time presented by the Act and Rules relating to such appeals.

I. F. Hellmuth, K.C., for the applicant.
M. K. Cowan, K.C., the defendants, respondents.

MASTEN, J.—The judgment of the Appellate Division was pronounced on the 12th day of May, 1916. Sec. 69 of the Supreme Court Act requires that every appeal shall be brought within sixty days from the pronouncing of the judgment appealed from. The period of sixty days prescribed by sec. 69 is not suspended during the vacations of the Court. *News Printing Company* v. *McRae*, 26 S. C. R. 695. It thus appears that the time within which the security should have been perfected and allowed expired on the 11th day of July last.

The appellant was bound under Rule 9 of the Supreme Court Rules to file his case within forty days after the allowance of the security, but by Rule 119 the time of the long vacation is not to be reckoned in the computation of the forty days. Assuming that the appeal had been regularly brought and proceeded with, the time for filing the case would therefore have expired on the 10th day of October. The result is

that the appellant was not bound to bring his appeal down to a hearing at the October sittings of the Supreme Court; so that no sittings of the Court has been lost. The excuse for his slip put forward by the applicant is not superlatively satisfactory, but if in other respects the special circumstances are such as to warrant the granting of the leave asked, I would be inclined to hold the excuse sufficient.

On the hearing of the appeal by the Divisional Court, I did not entertain a favourable opinion of the applicant's merits; and a review of the case in connection with this present application has not changed that opinion.

Such an opinion on the merits, while it may properly form a factor in the consideration of the application, would if it stood alone be insufficient in the circumstances of this case to warrant a refusal of the leave asked.

On this motion the crucial question is whether the applicant has shewn that legal issues involving matters of importance, doubt and difficulty—questions that are fairly debatable —will arise on his proposed appeal. If they do, then I think that in this case justice requires that leave should be given, even though I may personally be of opinion that the judgment appealed from is right. The fact that the trial Judge and the Appellate Court have arrived at different results favours the present application.

Nevertheless, I have reached the conclusion that the motion should be refused. The applicant's quarrel with the existing judgment is founded mainly on two grounds: first, that as a matter of fact the sale from Parker to Little under the mortgage was not a real sale to him but that the defendant Sale was the purchaser of the lands in question and merely took the agreement and subsequent conveyance in the name of Little, as a stool pigeon; secondly, that as a matter of law where a trustee (as Sale undoubtedly was) purchases the trust property under the circumstances above stated he takes it subject to the original trust whether he acquires it secretly or openly. Assuming that the last proposition is good in law, it yet remains necessary for the applicant to establish his first proposition of fact, namely, that Little did not become the real purchaser of the lot in question, and that the mortgage sale was a mere fraudulent device with the object of eliminating any interest of the plaintiffs in these lands.

With this point in mind I have again read the proceedings and the judgments of the trial Judge and of the Appellate Court. They concur in their findings of fact :

(1) That fraud was distinctly charged and negatived;

(2) That the sale to Little was a real sale; that he acquired and held for some time not merely the legal title but the dominion over the property, both for handling it and for sale; and that he has now sold and conveyed it to Windsor Realty Limited.

To succeed in the Supreme Court the applicant must upset these findings of fact; and the general rule is that where there are concurrent findings of fact by the two successive tribunals before whom the case has come the Supreme Court will not interfere.

I therefore think that the applicant has failed to show a reasonably arguable case on appeal.

Having regard to the two considerations to which I have adverted (lack of merits and lack of a clear legal right), and considering that the applicant deliberately refrained from arguing his case in the Court of Appeal; considering the numerous postponements and delays which have already at his instance occurred in the action; considering the small amount really at stake and the loss and inconvenience likely to result from a further prolonging of the litigation, I think that justice requires that there should be an end of the present litigation, and that leave should be refused. Order accordingly; costs of this application to be paid by the applicant to the respondent.

Motion dismissed.

LENNOX, J. (TRIAL.) 13TH NOVEMBER, 1916.

SUSSEX v. ÆTNA LIFE INSURANCE CO.

Insurance—Life Insurance—Conditions of Policy—Default in Paying Premium at Stipulated Time — Reinstatement — "Insurability" — "Privileges" — Satisfactory to the Company—Enlistment as soldier.

Evidence: — A policy of insurance contained a stipulation that it contained no restrictions regarding service in the militia in time of war or peace. The policy further stipulated that within 5 years after default in payment of premium it might be reinstated upon evidence of insurability satisfactory to the company. It also provided that the endorsement thereon and the application constituted the entire contract between the parties. The plaintiff failed to pay the third premium on his policy within the presented time and sought to have the policy reinstated under the said stipulation with regard to reinstatement. The company were willing to continue the insurance and to reinstate the policy of the plaintiff who had become a soldier for overseas service on condition that he pay the company an extra premium. *Held*, that the generality of the condition with reference to reinstatement should not be restricted in the absence of clear notice to the insured somewhere on the face of the policy.

Proof of Insurability means that the insured at the time of the application for reinstatement is a proper risk for insurance upon the basis of the original contract and under the circumstances of this case, the only matter to which it could apply was the health of the insured.

Satisfactory to company:—Where a policy of insurance stipulates that the evidence of insurability is to be satisfactory to the company, the company will not be allowed to act arbitarily or unreasonably.

Default in payment of premium:—Where a policy provides that if any premium subsequent to the first one be not paid when due, the policy will cease to exist, "subject to the privileges regarding reinstatement, etc.," the failure of the insured to pay the third premium when due does not render the policy null and void for any purpose, and the insured may avail himself of the privilege of reinstatement.

Action for a declaration that a policy of life insurance issued by the defendants to the plaintiff on the 24th March, 1914, is a valid and subsisting security or that the plaintiff is entitled to have the policy reinstated under the 14th condition thereof or for an order directing the defendants to reinstate the policy.

The action was tried without a jury at London.

LENNOX, J.—The insurance is for $3,000 payable to the plaintiff's mother at his death. The plaintiff agreed to pay

twenty consecutive annual premiums of $80.04 each, in advance and he paid the first and second premium. The third annual premium fell due on the 21st of March, 1916, and was not paid, nor was it paid or tendered within the thirty-one days' grace allowed for payment of premiums after the day stipulated for payment thereof. On the 25th day of April, 1916, the plaintiff mailed his cheque to the defendants' agents in Toronto for $80.04. This was refused and returned. Condition 5 of the policy provides: "This Policy shall not take effect until the first premium hereon shall have been actually paid during the good health of the insured, a receipt for which payment shall be the delivery of the policy. If any subsequent premium be not paid when due, then this policy shall cease, subject to the values and privileges hereinafter described, except that a grace of thirty-one days, during which time the policy remains in full force, will be allowed for the payment of any premium after the first, provided that with the payment of such premium interest at the rate of six per cent. per annum is also paid thereon for the days of grace taken; but for any reckoning herein named the time when a premium becomes due shall be the day stipulated therefor without grace."

It is evident that the plaintiff has not *a direct right* to have the policy continued or reinstated by reason of forwarding his cheque as above stated, under the provisions of this condition, for the double reason that the thirty-one days' grace had then expired and that he did not add interest as provided for, but I shall have occasion to refer specifically to the precise wording of this condition later on in discussing the defendants' contention that by default in payment the policy *ipso facto* became null and void to all intents and purposes—in fact ceased to exist. There was evidence given with a view of excusing the plaintiff's default, and evidence to shew that he was without excuse, but I do not think it matters either way; the plaintiff failed to comply with the terms of his policy as to periodical payments, and the only question is, is the plaintiff entitled to have the policy reinstated by reason of condition 14 of the policy?

Condition 14 is as follows: "Within five years after default in payment of premium, unless a cash value has been paid or the extension period has expired, or if this policy has not been surrendered, it may be reinstated upon evidence of in-

surability satisfactory to the company and by payment of arrears of premiums with interest at six per cent. per annum, and by reinstatement of whatever indebtedness to the company existed hereon at the date of default with interest from that date."

At the time the insurance was effected the plaintiff was a commercial traveller. He has since become a soldier, and liable to be called to active service in Europe in the present war, if in fact he has not already gone to the front.

Condition 6 provides that the policy endorsements thereon and application constitute the entire contract between the parties.

Condition 7 states: "This policy contains no restrictions regarding change of occupation, residence, travel, or service in the militia, or army or navy in time of war or in time of peace; but if the insured shall commit suicide within one year from the date hereof, while sane or insane, this policy shall be null and void."

The defendants are willing to continue the insurance but only upon the condition "that should the insured go into any military or naval service outside of the Dominion of Canada he, or someone on his behalf, shall notify the company and within ninety days from so engaging, and annually thereafter, shall pay to the company an extra premium of fifty dollars per thousand of insurance, and that otherwise the said policy *shall become and be null and void* except for the cash surrender value existing at the time of engaging in such service," and contend that condition 14 is only binding as to a policy upon which at least three years' annual premiums have been paid. They rely upon conditions 9 and 12 and table A of the policy as modifying and limiting the generality of the language of condition 14, and particularly that there is no "cash surrender value" or "extended time insurance" until the policy has been carried for at least three years.

It is pointed out that upon payment for three years there is an automatic "extended term insurance" for 4 years and 286 days.

It is quite clear from the company's proposal above set out and is bluntly admitted by Mr. Parkinson, the company's manager for Western Ontario, that the real difficulty or cause of dispute is not the delay in payment but the necessity of re-

adjusting methods by reason of the unforseen burdens imposed upon insurance companies by the daily casualty lists of the war. In consequence of this the company adopted new rules—and altered interpretation of their contracts in fact—after the making of this contract and after the war, to wit, on the 1st of September, 1915. It is not shewn that notice of the change was given to the holders of current policies. I am not wedded to any general rule of interpretation but all the same it is right to keep in mind that the language of the policy is the language of the company, that the plaintiff, like thousands of others similarly situated, entered the service of the country upon the faith of it, and, without saying that it is therefore to be construed unfavourably or favourably to its author, it is plainly right that the generality of the language of condition 14 should not be narrowed or cut down, or the express provisions of condition 7, in effect, abrogated, unless there is clear notice to the insured, somewhere upon the face of the policy, that the undertaking of the company by Condition 14 is to be read in a more limited sense that the *prima facie* meaning of its language would import. Sec. 71 of the Insurance Act, R. S. C. 1906, ch. 34, enacts: "No condition, stipulation or proviso modifying or impairing the effect of any policy or certificate of life insurance * * * shall be good or valid unless such condition, stipulation or proviso is set out in full on the face or back of the policy." Evidence was given, subject to objection, of the practice of some other companies, adopted since the war, under somewhat similar policy condition. I have not examined into whether the analogy is close or not. Upon consideration, I am of opinion that the statement of these witnessses are irrelevant and inadmissible and that the issue here must be determined by interpretation of the policy alone, construed in the light of its own circumstances, of course, in so far as they afford any aid. I entertain no doubt as to the meaning of the terms "insurability." The letter of the defendants' solicitors to Mr. Flock and his reply, put in as exhibit 11, in no way affects the question; "proof of insurability" in condition 14 means that the insured at the time of application for reinstatement is a proper risk for insurance upon the basis of the original contract, and the condition of the health of the insured is the only matter to which I can think it could apply in this case, and at all events it is the only matter to which it did in fact apply upon the cir-

cumstances here. If the policy had execepted the risks incident to warfare the insured, having become a soldier, would not be eligigble for insurance without the consent of the company, and so would lack the quality of "insurability" and the right to reinstatement, but the policy itself determines this point against the defendants. I give no weight to the argument, somewhat faintly urged, that the evidence of insurability is to be "satisfactory to the company;" the provision is not a contract that the company is to be allowed to be arbitrary or unreasonable. The plaintiff furnished proof of good health by the certificate of the doctor who originally examined him—Dr. Drake says: "This is to certify that I have this day carefully examined the above J. E. Sussex and find him in perfect health and an A No. 1 risk for life insurance as in previous examination on 9th May, 1914"—tendered the overdue premium with interest at six per cent. and offered to furnish any further proof of insurability required. The defendants did not at the time dispute the sufficiency of the proof or tender, nor since or at the trial claim that the tender or proof was insufficient or defective if as a matter of contract the plaintiff comes within the provisions of condition 14. The clear cut issue was and is to the interpretation of this condition.

I cannot accede to the argument that by default the policy became null and void—"ceased to exist for any purpose" as was strenuously urged by Mr. White, for the reason that the contract does not so provide but plainly provides to the contrary. Payment of the first premium is expressly made a condition precedent to the policy taking effect. It is not so as to other premiums. Condition 5. "*If any subsequent premium* be not paid when due then this policy shall cease, subject to the values *and privileges* hereinafter described * * * but for any reckoning herein named the time when a premium becomes due shall be the day herein stipulated therefor without grace." Condition 5. It conduces to clearness to eliminate consideration of the exception as to days of grace, and this consideration should be eliminated as the plaintiff did not avail himself of this exception; and if he had there would be no action. I have it then that the policy ceased on the 21st of March, 1916, "subject to * * privileges hereinafter described," and "the reckoning" is from the 21st of March, and not from the expiry of thirty-one days thereafter. The term-

ination of the policy by failure to pay *any premium*, except the first, is subject to many "privileges" one of the most important of which is the one provided for by condition 14, and the one claimed in this action. It is entirely distinct from the right to a loan under condition 9 or temporary insurance, a paid up policy, or cash surrender value provided for by conditions 12 and 13 and Table A.; all providing for the doing of something by the company upon the basis of what the insured has already done—an executed contract *pro tanto* on the part of the insured, and totally excluding the application of condition 14 of the policy has been surrendered or exchanged for a paid up policy, or a surrender value has been paid. These exceptions and also if "the extension period has expired" are set out in condition 14. Why should I read into it something that is not there—that the extension period has expired where there is no extension period, albeit it might have been prudent or proper for the defendants to have worded this condition to meet such a contingency. The argument founded upon an extended time insurance for 4 years and 286 days after three yearly regular payments is fallacious, it is more than that that works against the defendants. If the plaintiff had made three annual payments and failed to pay the forth, and delayed making application for 4 years and 287 days, "the extended period" would have been exceeded by a day and although there would yet be 1 year 78 days of the five years, after default, unexpired, he could not claim reinstatement. Why? Because whether of purpose or by accident this is provided for, it is then a case where there *is* an extension period and "the extension period has expired." A curious result perhaps—I am not concerned in results—but it is not without compensations, for in such case the plaintiff would have the privileges of conditions 9 and 12, not open to him in the circumstances of this case.

This all emphasizes, as I said, that Mr. White's argument is not well supported and does not work out. It may be that the limitation claimed could very properly have been inserted, and I express no opinion as to this, but as a matter of interpretation the question is only: "Is it so nominated in the bond?" This need not necessarily be provided for in express terms. That the condition for reinstatement does contain limitations and exceptions is certainly some evidence that others not men-

tioned are not excluded from its provisions. Condition 5 and the privileges it secures applies to a default in payment of *any premium* except the first, and by condition 14 "within five years after default in payment of (a ?) premium, unless a cash value has been paid for the policy or the extension period has expired, *or*, if the policy has not been surrendered, it may be reinstated."

This again *prima facie* means any premium except the first. Where in this condition or elsewhere is there a provision limiting this plaintiff's right of reinstatement to defaults in respect of the fourth or subsequent annual premiums only? "I can not find it; 'tis not in the bond." The disjunctive "or" affords another weighty argument against the defendants' contention, but I will not pursue it. I am of opinion that the plaintiff is entitled to have the policy reinstated. There will be judgment declaring that he is so entitled and directing and ordering that the defendant company reinstate it upon payment or tender of $80.04 with interest thereon at six per cent. per annum from the 21st of March last to the date of the tender already made, and delivery of the certificate of Dr. Drake hereinbefore referrd to, and for payment of costs by the defendants.

KELLY, J. (TRIAL.) 13TH NOVEMBER, 1916.

LEFEVRE v. LEDUC.

Title—Adverse Possession—Statute of Limitations—Erection of Buildings and Construction of Fences on one part of lot—Payment of Taxes on whole lot—Effect of—Unenclosed Land—Dispossession of Rightful Owner—Evidence—Lost Document.

Acts constituting adverse possession:—On the 3rd September, 1897, the plaintiff obtained a certificate of ownership of certain land and the certificate set forth that he had been located thereon on Oct. 17th, 1885, under the Free Grants and Homesteads Act. H. married J. L. in 1881 or 1882 and died on Oct. 22nd, 1895. From the time of their marriage H. and J. L. lived on the said land and since her husband's death J. L. continued to live on the land until recently without any interruption. H. erected a dwelling house on part of the land during his lifetime and some additions were made by J. L. after his death. The fences around the said part were built by H. and J. L.: *Held*, that there had been actual, constant and visible occupation and possession to the exclusion of the plaintiff of the said part enclosed by fences and that J. L. was therefore entitled thereto as against the plaintiff. *Held*, further, that as the part of the said land not enclosed was uncleared and uncultivated land and was used by the said J. L. and others alike for pasture and other purposes as common land, that there was not under the circumstances such unequivocal evidence of entry and possession as necessary to bar the right of the plaintiff in whom was the registered title. *Held*, also that the payment by J. L. of the taxes for the whole lot of which the said enclosed land was a part was not in the circumstances an act so enuring to the said J. L. as to deprive the owner of the remaining part of his right thereto.

True Test of Dispossession of Rightful owner is whether ejectment will lie at his suit against some other persons. The mere going out of possession by the rightful owner is not enough. In order that the statute of limitations may operate there must also be actual exclusive possession for the statutory period by some one else.

Action to recover possession of certain lands, tried without a jury at Barrie.

J. G. Guise-Bagley, for the plaintiff.
W. A. J. Bell, K.C., for the defendant Laplume.

KELLY, J.—To support his claim for recovery of possession of the lands involved in this action—part of the easterly half of lot 30 in the third concession and of lot 30 in the 4th concession of the Township of Baxter—the plaintiff relied principally on an understanding or agreement alleged to have been come to between him and Sylvester Houle (since deceased) for his life, and that he permitted Houle's family to live on the

lands after his death. Houle was a stepson of the plaintiff; and prior to going into possession of these lands he resided with plaintiff on the westerly half of lot 30.

The action was commenced on January 11th, 1916, against Richard LeDuc, who in his appearance claimed to be in possession as tenant of Josephine Laplume. Josephine Laplume appeared under and filed the affidavit required by rule 53.

Plaintiff, on September 3rd, 1897, obtained a certificate of ownership under The Land Titles Act of lot 30 in the third concession and lot 30 in the fourth concession of Baxter, which include the lands now in dispute; the certificate setting forth that plaintiff was located for these lots under the Free Grants and Homesteads Act on October 17th, 1885.

Sylvester Houle was married to the female defendant in 1881 or 1882, and died on October 22nd, 1895, leaving him surviving his widow and four children, the youngest of whom became twenty-one years of age on May 26th, 1915. From the time of their marriage until Houle's death, except for a period of about fifteen months seven or eight years after their marriage, their place of residence was on the land now in dispute; and since Houle's death until comparativley recently Josephine Laplume continued to reside there without any interruption, except for short intervals when she accompanied her present husband to another place where he was working.

There is much conflict in the evidence on many matters of importance. It is common ground, however, that some agreement or document relating to this land was given by plaintiff to Sylvester Houle about the time of or soon after the latter's marriage. This writing is not produced; it is shewn that it was in existence for many years. The evidence of its contents is far from satisfactory. Plaintiff asserts that its purpose and effect were to give the east half of the two lots to Sylvester Houle for his life and he seeks to account for the fact that Josephine Laplume and her children, as well as her second husband, whom she married about a year after her first husband's death, continued to occupy the lands or part of them, by saying that he had promised another party, not Joseprine Laplume or any of those who remained on the lands, that he would 'raise Houle's children, and that it was for that reason he allowed them to remain on the property until the youngest child attained twenty-one years of age. He admits that he never told Joseprine Lap-

lume that he was giving her permission to remain for this limited time or for any time. On the contrary he swears, and this is significant in view of what he now says about his intention to permit her to remain, that soon after Houle's death he told Josephine Laplume, who was wanting the land, that she would never get it, and that she then began to raise trouble.

If reliance is to be placed upon his statement it would indicate that so far as concerns what happened between him and her he ceased to assert any rights he may then have had, and let the matter rest, not agreeing with her, nor even informing her of his intention, to permit her and her family to continue in possession during the minority of Sylvester Houle's children. There was no bargain or agreement between them after Houle's death defining the terms on which she would continue in possession. If the fact was as plaintiff contends, that what he gave Houle was only a life interest, then from Houle's death her possession of the lands to which possession extended was adverse to plaintiff's title. Reliance cannot be placed on the evidence of the contents of the document which passed between plaintiff and Houle. It is several years since it disappeared; I have already expressed my view of the plaintiff's evidence about it. The evidence of Mrs. Laplume, based on recollection of what she saw or heard very many years ago, is not such as would justify a finding that its effect was to grant to Sylvester Houle or to him and his wife and family an absolute title, nor is there any clear evidence of what amount of land the document referred to. Mrs. Laplume says 'we' (I presume she means herself and her family) always regarded the hundred acres as their own; but her statement of her understanding of the meaning of the document was that if plaintiff died 'we' would have no trouble; and that it was not to be terminated by Houle's death. She has been aware all along that the registered title is in plaintiff, but no action was taken nor movement made to rectify the title in accordance with the ownership she contends for.

I am unable to find that it has been established that the effect of the missing document was to give Sylvester Houle or to his widow and his family an absolute title. I am also unable to determine just what was the effect of that document. The matter is so shrouded in doubt that it would in my judgment be unsafe, in the absence of the document itself or of some more

positive evidence than has been submitted, to declare the meaning and effect of its contents.

Equally in doubt are the happenings in connection with the payment by plaintiff to the three sons of Mrs. Laplume of one hundred dollars each in 1915. The evidence is again incomplete, and not sufficient to establish that the payment was an acknowledgment of title in the payees; on the evidence the payment might as well have been for the purpose of removing, without proceedings, claims by the payees which legally they could not substantiate. In arriving at the conclusion I have already expressed about the effect of the document referred to I have not left out of consideration the circumstance of this payment.

If defendants are to succeed their claim must rest on something other than that document. Josephine Laplume claims to have been in possession adverse to plaintiff, and she relies upon the Statute of Limitations.

There is now enclosed by fences about fifteen acres, nearly all of which is comprised within the east half of lot 30 in the third concession.

A dwelling house and outbuildings were erected thereon in Houle's lifetime; some small additions have been made thereto since his death. I think the plaintiff is at least mistaken, if not deliberately or recklessly stating what is untrue, in what he says about the part he took in erecting these buildings. His contribution amounted to nothing more than mere assistance to Houle in a friendly way, they having been in the habit of exchanging work as is frequently done by neighbours in country districts. I find that the buildings which were on the fifteen acres at the time of Houle's death were built by him, and that any additions thereto since his death were made by or for Josephine Laplume.

The fences around this enclosed portion, except in so far as plaintiff contributed to that part thereof which forms the boundary line between this enclosed portion and that part of the west half of lot 30 on which plaintiff has resided, were built by the occupants of the fifteen acres.

Josephine Laplume has by herself or by her tenants been in actual, constant and visible occupation and possession to the exclusion of plaintiff of that part of the east half of lot 30 which is comprised in the fifteen acres or thereabouts now en-

closed within the fences, and is entitled thereto as against plaintiff.

I may mention here that plaintiff's claim is confined to the east half of the lots; the evidence indicates, however, that the lands so enclosed with the fences extend into and embrace a portion of the west half as well, and no distinction has been made between the manner of Mrs. Laplume's possession of the part of the enclosed portion which is comprised in the east half and that comprised in the west half. Plaintiff was at one time the registered owner of the west half, but prior to action transferred it to another person not a party to his action.

Mrs. Laplume contends that her possession and occupation, sufficient to confer upon her title as against plaintiff, extends as well to all that part of the east half of the two lots numbered 30 not so enclosed within the fences. Houle, during the time that he resided on the east half of lot 30, or on part of it, and Josephine Laplume for many, if not all, the successive years paid the taxes on the east half, the charge for taxes being so far as it appears, in respect of the whole half lot. Taxes are entire and issue from and are chargeable against all and every portion of the land comprised in the charge. The payment of the taxes for all the lot by the occupant of the enclosed portion is not in the circumstances an act so enuring to the person paying as to deprive the owner of the remaining part of his right thereto. It may be that Mrs. Laplume has a right to contribution for the portion of the taxes she has so paid. At no time has any part of the east half of the lots, except the part of the fifteen acres or thereabouts referred to, been enclosed in fences; it is uncleared land, not cultivated, and Josephine Laplume's cattle have been allowed to roam and pasture thereon, as have the cattle of plaintiff and others, and she has taken timber therefrom for firewood; but this part of the lot has been to outward appearances common land, and has been used as such.

While Mrs. Laplume may have derived benefit from this common land, making use of it in the manner I have indicated, there was not and is not, when all the circumstances are considered, such unequivocal evidence of entry and possession as necessary to bar the right of plaintiff, in whom is the registered title: *Harris* v. *Mudie* (1882), 7 A. R. 414; *McIntyre* v.

Thompson (1901), 1 O. L. R. 163; *Huffman* v. *Rush* (1904), 7 O. L. R. 346.

It would seem to be a safe rule to follow in the case of unenclosed land of the character of the unenclosed portion of the east half of the lots now in question, where the signification of an entry upon any part of it would be equivocal with reference to the extent intended to be occupied, to confine a trespasser to the part which he has by open, visible occupation excluded the owner.

In Halsbury's Laws of England, volume 19, page 110, section 203, it is stated that: "The true test whether a rightful owner has been dispossessed or not is whether ejectment will lie at his suit against some other person. The rightful owner is not dispossessed so long as he has all the enjoyment of the property that is possible; and where land is not capable of use and enjoyment, there can be no dispossession by mere absence of use and enjoyment. To constitute dispossession acts must have been done inconsistent with the enjoyment of the soil by the person entitled for the purposes for which he had a right to use it.

"Mere going out of possession is not enough: in order that the statute may operate there must be not only going out of possession on the part of the owner, but also actual exclusive possession for the statutory period by someone else to be protected."

The facts of the present case fall short of establishing that there was such actual exclusive possession by Mrs. Laplume and anyone through whom she claims of the part of the east half of lot 30 not comprised in the portion enclosed by fences (fifteen acres or thereabouts) as would deprive plaintiff of his title; and I am of opinion that, having regard to the character of the occupation of this land, plaintiff has not lost his right to maintain an action for ejectment against defendant in respect to this unenclosed portion of the east half of the lots.

It is perhaps unnecessary to say that the conclusions I have expressed are subject to what is the real meaning and effect of the lost document referred to and which, if produced, may shew a quite different state of title. But it is not produced and the evidence of its contents is neither definite nor reliable.

Judgment will be in accordance with these findings, and there will be no costs.

BOYD, C. (WEEKLY COURT.) 13TH NOVEMBER, 1916.

BALDWIN v. HESLER.

Seduction — Judgment for Plaintiff — Motion to Set Aside — Rule 523 — Judgment Alleged to Have Been Obtained by Fraud of Plaintiff—Discovery of New Evidence—Witness Discrediting Himself—Evidence of Resemblance Between Child and Person other than Defendant — Inadmissibility of such Opinion Evidence.

Resemblance of child to alleged father:—The Court will not open up a judgment in an action for seduction on the ground that the child of of the giri seduced resembles some one else than the defendant who has been found guilty.

Motion by the defendant in an action for seduction, under Rule 523, to set aside the judgment for the plaintiff or for leave to appeal to the Appellate Division or for other relief.

W. M. German, K.C., for the defendant.
A. C. Kingstone, for the plaintiffs.

BOYD, C.—This is an application by the defendant, alleged to be made under Rule 523, of a most extraordinary character. The action is for the seduction by the defendant of an adopted daughter of the plaintiffs, and after evidence given on both sides the jury gave a verdict of $750 damages to the plaintiffs. The defendant now applies for an order setting aside the judgment and entering it for the defendant, or that the defendant have leave to appeal to the Appellate Division or for other relief. The application was to be made before the trial Judge, Mr. Justice Britton, but in his absence the parties agreed to my hearing it and conferring with him before disposing of it.

The grounds moved upon are stated to be because the judgment was obtained by the fraud of the plaintiffs and by coercing the witness, Bertha Bissett, (the girl in question) to give false testimony.

That the defendant was taken by surprise in that dates were sworn to at the trial of his having had intercourse with

the girl long prior to the date given in the statement of claim or sworn to by the plaintiffs in their examinations for discovery.

That the defendant has discovered since the trial new evidence which if brought forward at the trial would have changed the result.

Bertha Bissett makes an affidavit in which she states that she never had carnal connection with the defendant and that the father of the male child born on 22nd October, 1915, is the plaintiff, Henry Baldwin, and the child, in features and complexion, so resembles the plaintiff that she believes anyone would be convinced that he was the father.

She says further that Mrs. Baldwin, the other plaintiff, prepared a written statement of dates and events inplicating the defendant, and that she was compelled by the plaintiff to learn off these dates and to swear to them in Court.

Mabel Orth, a sister of the defendant, swears that the defendant was at her place on 18th August, 1912, and could not have had connection with the girl, as was sworn to for the plaintiffs. Mrs. Daboll, witness of the plaintiffs, says that the girl told her in April, 1916, about having been forced to give untrue evidence and gave to her a written statement to that effect which was to be left with Bradford Moore.

Mrs. Daboll swears also to the resemblance in complexion and features of the child to the male plaintiff and in her opinion and belief the child is his.

Bradford Moore is father-in-law of the defendant (the marriage to his daughter was in October, 1913). That he got the paper in September, 1916, and then went to see Bertha Bissett, who had moved to Hamilton, who repeated to him about her being forced to put the paternity on the defendant and that the male plaintiff was in truth the father of her child. He also believes that the complexion and features of the child point to the plaintiff as the father. Other deponents proved by affidavit that on other days when it was stated on the trial that the defendant was with the girl, he was elsewhere.

The pleading of plainiffs sets forth that on or about 1st March, 1915, the defendant seduced and carnally knew Bertha Bissett, whereby she become pregnant and was delivered of a child on 22nd October, 1915. The writ was issued on 18th January ,1916, and verdict and judgment on 29th February.

It does not appear that there was any occasion for surprise in the matters questioned about in the examination for discovery. The date in the pleading is the effective date which gave rise to the cause of action by virtue of the consequent pregnancy—but no questions were directed to any previous acts of carnal connection between the girl and the defendant.

The affidavits against the motion by the husband fully meet all that is alleged against him. The wife also explicitly denies all the damaging statements against her by the girl. She explains satisfactorily about the written statement of dates and words which the girl says was given to her to "coach her up" in her evidence. It was part of a private diary kept by Mrs. Baldwin for her own use and information, and it was not given to the girl, who must have taken it out of a room in the house where it was left by Mrs. Baldwin after the trial. She tells of an interview between the girl, Hesler, Mrs. Thomas, and the plaintiffs, when the defendant offered to pay all the expenses of the girl's illness. This is contradicted by Mrs. Thomas. The plaintiffs' solicitors, who "precognosed" the witnesses, says that the girl gave practically to him the same evidence that was given at the trial, and that without evidence of pressure being brought to hear upon here. Mrs. Baldwin ridicules the idea of the child being like her husband.

I have consulted with my brother Britton: he is not dissatisfied with the verdict and concurs in my disposition of the present application.

I have not considered the scope of Rule 523, because I think the application fails entirely on the merits. The girl and the guilty person alone know the real facts. The only ground which induced me during the argument not to give effect to *Rushton* v. *Grand Trunk R. W. Co.* (1903), 6 O. L. R. 425, was that the girl was sworn to have been given the written statement of dates by the female plaintiff with a view to shape her evidence at the trial. This ground is, it seems to me, completely displaced by the counter-affidavits. The girl appears as a witness who discredits herself—she has no regard for the sanctity of an oath—and in all such cases the evidence of one who impeaches his own veracity is to be received with the most scrupulous jealousy: *Merchants Bank* v. *Monteith* (1885), 10 P. R. 467, 475.

If there is such a striking likeness between the child and

the plaintiff, that is a matter that cannot have been discovered since the trial; and anyhow no Court would open up a judgment on the ground that the child of a girl seduced resembled some one else than the defendant who has been found guilty. The value of such opinion evidence is, in my judgment, of the most precarious kind. It was, no doubt, admitted by a Shakesperian Judge in Ireland in *Bagot* v. *Bagot* (1878), 1 L. R. Ir. 308, and in some succession cases before the Peers. But in the Bagot case the Court of Appeal decided on different lines, and held that it became unnecessary to adjudicate upon the point decided below that on a question of disputed paternity evidence of personal resemblance between the child and his alleged father was admissible: *Bagot* v. *Bagot* (1879), 5 L. R. Ir. 72, 73.

The application fails and should stand dismissed with costs.

APPELLATE DIVISION (S. C. O.) 17TH NOVEMBER, 1916.

MAHAFFY v. BASTEDO.

Execution—Writ of Fi. Fa.—Death of Execution Creditor—Revivor of Action—Renewal of Writ After Death of Execution Creditor.

Revivor of action upon death of execution creditor:—Upon the death of an execution creditor his executors, who are entitled to receive the money made under the execution are entitled to have the writ renewed without revivor or leave of the Court.

Appeal by the defendant Bastedo from the judgment of the District Court of Muskoka in favour of the plaintiff in an action to set aside a sale of land by a sheriff under a writ of *fieri facias*.

The appeal was heard by Meredith, C.J.C.P., Riddell, Middleton, and Masten, JJ.

W. H. Kennedy, for the appellant.
R. U. McPherson, for the plaintiff, respondent.

RIDDELL, J.—The facts of this case are very simplex and none of them is in dispute.

1910. June 4. Judgment was obtained by A, now deceased, against B.
June 7. A writ of execution was put in the sheriff's hands.
Oct. 24. B sold his land to the plaintiff Mahaffy, who on Nov. 15 caused a mortgage thereon to be discharged.
1911. Oct. 11. A died and
Nov. 8. Probate was granted of his will.
1913. June 5. The writ of execution was renewed and
1914. Dec. 12 The sheriff sold the land of B to the defendant.

The District Court Judge has held that the plaintiff has title on the ground that there was no revivor of the action by the executors of A. The defendant appeals.

In *Thoroughgood's Case*, Noy 73 (40 Elizabeth, i.e., A.D. 1597), it was held that "if after execution awarded the plaintiff dies, yet * * * the Sheriff may levy the money." So also in cases of execution by *capias* "when a prisoner is charged in execution * * * and the plaintiff afterwards die, his executors are not bound to revive the judgment by *scire facias* or even to charge the defendant in execution *de novo:*" Tomlin's Law Dictionary, vol. II Scire Facias, III. citing Tidd's Pract. B. R. 211, (370), *King* v. *Millett Hill*, 22 Geo. III. Churchill on Sheriffs, 2 ed., 216, may also be looked at.

The theory was that the issuing of a writ of fi. fa. etc., was a judicial act. *Wright* v. *Mills* (1859), 4 H. & N. 488, at p. 492, and that the writ was an order of the Court to make the money, etc., etc.: in other words the authority of the sheriff came from the Court not from the plaintiff.

This doctrine has never been questioned and cannot now be successfully attacked. While it is quite true that the fi. fa. lands in Ontario has by virtue of the Imperial Act 5 Geo. II ch. 7, and subsequent legislation, an effect unknown to the Common Law of England, there is no reason why it should be treated in a different way from a fi. fa. goods. None of the Rules affects or modifies this principle. The renewal was simply an extension of the effect of the writ, and I cannot see that this required a revivor: *Doel* v. *Kerr*, 34 O. L. R. 251, and cases cited.

I think the appeal should be allowed with costs throughout.

As to the effect of the discharge of the mortgage, etc., I think we should not here dispose of such matters. If the parties cannot agree, they may be determined in an action for that purpose in which all the facts can be brought out.

MIDDLETON, J.—The facts giving rise to the action are simple. A judgment was recovered in the action of *Leutzer* v. *Press* on the 4th June, 1910, and execution was issued thereon on the 7th June, 1910, and placed in the hands of the Sheriff to be enforced. On the 14th October, 1911, the execution creditor died. His will was proved in November, 1911. The execution was renewed on the 5th June, 1913, and the interest of the execution debtor in the lands in question was sold by the Sheriff to the defendant Freeman on the 12th December, 1914.

In the meantime, on the 24th October, 1910, while the execution was in the hands of the Sheriff, the execution debtor conveyed his interest in the lands to the plaintiff. This action is brought against the Sheriff and against the purchaser at the Sheriff's sale, for the purpose of having it declared that the sale is void and that the plaintiff is entitled to the lands free from any claim on the part of the purchaser. Put shortly the contention of the plaintiff, which has been given effect to by the trial Judge, is that because the action of *Leutzer* v. *Press* was not revived on the death of the execution creditor the writ of *fieri facias* became inoperative and the Sheriff could not longer act thereunder.

In the days of Queen Elizabeth, Noy 74 (1598), it was regarded as settled that "if after execution awarded the plaintiff dies; yet * * * the Sheriff may levy the money. And if he makes no executors or administrators as yet made, the money shall be brought into Court and there deposited until etc."

The question was again discussed in *Cleve* v. *Veer* (1637), Cro. Car. 457, where it is said: "There is a difference betwixt a judicial writ after judgment to do execution and a writ original, for the writ judicial to make execution shall not abate nor is abateable upon the death of him who sues it. * * * The Sheriff shall execute it although the party who sued it died before the return of the writ and although the death be before

or after the execution, if it be after the *teste* of the writ it is well enough. * * * If the plaintiff dies before the return day of the writ yet the executor or his administrator shall have the benefit and is to have the money, and it is no return for the Sheriff to say that the plaintiff is dead and therefore he did not execute it."

In *Clerk* v. *Withers* (1704), I Salkeld 323, it is said that "the plaintiff's death did not abate the execution, and that the Sheriff notwithstanding that might proceed in it, because the Sheriff has nothing more to do with the plaintiff, for the writ commands him to levy and bring the money into Court, which the plaintiff's death does in no way hinder; besides, an execution is an entire thing, and cannot be superseded after it is begun."

Much later, in the palmy days of Meeson and Welsby, when accuracy of practice was worshipped alike by Bench and Bar, it was sought to reopen this question: but in *Ellis* v. *Griffith,* (1846), 16 M. & W. 106, the Exchequer Chamber declined to interfere with that which had been regarded as established practice ever since the time of Charles I and even earlier. Alderson, B., discourages any attempt to seek for the reason for the rule; saying "I think it much better to stand on a general rule which we find laid down so far back as the reign of Charles I than to attempt after this lapse of time to find out the reason for it. The consequence of attempting to find out reasons for such old rules is that the reason is constantly mistaken for the rule itself, and persons argue on the reason as if it were the rule."

I might add that it more often it dangerous to seek the reason for a rule lest no reason at all be found.

Here, we were not embarrassed by any argument based either upon the rule or the reason, for a generation hath arisen who know not Tidd and his delightful volumes, and to whom Archbold's Common Law Practice is a sealed book.

At common law on the death of a party either before a judgment, or after judgment and before execution, it was necessary to sue out a sci. fa. before anything further could be done in the action. This writ has long been abolished, and a simplified procedure, now found in Rule 300, applicable where the action is yet current, and in Rule 566, applicable where it is desired to issue execution, has been the outcome of at-

tempts at legislative reform. It cannot be supposed that it was the intention of these Rules to make anything in the nature of revivor necessary where it was unnecessary in the strictest and most technical days of common law practice.

The only serious question is whether the execution should have been renewed, without leave. The renewal is a mere ministerial act on the part of the officer of the Court renewing the writ—*Poucher* v. *Wilkin*, 33 O. L. R. 125, *Doel* v. *Kerr*, 34 O. L. R. 251—and even if irregular the irregularity would not vitiate the execution so as to enable the plaintiff, a stranger to the record, to attack the sale.

I can see no reason why, upon the death of the execution creditor, his executors who would be entitled to receive the money if made under the execution should not be entitled to have the writ renewed without revivor or the leave of the Court. This is not any proceeding in the name of the deceased man, the renewal would be at the instance of the executors. For the like reason when after execution the judgment is assigned the assignee would, without any proceedings, be entitled to demand the money if levied without the leave of the Court. I can see no reason why he may not have the execution renewed without leave. The request for renewal would be by him, not by the assignor.

Chambers v. *Kitchen* is quite beside the present controversy. It merely held that where under the present practice proceedings may be had in the original action, although after judgment, an order to continue, in the nature of a revivor, may be issued under the Rule corresponding to the present Rule 300; the simpler and more summary procedure provided by Rule 566 being applicable only where leave is sought to issue execution upon a judgment already pronounced.

Upon the facts disclosed it appears that the plaintiff paid off a mortgage upon the property in question in 1910, but the discharge of the mortgage was not registered until 1915. It may be and probably is the case that the plaintiff is entitled to stand in the position of the mortgagee and claim a lien upon the lands for the amount paid to discharge the mortgage as against the purchaser at Sheriff's sale; but this case was not presented for determination. The sale, which purports to be a sale of the interest of the execution debtor in the lands, and which could convey to the purchaser no greater right than the

debtor himself had, is the subject of the attack; and this attack fails.

The appeal should therefore be allowed, and the action should be dismissed, both with costs.

MASTEN, J.—I agree and have nothing to add.

MEREDITH, C.J.C.P.—*(dissenting.)*—The substantial question involved in this case is: whether the defendant Freeman acquired title to the land in question under the Sheriff's deed —by virtue of which alone he claims title—against the plaintiff claiming title, and having possession, under a deed of the land made to him by the judgment debtor.

Hitherto the plaintiff has contended that the Sheriff's sale was invalid because the sale was made more than three years after the fi. fa., upon which the Sheriff acted, was issued, and without a renewal of the writ: and the defendants have contended that the sale was valid because the writ was renewed, and the land was sold during the currency of such renewed writ. No other question was raised, nor any other point made on either side.

But during the argument here the question was asked: Whether anything had been done by the Sheriff, before the renewal of the writ, which would give him authority to sell without any renewal of it; all parties, however, were agreed that nothing had been done; and that the sale could not be sustained on that ground; and in that all were right.

Though it is true that, speaking generally, a fi. fa. binds the "lands against which it is issued from the time of the delivery thereof to the Sheriff for execution:" The Executions Act, sec. 10: yet there must be something tantamount to an actual seizure; something, as it has been said, "amounting in law and fact to an incipient step in the execution of the writ:" see *Doe d. Miller* v. *Tiffany*, 5 U. C. R. *Doe d. Greenshields* v. *Garrow*, ib 237; to warrant a sale 90; and by the Sheriff after the expiration of the writ.

The fact that at common law a Sheriff might go on and sell under a fi. fa. against the goods of a judgment debtor, if the debtor died after the *teste* of the writ, seems to me to have no direct bearing on this case. At common law the writ bound the goods from its *teste* and so had some effect before the debtor's death: but whether that effect was considered a

sufficient warrant for continuing to completion the levy, or whether it was based upon the common sense ground that the ordinary method of revivor by *scire facias* would be inapplicable to such a case, is not very material: the fact existed, but existed under a practice very different from that now in force here; and, as I have said, has no direct bearing upon the questions involved in this case.

By the practice in force here a fi. fa. remains in force "for three years from its issue" and, "unless renewed" within that time, then expires: Rule 571: at the common law there was no such limitation; the writ might be executed at any time after its *teste* however remote the period might be, if it were returnable in the usual form immediately after the execution thereof; and might, at any time, be placed in the hands of the Sheriff for execution. The uncertainty and inconvenience of this practice, and the injustice which it sometimes caused called for legislative intervention, and by legislation a remedy was applied, a remedy which, apparently, was eventually thought to have gone too far, for in later years the remedy was remedied by extending the life of the fi. fa. from one to three years without renewal.

In this Province, under the Common Law Procedure Act, 1856, the subject was dealt with in this way: "Except writs of *capias ad satisfaciendum* every writ of execution shall bear date and be tested on the day on which it is issued, and shall remain in force for one year from the *teste*, and no longer if unexecuted, unless renewed," * *. So that in one stroke the two evils, retrospective effect and unlimited duration, were cured.

When the Common Law Procedure Act was superseded by the Judicature Act, as in nearly all things else, the provisions and words of the Judicature Act of England were substituted for those of our Common Law Procedure Act, and so the provision which I have quoted came to be the words now in force here: "writ of *fieri facias* shall remain in force for three years from its issue unless renewed before its expiration, when it shall be in force for a further period of three years from the date of such renewal, and so on from time to time: "but the change in the words has not altered the practice: a writ of fi. fa. is still in force for the stated period and no longer, although the words "and no longer" are not in the rule of Court, con-

firmed by legislation, now covering the practice in this respect: Rule 571: and a seizure made during the currency of the writ may be carried on to levy under it after the writ has expired although the words, "if unexecuted" contained in the Common Law Procedure Act, are not in the rule now in force.

At the time of the attempted renewal of the writ in question it was as all parties admit, wholly unexecuted, and so expired, unless the death of the judgment creditor before the end of the three years, or a renewal of the writ, prevented it.

It seems to me, in view of the provisions of the Common Law Precedure Act, and of the rule now in force, and which was in force when the attempted renewal was made, to be out of the question to consider that the death had any effect upon the necessity for the renewal. Neither makes any such exception; the one exception made in the Common Law Procedure Act is admittedly and obviously inapplicable; nothing of any kind had been done by the Sheriff in the way of execution of the writ. At common law there was no need to renew; the writ was in full force, except as affected by the death, when it was subsequently executed: so such cases as *Ellis* v. *Griffith*, 16 M. & W. 105; *Cleve* v. *Veer*, (1637), Cro. Car. 457, and *Thoroughgood's Case*, Noy 73, are wholly inapplicable upon this question: they would be applicable if this sale took place during the currency of the writ only.

So that, as the parties have conducted this case hitherto, the sole question upon which their rights depend is: whether the fi. fa. in question was renewed.

No leave of the Court was obtained or sought in the matter in any way, but, notwithstanding the death of the judgment creditor, nearly 20 months before, the writ was, in form, renewed upon *praecipe* in the name of the dead man, in the same manner only as it might have been renewed had he been alive.

That I cannot but deem an entirely unwarranted and ineffectual proceeding: it was done entirely without authority, for the dead man could give none, and if he had given any before his death—of which there is no evidence and which is extremely improbable—his death would have put an end to it, not to speak of the assignment of the judgment made by his executors after his death and before the form of renewal took place.

There is no evidence of any authority given by the executors of the dead plaintiff's will; and it is quite improbable that they gave any, or concerned themselves further in the matter after 11th November, 1912, when they assigned the judgment to "Ida Jane Press as part of her legacy under the will."

Had they given authority it could have been authority to carry on the proceedings for them as executors only: it could not have authorized active proceedings in the name of one who was dead. The case is quite different from that of an assignment or a judgment by a judgment debtor, still living, and so one who could act and may have authorised further proceedings in his name, though altogether for the benefit of the assignee.

All this shews the purpose and effect of rule 566; you cannot proceed in a dead man's name, or, without his authority, in the name of a living person: you cannot carry on legal proceedings to which you are not a party in any way: but if you have acquired a right in the action, rule 566 gives you a simple means by which you can enforce it: but without obtaining such means you are powerless to act for a dead party. If that were not so the rule would be senseless; you could go on as well without as with the leave of the Court for which it provides, and whether in truth having or not having any such right. Whether having or not is to be judicially determined on an application under the rule, otherwise anyone might misuse the process of the Court in an action to which he was in no way a party.

The act of renewal of the execution was in no sense a judicial act; on the part of the clerk of the Court, it was purely a ministerial act, done, as I have said, upon *praecipe* as solicitor in the name of and for one who was dead, and the use of whose name, whether used knowingly or in ignorance—though it could not have been in ignorance—for the act was done for the sole benefit of a legatee under the man's will—was improper and ineffectual.

The solicitor's proper course was a plain and a simple one; and I can find no excuse for a departure from it; for the doing of that which anyone must have known was unwarrantable, making use of a dead man's name to do that which only a living man could do.

Rule 566 afforded a simple and plain way of removal of all difficulties that the judgment creditor's death caused: it clearly provides that in just such a case as this, among others, the

party alleging himself to be entitled to execuion may apply for leave to issue it, or to amend any execution already issued. Had such an application been made, and had the judicial act of giving leave, which it provides for, been exercised, in giving leave, a renewal in accordance with such leave would have been valid, and valid for the purposes now in question, though there might have been some irregularity in the manner in which the application for leave were made.

It would be a misuse of words to speak of an unwarranted ministerial act as a mere irregularity. If the officer had no power to renew the writ except upon order made under rule 566 there could be, and was no renewal: if he had such power the renewal is valid: no question of irregularity arises: and it is out of the question to make any difference between the issue of a writ and its renewal, each is alike a ministerial act done upon the request, by *praecipe*, of a party: the writ dies if it be not renewed: the renewal gives another life to it just as much if it were a new writ signed and sealed anew. A sheriff has no power to renew a writ, nor has any stranger to the action, except upon an order of the Court under rule 566: and the clerk of the Court is absolutely without power to permit any stranger, whether claiming to be executor or assignee or otherwise entitled, to intermeddle, until he has proved his right by the production of an order of the Court, under rule 566, giving him the right.

An order made under rule 566, in such a case as this, should not give leave to proceed in the dead man's name—to sign the *praecipe* and so on in his name or as his solicitor—but should give leave to the executors, or with their consent their assignee, in their name, or without their consent in her own name, to carry on the proceedings: see rule 301: and to renew the execution, or, if in force, to amend it by a proper substituting of names, for that of the dead judgment creditor.

In my opinion the learned district Court Judge was right in considering the alleged renewal of the fi. fa. invalid; and, as the cases under the common law cannot affect the question of the renewal of a writ, I would dismiss this appeal.

Appeal allowed; Meredith, C.J.C.P., *dissenting.*

APPELLATE DIVISION (S. C. O.) 17TH NOVEMBER, 1916.

RE CANADA COMPANY AND TOWNSHIP OF COLCHESTER NORTH.

Assessment and Taxation — Assessment Amendment Act 1916, Sec. 6—"Special Case"—Appeal from County Court Judge —Evidence—Offer to sell Mineral Rights at Certain Price— Admissability as to Actual Value — Powers of Appellate Division—Mineral Rights—Academic Question—Costs.

Offer of sale evidence of actual value:—Where the owner offers by advertisement to sell certain mineral rights at a certain price the advertisement is evidence, *against* the owner, that the rights which he offers for sale have some value and *for* the owner, in the absence of other evidence of value, and the fact that no sale is made proves that the actual value does not exceed the price advertised.

Appeals by the Canada Company from the judgment of the Judge of County Court of the County of Essex dismissing the company's appeals from the decisions of the Courts of Revision of the Townships of Colchester North, Sandwitch South, Maidstone and Tilbury North, affirming the assessments of the appellant company in respect of mineral rights in lands in the said townships.

The appeals were heard by Meredith, C.J.C.P., Riddell, Middleton and Masten, JJ.

J. M. Pike, K.C., for the appellants.
J. H. Rodd, for the township corporations.

MEREDITH, C.J.C.P.—Recent legislation has widened, very much, the powers and duties of this division of this Court in regard to appeals against assessments, made for the purposes of taxation, under the provisions of the Assessment Act.

The Assessment Amendment Act, 1916, section 6, repeals section 81 of the Assessment Act and gives such an appeal "from the judgment of the Judge on a question of law or the construction of a statute, a municipal by-law, any agreement in writing to which the municipality concerned is a party or any order of the Municipal Board (except an order made under section 80)."

Any party desiring so to appeal shall upon the hearing

of the appeal by the Judge, in the first instance, request him to make a note of any such question, and to state it in the form of a special case; and thereupon it shall be the duty of the Judge to make a note of the request; and he may so state such a question: "may" meaning "shall in every proper case," the discretion being a judicial, not a personal, one, to be exercised under a remedial enactment.

And, in addition to that, any party desiring to appeal, may apply to this division of this Court, and it may, if it see fit, "direct the County Judge to state a special case," as before mentioned, if on the hearing before him he refused to do so.

The practice and procedure on such appeals "shall be the same,. *mutatis mutandis*, as upon an appeal from a County Court."

And this appeal comes on for hearing here under the provisions of such legislation, upon that which is, and has been throughout, treated by all parties as a special case stated under the provisions of this recent legislation; yet I may express the hope that the formal character of it may not be treated as a guide in other cases.

But formalities are unimportant in this instance, because the parties are quite agreed upon the questions which they need, and desire, to have considered here; and those questions are quite within the powers of this Court to consider under such legislation: so nothing would be gained by delaying the matter until the solicitors should have another apportunity to get the appeal in a better shape as to its form.

The questions the parties desire to have determined here, now are: 1. Whether "mineral rights," other than "petroleum mineral rights," can be assessed, except against the owner of the land in which they lie: and 2. Whether the learned County Court Judge was wrong in holding that the evidence adduced before him of the appellants' offers to sell their rights, which are the subject of this appeal, contained in their public advertisements of such offers, offered as evidence upon the appeal to him, was inadmissible.

On the first question it is enough to say that the appellants have not been assessed for any but petroleum mineral rights, and that no one has suggested or now suggests that any other exist in any of the lands their rights in which are the subject

of the assessment in question upon this appeal: therefore it would not only be needless but improper to consider the question.

On the other question, I find it difficult to understand how there could be better evidence of the fair value of the appellants' petroleum mineral rights in question, in the circumstances of this case, than such offers to sell as those which they sought to prove in connection with the fact, which it was also sought to prove, that there were no buyers at the advertised prices. That which no one will buy at the price for which it is offered for sale, can hardly be worth as much, and yet these appellants are assessed as if it were worth, in some cases, it is said, four times as much, without any other evidence of any character as to value.

And this case is a peculiarly strong one for the appellants, for in all cases there is, or should be, a person who is, or should be, anxious to buy, that is the owner of the land in which the petroleum mineral rights exist: and it should not be, but I am not sure that it is not, necessary to say that each owner should be treated alike, that there should be no discrimination against the appellants.

As there was no evidence, as to value of these mineral rights, before the learned County Court Judge, except that which he rejected, and as that evidence ought not to have been changed so as to conform to it: and that should be directed to be done now: though if there had been any other evidence it might have been necessary or advisable to refer the matter back to the learned Judge.

Our powers in that respect, being such as we have "upon an appeal from a County Court" are very wide: see the County Courts Act, sections 45 and 46.

I would allow the appeal accordingly; as well as the other appeals all of which were treated as being upon the same footing as, and were argued together with, this appeal.

The irregular manner in which the case was stated and brought here is perhaps reason enough for departure from the usual course as to costs and for making no order as to costs.

RIDDELL, J.—In certain townships in the County of Essex the Canada Company in making grants of land made in the grant a reservation as follows:—"Excepting and reserving to

the said Company, their successors and assigns, all mines and quarries of metals and minerals, and all springs of oil in or under the said land, whether already discovered or not, with liberty of ingress, egress and regress to and for the said Company, their successors, lessees, licensees and assigns, in order to search for, work, win and carry away the same, and for those purposes, to make and use all needful roads and other works, doing no unnecessary damage, and making reasonable compensation for all actually damages occasioned."

In the townships here concerned the assessor made the following assessments, viz:—"in Colchester North, $10,722.00 in respect of "Mineral rights" in 5,411 acres: In Sandwich South, $3,828.00 in respect of "Mineral rights" in 2,552 acres: In Maidstone, $5,900.00 in respect of "Mineral rights" in 1,700 acres. In Tilbury North $4,982.00 reduced by Court of Revision to $2,491.00 in respect of "oil and mineral rights in 2,491 acres."

The assessments were confirmed by the Courts of Revision and an appeal was taken to the County Judge—upon the hearing before him the Judge ruled against certain evidence and also (apparently) against certain objections by the Canada Company against the assessments.

The Judge has signed what purports to be a "special case" for this Court under the Act 6 Geo. V. ch. 41, sec. 6.

The provisions of that statute are quite plain—on the request of either party to an appeal before him the Judge is to make a note of any question of law or construction of a statute, etc., and he "may thereupon state such question in the form of special case setting out the facts in evidence relative thereto and his decision of the same as well as his decision of the whole matter": sec. 6 (3). The so-called special case before us does not at all comply with the definite directions of the statute—but we are left to gather from other papers and from counsel what it is we are expected to decide.

One matter is clear from the papers—The Canada Company advertised its rights in the lands in questions for sale to the public at the price of "50 cents per acre" and the learned County Court Judge held that this was not evidence for the company as to "actual value." Counsel for the townships objecting, the Judge said:—"I think that objection is well taken. But having been put in by appellant (the Canada Company) it is evidence against the appellant for all other

purposes of the appeals: and is evidence against the appellants also that the reservations have some value."

Of course if it is evidence at all it is evidence of which notice should have been taken by the Judge—for the company as well as against it.

I am clear that a *bona fide* offer on the part of the owner (and there is here no attack on the good faith of the Company) to sell anything is some evidence of its actual value: what weight should be given to it by a Judge is a matter for him to decide but he must consider it.

Were there any power to refer the matter back to the County Court Judge that course should be pursued, but it seems to me that we are given no power to send the case back—sub-sec. (6) indicates that any change to be made in the assessment roll must be made to appear "by the judgment of the Divisional Court upon the case stated."

Therefore I think we must determine as best we can from the material before us what, if any, "alteration should be made in the assessment roll."

I think as a matter of law the advertisement is evidence against the company that the mineral rights which they offered for sale had some value and for the company, in the absence of other evidence of value, the fact that no sale had been made proved that the actual value did not exceed 50 cents per acre. The County Court Judge therefore should have found that the mineral rights were not worth more than 50 cents per acre.

We are asked to decide that of mineral rights only, petroleum mineral rights are assessable.

While the assessments read "mineral rights" in some cases and "oil and mineral rights" in another, it was admitted before us that only petroleum rights were really assessed and no other mineral rights were considered by anyone, assessors or otherwise. It is therefore an academical question we are asked to decide; and that we should decline to do. If and when the matter becomes of consequence, it may be argued by those really interested and decided accordingly.

I would direct that an alteration should be made in the assessments in question to 50 cents per acre. There should be no costs.

MASTEN, J.—This appeal comes before us in a manner so

unsatisfactory both as to form and substance that the proper disposition of it would, in strictness, be to dismiss it, not only on the ground that no appeal has really been lodged within the provisions of 6 Geo. V. ch. 41, sec. 6, but also because the matters of substance on which an adjudication is sought have not been so brought before us as to enable us to make a satisfactory disposition of them.

Having regard, however, to the fact that undoubtedly there is a difference between the parties in regard to which the company desired to appeal, and in regard to which both parties have appeared and argued before us: Having regard also to the considerations mentioned in the judgments of my learned brothers, I am willing, without deciding any general question of law, to agree in certifying to the County Judge that the assessment roll should be amended by reducing the assessment to fifty cents per acre.

There should be no costs to either party.

MIDDLETON, J.—*(dissenting.)*—This is the first case under the statute 6 Geo. V. ch. 41, sec. 6, and in view of the great number of assessment appeals heard by County Judges case should be taken to ascertain whether this case is one in which a right of appeal to the Divisional Court has been given.

The only case in which the Divisional Court has been given any jurisdiction is upon an appeal from the judgment of the Judge "on a question of law or the construction of a Statute * * ."

The appeal is to be by a special case which is to state "the question of law or construction." The Judge is, at the request of the party to note the "question of law or construction" and the Judge is thereupon to state the case setting out the facts in evidence relating thereto and "his decision of the same as well as his decision of the whole matter."

That course has not been followed here but it is sought to argue in addition to what is undoubtedly a question of law arising upon the facts:—the right to assess petroleum mineral rights—another question of law which does not arise upon the facts; the right to assess other mineral right; and a future question as to the effect if any to be given to an advertisement offering to release the petroleum rights in question for 50 cents per acre, a sum much less than the assessment in question.

I feel much doubt as to the question of the admissibility of evidence being a "Question of law" within the true meaning of this statute but I cannot find anything in the stated case as it is called to indicate that this is one of the questions intended to be submitted. The Judge has undoubtedly said, in the course of his judgment, that the advertisement is not evidence. If he meant that it was not shewn that the advertisement was published with the authority of the company, he was right; if he meant that an offer to sell at a named price, made in good faith, was no indication of value, he was wrong; if all he meant was that he gave no weight to the advertisement as establishing the true value—this is a matter as to which there is no appeal.

Speaking for myself I decline to answer a question not raised in the way pointed out by the statute, particularly when it is impossible to tell what that question is.

The practice and procedure upon the appeal is to be the same *mutatis mutandis* as upon a County Court appeal. The right to grant a new trial is not a matter of practice or procedure and the Statute contemplates the determination by the Divisional Court of questions raised and if from its judgment it appears that an alteration in the note should be made, the County Judge is to make the alteration.

Upon the question of law which may be taken to be well raised petroleum mineral reservations are clearly liable to assessment under sec. 40-8.

Appeal allowed with costs; Middleton, J., *dissenting.*

LATCHFORD, J. (CHAMBERS.) 17TH NOVEMBER, 1916.

REX v. BERRY.

Criminal Law—Certiorari—Canada Temperance Act—R. S. C. ch. 152 Sec. 148—Conviction by Police Magistrate—No Evidence to Warrant—Jurisdiction of Magistrate.

Right to Certiorari:—As the right to *certiorari* and to appeal where there has been a conviction under Part II of the Canada Temperance Act, R. S. C. ch. 152 is taken away by Sec. 148 of that Act, the evidence cannot be looked at to determine whether or not it is sufficient to warrant the conviction.

Motion to quash a conviction of the Police Magistrate of the Town of Clinton and Village of Hensall removed into the High Court Division of the Supreme Court by *certiorari*. The conviction was for a breach of Part II of the Canada Temperance Act, R. S. C. 1906, ch. 152. The alleged offence was committed in Hensall.

L. E. Dancey, for the defendant.
J. R. Cartwright, K.C., for Attorney-General.

LATCHFORD, J.—It is not suggested that the Magistrate acted without qualification, or in excess of his power or his territorial jurisdiction, or that there was any irregularity in the conduct of the proceedings. No evidence is set out on the conviction itself. The sole ground upon which Mr. Dancey relied is that there was no evidence before the magistrate to warrant the conviction, and that therefore he acted without jurisdiction.

Mr. Cartwright contends that as the right to *certiorari* and to appeal in such cases as this was taken away by sec. 148 of the Act, the evidence cannot be looked at to determine whether or not it is sufficient to warrant the conviction. He relies on *Regina* v. *Wallace* (1883), 4 O. R. 127, and *Rex* v. *Carter* (1916), 26 C. C. C. 51.

In *Regina* v. *Wallace*, the Queen's Bench Division, Hagarty, C.J., and Cameron and Armour, JJ., had under consideration sec. III of The Canada Temperance Act of 1878, 41 Vic. ch. 16.

Apart from s-s. 3, which applies only to the case of the conviction of a physician and has no application to the present

case, the provisions of section 148 of the Act now in force are almost identical with the provisions of sec. 111 of the Act of 1878. The only difference is that sec. 148 is wider in its application than sec. 111.

The judgment of the Queen's Bench Division is therefore of importance in considering the effect of sec. 148. The Court was divided in opinion, the Chief Justice and Armour, J., taking one view, and Cameron, J., another.

Mr. Justice Armour, after referring to the effect of certain words in sec. 111, said (p. 133) :

"The question therefore is *certiorari* being expressly taken away, and the magistrate having proceeded regularly with the enquiry, and having heard witnesses in support of the charge, can there be said to be such want of jurisdiction as would warrant the issue of a *certiorari* because the magistrate erroneously found that there was sufficient evidence to support the charge, when he ought to have found that there was no evidence or not sufficient evidence to support it?"

The precise ground of Mr. Dancey's contention before me could not be more clearly or concisely expressed.

The learned Judge proceeds :

"I do not think it can be said that this erroneous finding by the magistrate was such a want of jurisdiction as would warrant the issue of *certiorari* and I think that so far as this ground is concerned the *certiorari* was issued improvidently, and ought to be quashed."

Several cases are cited in support of this conclusion. I quote from one; *Colonial Bank of Australasia* v. *Willan*, L. R. 5 P.C. 417, where, at p. 442, Sir James William Colvile said, in delivering the judgment of the Judicial Committee: "There are numerous cases in the books which establish that notwithstanding the privative clause in a statute the Court of Queen's Bench will grant a *certiorari*. But some of these authorities establish, and none are inconsistent with, the proposition that in any such case that Court will not quash the order removed except upon the ground either of a manifest defect of jurisdiction in the tribunal that made it, or of manifest fraud in the party procuring." He then goes on to point out the conditions upon which jurisdiction depends, including facts or a fact to be adjudicated upon in the course of the inquiry. "Objection founded upon the

personal incompetency of the Judge, or on the nature of the subject matter or on the absence of some essential preliminary must obviously in most cases depend upon matters which, whether apparent on the fact of the proceeding or brought before the Superior Court by affidavit, are extrinsic to the adjudication impeached. But an objection that the Judge has erroneously found a fact which though essential to the validity of his order he was competent to try assumes that, having general jurisdiction over the subject matter, he properly entered upon the inquiry but miscarried in the course of it. The Superior Court cannot quash an adjudication upon such an objection without assuming the functions of a Court of Appeal and the power to retry a question which the Judge was competent to decide."

Chief Justice Hagarty states his conclusion to be that the Legislature by sec. 111 clearly intended to bar supervision by the higher Courts of any decision of the stipendiary magistrate arrived at by him on the merits. "If" he says, p. 140, "we take upon ourselves to say that the evidence in this case was insufficient to convict, we fall back on the law as it has always been applied in cases where the *certiorari* was not expressly taken away and we completely defeat what appears to me to be the clear intention of the legislature and render the express denial of the *certiorari* an utterly idle and futile enactment. We have to see that the inferior tribunal acted strictly within the authority of the Act, duly heard the case and gave its decision upon the evidence duly laid before him. If we quash this conviction we can do so only on the ground that we consider his conviction on the evidence wrong. I think Parliament has enacted that in this case we have no such right."

Much of the dissenting judgment of Cameron, J., is taken up with a consideration of the effect of the words "in any such case" appearing in sec. 111 of the Act of 1878—a question which does not arise in the present case. The words mentioned had previously occasioned a division of opinion in the Superior Court of New Brunswick; *Ex parte Hackett*, 21 Pugsley 513; and in the revision of the Act in 1888, 51 Vic. ch. 34. sec. 5, they were replaced by the words now appearing in sec. 148 "in respect of any offence against Part II of this Act." But apart from the effect of which Mr. Justice Cameron thought should be given to the words "in any such case," his

judgment is based on the view that in the absence of evidence to support the charge—a matter which could be ascertained only by referring to the evidence—the Magistrate acted wholly without jurisdiction. But he says (p. 142): "If there is anything in the evidence on which the opinion of a jury could be asked as to whether the defendant sold intoxicating liquor either on the 30th July or at any time within thirty days before the laying of the information this Court is ousted of jurisdiction and cannot review the Magistrate's decision." The learned Judge thought (p. 148) the law could not be "in the monstrous condition" that a person injured by a conviction which had no evidence to sustain it should be left without redress. That, however, was the view as to the effect of sec. 111 entertained by the majority of the Court.

In delivering the judgment of the Court in *Regina* v. *Cunerty* (1894), 26 O. R. 51 Street, J., cited *Colonial Bank* v. *Willan* with approval in a case in which the question was whether the defendant had or had not sold liquor in quantities of less than three half-pints. "We have," he says, "no power upon such a motion to review the decision of the magistrate in a matter within his jurisdiction."

Again in 1893 the Queen's Bench Division, Armour, C.J., and Falconbridge and Street, JJ., in quashing a conviction under the Ontario Medical Act, R.S.O. (1887), ch. 148 sec. 45 which was bad for uncertainty, said, per Armour, C.J.: "Where a conviction is valid on its face we are not to look for evidence for the purpose of determining whether an offence is established by it. That is a matter for the magistrate and for the Appellat Court when there is an appeal." *Regina* v. *Coulson*, 24 O. R. 246, at 249.

Less than two years later, however, upon a motion to quash a conviction of the same defendant for breach of the same section of the Medical Act, the Common Pleas Division (Meredith, C.J., and Rose, J.), gave expression to an opinion directly opposed to that of the Queen's Bench; *Regina* v. *Coulson* (1896), 27 O. R. 59. Rose, J., says (p. 62) in delivering the judgment of the Court: "We think it our duty to look at the evidence taken by the magistrate to see if there was any evidence whatever shewing an offence; if none, then it is our duty (in our opinion) to quash the conviction as made without jur-

isdiction; but if there was any then not to interfere as it is not our province to view the evidence as on an appeal."

Upon looking at the evidence the Court considered that the conviction should be affirmed; but the opinion stated means—quite plainly, I think—that where there is no evidence to support a conviction the magistrate acts without jurisdiction.

It is, however, to be observed that the Medical Act, for a breach of which the conviction was made, does not, like The Canada Temperance Act, prohibit *certiorari* and appeal.

In 1908 in *Rex* v. *Cook*, 18 O. L. R. 415, 419, and 12 O. W. R. 829, Mr. Justice Anglin, in delivering judgment upon an application to quash a conviction under The Liquor License Act (R. S. O. 1887, sec. 118) said (p. 833) : "It has been held that in making a conviction without evidence of the offence charged a magistrate acts without jurisdiction." No case is cited in support of the proposition that the absence of any evidence constitutes a want of jurisdiction in the convicting magistrate. The opinion stated by Rose, J., in the second Coulson case was doubtless present to the mind of the learned Judge. While that opinion was not necessary for the decision of the case, as there was evidence to support the conviction, it has, I think, been generally regarded as expressing the law applicable in all cases where motions were made to quash convictions under our Liquor License Acts. A recent case is *Rex* v. *Borin* (1913), 29 O. L. R. 584, where a conviction made under the Act of 1887, as amended by 9 Edw. VII. ch. 82, sec. 27, was quashed by the Chief Justice of the Common Pleas "because," as was stated in the head-note. "there was no reasonable evidence to support it."

If the conviction now before me was made under The Medical Act or The Liquor License Act, I should undoubtedly be compelled to follow the judgments in *Reg.* v. *Coulson* (No. 2) and *Rex* v. *Borin*. But the decision in *Regina* v. *Wallace* is on the very section of The Canada Temperance Act now before me as clarified by the amendment of 1888. There is no decision on that statute to the contrary in the Courts of Ontario that I have been referred to or that after no slight investigation I have been able to find.

Rex v. *Carter*, cited by Mr. Cartwright, is a recent decision of Chief Justice Harvey of the Supreme Court of Alberta, upon

a motion to quash a summary conviction as on *certiorari*, in a case in which the report indicates no appeal was authorized by statute. The learned Judge states (p. 56) that when an appeal is not authorized: "it must be assumed that it is because the legislature deems it wise that there should be no appeal, and the Courts have no rights to permit by indirect means that which the legislature has declined to allow directly." He then reviews the English and Canadian cases, including *R.* v. *McPherson* (1915), 25 C. C. C. 62, a decision of the Supreme Court of Saskatchewan, holding that a conviction may be quashed for want of evidence. The offence in that case was an alleged infraction of The Liquor License Act of the Province, 4 Geo. V. ch. 64. That Act, however, unlike The Canada Temperance Act, not only does not prohibit *cetriorari* and appeal, but permits both; s-s. 106 and 107. Among the authorities cited is the opinion of Strong, J., in *Re Trepanier* (1885), 12 S. C. R. 111 at 129. But the subject matter of the learned Judge's remarks was the writ of *habeas corpus* with writ of *certiorari* in aid. In that connection he merely states what has been the constant and uniform practice of the Courts of this Province where *habeas corpus* has issued with a *certiorari*. But it does not appear to me to be authority for the much broader proposition it was relied on to support. Harvey, C.J., concluded: "In the result there is no decision, except those of *Regina* v. *Coulson* (No. 2), 27 Ont. R. 59, and *Rex* v. *McPherson*, 25 Can. Cr. Cas. 62, which I have seen which holds that the evidence may be looked at for the purpose of seeing whether there is any evidence, and the opinion in the former of these was unnecessary for the decision since the Court held there was such evidence. For that reason, and because *Regina* v. *Bolton* and *Colonial Bank* v. *Willan* are not considered, with much respect, I do not consider that they can be taken as in any way affecting the authority of the last mentioned case, which, as a decision of the Privy Council, is of the highest authority, and which I am therefore bound to follow."

In the case before me it is not necessary or perhaps desirable to say that I entirely agree with the opinion thus stated. What I feel that I am bound by is the authority of *Regina* v. *Wallace* on the very matter in issue here. Jurisdiction to enter into the inquiry existed in the magistrate. There is no allegation that his jurisdiction was ousted by any claim made on

reasonable grounds during the trial. If he erred in his appreciation of the testimony adduced, and found the accused guilty without evidence of guilt, his action implies not want of jurisdiction but an improper exercise of it; and that is by the statute as interpreted by the *Wallace Case* not open to review on such an application as is now made. If I am right in my conclusion, and the result is, as thought to be by Cameron, J., "a monstrous condition of the law," the remedy, if one is needed, must be sought from Parliament and not from the Courts.

The motion is dismissed with costs.

Motion dismissed with costs.

APPELLATE DIVISION (S. C. O.) 17TH NOVEMBER, 1916.

BILLINGS v. CITY OF OTTAWA AND COUNTY OF CARLETON.

Municipal Corporations—Trespass to Lands of Private Owner—Bridge Constructed as Part of Highway—Reservations in Crown Grant — "Line of Road" — Title to Lands Encroached upon not Proved—Damages—Reference—Compensation for Injury to Land — Arbitration — Jurisdiction of Court—Municipal Act, R. S. O. ch. 192 Sec. 325 (2) —Injunction—Appeal—Costs.

Failure of plaintiff to prove title to lands encroached upon: — The Crown in 1857 issued a Patent to one B. of certain land adjoining a small island in the Rideau River "reserving the line of road across the said island." Some years before this time there was a way across the island connected with the mainland on either shore by bridges. In 1913 a new bridge was built higher and wider than the old one. The plaintiff, the successor in title of B., brought action claiming that the defendants had entered upon land not reserved in the said patent, that his property had been damaged by the increased height and width of the bridge: he also claimed an injunction preventing the defendants from trespassing upon his lands and a mandatory injunction that they remove equipment, etc., on his land.

Held, that the patent must be enterpreted by reference to the order in Council upon which it was founded and as there was no evidence that "the line of road" was in 1857 or at any time since less than the regulation width of highways that the said expression meant all the land allotted to a highway; that, at the best, the expression being ambigious could be explained by other documents and transactions and as so explained meant the regulation highway of 1 chain width. *Held*, also, that although the defendants had by the exercise of their right to build a new bridge damaged the plaintiff, the Court could not assume jurisdiction to deal with a claim which could only be enforced by proceedings under the Municipal Act, R. S. O. ch. 192 sec. 325 (2).

Appeals by the defendants from the judgment of Sutherland, J., 10 O. W. N. 450.

The appeals were heard by Meredith, C.J.C.P., Riddell, Middleton and Masten, JJ.

F. B. Proctor, for the appellants, the City Corporation.
J. E. Caldwell, for the appellants, the County Corporation.
S. J. McDougal, for the plaintiff, respondent.

MEREDITH, C.J.C.P.—After a careful perusal, since the argument of this appeal, of all the evidence adduced at the trial, I am unable to support the judgment in appeal. The action is substantially one for trespass to lands; the act complained of is the building of a bridge as part of a public highway. It is admitted that the bridge is built in part upon the highway; but the plaintiff contends:—that its piers are about three times the width of the highway, and that to the extent of that excessive width it is upon his land: the defendants' contention being that the highway is really one of the usual width of sixty-six feet, and that the bridge is in all respects well within the highway except to the extent of a few feet of one of its piers which, it is admitted, does extend beyond the sixty-six feet line.

The onus of proof is upon the plaintiff; he must prove that his land has been invaded, and it is enough to defeat the substantial part of his claim to say that he has not proved title to any part of the sixty-six feet strip. He has proved title to the island which the highway crosses, except that part of it which is the highway. The highway is not merely a right of way over his land, the soil and freehold of it are now vested in the defendants; this is not denied. There is no evidence of any actual possession by the plaintiff or by any of his predecessors in title of any part of the sixty-six foot strip; and that implied possession which his paper title gives him excludes the line of the highway.

It is worse than hopeless for the plaintiff to endeavour to lead anyone to believe that the guard rails of the road, necessarily placed at or near the top of the embankment, are fences indicating the lines between his land and that excepted out of the grant to him, even though he might be encouraged in so doing by the questions asked him in his own behalf. It is more

than hopeless because it may tend to throw some discredit upon his testimony otherwise. There is no evidence of possession by him, or by anyone through whom he claims, at any time of that part of the island which is now in question. There were no fences, the whole island was open to anyone who, choosing to pass under or over the guard rails, might invade it, or, by taking down a rail, drive from the road upon it.

So that whether the plaintiff's rights be looked upon as resting upon his patent alone or upon any title prior to the grant evidenced by the patent makes no difference. He has not proved title to anything but land out of which is excepted the highway in question. Then, if regard can be had to the documents leading up to the issue of the patent, documents upon which each side relies, the order in council upon which it was granted is conclusive against him, as it states the width of the highway and states it, not at twenty-three feet, but at sixty-six feet, the standard width of the public roads in the Province. But it must be remembered that changes were possible in the terms of the grant of the land between the date of the order in council and that of the patent—more than a year afterwards. The judgment in appeal seems to have gone largely upon a plan or sketch which seems to have been prepared for the plaintiff and used upon his application for the patent; but that document does not seem to me to be helpful to the plaintiff's contention: it may be more helpful to the defendants'. It purports to be drawn to a certain scale, and according to that scale the "bridge" appears to be about twenty feet in width and of the same width over the water as over the land. That which is shewn is the surface of a bridge only, and as the bridge over the island was an embankment it must necessarily have been very much wider at the bottom. If the embankment were ten feet high and the fall on each side one in one that would make the road over the island at least forty feet in width without allowing anything for ever varying its height without trespassing upon the plaintiff's land, and without making the defendants liable to an action for anything sliding or rolling down the bank upon the land at the foot of it or leaving any room at the bottom for working upon and making repairs of it. And beside this, the plan shews the road from Ottawa to the bridge to be of about, or at all events very little more than, the same

width as the bridge though in truth it was more than twice as wide.

The defendants must pay for the land taken by them beyond the sixty-six foot line: this they could have expropriated; the parties can no doubt agree upon compensation, if not, the proper local officer can fix it.

A minor claim is made by the plaintiff for compensation for the deprivation of some right of access from the highway in question to his land. This seems to be the only real injury the plaintiff has sustained. In other respects the elevation of the road, and the conversion of it from an embankment into a bridge, seems to me to have been distinctly a benefit to him, giving him a means of access from one part of the island to the other which he had not before without crossing this embankment. Extravagant claims under such circumstances ought not to be encouraged. There ought not to have been any costly litigation between the parties over their rights; for, with access, or convenient access being given, and a right to use the land under the bridge for the purpose of passage from one part of the island to the other the parties ought to have been content, or at least it should have been sufficient to have prevented litigation; but that was not done, and the defendants, not only admitting but contending that the case is one for compensation under the arbitration clauses of the Municipal Act, the plaintiff's claim in that respect must be prosecuted in that way, and not in this action.

The appeal should be allowed, and the judgment entered upon the direction of the trial Judge set aside, and instead thereof judgment should be entered dismissing the action except as to the amount to be agreed upon between the parties for which judgment should be entered for the plaintiff, but, if the parties do not agree, then there should be a reference as before mentioned and judgment should go for the plaintiff for the amount found due upon it. No costs of the action.

Costs of the reference, if any, to be dealt with by the referee. Costs of the appeal to the appellants. Compensation for deprivation of rights of access to the plaintiff's land must be sought under the arbitration clauses of the Municipal Act.

RIDDELL, J.—In the Rideau River is a small island which is said at one time many years ago to have been a peninsula though that is not satisfactorily proved (even if material).

Bradish Billings, the predecessor in title and ancestor of the plaintiff, acquired the adjoining land on one side of the river and made some claim to the island: Brulé entered upon the island and there seems to have been some litigation over the matter. However, both parties made application to the Crown for a patent and the Crown, April 16th, 1857, gave a patent to Billings "reserving the line of road across the said island and free access to the shore for all vessels, boats and persons."

Some years before this time there was a way across the island connected with the mainland on either shore by bridges—the well-known Billings Bridge. In 1913 this bridge had got into disrepair and was not sufficient for the traffic and a new bridge was built higher and wider than the old.

The plaintiff, the successor in title of Bradish Billings, brought this action against the City of Ottawa and the County of Carleton, claiming: (1) that they have entered upon land not reserved in his patent; and (2) that the increased height and width of the bridge damages his property—and he claims $6,500 damages for these wrongful acts, an injunction preventing the defendants from trespassing on his land and a mandatory injunction that they remove equipment, etc., on his land.

At the trial before my brother Sutherland at Ottawa, the plaintiff succeeded and a judgment has been settled ordering the defendants to remove from the land claimed by the plaintiff (being all outside of a strip of 23 feet) and not to trespass thereon—(with a proviso staying the injunction for sixty days to enable expropriation proceedings to be had)—also that the defendants pay the plaintiff damages to be determined by the official arbitrator at Ottawa "to his said lands by the action of the defendants in constructing their said bridge."

The defendants appeal.

There are two matters to be decided—one depending on the construction of the patent; the other upon the construction of the Municipal Act.

Attacking the former question, the contentions of the parties are as follows: the plaintiff says there was a road 23 feet wide and that the reservation in the patent refers to that road —the defendants say that the patent must be interpreted by reference to the order in council upon which it was founded.

The learned trial Judge has given effect to the former contention but I think he is in error.

While it may be considered proved that the former bridge was from 22 to 24 feet in width there is no evidence that "the line of road across the island" was in 1857 or at any time only of that width—"a line of road" does not mean *via trita*, it means all the land allotted to a highway.

At the best for the plaintiff the expression "line of road" is ambiguous and may be explained by other documents and transactions: *Brady* v. *Sadler* (1890), 17 A. R. 365, and cases cited. And that ambiguity cannot be better cleared up than by enquiring into the previous acts leading up to and authorizing the patent—the report of the Commissioner of Crown Lands approved by council and becoming an order in council was that Billings might be granted so much of the island "as may not be taken up by a line of road of the ordinary breadth of one chain in connection with the bridge." I can find no evidence that the patent was intended to go beyond its basic order in council.

It is said that the plan prepared in 1854 shews that the "line of road" was only 23 feet or thereabouts but this plan gives only the bridge (while the two parts of the plan purport to be to scale it may be noticed that the plan in the smaller scale makes the bridge a little wider than that in the larger) the former being very nearly 25 feet.

I have no doubt that the patent means by "line of road" what the Order in Council says and that the "line of road" was a chain wide.

Even had the evidence been more satisfactory than it is of prior possession and (or) ownership by the original Billings, I do not think he can claim more than is given him by the patent —he admits the ownership by the Crown of the part reserved; and the defendants now stand in the place of the Crown.

There is indeed a very small portion of land (it is said about 30 or 40 square feet) which is the property of the plaintiff and for which the defendants must pay. If the parties cannot agree the value may be determined by the Master who should deal with the question of costs of the reference, having in view the reasonableness of the parties.

It would seem that the exercise by the defendants of their right to build a new bridge has damaged the plaintiff—but

such a claim cannot be adjudicated upon by the Court. No doubt, where a plaintiff has been obliged to come to the Court to enforce one claim it might be convenient to allow him also to claim compensation for injury to his land: but the Legislature has not thought proper to make such a provision.

This claim can be enforced only by proceedings under the Municipal Act. See *Smith* v. *Eldon*, 9 O. W. R. 963 and cases cited: the language of sec. 325 (2) of the Act being clear and imperative it would be impossible for the Court to assume jurisdiction in the premises.

I think the judgment wrong except as to the small piece of land actually taken— the action should *be dismissed* except as to this small piece and as the plaintiff has some small measure of success the dismissal will be without costs—the action well lies for the small piece and the defendants should be enjoined in respect of that, but the operation of the injunction suspended for a reasonable time, say 6 months, to allow expropriation proceedings to be taken—the plaintiff should pay the costs of appeal.

MIDDLETON and MASTEN, JJ., concurred.

Appeals allowed.

MASTEN, J. WEEKLY COURT.) 27TH NOVEMBER, 1916.

RE PHERRILL.

Will — Devise of Property not Owned by Testator — Owner a Beneficiary under Will—Election—Compensation to Disappointed Beneficiaries—Basis of Compensation—Equitable Mortgage—Subrogation—Cloud on Title Created by Executors—Removal.

Election of beneficiary:—Where a testator devises parts of property, the whole of which another person owns, and confers, by his will, benefits upon that other person, the latter must elect either against the will or to retain the said property, and if he elects against the will the benefits accruing to him thereunder are to be treated in equity as a fund out of which compensation is to be made to the disappointed beneficiaries.

Motion by the executors of the will of Hannah Pher[illegible] for the advice and direction of the Court upon certain qu[illegible] arising under the will.

The motion was heard in the Weekly Court at Toronto.

K. F. Mackenzie, for the executors and for Thompson David Pherrill and Hannah Walton, assignee of Archibald George Pherrill.

W. J. McLarty, for James Albert Pherrill.

MASTEN, J.—The questions submitted are by the notice of motion defined as follows :

Whether under the circumstances set out in the affidavit of Alexander Baird, the beneficiary, James A. Pherrill, is put to his election to forfeit to the other devisees thereby deprived of parts of lot "E", mentioned in the said will, the benefits conferred upon him under the said will if he retains the whole of said lot "E" under his claim to be the owner thereof against the said will; or whether the said James A. Pherrill can retain the whole of said lot "E" contrary to the provisions of said will and at the same time be entitled to receive the benefits conferred upon him by said will.

Two questions arise; first, is James A. Pherrill put to his election; and second, if put to his election, on what basis is the compensation which is to be awarded to the disappointed devisees to be computed?

No question arises on this application respecting the title by adverse possession acquired by James A. Pherrill. Both parties concur in stating that he has acquired a good title by adverse possession to the whole of the six acres referred to in the will as plan "E", 424. I have not considered the question of, and express no opinion upon it. It appears, however, that at an earlier stage in the administration of the estate the executors assumed to deal with that portion of the lands devised to Thompson David Pherrill and Hannah Walton and executed conveyances to these devisees which conveyances may form a cloud on the title of James A. Pherrill to these lands.

Mr. McLarty, on behalf of James A. Pherrill, claimed that, while his client had acquired a title by possession to all of the lands in question, the testatrix died possessed of an equitable interest in the lands arising out of the fact that she had in 1911 paid off the mortgage which was then standing against the lands and which was then discharged and not assigned to her, and counsel contended that the devise in the will of Hannah

Pherrill above named must have reference to that equitable interest only; that the testatrix devised what she had and no more, and so he, James A. Pherrill, was not compelled to elect.

For the purpose of determining this question, it is not necessary to decide whether the testatrix was or was not entitled to be subrogated to the rights of the mortgagee whom she paid off, because it is clear that what was devised by the will was not any equitable interest in these lands but a certain specific two acres to Thomas David and a certain specific two acres to Archibald George. The testatrix therefore undoubtedly assumes to devise something to which as agreed by both parties she was not entitled, consequently the devisee, James A. Pherrill, is put to his election.

The result is that the benefits occruing to James A. Pherrill under the will are to be treated in equity as a fund out of which compensation must be made to the disappointed beneficiaries, Thomas David and the assignee of Archibald George.

I am asked, however, to go further and to determine on this application the basis on which compensation is to be awarded. I do not think that upon an application of this kind all the facts and circumstances can be sufficiently developed so as to enable the Court satisfactorily to pronounce a judgment. I, therefore, decline to determine this question, or to include any direction regarding it in the order to be issued. As the parties have, however, asked the question to be discussed, I have no objection to say that upon the facts so far as they appear upon this application, I do not agree with Mr. McLarty that Mrs. Pherrill was an equitable mortgagee of these lands or that the compensation due to Thomas David and Archibald George should be anything less than the full value of the two acres devised to each of them.

The order will contain a declaration that the executors by their counsel appearing and stating that they assert no title to the lands in question, being lot No. "E", plan 424, referred to in the will, and undertaking to remove any cloud on the title created by them, I declare that James A. Pherrill is put to his election under the will and that if he elects against the will then the devisees Thomas David Pherrill and Archibald George Pherrill are each entitled to compensation out of the share coming to James A. Pherrill under the will.

There will be no costs of the application as between the parties. The executors to have their costs out of the estate.

SUTHERLAND, J. (TRIAL.) 22ND NOVEMBER, 1916.

BOON v. FAIR.

Deed—Obtained by Threats to Prosecute for Criminal Offence—Agreement to Hold as Security — Implied Agreement not to Prosecute—Illegal Consideration.

Deed founded upon illegal consideration:—An employee of an Insurance agent misappropriated the company's funds. As a result of the agents threats to prosecute his employee the plaintiffs executed a deed of land to the agent who agreed that he would not dispose of the land conveyed to him but that he would hold the deed as security for the payment to him by his employee of the amount misappropriated. *Held*, that the deed was void as it was founded upon an illegal consideration.

Action by the two sisters of one Thomas J. Boon to set aside a conveyance of land made by them to the defendant as a result of threats made by the latter to prosecute the said Thomas J. Boon for a criminal offence.

A. B. Cunningham, for the plaintiffs.
T. J. Rigney, for the defendant.

SUTHERLAND, J.—In and for some years prior to the year 1915, the defendant was the District Manager for the North American Life Assurance Company, having his office in the city of Kingston.

One Thomas J. Boon, a brother of Sarah Ellen Boon and Isabella Susan Boon, the plaintiffs herein, was associated with the defendant's office and worked on commission for him in connection with his life insurance business. Boon became short in his accounts with the said company for funds for which the defendant was responsible to it. He had made and misappropriated collections and sought to cover his delinquencies by forging promissory notes for various amounts.

The defendant in the month of April or the beginning of the month of May, 1915, began to discover Boon's misconduct and misappropriations. He charged him with these and they were admitted. He began to press Boon for payment of the shortages or security therefor. On the 10th May, 1915, Boon, his wife, Mary E. Boon, joining therein to bar dower, conveyed

to the defendant lot (or part lot) No. 20 on the westerly side of Chatham street in the city of Kingston for a consideration "of certain valuable considerations and of one dollar" and on the same day assigned to him a life insurance policy.

The plaintiffs are elderly spinsters one of whom is a dressmaker who supports herself and her sister by her work and the other does the housework. On the 15th May, 1915, the plaintiffs were the owners of another part of said lot No. 20 to which they became entitled under and by virtue of a deed to them by their father some little time before. The father made his home with them. On said last named date the plaintiffs conveyed that portion of said lot No. 20 then owned by them to the defendant for a named consideration of "certain valuable considerations and one dollar." In this action they are seeking to set aside this deed on the grounds (1) that the defendant promised them before or at the time of their execution of the said deed that he would deliver to them an agreement in writing "binding himself and his estate not to dispose of the said lands and also agreed to give the said Thomas J. Boon time to make up his said shortage;" (2) that the said conveyance "was induced by the fraud, duress and undue influence of the defendant;" (3) that the said conveyance was invalid (a) "on the grounds of public policy" and (b) that it was "induced by compounding a felony."

The defendant was no doubt justly indignant with Thomas J. Boon on ascertaining his misconduct already mentioned. Soon after doing so, it became apparent to him that he would likely suffer a considerable loss, and it is said that in the end the defalcations for which the defendant became liable amounted to the sum of $2,000, or upwards. By the 10th day of May, 1915, when he obtained his first securities as against loss, he had ascertained that the defalcations amounted to five or six hundred dollars. Between the 10th and 15th May, 1915, new ones were being discovered by him. It is clearly proved by the evidence of Thomas J. Boon and his wife Mary E. Boon, that between the last days of April or the first day of May and the 10th day of the latter month, the defendant was pressing Thomas J. Boon for money to repay his defalcations and for security to the defendant therefor, and that he was seeing Boon and his wife frequently and threatening the former with arrest. The defendant denied this at the trial, and testified that he

made no threat of arrest until that contained in his letter to Mrs. Boon, dated May 28th, 1915, in which he intimates to her that he will "report the whole matter to the head office and issue warrant for his arrest."

Having regard, however, to what he said in his examination for discovery, and the other evidence given at the trial, I cannot credit his denial.

It is also clear that some little time before the 15th May, 1915, Sarah Ellen Boon, the seamstress, had learned from her brother Thomas J. Boon and her sister-in-law of the former's wrong doings and of the threats of the defendant to have him arrested. Out of her sisterly regard for him and her apprehension lest he should be arrested, she had offered to permit him, and had endeavored herself, to raise money on the property of her sister and self mentioned but without result.

It is clear also from evidence given at the trial which I credit that on the 15th May, 1915, the defendant had one or two interviews with Boon and his wife during which he again threatened to have the former arrested unless further money were paid to him or security given. During one of these interviews he learned of the sisters' offer made to their brother to permit him to raise money on their property. Thomas J. Boon testifies with reference to what occurred on that day as follows :

"Q. 19. What happened? A. We did not give him bill of sale. The demands for security and threats of arresting me were almost daily matters for a number of days and in our effort to obtain some money my sister approached me and asked me if I thought I could raise some money on a piece of property she had. Went to Mr. Fair's office when he sent for me. My wife was with me and we had been endeavoring to raise a certain amount of money to hand over to him and apparently when he learned that property was available he wanted it handed over to him and he would take care of it and would never do anything to me, wanted us to hand over the deed to him.

"Q. 20. Did he make that suggestion? A. Yes.

"Q. 21. To whom? A. To myself.

(Mr. Rigney objects to questions along these lines; Questions allowed subject to objections).

"After talking matters over (three of us there, the steno-

grapher was there), when he gave us the assurance nothing would be done, he would bind himself by agreement and give us agreement to that effect, not to attempt to dispose of the property. He suggested that we give him the deed.

"Q. 22. Had you gone to your sister? A. I do not know if I went to my sister immediately then. She made the offer to us.

"Q. 23. Did you report this to your sister about the agreement? A. Yes certainly.

"Q. 24. With what result? A. At that time if certain amount was not available and paid to him he would push me for it and arrest me.

"Q. 25. He told you that? A. Yes, he threatened me with arrest on the street that day.

"Q. 26. Did you report this statement to your sister? A. Yes."

Mary E. Boon says that she was at the defendant's office several times during the week prior to the 15th May, 1914, and that the defendant threatened a number of times to have her husband arrested if he did not produce a certain sum of money. She talked the matter over with her sister-in-law, the plaintiff, Sarah E. Boon.She says that on the 15th May, 1915, the defendant demanded that a bill of sale of the chattels in the house occupied by herself and her husband should be given to him and that on her remonstrating and stating that the goods had been bought with her money and that she would not execute a bill of sale thereof he told her that if that were her attitude he would have her husband arrested by four o'clock of the afternoon of that day. She said that after the defendant left the house her husband had suggested to her that she should not have spoken to him in that way and as a result they went later in the day to the defendant's office and told him that the plaintiff Sarah E. Boon had offered to permit them to raise money on her property. She further states that thereupon the defendant said why raise money on it, why not let me "hold a deed as security." She says her husband thereupon said the property was not for sale to which the defendant replied that he would bind himself and his estate that the property would never be disposed of but held as security until her husband's debt was paid. In these circumstances Sarah E. Boon was communicated with and consented to execute the deed of the property in

question to the defendant as security for her brother's debt on condition that it should not be disposed of but held solely for that purpose. She says that it was represented to her that the defendant would give her an agreement to that effect.

Mrs. Boon says that thereupon she telephoned to the defendant and it was arranged that he should go with a lawyer that night to the residence of Thomas J. Boon and that the deed in question should be drawn. The parties met as thus agreed and a deed was drawn or completed and executed by Sarah E. Boon. She says that before executing the deed she raised the question of the agreement which was to be given to her and that she was put off at the time by the defendant and the solicitor, and it never was in fact given to her. The deed was then taken to the house where her sister was and there executed by her.

Jones v. *Merionethshire Permanent Benefit Building Society*, [1891] 2 Ch. 587, affirmed [1892] 1 Ch. 173, is a case often cited in actions of this kind. There the secretary of a company had made default and was threatened by the Society with prosecution for embezzlement. He applied to the plaintiffs who gave a written undertaking to the Society to make good a large part of the debt, the express consideration being the forbearance of the society to sue its secretary for the amount for which the plaintiffs became responsible and pursuant to the undertaking they gave promissory notes to the society. In the action it was held to be an implied term of the agreement also that there should be no prosecution, and that the agreement was founded on an illegal consideration and void. Williams, J., at p. 596, says :

"Let us look on one side of the line and the other. It would seem to be clear that so far as the persons giving the security are concerned they must be cognizant of the crime which the person whom they seek to help has committed, otherwise the doctrine does not seem applicable at all. That is present here, because there is no doubt that Mr. and Mrs. Jones both knew that their relative had been guilty of these frauds. Then one must, I think, also find that the persons coming forward and taking upon themselves the debt, must have been actuated by the desire to prevent a prosecution. That also is present here. I have no doubt that Mr. and Mrs. Jones, in coming forward, were actuated by the desire to prevent a pros-

ecution, and somehow or other it seems to me that the very form of the agreement which, in my view, put an end to the indebtedness of Cadwaladr for the £526 altogether, was, to some extent, affected by their desire that the matter should be so carried through as to most effectually give them that which they wanted—that is to say, the prevention of the prosecution. But that is not enough; something is wanted on the other side. Now, on the other side there must be, in the first place, either an intention to prosecute or threats to prosecute, and I find here that there were threats to prosecute but then something more is wanted on that side. I think that the person receiving the promise or the security must be aware that the person giving the promise or the security would not have come forward but for the threat or the probability of the prosecution. When I say that all these things are necessary and are present in this case, I think that I still leave it possible that many cases might occur of persons coming forward and undertaking to make good the default of a man who has committed a crime, from which these elements would be absent on the one side or the other."

In like manner the plaintiffs in the present action were cognizant of the crime of their brother, had already heard of the threats of the defendant to prosecute and were actuated by a desire to prevent his doing this. On the very day that the deed in question herein was taken by him from the plaintiffs, he had repeated the threats to prosecute and this fact had been reported to the plaintiffs. Having learned on that day from the brother and his wife that the concern of the plaintiffs was such as to lead them to offer their property to be used for the purpose of raising the money, he asked for a deed.

It seems to me that he must have known that the deed he thus obtained was made in view of his threats to prosecute and that there was an implied term of the agreement under which it was given that there should be no prosecution.

I have also come to the conclusion, upon the whole evidence, and I find as a fact, that the defendant did promise and agree that the deed from the plaintiffs should be subject to a term that he would not dispose of the lands thereby conveyed to him, but hold them as security for the payment to him by the brother of his indebtedness to the defendant. Reference to *Flower et al* v. *Sadler* (1882), 10 Q. B. D. 572, at 576; *Lound* v.

Grimwade (1888), 39 Ch. D. 605; *Leggatt* v. *Brown* (1898), 29 O. R. 530, affirmed in appeal (1899), 30 O. R. 225; Leake on Contracts, 5th ed. (1906), p. 510; Hals. L. of E. vol. 7 (1909), p. 398.

There will therefore be judgment in favor of the plaintiffs directing that the conveyance from the plaintiffs to the defendant, dated 15th May, 1915, be set aside with costs.

Since the hearing of the case, the defendant has been guilty of most improper conduct in writing to me a letter with reference to his evidence at the trial and as to the suit generally. If I had been unable to see my way clear to give the plaintiffs relief in the action, I would not have been disposed to make any order as to costs against them in favor of the defendant. The letter written by him would have determined me definitely not to do so if I had otherwise been in any doubt.

SUTHERLAND, J. (TRIAL) 22ND NOVEMBER, 1916

NORTH-WESTERN NATIONAL BANK OF PORTLAND v. FERGUSON.

Principal and Surety—Promissory Note—Loan by Bank—Agreement to Advance—Partnership up to Certain Amount—Financial Condition of one Partner—Fraudulent Concealment of Bank as to—Misrepresentation— Collusion—Guaranty—Agreement to Give Time to Principal Debtor—Release of Guarantor.

Extention of time to debtors:—A father agreed to guarantee advances from a bank to a partnership of which his son was a member to the extent of $10,000. The first advance consisted of a loan of $3,000 for which the son and his partner gave a promissory note. When the said note came due it was renewed without any notice having been given to the said father: *Held*, that the bank in extending to the principal debtor time for payment of the note given on the advance without the consent of the guarantor made a binding agreement to give time which released the latter.

Action by the North-Western National Bank of Portland, Oregon, against John Ferguson and W. W. Ferguson upon a promissory note made by the former in favor of plaintiffs and

upon a contract of guaranty given by the said W. W. Ferguson to the plaintiffs. Tried without a Jury at North Bay.

M. G. V. Gould, for the plaintiff bank.
R. McKay, K.C., for the defendants.

SUTHERLAND, J.—The plaintiffs are a foreign banking concern doing business in the State of Oregon in the United States of America. The defendants are father and son who reside in the town of North Bay in this Province but were, or at all events the son was, interested in the purchase of horses in the United States Some business transaction between the plaintiff bank and defendants were current or some negotiations in progress between the plaintiff bank and the defendants as early as October 28, 1914, as appears from a telegram from the defendant John Ferguson to the plaintiff bank bearing that date, in which he intimates that he will accept and pay all his son's drafts on him.

The defendant, W. W. Ferguson, had become acquainted with a man named Robert Smith, apparently an experienced dealer in horses, and they had discussed becoming partners in a transaction which looked to the furnishing to the French Government of horses to be bought in Oregon.

The father and son had also apparently discussed the matter and the payment for such stock as should be bought. Both had learned casually on the street from persons other than the plaintiff bank, one that Smith was thoroughly responsible, and the other that he was one of the leading men in that section.

The defendant W. W. Ferguson applied to the plaintiff bank for a loan or advance in connection with the proposed transaction. He says that when doing so he spoke to Mr. Olmstead, the Vice-President, and was told by him that "Smith (as near as he could make out) had been worth $150,000, probably around there at one time or another."

It appears that Smith had a considerable period before this been a customer of the plaintiff bank, and was largely indebted to it, the advances being covered by collateral securities. Olmstead says that W. W. Ferguson told him that his father, the defendant John Ferguson, had a contract to buy horses, and would be willing to guarantee such sums as the bank would

advance him, and that he told him in reply he had looked up his father's financial ability and found it good and that he would submit the matter of advance to the son to the bank committee. He adds that it was submitted and the advance agreed to be made.

On November 21st, 1914, the defendant John Ferguson sent a telegram from New York to the plaintiff bank as follows: "All acceptable stock purchased by my son and Robert Smith will be paid for immediately on inspection. I will personally stand behind them in transaction." On the 23rd November the plaintiff bank telegraphed to him as follows: "Referring your telegram Saturday must have guarantee from you for any sum advanced your son up to $10,000, regardless of stock being acceptable."

On the same day John Ferguson telegraphed in reply: "I hereby guarantee advances to my son up to $10,000."

On November 24th a note for $3,000, signed by W. W. Ferguson and R. Smith, payable thirty days after that date, with interest at seven per cent. from date until paid, was given to the plaintiff bank, and they made an advance of $3,000 which they carried into their books against the firm, Smith & Ferguson, and, under instructions from the defendant W. W. Ferguson, and probably also from Smith, on the same day sent a telegram in cipher to the First National Bank at Bend, Oregon, the translation of which is as follows: "Credit account Smith and Ferguson, trustee, $3000. We are remitting by mail to-day."

Olmstead says that on the same date they made out their cashier's cheque for $3,000 and sent it to the said First National Bank accompanied by a letter repeating their telegram and stating that they were enclosing the cheque. On the same day the plaintiff bank telegraphed to the defendant John Ferguson as follows: "We loaned your son $3,000 to-day; wish you would send us a letter confirming your telegram wherein you agreed to pay the advances to your son. Do you want Smith's name on the notes."

On November 25th, the defendant John Ferguson wrote the plaintiff bank: "Re W. W. Ferguson loan; I beg to confirm my guarantee to you to the extent of $10,000 (if necessary) as per your wire to me" and on the next day he sent the plaintiff bank the following telegram: "I appreciate your telegram; wrote you as requested; I expect my son's associates to join in

liability to the proportionate extent of their interest in transaction with him. You may be wired regarding their ability to fill contract which I am negotiating on 25 per cent. profit."

Some difficulty seems to have arisen between W. W. Ferguson and the bank at Bend, Oregon, as to the payment out by the latter of the whole or part of the $3,000. When the thirty days were up, the plaintiff bank, without notice to or consent by the defendant John Ferguson, took from W. W. Ferguson and R. Smith a note in renewal of the note of the 24th November, 1914. The new note bears date the 24th December, 1914, and it was also made payable in thirty days, with interest at the same rate as the original. This note was not paid and both defendants now repudiate liability therefor.

It is said that a week or so after the first note was given, the defendant W. W. Ferguson met Olmstead and was told by the latter that he should be careful how much of the money he would allow to go into the hands of Stanley and Smith, this being a firm of which Smith was a partner. W. W. Ferguson says that at the time he remarked to Olmstead that it was a fine time to tell him about it after the advance had been made, or something of that kind. In the spring of 1915, the plaintiff bank sued Smith and his wife and obtained a judgment for about $30,000, inclusive of interest, and sold certain bonds of the Stanley Smith Lumber Company and certain shares therein held as collateral and realized about $15,000. They still hold the judgment for the balance with certain unrealized securities in their hands.

The writ herein was issued on the 7th April, 1916, and the endorsement thereon is as follows :

"The plaintiff's claim is for $3,001.98 on a promissory note made by the defendant W. W. Ferguson in favor of the plaintiffs, dated the 24th November, 1914, for $3,000.00 bearing interest until paid at the rate of seven per cent. per annum, whereon a payment was made of $130.67 on September 4th, 1915.

"The following are the particulars :

Principal	$3000.00
Interest to date	132.65
Total	$3132.65

By Cash 130.67

$3001.98

"And the plaintiff claims interest at the rate of 7 per cent. per annum until judgment.

"The plaintiff further claims from the defendant, John Ferguson, the said sum of $3001.98 with interest as aforesaid, under and by virtue of a guarantee in writing given to all plaintiff by the defendant by telegram dated Nov. 23rd, 1914, and by letter dated Nov. 25th, 1914, for payment of all moneys advanced by the plaintiff to the defendant, W. W. Ferguson, up to $10,000.00."

The defendant, W. W. Ferguson, says in his statement of defence that on his inquiring "of the plaintiff bank" before entering into the transaction in question as to the financial standing of R. Smith, he was told by the representatives of the bank that he was a man of substance and that the defendant would be perfectly safe in going into a business transaction with him and that the plaintiff bank at the time were aware of material facts relative to Smith which they should have disclosed and which amounted to a fraudulent concealment, and he charges that the plaintiff bank and Smith acted in collusion in connection with the said advance.

The defendant, John Ferguson, says that the alleged misrepresentations of the plaintiff bank to his son were reported by the latter to him and that he was thereby misled. He admits that earlier than this the idea was conveyed to him at one time in the plaintiff bank at Portland that Smith had a standing as one of the leading men in the section. He says that he got this information either from a man named Hunter, not associated with the bank, or else from Sensenich, an employee of the bank, one or other of whom told him that Smith was a responsible man. He also claims that the telegram and letter sent by him were obtained by the plaintiff bank through misrepresentation, that the advances intended to be guaranteed were advances to his son and not to his son and Smith, and that without his consent the plaintiff bank gave time for payment of the advance made by taking the renewal note therefor.

Olmstead says that while the bank had been carrying Smith for about two years, they were not in the year 1914 anxious about his account or the collateral security therefor, held

by them. He admits they were pressing him to reduce his indebtedness. He states that all he told W. W. Ferguson was that Smith had furnished the bank statements in which he claimed to be worth $150,000, and he says that he told him also that they would not lend Smith money without collateral security. He further says that the bank had no interest one way or the other as to Smith going into the proposed contract. The suggestion, on the part of the defendants, is that the plaintiff bank was anxious that Smith should become a partner in a contract where he was likely to make money so that he would thus be enabled to reduce his liability to them.

While the evidence almost suggests to one that the bank should have been more candid than they were about Smith's financial condition, I am unable to come to the conclusion that the defendants have made out any case of misrepresentation or concealment which would constitute a defence to the note in question. See Pollock on Contracts, 8th ed. (1911), 567, for a discussion of the principles applicable.

The evidence of W. W. Ferguson leads one to think that he was an inexperienced young man and it is vague and unreliable. I do not mean by this to imply that he was intentionally dishonest.

As to the defendant, John Ferguson, it seems to me plain that he knew his son was going into the horse transaction with Smith and that he was undertaking to make himself liable to the bank for the advances which it would make in connection therewith. While the guarantee is to pay advances to the son, the father knew that the latter was associated with Smith in the transaction. He must also, I think, be taken to have known that Smith was joining in the note taken by the bank to evidence the advance.

I come to the conclusion, therefore, that judgment must go against the defendant, W. W. Ferguson, for the amount due upon the note in question.

As to the father, the defence that the plaintiff bank by entering into an arrangement with the principal debtor by which it accepted from him and Smith a note in renewal of and substitution for the original note and by extending the time, namely, 30 days, for which it ran, for a further definite period of 30 days, raises a somewhat difficult question. It was argued that from the use of the word "advances up to the

sum of $10,000'' it might reasonably be considered in the contemplation of the parties that as loans were from time to time made to the son, notes would be given in the ordinary course of banking business, and that these would be renewed from time to time.

Calder & Co. v. *Cruikshank & Rattray*, (1889) 27 Scots. L. R. 65, contains an interesting discussion of a case where the guarantee was ''for payment of any goods which you may sell or cash which you may advance.'' See pp. 68-9.

While a mere delay given to a principal debtor does not discharge the surety, a binding agreement to give time does. It seems to me that the bank, in extending to the principal debtor the time for payment of the note given for the advance without the consent of the guarantor, made a binding agreement to give time, which in law released the latter.

The plaintiff bank will therefore have judgment against the defendant, W. W. Ferguson, with costs, and the action will be dismissed as against the defendant, John Ferguson, without costs. Reference to *Thompson* v. *McDonald* (1859), 17 U. C. R. 304; *Wilson* v. *Brown* (1881), 6 A. R. 87; *Devanney* v. *Brownlee* (1883), 8 A. R. 355; *Healey* v. *Dolson* (1885), 8 O. R. 691; *Fleming* v. *McLeod*, 37 N. B. R. 630; DeColyar on Guarantees (1897), 3rd ed., p. 422; Chalmers on Bills of Exchange, 7th ed. (1909), p. 244; Hals. L. of E., vol. 2, p. 557; Maclaren on Bills, Notes and Cheques. 5th ed. (1916), 381-2, where there is a collection of the authorities.

CLUTE, J. (WEEKLY COURT) 28TH NOVEMBER, 1916.

RE HONSBERGER.

Insurance — Life Insurance — Will — Construction—Change of Beneficiary by Will—Insurance Act, R. S. O. (1914) c. 183, ss. 179 171 (3)

Change of beneficiary by will to member of preferred class:—A testator who had received a certificate of insurance during his life time for $1000, one third of which was stated therein as payable to his wife as beneficiary, the remaining two-thirds was directed therein to be paid to his executors. By his will the testator bequeathed the said $1,000 to two children. *Held*, that the widow did not take the third as the insured was at liberty to alter the provision made for the widow by virtue of R. S. O. (1914) c. 183 s. 171 (3) and s. 179.

Motion by the executor of the will of John A. Honsberger, deceased, for the construction of the said will.

A. W. Marquis, for the executor.
J. A. Keyes, for the widow.
F. W. Harcourt, K.C., for the infants.

CLUTE, J.—The deceased, on the 7th November, 1893, received a certificate of insurance for $1,000 in the incorporated Canadian Order of Foresters in which certificate he designated his wife as beneficiary for one-third and the remaining two-thirds to be payable to his executors.

His will, which is dated the 13th of May, contains the following clauses :

"I direct my executors to pay all my just debts, funeral and testamentary expenses, as soon as may be conveniently done after my decease. The balance of my estate, after my debts are paid, which consists of one thousand dollars, Life Insurance Policy in the Canadian Order of Foresters, one roan mare, waggon harness and whatever personal property I may own, I bequeath to my daughter, Carrie, and my son, Archie, to be divided between them equally."

The testator died on May 15th, 1914, leaving him surviving his widow, Nellie Honsberger, and nine children of whom five are infants under the age of twenty-one years. The two

youngest beneficiaries, Caroline and Archibald, are respectively nine and twelve years of age.

On behalf of the widow it is urged that upon the true construction of the will the widow is entitled as beneficiary to one-third of the one thousand dollars insurance; that this formed no part of the testator's estate and was not intended to be bequeathed. Under the wording of the will I cannot take this view but hold that according to its natural and true meaning the two younger children, Caroline and Archibald, take the estate subject to payments of the debts. The debts are very small, something between one and two hundred dollars.

Under the statute, R. S. O. (1914) ch. 183, sec. 171 (3) and 179 (1) the testator had a right to alter the provision made for the wife and to limit the benefits of the insurance to the two children. Had the debts amounted to more than two-thirds of the insurance it would have been necessary to consider whether there could have been any encroachment upon the one-third of the insurance, a trust having been created in respect of that in favour of a preferred class, but under the facts in this case that question does not arise on account of the small amount of the debts. See *Re Wrighton* (1904), 8 O. L. R. 630.

Costs out of the funds.

MULOCK, C.J. EX., (CHAMBERS) 29TH NOVEMBER, 1916.

REX v. McEVOY.

Ontario Temperance Act—Receiving an Order for Liquor within the Province—Conviction under Sec. 42—Motion to Quash—Sending Order out of Province—Sec. 139 — Agent within Province.

Receiving an order for Liquor for Beverage purposes within the Province:—After the coming into effect of the Ontario Temperance Act one C. who had previously kept a liquor store continued to carry on a store business at the said store thereafter. C. supplied B. with a blank form of an order for the purchase of liquor which was signed by B. and directed to a company in Montreal which conducted a business for receiving and filling liquor orders. B. purchased from A. an express order in the company in Montreal, covering the price of the liquor ordered and posted it himself. The express company subsequently delivered to B. the liquor which he had ordered. *Held*, that the receipt of the blank form from B. signed by him and the filling up by C. rendered C. guilty of the offence of receiving an order for liquor for beverage purposes within the Province of Ontario. Under Sec. 42 of the Ontario Temperance Act, the offence being complete when C. received the order from B. *Held*, also, that even if C. was the agent of the Montreal company that he would still be personally liable within the meaning of the said section.

Motion by the defendant to quash a conviction made by the Police Magistrate for the City of Toronto for receiving an order for liquor for beverage purposes contrary to Sec. 42 of the Ontario Temperance Act, 6 Geo. V. ch. 50.

James Haverson, K.C., for the defendant.
J. R. Cartwright, K.C., for the Crown.

MULOCK, C.J. EX.—This is a motion to quash a conviction made by George Taylor Dension, Police Magistrate for the city of Toronto, whereby the said McEvoy was convicted of receiving an order for liquor for beverage purposes.

The facts appear to be as follows :

When the Ontario Temperance Act came into force, one Convey was carrying on a liquor and store business in the city of Toronto at his store, being number 300 Royce avenue, and continued to carry on the store business at the said premises after the coming into force of the Act. A company, called the Distillers Distributing Company, in the city of Montreal conducted the business of receiving and filling orders for the sale

of liquor, and Convey obtained and kept in his store blank forms of orders for the purchase of liquor. On the afternoon of Saturday, the 7th of October, 1916, one Charles Bruce, called at the store in question, McEvoy at the time being in charge, and asked him for a bottle of MacKenzie's Scotch Whiskey at .85c. per bottle. Thereupon McEvoy produced one of the blank forms and asked Bruce to sign it at the foot, which he did. McEvoy then filled in the blank with Bruce's order for the bottle of whiskey and directed it to the Distillers Distributing Company. As thus completed, the order (so far as it applied to the transaction in question) read as follows :

"Distillers Distributing Company, Limited, E.J.C.,
"1072 St. Lawrence Building,
"9th October, 1916.

"Gentlemen :

Please find $ for which deliver to me the following through E. J. Convey, carter.

"Quantity, 1 qt. McKenzie's Scotch mild, price, 85c.
"Name, C. Bruce,
"Street No. 7 Hugo Street,
"Place, West Toronto,
"7 Hugo Street."

Bruce then tendered a one dollar bill in payment, but McEvoy said he had no change, that Bruce could go and get the change and that he, McEvoy, would "have it ready for you when you get back." When Bruce returned McEvoy had an express money order for .85c. filled out and ready to accompany the order. Bruce then paid him .85c. for the whiskey, two cents for the stamp on the express order, and three cents doubtless for postage, and McEvoy enclosed this express order for the bottle of whiskey in an envelope addressed to "The Distillers Distributing Company, 1072 St. Lawrence Boulevard, Montreal," and gave it to Bruce, telling him at the same time to post it.

The material wording of the express order is as follows :

"The Dominion Express Company agrees to transmit and pay to the order of the Distillers Distributing Company the sum of eighty-five cents."

"(Sgd.) G. C. Marroman, Treasurer,
"(Sgd.) E. J. McEvoy, Agent.
"Issued at Toronto, Canada Branch.
"October 7th, 1916.

"Name of remitter, C. Bruce."

This letter with the express order evidently reached its destination, the express order having stamped on the back of it "Distillers Distributing Company" and on the 11th October, the Canadian Express Company delivered to Bruce, in the city of Toronto, a box which had apparently come from Montreal containing a bottle of whiskey, a price list of wines and liquors and an envelope addressed to the Distillers Distributing Company.

The section of the Act under which the defendant was convicted reads as follows :

"42. Every person, whether licensed or unlicensed, who, by himself, his servant, or agent canvasses for, or receives, or solicits orders for liquor for beverage purposes within this Province, shall be guilty of an offence against this Act and shall incur the penalties provided in section 59 of this Act."

The Magistrate was, I think, right in holding that in receiving the blank form from Bruce, signed by him, and filled up by the defendant, the latter was guilty of the offence of receiving an order for liquor for beverage purposes within this Province.

Mr. Haverson contended that the transaction between Bruce and the defendant was a *bona fide* transaction in liquor between Bruce in the Province of Ontario and the Distillers Distributing Company in the Province of Quebec, and that therefore under the provisions of sec. 139 this was not an offence under the statute. I am unable to accede to this view. What occurred was a giving by Bruce and a receiving by the defendant of an order for liquor and the offence was complete when the defendant received the order from Bruce. That he intended to send it to another Province to be filled up does not undo the previous occurrence, namely, the giving and receiving of the order.

Mr. Haverson argued that McEvoy was acting as agent for the Distillers Distributing Company. There is no evidence of agency, but even if McEvoy was acting as agent, he would still be a person within the meaning of sec. 42 receiving an order for liquor and be personally liable.

It is immaterial whether the person receiving the order

transmits it to another Province to be filled up or makes no use of it. His offence is complete when he has received the order.

For these reasons, I think that McEvoy was rightly convicted and this motion should be dismissed with costs.

Motion dismissed with costs.

SUTHERLAND, J. (CHAMBERS) 30TH NOVEMBER, 1916.

REX v. KNIGHT.

Criminal Law—Neglect of Child — Endorsement on Information — No Formal Conviction by Magistrate — Suspended Sentence — Warrant of Committment — Improperly Issued — Failure of Magistrate to call upon Accused to Appear and Receive Sentence—Criminal Code Secs. 242 A. and 1081— Habeas Corpus —Motion for a Discharge of Prisoner.

Absence of conviction:—The accused was charged before the Magistrate that on the 8th of October, 1914, and previous dates he did unlawfully and wilfully neglect by reason of his drunkenness and disorderly habits cause to be neglected his two children, both under the age of sixteen, he having the custody and care of them, contrary to the form of the statute in such case made and provided. The Magistrate made an endorsement on the back of the information to the effect that if the accused did not dispose of his property, move out of the community, and undertake to deliver the children in question to one John Dodge for care within 30 days the sentence imposed of one year in Central Prison with hard labour would be enforced. No formal conviction was drawn up. On the 26th of September, 1916, a warrant of committment was issued by the Magistrate which erroneously stated that the accused was charged before him on the 26th day of September, 1916, and also erroneously stated that the charge was that on the 9th of October, 1914, and for some time previous he did neglect care of his children. Upon this warrant the accused was arrested and imprisoned. A writ of *habeas corpus* having been granted, a motion was made for the discharge of the accused from custody: *Held*, that the accused should be released from custody as there was no conviction on which the warrant of committment could properly be based. *Held*, also, that the Magistrate had no power to make such a disposition of the case as he did in the memorandum on the information.

Held, also, where sentence is suspended under Sec. 1081 of the Criminal Code, that a warrant of committment issued without calling upon the accused to appear and receive sentence is prematurely and improperly issued.

J. H. Fraser, for the applicant.

Edward Bayly, K.C., for the Crown.

SUTHERLAND, J.—On the information and complaint of William F. A. Hackney, the Inspector of Children Aid Societies for

the County of Essex, laid before J. H. Smart, Police Magistrate for the town of Kingsville in the said county on the 9th October, 1914, the applicants herein, Harry Knight, was charged as follows :

"That on the 8th day of October, 1914, and previous divers dates" he "did unlawfully and wilfully neglect by reason of his drunkenness and disorderly habits cause to be neglected his two children Lulu Dodge and Delbert Dodge, both under the age of sixteen, he having the custody, charge and care of same, contrary to the form of the statute in such case made and provided."

Hackney gave evidence at the trial to the effect that the children in question were on two different occasions when seen by him in a neglected, dirty and destitute condition. It is said that the accused was not represented by counsel. The proceedings do not shew that he himself gave or offered any testimony of other witnesses in answer to the charge.

The Magistrate endorsed on the back of the information this rather curious minute or memorandum of the alleged conviction :

"1 yr. in Central Prison with hard labor, to take effect in 30 days unless you dispose of your property and move out of the community, also undertake to deliver the children to John Dodge for care. (Sgd.) J. H. Smart, P. M., Oct. 9, 1914."

Under the above appears also the words: "sentence suspended" which the Magistrate appears to have written afterwards.

No formal conviction was ever drawn up under the hand and seal of the Magistrate or is included among "the information, depositions, evidence, conviction orders and proceedings" which the writ of *certiorari*, issued on the 31st October, 1916, to remove conviction, directs the Magistrate to send. The conviction, though it is to be based upon the minute, is the formal record.

On the 26th September, 1916, a warrant of committment was issued by the Magistrate which recites as follows :

"Whereas Harry Knight of the township of Gosfield was this day charged before me, the undersigned, Police Magistrate * * * for that he the said Harry Knight at the township of Gosfield South * * * * on the ninth day of October, 1914, and for some time previous did neglect care of his children, on

complaint of Wm. Hackney, Inspector, contrary to the form of the Statute in such case made and provided, and the said Harry Knight consenting to my deciding upon the charge summarily, and the said Harry Knight being convicted by me, it was thereby adjudged that the said Harry Knight for his offence shall be taken to the Common Gaol at Sandwich, in the said County of Essex, and from thence taken to the Central Prison of the Province of Ontario at Toronto, and there to be imprisoned and kept at hard labor for the space of one year, sentence being suspended until present date. These are therefor to command you'' etc.

This warrant erroneously states that the accused was charged before the Magistrate on its date, namely, the 26th September, 1916, the correct date being the 9th October, 1914, and it is also inaccurate in stating that the charge was that ''on the 9th October, 1914, and for some time previous he did neglect care of his children,'' the charge in the information being that it was ''on the 8th day of October and previous divers dates'' that he ''did unlawfully and wilfully neglect'' them.

Upon this warrant the accused was arrested and incarcerated in the gaol at the town of Sandwich in the County of Essex. He applied for and obtained on the 31st October, 1916, a writ of *habeas corpus*, and on this motion for the discharge of the accused from custody, it is attempted to be shewn by affidavits filed on his behalf that he is not the father of the children and that he was not aware in October, 1914, that he was being tried for anything other than a charge of drunkenness or at that time heard or knew of the alleged conviction in question or that in fact he had been guilty of neglecting the children.

Numerous grounds were urged as follows: that no useful purpose could now be served by enforcing the conviction even if lawfully made, that if the minute endorsed on the information is to be looked to as the basis of the warrant to commit then it was a case of conviction and suspended sentence, that the accused was never subsequently brought forward for sentence, that there is no record in the proceedings anterior to the warrant to commit to shew that the accused was ever asked to elect if he would submit to a summary trial, that there was not sufficient evidence that the children in question were his children, that the charge in the information does not specify the

section of the Code or other criminal or penal enactment under which it was laid, that the warrant of conviction states that he was charged for that he on the 9th October, 1914, and for some time previous, did neglect care of his children, when in fact it was on that day he was tried for the alleged offence, and the information stated that the offence had occurred on the 8th October and previous divers dates, that if there was a conviction the sentence imposed of one year had lapsed before the warrant was issued or the accused taken into custody thereunder, that the charge as laid in the information is uncertain and may have been laid under section 242 A. of the Code or under The Children's Protection Act, R. S. O. ch. 231, sec. 15.

It was also attempted to be shewn by the affidavits already referred to that it was only when the accused was being tried upon another criminal charge before the Senior Judge of the County of Essex, on which he was found not guilty, that being then in Court the warrant in question was produced, he was taken into custody thereunder and committed to gaol.

It was stated by counsel for the Crown that in the case before him the Senior Judge of the County of Essex did not find the accused not guilty of the pending charge but committed him for trial.

A letter was produced from the Police Magistrate with a view to shew that the accused was well aware of his conviction and had sought an extension of the period of 30 days for which sentence had been suspended.

This motion is necessarily, to some extent, a technical one, and it may well be that I cannot properly read or consider anything but the proceedings which indicate the reason of the detention of the accused and the sufficiency of his commitment.

I am of opinion that the information may be considered to have been laid under sec. 242 A. of the Code and that the evidence adduced at the trial before the Magistrate was sufficient to warrant a conviction.

I am unable, however, to find among the proceedings forwarded by the Magistrate any conviction on which the warrant of commitment could properly be based, and on this ground alone I am of opinion that the accused should be released from custody.

It was argued on behalf of the Crown that the accused was convicted and sentenced at the time of the conviction but given

a month to do certain things, that no warrant of commitment was issued for a long time and in the meantime he was out on irregular bail or illegally out.

The memorandum of the alleged conviction construed strictly seems to mean that if the accused did dispose of his property, move out of the community and undertake to deliver the children in question to John Dodge for care within thirty days the sentence alleged to have been imposed of one year in the Central Prison with hard labour would not be enforced. I do not think the Magistrate had any power to enter into such an arrangement or stipulation with the accused person or that such a disposition of the matter could be considered in any way as an effective conviction. It almost looks as though it were looked upon as more important to get rid of the accused from the community than convict and punish him for an alleged infraction of the law.

It is contended on the part of the accused also that any power of the Magistrate to suspend the sentence in question if it existed at all, would be under sec. 1081 of the Code, in which it is provided that under conditions therein set out "the Court may instead of sentencing" the accused "at once to any punishment direct that he be released on his entering into a recognizance, with or without sureties, and during such period as the Court directs to appear and receive judgment when called upon, and in the meantime to keep the peace and be of good behavior."

If the suspension of sentence can be considered as having been made under this section then the Magistrate had not called upon the accused to appear and receive judgment and the warrant to commit was prematurely and improper issued.

Reference to *The King* v. *Siteman* (1902), 6 C. C. C. 224; *The King* v. *Taylor* (1906), 12 C. C. C. 244; *Rex* v. *Robinson* (1907), 14 O. L. R. 519; *Robinson* v. *Morris* (1909), 19 O. L. R. 633; *The King* v. *Harris* (1911), 18 C. C. C. 392; *Rex* v. *Chitnita* (1914), 22 C. C. C. 344.

I therefore make an order that the accused be released from custody, and it will contain a clause protecting the Magistrate.

COUNTY COURT OF THE COUNTY OF SIMCOE.

VANCE, Co.C.J. JULY 31ST, 1916.

RE LAKE SIMCOE HOTEL CO. AND TOWN OF BARRIE. RE TUCK AND TOWN OF BARRIE.

Assessment and Taxes—Assessment Act, R.S.O. 1914 ch. 195, sec. 69 (16)—Value of Lands for Assessment Purposes—Uniformity in Assessment.

Appeals by the hotel company and A. J. Tuck from decisions of the Court of Revision of the Town of Barrie confirming the respective assessments of the appellants in respect of adjoining properties in the town.

D. Stewart, for the appellants.
W. A. Boys, K.C., for the town corporation.

VANCE, Co.C.J., in a written judgment, pointed out the difficulty of arriving at the value of lands for assessment purposes. The proper guide, he said, was to be found in sec. 69 (16) of the Assessment Act, R.S.O. 1914 ch. 195, providing that "the Court may, in determining the value at which any land shall be assessed, have reference to the value at which similar land in the vicinity is assessed." In this case the lands were assessed at $100 a foot frontage; there had been no sale of similar lands in Barrie; the assessment of the hotel property was at $13,200 and that of the Tuck property at $2,200. Value alone is to be considered, as urged by the appellants' counsel, but the assessment should be equitable and fair, and there should be uniformity. Looking at the values put on the different properties on each side of the street in the block of which the two properties form part, the assessments made and confirmed were equitable and fair, and the appeals should be dismissed.

COUNTY COURT OF THE COUNTY OF ESSEX.

DROMGOLE, CO. C. J.

AUGUST 4TH, 1916

RE WALKERVILLE ASSESSMENT APPEALS.

Assessment and Taxes—Appeal to Court of Revision—Status of Assessor as Appellant—Jurisdiction of Court of Revision—Appeal to County Court Judge—Remedy by Prohibition—Assessment Act, R.S.O. 1914 ch. 195, sec. 69 (1), (3), (5), (19), (21)—Further Appeal—Assessment Amendment Act, 6 Geo. V. ch. 41, sec. 6—Stated Case.

Appeals by the Essex Terminal Railway Company and others to the Judge of the County Court from decisions of the Court of Revision of the Town of Walkerville, whereby the appellants' assessments, as originally set down in the roll returned by the assessor to the clerk, were increased. These decisions were given at the complaint of the assessor himself, upon the ground that the appellants' properties were assessed too low.

A. R. Bartlet, for the appellants the Sandwich Windsor and Amherstburg Railway.

J. H. Coburn, for the other appellants.

John Sale, for the town corporation.

DROMGOLE, CO. C.J., in a written judgment, said that the objection was taken before him and before the Court of Revision that the assessor had no status as appellant or respondent upon an appeal to the Court of Revision; and, therefore, the Court of Revision was without jurisdiction: sec. 69 (1), (3) (5) of the Assessment Act, R.S.O. 1914 ch. 195; *Re British Mortgage Loan Co.* (1898), 29 O.R. 641. Counsel for the municipality contended that the case cited was no longer an authority because of the amendment of sec. 75 of the Assessment Act, R.S.O. 1897 ch. 224—sec. 72 (1) of the present Act expressly gives to the assessor a right of appeal from the decision of the Court of Revision to the County Court Judge. But (the learned Judge said) the Legislature, while amending sec. 75, had not seen fit materially to amend sec. 71 (substantially contained in sec. 69 of the present Act); and he considered that he was bound by the case cited to hold that the assessor had no *locus standi* in the Court of Revision.

Counsel for the municipality further contended that under sec. 69 (21) of the present Act, where a complaint has been made to the Court of Revision by any person entitled to complain under sec. 69 (1) or (3) (in this case complaints were made to the Court of Revision by other persons assessed), the Court of Revision, or the County Court Judge on appeal, has jurisdiction to reopen and adjust the assessments of other persons assessed who may not be before the Court or Judge, so that the accurate amount of the assessment of such other persons may be ascertained and placed in the assessment roll.

As to this contention, the learned Judge said, clauses (19) and (21) must be held to apply only to palpable errors, unless an error involves an alteration of assessed values, and in that case provision is made for adjourning the Court and giving notice to the parties affected. That course was not taken in this case by the Court of Revision. If effect were given to this contention, it must be held that clause (21) permits of an increase of assessment, though it may involve the decision of a question of fact as to value or perhaps a question as to the principle of assessment or the construction of the statute by the Court of Revision or the Judge, without notice to or hearing the parties to be affected thereby—an arbitrary power which the Legislature could not have intended to confer.

On all grounds, there was no complaint before the Court of Revision, under any of the clauses, (1), (3), or (19), of sec. 69, upon which any increase in the assessments in question could be made.

The appeals should be allowed, the decisions of the Court of Revision set aside, and the assessments restored to the amounts originally set down in the assessment roll.

Quaere, as to the jurisdiction of the Judge—whether the appellants' remedy was not by prohibition to the Court of Revision.

In view of the wide right of appeal provided in the Assessment Amendment Act, 1916, 6 Geo. V. ch. 41, sec. 6, the learned Judge professed his willingness to state a case for an appeal to a Divisional Court.

STIRTON v. DYER.

Costs — Partnership Action — Incidence of Costs — Contribution—Interlocutory Costs—Trustee—Misconduct—Parties.

Motion by the plaintiff for judgment on a Master's report in a partnership action. See *Stirton* v. *Dyer* (1916) 10 O.W.N. 393.

The motion was heard in the Weekly Court at Toronto.

R. G. Fisher, for the plaintiff.
Sir George Gibbons, K.C., for the defendant Dyer.
E. C. Cattanach, for the defendant Coles.

MIDDLETON, J.—Having regard to the nature of the action and the result of the litigation with regard to the issues, I do not think I should make a general award of costs in the plaintiff's favour nor that I should direct contribution as suggested by Sir George Gibbons. Any principle of apportionment by the taxing officer would be difficult to work out. So I cut the knot by directing judgment for the amount agreed on in the plaintiff''s favour as against Dyer, with costs fixed at $350.

If, as said in an affidavit filed, Dyer has any costs payable to him under any interlocutory order such costs will be deducted from the amount fixed or may be credited on the judgment when they are taxed.

So far as Cole is concerned—misconduct as a trustee in refusing to account before action has been found by the Master and I think he should not receive costs, nor should costs be awarded against him. Had he accounted before action he could have paid the money in his hands into Court and he need not have been a party to the controversy between *Stirton* and *Dyer*.

SUTHERLAND, J. (CHAMBERS.) 25TH SEPTEMBER, 1916.

HALSTED v. PRIESTMAN.

Mortgage—Action upon—Motion for Summary Judgment—Dispute as to Amount Due—Judgment Directing Account to be Taken—Notice of Assignment of Mortgage—Stay of Proceedings — Mortgagors and Purchasers Relief Act, 1915 — Rule 760.

Appeal by the defendants from an order dated 7th July, 1916, made by the Master-in-Ordinary, sitting for the Master-in-Chambers, upon a motion under Rule 760 for Summary Judgment in a mortgage action.

By the said order it was directed that the affidavit of Margaret Priestman, filed with her appearance, be struck out and an account taken of the amount owing for principal and interest under the mortgage in the action as if "no affidavit of merit had been filed," and that if it were ascertained that any principal or interest were in arrear at the date of the issue of the writ, the plaintiff should be allowed to enter judgment therefor with costs.

Harcourt Ferguson, for the defendants, appellants.
F. J. Hughes, for the plaintiff, respondent.

SUTHERLAND, J.—The appeal is on a number of points urged before the Master, and on the ground particularly that no notice of the assignment in question had been given to the defendants; and alternatively relief is asked under the Mortgagees and Purchasers Relief Act, 1915.

It was plain, I think, from the material before the Master that no substantial defence to the motion for judgment had been shewn and that the defendants were in reality only disputing the amount due. On this motion the further affidavit filed on behalf of the defendants themselves makes it plain they had notice of the assignment to the plaintiffs and had been treating them as the proper assignees of the mortgage by making payments to them on account of interest.

The further facts set out in said second affidavit are not, in my opinion, sufficient in the circumstances of this case to

enable the defendants to properly ask for a stay of proceedings under the Act. I think the order of the Master was substantially right and that the motion must be dismissed. Costs thereof to be costs in the cause.

Appeal dismissed.

SUTHERLAND, J. (CHAMBERS.) 25TH SEPTEMBER, 1916.

RE WEST NISSOURI CONTINUATION SCHOOL.

Schools—Public Schools—Continuation School — Vacancies in Board—Duty of Township Council to Fill—Mandamus.

An application by Walter C. Bryan, Joseph Cunningham and W. B. Harding, for an order for a mandamus to issue to compel the municipal council of the township of West Nissouri in the County of Middlesex to fill existing vacancies in the West Nissouri School Board.

W. R. Meredith, for the applicants.
George S. Gibbons, for the School Board.

SUTHERLAND, J.—Without canvassing in detail the somewhat complicated facts in this much litigated matter, I am compelled to the conclusion that the township council should forthwith appoint new trustees of the school board in question so as to enable that Board, when thus completed, to deal with the present urgent situation existing as to the continuation school in question.

Unless, therefore, by Monday next, the 2nd October, the said township council for the township of West Nissouri so fill the vacancies in the said Board by the election of new trustees, the order will go as asked. I will make no disposition of the costs of the motion until after the date named.

Appellate Division, S. C. O. 4TH OCTOBER, 1916.

MORRIS v. MORRIS.

Contract—Agreement as to Land by Tenants in Common — Intention to Sell—Judgment for Partition or Sale—Postponement of Proceedings under, until Expiry of Period Mentioned in Agreement.

Apeal by the plaintiffs from a judgment of Middleton, J., 10 O.W.N. 287.

The appeal was heard by Meredith, C.J.C.P. Riddell, Lennox, and Masten, JJ.

H. E. Rose, K.C., and *G. H. Pettit*, for the appellants.
W. N. Tilley, K.C., for the defendants, respondents.

THEIR LORDSHIPS, (v. v.) allowed the appeal with costs, and struck paragraph 6 out of the judgment.

RIDDELL, J. (CHAMBERS.) 4TH OCTOBER, 1916.

REX v. PYBURN.

Criminal Law — Application for Bail — Charge of Rape — Bail Refused.

An application for bail by a prisioner charged with rape.

B. H. Symmes, for the prisoner.
Edward Baly, K.C., for the Crown.

RIDDELL, J.—An application for bail in the case of a charge of rape. The charge is a peculiarly atrocious one: and there is no reason, in my view, why bail should be allowed—the prisoner can be tried in a few weeks.

The application is refused.

Bail refused.

FALCONBRIDGE, C.J.K.B. (TRIAL.) 10TH OCTOBER, 1916.

DISCEPOLO v. FORT WILLIAM.

Negligence — Collision between Street Car and Automobile — Motorist under Age of 18 Years—Evidence—Contributory Negligence—Ultimate Negligence—Colour of Paper Covers of Certified Copies of Pleadings.

Actions by father and son against the city to recover damages sustained by reason of a collision between defendants' street car and plaintiffs' automobile. Tried at Port Arthur.

M. J. Kenny, for the plaintiffs.
F. R. Morris, for the defendants.

FALCONBRIDGE, C. J. K. B.,—The plaintiff "Mike" was driving his father's motor vehicle. The father is the plaintiff "Angelo", and "Mike", who was driving with the permission of his father, was under the age of 18 years. This is contrary to the provisions of R. S. O. (1914) ch. 207, sec. 13.

It is contended that the boy was *ipso facto* an unlawful, incompetent and negligent driver. However this may be, the evidence of independent witnesses is overwhelmingly in favour of defendants on all the issues. Their statements were clear-cut, apart from the testimony of the motorman. I do not think any case of "ultimate negligence" was established against him.

Actons dismissed with costs. Twenty days' stay.

Memo. The "endorsements" of the Records are written at the head of the pleadings. It is perfectly ridiculous to use *black* paper for the covers of certified copies of pleadings and in the future the Register will refuse to certify records covered with *black* paper.

Action dismissed with cost.

APPELLATE DIVISION, S. C. O. 12TH OCTOBER, 1916.

LAURIN v. ST. JEAN.

Contract—Promise to Pay Money—Evidence—Forgery—Scheme to Defraud—Findings of Fact by Trial Judge—Appeal.

Appeal by the plaintiff from a judgment of Clute, J., 9 O. W. N. 411.

The appeal was heard by Meredith, C.J.O., Maclaren, Magee, and Hodgins, JJ. A.

Gideon Grant, for the appellant.
M. K. Cowan, K. C., for the defendant, respondent.

THEIR LORDSHIPS, (v.v.) dismissed the appeal with costs.

APPELLATE DIVISION, S. C. O. 18TH OCTOBER, 1916

COOPER v. ABRAMOVITZ

Mortgage — Foreclosure — Oral Agreement not to Take Proceedings under Mortgage—Required to be in Writing.

Appeal by the defendant, Gussie Gross, from an order of Latchford, J., in Chambers, affirming an order of the Master-in-Chambers for summary judgment in an action for foreclosure of a mortgage, 27 O. W. R. 71.

The appeal was heard by Meredith, C. J. C. P., Riddell, Latchford and Masten, JJ.

W. J. McLarty, for the appellant.
S. M. Mehr, for the plaintiff, respondent.

THEIR LORDSHIPS, (v.v.) allowed the appeal and set the order aside in so far as it permitted the plaintiff to have judgment for possession against the appellant. The parties to go to trial on the question of tenancy if they choose to do so. The appellant to have the costs of the appeals in Chambers and in this Court against the plaintiff. If there are any costs against the appellant, they are to be set off.

Appeal allowed.

APPELLATE DIVISION, S. C. O. 27TH SEPTEMBER, 1916

WAY v. SHAW.

Evidence — Action by Personal Repres entative to Set aside Mortgage—Made by Deceased Person—Denial of Signature of Subscribing Witness—Conflict of Evidence—Finding of Fact by Trial Judge—Appeal—Mortgage Account.

Appeal by the plaintiffs from a judgment of Britton, J., 10 O.W.N. 124.

The appeal was heard by Garrow, Maclaren, Magee, and Hodgins, JJ.A.

H. J. Scott, K.C., and *E. Gus Porter, K.C.*, for the appellants.

W. C. Mikel, K.C., and *A. B. Collins*, for the defendant, respondent.

HODGINS, J.A.—It is impossible to finish the consideration of this case, assisted by the able arguments of counsel, without being impressed by the want, in almost every specific instance where doubt arises, of those corroborative surroundings which it would be natural to expect.

Were it not that the matters in question have been passed upon by an experienced Judge and that to reverse his opinion would be in fact to pronounce the respondent guilty of forgery and perjury, without the opportunity of judging him by his demeanour and bearing, I would have considerable doubt as to whether the conclusion arrived at was one which this Court should adopt.

But suspicion is not proof and it is almost impossible, where the issues raised involve the moral character of the actors in the transaction, and where they have given essential evidence which the Judge has accepted, to refuse to give effect to his view.

These considerations do not go far enough, however, to require us to hold that in giving judgment for the defendant he took the mortgage account. There are four items in it, which were necessarily discussed in the endeavor to discredit the respondent's whole story. One was an advance made when the mortgage was said to be executed, and as to it there is only the evidence of the respondent. The three others are, in a meas-

ure, corroborated if the receipt is proved, because it shews that notes for these sums were then given up. But one of them depends in the end on the sole evidence of the respondent, who alleges a payment to an estate on behalf of the deceased mort gagor, which is not shewn to have been made. The third payment is money advanced, it is said, for the specific purpose of removing an incumbrance, which is not paid off.

While, therefore, the judgment will have to stand affirmed, I think the respondent must prove his mortgage account, and that for that purpose the judgment must be varied to provide for the reference to ascertain the amount advanced upon and due under the mortgage actions, to the Master at Belleville, and to take the mortgage account. In this respect the judgment appealed from is not to be regarded either as *prima facie* or conclusive evidence.

No costs of appeal.

GARROW, J.A., died on the 31st August, 1916, while the appeal was standing for judgment; he had, however, expressed his concurrence in the judgment as about to be delivered.

MACLAREN, J.A.—I agree.

MAGEE, J.A.—I agree.

APPELLATE DIVISION, S. C. O. 8TH SEPTEMBER, 1916.

SEAGRAM v. HALBERSTADT.

Trusts and Trustees—Conveyance of Land—Alleged Trust for Execution Debtor—Action by Execution Creditors for Declaration — Evidence — Bona Fide Sale for Value — Findings of Fact of Trial Judge—Appeal.

Appeal by the plaintiffs from the judgment of Sutherland, J., 10 O.W.N. 308.

The appeal was heard by Meredith, C.J.O. Maclaren, Magee, and Hodgins, JJ.A.

W. S. MacBrayne, for the appellants.

J. L. Counsell, for the defendants, respondents.

THEIR LORDSHIPS, (v. v.) dismissed the appeal with costs.

APPELLATE DIVISION, S. C. O. 18TH OCTOBER, 1916

STOTHERS v. BORROWMAN

Mortgage—Payment — Second Mortgage — Priority — Master's Report—Appeal.

An appeal by the plaintiff from an order of Latchford, J., in the Weekly Court, 10 O.W.N. 367, dismissing an appeal by the plaintiff from the report of a Local Master allowing a payment of $208.65 made on a first mortgage in priority to the plaintiff's second mortgage.

The appeal was heard by Meredith, C.J.C.P., Riddell, Lennox, and Masten, JJ.

P. H. Bartlett, for the appellant.
R. G. Fisher, for the defendant, respondent.

THEIR LORDSHIPS, (v.v.) dismissed the appeal with costs.

APPELLATE DIVISION, S. C. O. 19TH OCTOBER, 1916.

AGNEW v. EAST

Payment—Claim for Price of Goods Sold and Delivered—Payment by Promissory Notes and Assignment of Mechanic's Lien—Destruction by Fire of Building on Land Covered by Lien—Application of Insurance Moneys — Mechanics and Wage-Earners Lien Act, R.S.O. 1914 ch. 140, sec. 9.

Appeal by the plaintiff from the judgment of Sutherland, J., 10 O.W.N. 428.

The appeal was heard by Meredith, C. J. C. P., Riddell, Lennox, and Masten, JJ.

Frank Denton, K.C., for the appellant.
R. T. Harding, for the defendants, respondents.

THEIR LORDSHIPS, (v.v.) dismissed the appeal with costs.

FALCONBRIDGE, C.J.K.B. (TRIAL.) 21ST OCTOBER, 1916

WAKE v. SMITH

Vendor and Purchaser—Exchange of Lands—Fraud and Misrepresentation—Deficiency in Acreage — Value of Standing Timber—Opportunity of Inspection—Husband Agent for Wife.

Action to recover damages for false representations whereby the plaintiff was induced to exchange his farm for the defendants' farm. Plaintiff alleged that the defendants misrepresented their farm. Tried at Woodstock.

S. G. McKay, K. C. for the plaintiff.
J. Marshall, for the defendants.

FALCONBRIDGE, C. J. K. B.—Defendants are admittedly liable for the deficiency in acreage. I adopt the acreage of Mr. Farncombe, viz., 148 and nine-tenths acres. The farm was represented as containing 175 acres, therefore, there is a deficiency of 26 and one-tenth acres. Plaintiff says it ought to be allowed at $60 per acre, the defendants say $40. I allow it at $50 per acre, or $1,305.

The evidence is overwhelming, and I find, that defendant George (whose position as agent of his wife is admitted) represented that there were $1,500 to $2,000 worth of standing timber. $500 is the outside value of it either as timber or wood. And this George Smith must have known, and I find that he did know when he made the representations.

Damages on this head I allow at $1,000.

The same remarks apply to the general representation that the farm was well kept up and in good condition.

And for this I allow $500.00.

As regards other representations, plaintiff had the opportunity of inspection and should have detected the deficiencies, e. g., condition of fences and buildings, etc.

Judgment for plaintiff for $2,805.00 and costs. Fifteen days' stay.

Judgment for plaintiff.

APPELLATE DIVISION, S. C. O. 28TH SEPTEMBER, 1916.

HAY v. GREEN.

Contract—Formation—Sale of Goods—Correspondence — Failure to Shew Consensus ad Idem.

An appeal by the defendant from the judgment of the County Court of the County of Kent in favour of the plaintiff in an action brought to recover damages for the breach of an alleged contract for the sale of oats.

The appeal was heard by Meredith, C.J.O., Maclaren, Magee, and Hodgins, JJ.A.

M. K. Cowan, K.C., and *A. R. Bartlet*, for the appellant.
R. L. Brackin, for the plaintiffs, respondents.

MEREDITH, C.J.O., delivering the judgment of the Court, said that the question turned entirely upon the effect of three letters. The first was from the respondents to the appellant, dated the 21st January, 1916, in which reference was made to the fact that a Mr. Hope, who was in their employment, had brought in a sample of oats, and that the appellant had two large cars at Windsor. The letter went on to state: "We would take these oats from you at 41c. track Windsor, shipment to New York for export shipment to be made just as soon as any trunk line will take oats to New York for export. We are told the embargo will be lifted almost every day, but have been told this for two weeks, and it still seems to be as tight as ever. If you accept, please advise us, and we will send you shipping instructions that can be used just as soon as the embargo lifts."

The appellant in his answer, on the 24th January, spoke of the oats as being 3,000 bushels on the Grand Trunk at Belle River, "like the sample you have." Then he mentioned that there was a smell of must on the oats, and that they would not be better than the sample, but would be as good, and that he would book them to the respondents, provided that he was able to get cars to move them out within a reasonable time. He then spoke about the embargo which prevented the shipment of the oats to New York.

On the 25th January, the respondents replied acknowledging the receipt of the appellant's letter and said that they did

not expect a better grade than "rejected," and instructed the appellant to ship to New York for export to Liverpool, and that if the railway company required a foreign consignee it would be the Shipton Anderson Company, and adding: "At present none of the railways are taking bulk grain for export to New York, but we are advised that the embargo which has been in effect for over a month will be lifted on Monday. You will have to try and pick up enough oats to make two cars of 54,000 lbs. each, and see that you get only cars of 30 tons capacity of 60,000 lbs, each, because the minimum for a car of oats for export in a thirty-ton car is ten per cent. of the market capacity of 54,000 lbs., but if the car is otherwise there will be a dead freight."

There was a postscript to this letter in which it was said that ,if the embargo were not lifted in a little while so that the oats could be shipped—and it was important to the appellant that they should be shipped in order that he might get his money—he was to let them know, and they would make some further proposition and arrange with him.

This correspondence, as contended by Mr. Cowan, shewed that the respondents' proposition was to enter into a contract which would oblige the appellant to hold the oats until the embargo was lifted. On the other hand, the appellant's proposition was that he should hold them for a reasonable time. There was no *consensus ad idem*, and therefore no contract.

The appeal should be allowed with costs and the action dismissed with costs.

Appeal allowed.

BRITTON, J. (TRIAL.) 16TH NOVEMBER, 1916.

MOONEY v. McCUAIG.

Vendor and Purchaser—Agreement for Sale of Land—Authority of Agent of Vendor—Ratification—Specific Performance—Reference—Costs.

Action by the purchaser for specific performance of a contract for the sale and purchase of land. Tried without a jury at L'Orignal.

W. S. Hall, for the plaintiff.
John Maxwell, for the defendant.

BRITTON, J.—The defendant was the owner of freehold property in the village of Vankleek Hill, which he was anxious to sell. The defendant's agent for collecting rent and generally acting for the defendant was one Cheaney, but the defendant advertised the property and referred intending purchasers to himself. The defendant fixed his price at $3,500, and said in substance "first come, first served." A considerable correspondence took place between the defendant and Cheaney in regard to the sale; the agent Cheaney keeping defendant informed of the various offers. At length an offer came from the plaintiff of $3,500, the price at which the defendant had said he would sell, and then Cheaney closed with the plaintiff, and a written contract was drawn up by plaintiff's solicitor between the parties, the plaintiff and defendant—Cheaney acting as agent for defendant—and so stating it in the agreement.

Of course it does not follow that the appointment of Cheaney as agent for collecting rent or for negotiating a sale constitutes agency for this sale, but Cheaney was more. The correspondence and interviews between defendant and Cheaney, in my opinion, make out a case of agency on the part of Cheaney for the sale as afterwards made.

Then, upon the defendant being informed of the sale Cheaney had made he ratified and confirmed it by letter written by himself, in clear and unmistakable terms, as follows: "Glad you sold it to Dr. Mooney. It is worth more to him than anyone. It is cheap. Send on the papers."

That was identification of the purchaser, the property sold, and price of same.

This was before any higher offer had been made. No collusion is suggested as between the agent and purchaser, no fraud; apparently the utmost good faith was practised.

Then, the defendant kept the money paid on account of the purchase. By the agreement $300 was to be paid down. The defendant wanted money. The plaintiff paid an extra sum of $200 on account, making $500 in all, which the defendant retained and still retains.

After the payment to him an offer higher by $100 was made; a so-called tender of $500 was made to plaintiff. This offer, no doubt authorised by defendant was by another who desired to purchase and to push plaintiff out of the way. This money has not been paid into Court and defendant still retains it. It is, I think, apparent that this defence is rather for another purchaser than for the defendant, who at most is interested to the extent of $100.

I find that Cheaney was agent by appointment and that his action in selling the defendant's land to plaintiff was ratified and confirmed by defendant.

A tender of conveyance was made by the plaintiff. As the defendant disputed plaintiff's right to recover by disputing the agency of Cheaney, a tender of conveyance was not necessary. If necessary, I am of opinion that it was a valid tender.

Judgment will be for the plaintiff against the defendant, declaring that the agreement in question is valid, and that same was authorized by the defendant, and for specific performance of that agreement. There will be a reference to the local Master at Ottawa for the purpose of determining title and as to rents and profits received by defendant since the sale, and as to interest both on the $500 received and retained by the defendant and on balance of purchase money owed by the plaintiff. The reference will be in terms usual in specific performance actions where plaintiff succeeds.

The defendant must pay costs of action and reference; these costs, if not otherwise paid, to be deducted from purchase money.

Twenty day's stay.

Judgment for plaintiff.

BOYD, C. 21ST OCTOBER, 1916.

RE BROOM.

Justices of the Peace and Magistrates — Jurisdiction — Petty Trespass Act. R.S.O. (1914) c. 111, s. 2.

An application by one Broom to prohibit the Toronto Police Court from proceeding in a charge that the applicant did, contrary to law, trespass upon the premises of Mrs. McIntyre.

Applicant in person, for the motion.

No one contra.

BOYD, C.—An application to prohibit proceedings in the Police Court on a charge that the applicant did, contrary to law, trespass upon the premises of Mrs. McIntyre.

This charge appears to be based upon the Petty Trespass Act, R.S.O. (1914) ch. 111, sec. 2, and one over which the Police Magistrate has jurisdiction. This is the sole question before me and there is no ground for interfering with him for want of jurisdiction

No order.

BOYD, C. (WEEKLY COURT.) 23RD OCTOBER, 1916.

RE SOVEREIGN BANK OF CANADA. BARNES'S CASE.

Bank — Winding-up — Contributory — Gift of Shares to Infant—Repudiation by Infant at Majority—Ratification by Court—Reversion to Donor—Liability as Contributory.

Appeal by Barnes from an order of the Referee in a winding-up proceeding placing the appellant on the list of contributories.

The appeal was heard in the Weekly Court at Toronto.

A. C. McMaster, for the appellant.

J. W. Bain, K.C., and *M. L. Gordon*, for the liquidator.

BOYD, C.—The joint admission of facts states "that the daughter has repudiated her action in accepting said shares

upon the ground that she was an infant, and her repudiation has been upheld by the Court.

Upon this admission I base my judgment: the transfer of shares to the daughter from the father by way of gift while yet an infant was not voidable but it was capable of being avoided by her dissent and repudiation. She did validly and effectually repudiate the shares: her title thereto ceased of necessary consequence reverted to the donor, her father, whose gift has failed by the repudiation of the beneficiary and ratified by the judgment and order of the Court.

This judgment still stands, and I must regard it as final, not being appealed from. The appeal is dismissed with costs.

Appeal dismissed.

APPELLATE DIVISION, S. C. O. 25TH OCTOBER, 1916.

COTTON v. ONTARIO MOTOR CO.

Nuisance—Injunction—Temporary Suspension—Damages.

Appeal by the defendants from the judgment of Masten, J., at the trial, awarding the plaintiff an injunction to restrain the appellants from carrying on their business at night, as they had been carrying it on, in the manufacture of munitions for the Imperial Munitions Board.

The appeal was heard by Meredith, C.J.O., Maclaren, Magee, and Hodgins, JJ.A.

R. B. Henderson and *C. C. Robinson*, for the appellants.

A. C. McMaster and *J. H. Fraser*, for the plaintiff, respondent.

Their Lordships' judgment was, at the close of the hearing, delivered by

MEREDITH, C.J.O.—He said that the defendants, or one of them, had a contract with the Munitions Board for the supply of a large quantity of an appliance which formed part of a shell, and it also appeared that it was very important that these articles should be produced with as great rapidity as possible.

The case that the appellants' counsel attempted to make out, and which the learned Chief Justice did not think was

made out, was that the matter was of so great importance that damages alone should be the remedy awarded to the respondent. In the circumstances of the case, having regard to the urgent need of a supply of these munitions, and the temporary character of the business, the proper course was to suspend the operation of the injunction for six months, which would be probably long enough to enable the appellants to complete their present contract.

The respondent would, of course, be entitled to damages for the injury which he had sustained, or would sustain during that period.

There should be liberty to the appellants, at the expiration of the six months, to apply for a further suspension of the injunction.

The costs of the appeal should be paid by the appellants.

There should be a reference as to damages to the Master in Ordinary.

APPELLATE DIVISION, S. C. O. 25TH OCTOBER, 1916.

PEPPIATT v. REEDER.

Damages—Deceit—Measure of Damages—Method of Estimating—Master's Report—Appeal—Reference back—Costs.

Appeal by the plaintiff from the order of Riddell, J., 10 O.W.N. 263.

The appeal was heard by Meredith, C.J.O., Maclaren, Magee, and Hodgins, JJ.A.

Edward Meek, K.C., for the appellant.
J. J. Gray, for the defendant, respondent.

THEIR LORDSHIPS, (v. v.) allowed the appeal and limited the scope of the reference back to the Master. No costs of the appeal to either party.

APPELLATE DIVISION, S. C. O. 31ST OCTOBER, 1916.

WIGLE v. HUFFMAN.

Will — Annuity — Arrears — Dower — Money Lent — Funeral Expenses—Administration.

Appeal by the defendant Randolph Huffman from the judgment of Kelly, J., 10 O.W.N. 431; and appeal by the plaintiffs from the same judgment in so far as it dismissed the action as against the defendant William Huffman.

The appeals were heard by Meredith, C.J.C.P., Riddell, Middleton and Masten, JJ.

J. Sale, for the defendants.
F. D. Davis, for the plaintiffs.

THEIR LORDSHIPS, (v. v.) dismissed the appeal with costs.

APPELLATE DIVISION, S. C. O. 31ST OCTOBER, 1916.

POWERS & SON v. HATFIELD & SCOTT.

Contract—Sale of Goods—Formation of Contract from Correspondence—Acceptance of Offer—Absence of Ambiguity—Breach by Failure of Vendor to Deliver Goods—Abandonment — Rise in Market-price — Failure to Prove Damage —Time of Breach.

Appeal by the plaintiffs from a judgment of Middleton, J., 10 O.W.N. 198.

The appeal was heard by Meredith, C.J.C.P., Clute, Riddell, and Masten, JJ.

E. Gus Porter, K.C., for the appellants.
G. H. Kilmer, K.C., for the defendants, respondents.

THEIR LORDSHIPS, (v. v.) dismissed the appeal with costs.

APPELLATE DIVISION, S. C. O. 2ND NOVEMBER, 1916.

JESSOP v. CADWELL SAND AND GRAVEL CO.

Land—Injury to, by Operations on Neighbouring Land—Water Lots—Assessment of Damages.

Appeal by the defendants from the judgment of Kelly, J., 10 O.W.N. 392.

The appeal was heard by Meredith, C.J.C.P., Riddell, Middleton, and Masten, JJ.

J. H. Rodd, for the appellants.
T. Mercer Morton, for the plaintiff, respondent.

THEIR LORDSHIPS, (v. v.) dismissed the appeal with costs.

APPELLATE DIVISION, S. C. O. 3RD NOVEMBER, 1916.

LAHEY v. QUEENSTON QUARRY CO.

Fixtures—Sale of Land—Articles not Affixed to Freehold—Evidence—Intention— Money Paid into Court—Costs.

Appeal by the plaintiff from the following judgment of Falconbridge, C.J.K.B., dismissing their action to recover possession of certain chattels alleged to have been wrongfully removed by the defendants from a gravel-pit sold by them in April, 1914, or to recover the value of the chattels, and for damages.

The action was tried without a jury at St. Catharines.

Gideon Grant and *H. F. Upper*, for the plaintiff.
A. C. Kingstone and *F. E. Hetherington*, for the defendants.

FALCONBRIDGE, C.J.K.B., (16th September)—The chattels mentioned in paragraph one of the prayer of the statement of claim are the only ones now in dispute. As to the other matters they were either abandoned or sufficient money has been paid into Court to cover them.

I call them chattels because I find that they never became part of the land and did not pass under the conveyance to Kasting.

As far as any evidence of intention could affect the case I accept the testimony of C. Lowry, W. A. Pew and R. Lowry as to the conversation in Mr. McBurney's office following on Perry's question "Did you get the derrick?"

Frank Stewart, an apparently independent and credible witness, says that Perry told him the derrick was rented from Lowry.

Whether observed or recognised by Kasting and his agents or not, the item of rental of the derrick appears frequently in the accounts rendered by defendants.

Plaintiff fails both on the law and the facts.

Action dismissed with costs. Defendants may take the money out of Court and apply it *pro tanto* on their costs.

Fifteen days stay.

Plaintiff's appeal to the Appellate Division was heard by Meredith, C.J.C.P., Riddell, Middleton, and Masten, JJ. on 3rd November, 1916.

Gideon Grant, for the appellant.

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

THEIR LORDSHIPS, (v. v.) dismissed the appeal with costs.

APPELLATE DIVISION, S. C. O. 6TH NOVEMBER, 1916.

BENDER v. TORONTO GENERAL TRUSTS CORPORATION

Payment—Attempt to Establish Payment on Mortgage—Evidence Act, R.S.O. (1914) c. 76, s. 12—Corroboration.

Claim against estate of deceased: —Where it was sought to recover from the executors of a mortgagee the amount of a promissory note alleged to have been given and paid by mortgagor on account of the mortgage, and the evidence at trial shewed that the mortgagee had several thousand dollars invested in promissory notes, representing loans, *held*, that the giving of the note was as consistent with a specific loan as it was with payment on the mortgage, and the mortgagor had failed to satisfy the corroboration of his evidence required by the Evidence Act, R. S. O. (1914) c. 76, s. 12. On appeal additional evidence was allowed to be put in. This evidence shewed that at the time the note was given the mortgagee was overdrawn at his bank and that the note was discounted to cover the overdraft. *Held*, this evidence was sufficient to satisfy the Statute.

Appeal by the plaintiffs from a judgment of Falconbridge, C.J.K.B., 27 O.W.R. 32.

The appeal was heard by Meredith, C.J.O., Maclaren, Magee, and Hodgins, JJ.A. Additional evidence was allowed to be put in upon the appeal.

D. L. McCarthy, K.C., and *D. B. White*, for the appellants.

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

Their Lordships' judgment was, at the close of the hearing, delivered by

MEREDITH, C.J.O., who said that he was satisfied from communication he had with the Chief Justice of the King's Bench that, if the additional evidence which had come to hand since the trial had been before him, he would have come to a different conclusion, and would have held that there was corroboration of the testimony of the appellant Hiram Bender sufficient to satisfy the statute. All the members of the Appellate Court agreed in that view.

There were but three ways in which the note given by the appellant for $1,000 could be accounted for: it was a gift, or it was for an advance made by the deceased Lowell, or, as the appellant contended, a payment on account of the mortgage.

The bank-account had been produced, as well as the ledger, and they shewed that Lowell, at the time the note was given, was "hard up," and that his account was overdrawn.

He was in this position when, as the appellant testified, Lowell came to him and asked him for a payment of $1,000 on account of the mortgage. The appellant said that Lowell told him that his bank was pressing him for payment, and, in reply to Lowell's request, the appellant said that he could not let him have the money then, but that he had money coming in in three months, and that he would give him a note. A promissory note was accordingly given, and the books of the bank shewed that it was discounted.

In these circumstances, there was sufficient corroboration of the testimony of the appellant.

Having regard to all the circumstances, there should be no costs of the litigation to either party. The litigation was necessary on account of the failure of the appellant to obtain a receipt; although he was not strictly entitled to it, yet he would have received it had he asked for it.

This was not the case of a living person disputing the fact of a payment having been made, and the Court deciding against him. Lowell being dead, there was simply the appellant's side of the story; and a suit, therefore, had become necessary.

The only question was whether, in view of the position taken by the executors, the respondents, their costs ought not to be paid by the appellant; but upon the whole the proper disposition of the case seemed to be that there should be no costs of the case to either party.

APPELLATE DIVISION, S. C. O. 10TH NOVEMBER, 1916.

THORNE v. HODGSON.

Contract—Timber—Delivery not Made as Agreed—Deduction from Price—Quality of Timber—Inferiority—Counterclaim—Damages — Extinction of Plaintiff's Claim — Dismissal of Action—Costs—Appeal.

Appeal by the plaintiff from the judgment of Clute, J., 10 O. W. N. 461, dismissing the action without costs.

The appeal was heard by Meredith, C.J.O., Maclaren, Magee, and Hodgins, JJ.A.

A. R. Hassard, for the appellant.

No one appeared for the defendant, respondent.

THEIR LORDSHIPS, (v.v.) dismissed the appeal with costs.

FALCONBRIDGE, C. J. K. B. (CHAMBERS.) 13TH NOVEMBER, 1916

HELSDON v. BENNETT

Trial—Jury Notice—Venue—Rights of Plaintiff.

Motion by the defendant for an order striking out the jury notice and directing that the action be placed on the non-jury list for trial at Stratford on the 28th November, 1916.

W. C. Brown, for the defendant.

W. N. Tilley, K. C., for the plaintiff.

FALCONBRIDGE, C. J. K. B.—I must give plaintiff credit for having some confidence in the merits of his case and for a desire also to bring it on for trial as soon as it is safe for him to do so. He also has some right as to place of trial.

I am of opinion that defendant's motion for trial at Stratford ought not to prevail. And inasmuch as, if there should be separate sittings at Woodstock in spring for jury and non-jury cases, I direct that this case shall be entered for trial at the jury sittings, I refer the motion to strike out the jury notice to the trial Judge.

Costs of both motions (as in Chambers) to be costs in cause to successful party.

APPELLATE DIVISION, S. C. O. 10TH NOVEMBER, 1916.

RE CANADIAN MINERAL RUBBER CO. LIMITED.

Contract—Winding-up of Contracting Company—Moneys Payable to Company in Respect of Contract — Assignment to Bank—Claims of Wage-earners and Material-men—Priority —Construction of Contract.

Appeal by the Canadian Bank of Commerce from an order of Sutherland, J., in the Weekly Court, dismissing an appeal from a decision of the Master in Ordinary in a winding-up matter: 10 O.W.N. 456.

The appeal was heard by Meredith, C.J.O., Maclaren, Magee, and Hodgins, JJ.A.

Glyn Osler, for the appellants.
W. B. Raymond, for the respondents.

THEIR LORDSHIPS, (v. v.) dismissed the appeal with costs.

MASTEN, J. (CHAMBERS.) 21ST NOVEMBER, 1916.

BULMER v. BULMER.

Husband and Wife—Alimony—Pleading—Amendment of Statement of Claim.

Appeal by the plaintiff from an order of the Master-in-Chambers, striking out certain paragraphs of the Statement of Claim in an action for alimony.

T. N. Phalen, for the plaintiff.
T. R. Ferguson, for the defendant.

MASTEN, J.—Plaintiff asking leave to amend paragraph 15 of the statement of claim by alleging that she returned to her husband's house and now lives there under an agreement that such action shall not prejudice her claim to alimony, and undertaking forthwith to amend her pleading accordingly—paragraphs 14, 15 and 16 are restored and the appeal allowed to that extent. Paragraphs 5 to 13 inclusive remain deleted. Costs to the defendant.

Order varied.

LENNOX, J. (TRIAL.) 17TH NOVEMBER, 1916.

MYLAM v. RAT PORTAGE LUMBER CO. & FRASER.

Trespass—Timber—Claim for Conversion of—Damages—Evidence—Counterclaim.

Action to recover $4,000 damages for trespass to lands and for conversion of timber, etc., tried without a jury at Port Arthur.

J. T. McGillivray, for the plaintiff.
James A. Kenney, for the defendants.

LENNOX, J.—The plaintiff claims $4,000 for trespass on land and conversion of timber, etc. The defendants deny the plaintiff's title and dispute their liability; the defendant company brings into Court $236.72, and counter-claim to recover the sum of $225.00.

The plaintiff has established a cause of action. There is no certain measure of damages, but even with this admitted and the speculative character of the plaintiff's mining rights kept in mind, much of the evidence for the plaintiff, in addition to being rather hazy, was very exaggerated. The estimate of damages made by the plaintiff's chief witness and Canadian representative, J. S. Whiting, when he promoted an action for Mrs. Whiting some years ago, I think ought to steady me a bit as I follow the dizzy heights to which the figures mounted upon the trial of this action. It is impossible to entirely separate Emily L. Whiting, J. S. Whiting and the plaintiff. There is no way of reaching the fair amount to be allowed by any species of mathematical calculation. Neither do I think it right that the defendants should be dealt with separately. In the judgment I direct to be entered I have considered and taken into account all the evidence given by the company of wrongs said to have been committed by the plaintiff's agent. My judgment is what I consider should be the net result of all the evidence at the trial. There will be judgment dismissing the counterclaim and judgment for the plaintiff for $600 with costs against both defendants, the money paid into Court to be applied thereon *pro tanto*. Stay execution for fifteen days.

Judgment for plaintiff.

FALCONBRIDGE, C.J.K.B. (WEEKLY COURT.) 16TH NOVEMBER, 1916.

SOUTHBY v. SOUTHBY.

Injunction—Motion to Continue Interim—Granted on Terms.

Motion by the plaintiff to continue an interim injunction granted by Middleton, J., heard in Weekly Court at Toronto.

J. F. Boland, for the plaintiff.
H. S. White, for the defendant Southby.
A. J. Anderson, for the Molsons Bank.

FALCONBRIDGE, C.J.K.B.—The injunction granted by my brother Middleton will be continued until the trial to the extent only of $675.00.

The bank's costs, which I fix at $20, to be paid out of the balance.

Costs otherwise to be costs in cause unless Judge at trial shall otherwise order.

APPELLATE DIVISION, S. C. O. 5TH OCTOBER, 1916.

McCONNELL v. TOWNSHIP OF TORONTO.

Negligence—Municipal Corporations—Ditches and Watercourses Act — Failure to Provide Sufficient Outlet — Injury to Land—Damages—Evidence—Findings of fact of Trial Judge—Appeal.

Appeal by the defendants from the judgment of Britton, J., 10 O.W.N. 234.

The appeal was heard by Meredith, C.J.C.P., Riddell, Lennox, and Masten, JJ.

W. D. McPherson, K.C., and *W. S. Morphy*, for the appellants.

R. U. McPherson, for the plaintiffs, respondents.

THEIR LORDSHIPS, (v. v.) dismissed the appeal with costs.

APPELLATE DIVISION, S. C. O. 14TH NOVEMBER, 1916.

WILLOX v. MICHIGAN CENTRAL RY. CO.

Negligence—Fire Caused by Sparks from Railway Engine—Evidence—Finding of Fact by Trial Judge.

Appeal by the plaintiff from the following judgment of Falconbridge, C. J. K. B. dismissing an action to recover damages for the destruction of timber on plaintiff's land by fire alleged to have been caused by sparks from a locomotive engine owned by the defendants.

The action was tried without a jury at St. Catharines.

Gideon Grant and *H. F. Upper*, for the plaintiff.

S. S. Mills, for the defendants.

FALCONBRIDGE, C.J.K.B., (9th September)—I am of the opinion that the plaintiff has failed to prove that the damage to his property was caused by a fire started by a railway locomotive of which defendants were making use.

This judgment does not turn on the demeanour of witnesses and it is open to an appellate tribunal to take a different view of the evidence as in *Beal* v. *Michigan Central Ry. Co.*, (1909) 19 O. L. R. 502; 14 O. W. R. 778; 10 Can. Ry. Cas. 37.

Plaintiff's appeal was heard by Meredith, C. J. C. P., Riddell, Kelly, and Masten, JJ., on 14th November 1916.

Gideon Grant, for the appellant.

D. W. Saunders, K. C., and *S. S. Mills*, for the defendants, respondents.

THEIR LORDSHIPS (v. v.) dismissed the appeal with costs.

MULOCK, C. J. Ex. (CHAMBERS.) 15TH NOVEMBER, 1916.

BROWN ENGINEERING CORP. v. GRIFFIN AMUS. CORP.

Courts—Jurisdiction—Master-in-Chambers — Removal of Cause From County Court to Supreme Court of Ontario—Rule 208 (14)—Order of Officer Acting for Master—Nullity of Order —Appeal.

Appeal by the defendants from an order made by George M. Lee, Registrar, sitting under provision of Rule 760, as Master-in-Chambers, refusing to transfer the cause from the County Court to the Supreme Court of Ontario.

S. W. Burns, for the defendants.
E. F. Raney, for the plaintiffs, respondents.

MULOCK, C. J. Ex.—The plaintiffs' claim was within the jurisdiction of the County Court. The defendant corporation counter-claimed for an amount beyond the jurisdiction of the County Court and applied to Mr. Lee for an order transferring the action from the County Court to the Supreme Court of Ontario. The learned Registrar dismissed the application, ordering that the costs thereof be costs in the cause. From this order the defendant corporation appeals.

Rule 208, sub-sec. 14 expressly declares that the Master-in-Chambers shall not have jurisdiction to deal with applications for the removal of causes from inferior Courts. Therefore Mr. Lee had no jurisdiction to entertain the motion, and his order is a nullity and is not appealable.

I therefore dismiss this application.

Appeal dismissed.

RIDDELL, J. (CHAMBERS.) 13TH NOVEMBER, 1916.

RE PORT ARTHUR WAGON CO. v. SMYTH.

Company — Winding-up — Contributory — Order of Judge in Court — Leave to Appeal — Winding-up Act, R. S. C. (1906) c. 144, s. 101.

Motion by the liquidator of the company for leave to appeal from an order of Britton, J., dated 15th January, 1916, allowing an appeal from a decision of the Master in Ordinary in a winding-up matter. See 9 O. W. N. 383.

Peter White, K. C., for the applicant.
Strachan Johnston, K. C., for the respondent, W. R. Smyth.

RIDDELL, J.,—This matter raises several points of considerable importance which should be authoritatively settled. The delay has been considerable and the explanation rather limps.

But on the whole case I think that upon the applicant paying forthwith the costs of this application, and within 20 days of this day giving the security required by the Act, he may have leave to appeal, the respondent upon the appeal to be at liberty to raise the objection that the liquidator has disposed of the assets.

Leave granted.

APPELLATE DIVISION, S. C. O. 20TH NOVEMBER, 1916.

BALDRY YERBURGH & HUTCHINSON LIMITED v. WILLIAMS.

Contract—Indemnity and Guaranty — Action to Enforce — Defence—Fraud and Misrepresentation—Failure to Prove—Finding of Trial Judge—Appeal.

Appeal by the defendants from the judgment of Middleton, J., 10 O.W.N. 309.

The appeal was heard by Meredith, C.J.O., Magee and Hodgins, JJ.A., and Sutherland, J.

C. V. Langs, for the appellants.
W. N. Tilley, K.C., for the plaintiffs, respondents.

THEIR LORDSHIPS, (v. v.) dismissed the appeal with costs.

APPELLATE DIVISION, S. C. O. 7TH NOVEMBER, 1916.

HARGRAVE v. HARGRAVE.

Husband and Wife — Alimony — Action for — Appearance Entered but no Statement of Defence Filed—Motion for Judgment— Rule 354—Judgment on Motion in Weekly Court—Appeal—Reference.

Appeal by the defendant from a judgment of Riddell, J., 27 O.W.R. 150.

The appeal was heard by Meredith, C.J.O., Maclaren, Magee, and Hodgins, JJ.A.

G. R. Roach, for the appellant.

J. Grayson Smith, for the plaintiff, respondent.

THEIR LORDSHIPS, (v. v.) varied the judgment by substituting a declaration that the plaintiff is entitled to alimony and directing a reference to the Master in Ordinary to fix the amount of permanent alimony, which is to date from the issue of the writ of summons, on condition that the appellant, within two weeks, pays the costs of the motion for judgment and of this appeal; in default the appeal is to be dismissed with costs. The alimony fixed by Riddell, J., is to stand pending the reference; and, if a lesser sum is found to be proper to be allowed, that sum is to be substituted when the report is confirmed.

Judgment varied.

FALCONBRIDGE, C.J.K.B. NOVEMBER 18TH, 1916.

RE PERRIE.

Will—Construction—Specific Legacies — Estate Insufficient to Pay in Full—Cesser of Life Interest in Fund Set apart—Application of Fund to Supplement Abated Legacies.

Motion by the executors and trustees under the will of Elizabeth Ann Perrie, deceased, for the opinion, advice, and direction of the Court respecting the distribution of a sum of money invested under para. 20 of the will, it having transpired that there was not sufficient money in the estate to pay the specific legacies in full, and that Agnes Fahey, mentioned in para. 20, died without leaving any issue her surviving.

By para. 20, the testatrix directed her executors and trustees to invest the sum of $20,000 and to pay the interest thereof to Agnes Fahey "during her life, and after her decease to pay the interest to any children she may leave her surviving equally until they attain the age of 30 years, when they shall divide the same equally among such children, but, in case she leaves no child or children her surviving, then the same shall be added to and disposed of in the same manner as the residue of my estate is herein directed to be disposed of."

The questions submitted by the applicants were :—

(a) Should the money invested for Agnes Fahey be paid into the residue of the estate and be disposed of as directed by para. 32 of the will (the residuary clause)?

Or (b) should the money be paid in satisfaction of the specific legacies which were abated by reason of the insufficiency of the estate?

(c) If the said money should be disposed of as directed by para. 32, are the heirs or devisees of Gideon Perrie, who died on the 17th January, 1910, entitled to one-third thereof?

The motion was heard in the Weekly Court at Toronto.

G. Lynch-Staunton, K.C., for the applicants.
J. G. Farmer, K.C., for T. M. Waddell and J. J. Barry.
M. J. O'Reilly, K.C., for the Kirk estate and others.
F. W. Harcourt, K.C., for infants (unborn).
M. Malone, for D. A. Fletcher.

FALCONBRIDGE, C.J.K.B.—On the principles laid down in *Re Tunno* (1890) 45 Ch. D. 66, and *Arnold* v. *Arnold* (1834) 2 My. & K 365 at 374, the answer to question (a) should be "No," and to question (b), "Yes." Owing to these answers, it is not necessary for me to consider question (c).

Costs of all parties out of the estate.

Order declaring accordingly.

FALCONBRIDGE, C.J.K.B. (WEEKLY COURT.) 18TH NOVEMBER, 1916.

LONGSTREET v. SANDERSON.

Executors—Right to Property of Testator — Intention of Relatives in Possession of Assets to Oppose Grant of Probate of Will—Injunction,

Motion by the plaintiffs to continue an interim injunction restraining the defendants from in any way dealing with or interfering with the assets of the estate of the late Charles W. Sanderson, heard in Weekly Court at Toronto.

T. R. Ferguson, for the plaintiffs.
W. C. Brown, for the defendant, Mary Sanderson.
T. J. Agar, for the defendant Clare S. Laub.

FALCONBRIDGE, C.J.K.B.—The plaintiffs derive their titles from the will, and the property of the deceased vests in them from the moment of the testator's death. It would be dangerous doctrine that persons merely suggesting infirmity in the will or in testator's capacity to make one and expressing the intention to oppose probate thereof, should be allowed to remain in possession and withhold property of deceased from those who are named in the will as executors and devisees.

The injunction will be continued until the trial or other final disposition of the action.

Costs of the motion to be costs in cause unless the Judge at the trial shall otherwise order.

Injunction continued.

COUNTY COURT OF THE COUNTY OF ONTARIO.

McGILLIVRAY, Co.C.J. NOVEMBER 27TH, 1916.

CITY OF TORONTO v. MORSON.

Assessment and Taxes—Income Tax — Exemption — Salaries of Federal Officers—Action for Taxes Amounting to Less than $200—Costs—Scale of—Assessment Act, R.S.O. 1914 ch. 195, sec. 95 (2).

This action came before a Divisional Court of the Appellate Division upon a reference by the Judge of the County Court, and was remitted to the County Court for determination on the 9th June, 1916. See 37 O.L.R. 369 and 10 O.W.N. 322.

The action was then tried in the County Court without a jury.

S. W. Graham, for the plaintiffs.
Robert A. Reid, for the defendant.

McGILLIVRAY, Co.C.J., in a written judgment, said that the plaintiffs sought to recover from the defendant $126.98 for municipal taxes for 1912 and 1914 upon the income received by the defendant as a Judge of the County Court of the County of York.

The defendant did not dispute the amount, but contended that the income derived from his office was exempt from taxation.

After full consideration, the learned Judge said, he felt that he should follow the decision in *Abbott* v. *City of St. John* (1908), 40 S.C.R. 597.

Under the provisions of sec. 95 (2) of the Assessment Act, R.S.O. 1914 ch. 195, the action might have been brought in a Division Court.

There should be judgment for the plaintiffs for $126.98 and costs on the Division Court scale, with the right to the defendant to set off his costs of defence, as between solicitor and client, to be taxed on the county Court scale.

FALCONBRIDGE, C.J.K.B. (WEEKLY COURT.) 27TH NOVEMBER, 1916.

RE CHAMBERS.

Will — Construction — Specific Bequests Followed by General Bequest — Modification or Revocation — Lapsed Legacy — Devise of Real Estate Subject to Legacies — Executors — Sale of Land—Public Auction.

Motion by the executors, upon originating notice, for an order determining certain questions arising upon the will of the late Mary Elizabeth Chambers, heard at Ottawa Weekly Court.

W. McCue, for the executors.
H. A. O'Donnell, for Lillian Flindall.
J. E. Madden, for the children of Sarah Platt.

FALCONBRIDGE, C.J.K.B.—The clauses of the will upon which the questions arise are as follows :

First. I desire my Executors hereinafter named to pay all my just debts, funeral and testamentary expenses as soon as convenient after my decease.

Second. I will devise and bequeath unto my beloved niece Lillian Flindall, of Trenton, Ont. in the Province of Ontario, my household furniture, bed and bedding and knick-knacks absolutely.

Third. I will devise and bequeath unto my said niece Lillian Flindall my Real Estate (which shall be sold to the best advantage by my Executors) subject to the legacies hereinafter mentioned.

Fourth. I will devise and bequeath unto my niece Bessie (formerly Bessie Casey) the sum of One Thousand Dollars, absolutely.

Fifth. I will devise and bequeath unto the children of my deceased sister Sarah Platt my personal Estate subject to the legacies hereinafter named.

Then follow a number of specific bequests of personalty, one of which bequests, namely, the bequest of $200 to Alice Ward, has lapsed on account of her predeceasing the testatrix.

The questions to be answered are as follows :

(1) Is the bequest in clause (2) of the Will revoked or governed by clause (5) ?

(2) Is the real estate bequeathed in clause (3) subject to all the legacies mentioned thereafter in said Will or only clause (4)?

(3) Is the bequest of $1,000.00 in clause (4) revoked or governed or affected by clause (5)?

(4) Are not the children of Sarah Platt the residuary Legatees?

(5) Tenders having been called for by the Executor for the real estate and none having been received is the Executor now justified in selling same by public auction.

(6) Who is entitled to the lapsed share of Alice Ward?

Questions 1, 3 and 5 do not appear to present any difficulty and should be answered as follows: 1, No.; 3, No.; 5, Yes.

Question 2 is not so easy of solution but I have come to the conclusion that I must give effect to the words as appearing on the face of the will. I cannot see anything in the circumstances surrounding the making of this will from which I can draw any inference that the testator really intended the real estate to be subject only to the payment of the one legacy. The words are clear "subject to the legacies hereafter mentioned" and I think they ought to be given their full and ordinary meaning.

The answer to this question is yes.

Question 4 should be answered yes. The gift to the children of Sarah Platt is a gift of the residuary personalty and the legacy of $200 to Alice Ward having lapsed, those children should get the benefit. This answer also covers question No. 6.

I have been asked by counsel for the executors to answer another question regarding the purchase by the deceased in her lifetime of some property at Swift Current but I do not feel that I can give an answer to this question on the material at present before me.

Costs to all parties out of estate—those of executors as between solicitor and client.

BRITTON, J. (TRIAL.) 27TH NOVEMBER, 1916.

MOFFATT v. BEARDMORE.

Contract—Conveyance of Land—Oral Agreement to Account for Proceeds of Land when Sold—Failure to Prove—Absence of Fraud—Account—Statute of Frauds—Limitations Act.

Action for an accounting, tried at Toronto, without a jury.

R. H. Holmes, for the plaintiff.
H. D. Gamble, K.C., for the defendants, the Royal Trust Co.
T. S. Elmore, for the other defendants.

BRITTON, J.—The statement of claim and statements of defence fully set out the alleged facts, and define the issues to be tried. The claim is, in short, that the plaintiff being the owner of certain lands, viz: a lot on Church street and a lot on Anderson street in Toronto, and being in debt to the defendants Beardmore & Company, conveyed these lands to Walter D. Beardmore for the said firm, or for some of the defendants to be managed and sold, and the proceeds to be applied in payment of the debt owed by plaintiff, and upon such payment being made the balance of such proceeds to be paid to the plaintiff. The plaintiff claims an accounting.

If there was any such agreement it was with Walter D. Beardmore & Co., or one of the firm for the firm, and the plaintiff can have his rights established and any money owed to him paid by the firm without investigating transactions entered into long subsequent to what plaintiff complains of, but no such bargain has been proved.

The plaintiff himself made the exchange of his Church street property with the owner of the Euclid avenue lot for that lot, and the plaintiff then freely consented to the purchase by Beardmore of the Euclid avenue lot for $1,200, for which the plaintiff got credit. I find that there was no fraud on the part of defendants or any of them. In the absence of fraud, and in the absence of any such express or implied agreement, the Statute of Frauds and the Statute of Limitations bar the way to opening up transactions of which plaintiff complains. No

doubt the Beardmores were shewd dealers and the plaintiff was not so far-seeing as Mr. Beardmore and quite unable to match them in bargain-making; but there is no evidence that defendants possessed any knowledge of any facts unknown to the plaintiff.

The action should be dismissed as against all the defendants, but under the circumstances without costs.

Fifteen days' stay.

Action dismissed.

BOYD, C. (TRIAL.) NOVEMBER 21ST, 1916.

HUTCHINSON v. STANDARD BANK OF CANADA.

Illegal Combination — Action to Set aside Agreement, Conveyance, and Mortgages—Failure of Proof.

This action was brought by Lillian Maud Hutchinson against the Standard Bank of Canada and H. T. McMillan for a declaration that certain mortgages and an agreement and conveyance made by the plaintiff were void and should be delivered up to be cancelled—the plaintiff alleging that the defendant McMillan combined with two other persons to obtain the execution of the instruments by her, she being without independent advice and incapable of understanding the nature and effect of the instruments.

The action was tried without a jury at Toronto.

W. R. Symth, K.C., and *J. F. Boland*, for the plaintiff.

R. McKay, K.C., for the defendants.

THE CHANCELLOR—The plaintiff's attack fails on lines of combination. I do not assume that the defendants ask for costs I hope to give reasons later.

Endorsed on the record were the words: "Let judgment be entered dismissing action. J. A. Boyd."

[The pathetic hope was not realised. The learned and venerable Chancellor died two days after the above words were penned by his own hand. Nothing better illustrates his single-hearted devotion to duty than this his last official act, performed on his death-bed.]

APPELLATE DIVISION, S. C. O. 8TH NOVEMBER, 1916.

RE REX v. SCOTT.

Police Magistrate—Jurisdiction—Motion for Prohibition—Refusal by Judge in Chambers—Appeal to Divisional Court—Proper Remedy—Order Quashing Appeal.

Appeals by the defendant from the order of Sutherland, J., in Chambers, 10 O.W.N. 366, refusing a motion for prohibition to a Police Magistrate.

The appeal came on from hearing before Meredith, C.J.O., Maclaren, Magee, and Hodgins, JJ.A., and Riddell, J., on the 26th September, 1916.

F. H. Thompson, K.C., for the appellant.
J. R. Cartwright, K.C., for the Crown.

THEIR LORDSHIPS took exception to the appeal being heard, being of opinion that the remedy of prohibition was not open to the appellant; and that the case was, therefore, not properly before the Court; but directed that it should stand.

On the 8th November, an order quashing the appeal was pronounced.

Appeal quashed.

APPELLATE DIVISION, S. C. O. 13TH NOVEMBER, 1916.

BIGGAR v. BIGGAR.

Husband and Wife — Money Paid by Wife to Husband — Action to Recover as Money Lent—Onus—Finding of Fact of Trial Judge—Appeal.

Appeal by the plaintiff from the judgment of Sutherland, J., 10 O. W. N. 368.

The appeal was heard by Meredith, C. J. C. P., Riddell, Lennox, and Masten, JJ.

C. W. Bell, for the appellant.
W. M. McClemont, for the defendant, respondent.

THEIR LORDSHIPS, (v. v.) dismissed the appeal with costs.

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ACTION

Fiat:—While the Attorney-General has exclusive jurisdiction to say whether he will grant a *fiat* to bring an action or not, still, neither he nor anyone else has any standing to prevent a declaratory action being maintained against him. *Roverts* v. *Atty-,Gen.* & *McKay* (1911), 27 O. W. R. 58.

Fiat of Atty.-General: — The granting of a fiat to bring an action against the Hydro-Electric Power Commission is purely discretionary on the part of the Attorney-General, and where a writ is issued against the Commission after the Attorney-General has refused a fiat, the writ and service thereunder will be set aside. *Elect. Devel.* v. *Atty.-Gen.* & *Hydro-Elect.* (1916), 27 O. W. R. 53; 38 O. L. R. 383; 11 O. W. N. 17.

Petition of right:—The Court has jurisdiction to maintain an action against the Attorney-General as representing the Crown, although the immediate and sole object of the action is to affect the rights of the Crown in favour of the plaintiff, and a declaratory judgment can, under order, be made against the Attorney-General as representing the Crown, and the plaintiff is not bound in such a case to proceed by petition of right. *Roverts* v. *Atty.-Gen.* & *McKay* (1911) 27 O. W. R. 58

Premature action: — Where an action was commenced on 24th Nov., 1915 to recover the money paid to purchase a business, which the defendant, vendor agreed to return to the plaintiff, purchaser, within three months from the date of the sale (25th Oct. 1915), if the purchaser was dissatisfied and found the business not as represented, *held*, that on the face of the agreement the money was not payable (if at all) until three months from the 25th Oct., and notwithstanding that no objection had been taken in the statement of defence and that no application had been made to stay proceedings, still the Court would take Judicial Notice of the fact that the action was premature. *Held*, further, that there had been no misrepresentation and the action should be dismissed on merits as well. *Watson* v. *Morgan* (1916) 27 O. W. R. 523; 11 O. W. N. 125.

Revivor of action upon death of execution creditor:—Upon the death of an execution creditor his executors, who are entitled to receive the money made under the execution are entitled to have the writ renewed without revivor or leave of the Court. *Mahaffy* v. *Bastedo* (1916), 27 O. W. R. 591; 11 O. W. N. 149; 38 O. L. R. 192.

AFFIDAVIT

Validity of Provincial Statute:—While the Court is given power by section 20 of the Judicature Act to determine the validity of a Provincial Statute, at the instance of the Attorney-General, it by no means follows that the Attorney-General may, against his will, be compelled to appear as a defendant to uphold the validity of a Provincial Statute. *Elect. Devel.* v. *Atty.-Gen.* & *Hydro-Elect.* (1916), 27 O. W. R. 53; 38 O. L. R. 383; 11 O. W. N. 17.

Not an idle form:—Though the taking of an affidavit is a mere form

it is not an idle form. *Georgian Bay Milling & Power Co.* v. *Gentles* (1916) 27 O. W. R. 135.

APPEAL

Advocate-witnesses: — The evidence of advocate-witnesses, who are carried away for the cause of the side on which they are enlisted, is not entitled to any special weight: An Appellate Court is mainly concerned in what the lands could have been sold for at the time they were expropriated, and a ton of conflicting interested opinions as to value, is less helpful to an Appellate Court in fixing compensation, than an ounce of dependable facts. *Re Watson & Toronto*, (1916) 27 O. W. R. 367; 38 O. L. R. 103; 11 O. W. N. 111.

Belated contentions: — The contention that there is no evidence upon which a jury could properly find that any negligence of the driver of an automobile was the cause of plaintiff's injuries should be raised at the trial; it comes too late when raised, for the first time, in an Appellate Court. *Hirshman* v. *Beal* (1916), 27 O. W. R. 245; 38 O. L. R. 40; 11 O. W. N. 83.

Court of Appeal:—There is only one Court of Appeal in Ontario and, however constituted from time to time, it will follow its own decisions until reversed by a higher Court. *Toronto General Hospital Trustees & Sabiston, Re* (1916) 27 O. W. R. 515; 38 O. L. R. 139; 11 O. W. N. 117.

Delay caused by submitting question of appealing to Board of Directors:—Where it was the duty of an officer of a company to deal with the question of appealing from judgments given against the company and the said officer was prevented, within the time limited for appealing, by special circumstances, from taking the necessary steps of submitting the question of appealing to his Board of Directors although he had the *bona fide* intention of doing so, leave to appeal was granted. *Canadian Heating & Ventilating Co.* v. *T. Eaton Co. and Guelph Stove Co.* (1916) 27 O. W. R. 565; 11 O. W. N. 176.

Findings of Fact:—Where there have been concurrent findings of fact by two successive tribunals before which a case has come and the applicant for leave to appeal to the Supreme Court of Canada bases his reasons for leave to appeal upon his intention to upset those findings leave will be refused on the ground that said reasons do not shew a reasonably arguable case for appeal *Loveland* v. *Sale* (1916) 27 O. W. R. 572; 11 O. W. N. 136.

Findings of Ont. Ry. & Mun. Board are conclusive on a question of fact. *Toronto & York Radial Ry. Co.* v. *Toronto* (1916) 27 O. W. R. 414; 38 O. L. R. 88; 11 O. W. N. 171.

Inadequacy of compensation: — When an Appellate Court is asked to increase the amount of compensation awarded by an arbitrator, for lands expropriated, the onus is upon the appellant to convince the Court of the inadequacy of the amount allowed by the arbitrator. *Re Watson & Toronto*, (1916) 27 O. W. R. 367;

No appeal lies from an order granting leave to appeal. *Re McCarthy & Son Co., Ltd.* (1916) 27 O. W. R. 167; 38 O. L. R. 3; 11 O. W. N. 48.

Object of appeal:—Where the purpose of a motion for leave to appeal against an award of the Ont. Ry. & Mun. Board is to increase the amount awarded, where the argument in support of the motion is directed mainly and properly to that subject, and where the Court is satisfied that full compensation has been awarded, no matter whether the means by which that end was accomplished were regular or irreg-

aside the award; In such a case the appeal should be held over and the matter referred back to the arbitrator to allow him to supplement his reasons. *Re Watson & Toronto*, (1916) 27 O. W. R. 367; 38 O. L. R. 103; 11 O. W. N. 111.

Reversal of facts :—The findings of fact by a trial Judge, who has seen and heard all the witnesses, should not be reversed by an Appellate Court, unless it is satisfied that the findings were wrong. *Wedemeyer* v. *Canada Steamship Co.* (1916) 27 O. W. R. 161; 10 O. W. N. 284; 11 O. W. N. 40.

Right of appeal:—The summary convictions provisions of the Criminal Code do not apply to prosecution under Sec. 777 (5), the only appeal lying from a summary conviction for theft under the said sub-section is that given by Sec. 1013. *Rex* v. *Sinclair* (1916) 27 O. W. R. 568; 38 O. L. R. 149; 11 O. W. N. 131.

Right to Certiorari:—As the right to *certiorari* and to appeal where there has been a conviction under Part II of the Canada Temperance Act, R. S. C. ch. 152 is taken away by Sec. 148 of that Act, the evidence cannot be looked at to determine whether or not it is sufficient to warrant the conviction. *Rex* v. *Berry* (1916) 27 O. W. R. 608; 11 O. W. N. 158; 38 O. L. R. 177.

Rule 507: — Under Rule 507, governing appeals from the decision of a Judge in Chambers, where the order in question does not finally dispose of the whole or any part of the action, an appeal shall not be had unless, firstly, there are conflicting decisions and it is in the opinion of the Judge desirable that an appeal should be permitted, or, secondly, there appears to be good reason to doubt the correctness of the judgment and the appeal would involve matters of such importance that, in the opinion of the Judge applied to, leave to appeal should be given. *Forbes* v. *Davidson* (1916) 27 O. W. R. 399; 11 O. W. N. 86.

ular, leave to appeal should be refused. *Re Toronto & Hamilton Highway Com.* v. *Crab* (1916) 27 O. W. R. 155; 37 O. L. R. 656; 11 O. W. N. 47.

Practice cases:—Leave to appeal to the Appellate Division should be refused, except in cases of real importance and involving some substantial right; mere matters of practice should, (except in extraordinary cases) be disposed of in the High Court Division *Henderson* v. *Henderson* (1916) 27 O. W. R. 422; 38 O. L. R. 97; 11 O. W. N. 69, 123.

Privy Council will not entertain a question not raised at the trial, and on which, if it had been raised, it was open to the other party to have called evidence in answer to the case made against him. *Toronto & York Radial Ry. Co.* v. *Toronto* (1916) 27 O. W. R. 414; 38 O. L. R. 88; 11 O. W. N. 171.

Question raised on argument of appeal:—An assignee of a renewable lease appointed an arbitrator, took part in the arbitration proceedings, moved to set aside the award and appealed to an Appellate Division, but not until the argument of the appeal did he raise the question that he had assigned his interest in the lease and therefore he had no interest in the matter, and therefore the award was a nullity. *Held*, that it was quite too late to then raise any such point even if there were something substantial in it. *Toronto General Hospital Trustees & Sabiston, Re* (1916) 27 O. W. R. 515; 38 O. L. R. 139; 11 O. W. N. 117.

Reasons for award: — Municipal Arbitrations Act, R. S. O. (1914) c. 199, s. 4, requires that where an arbitrator proceeds to make his award partly on view or upon any special knowledge or skill possessed by himself, he shall state such matters in his reasons for his award sufficiently full to enable an Appellate Court to determine the weight to be attached thereto, but when this is not done it is not a ground for setting

Vacations:—The period of 60 days prescribed by Sec. 69 of the Supreme Court Act is not suspended during the vacations of the Court. *Loveland* v. *Sale* (1916) 27 O. W. R. 572; 11 O. W. N. 136.

Wrong conclusions:—Where an Appellate Court finds evidence on which the trial Judge might have arrived at a different result, still, his findings of facts should not be reversed unless the evidence is sufficient to convince the Appellate Court that he came to a wrong conclusion. *Cakley* v. *Webb* (1916) 27 O. W. R. 544; 38 O. L. R. 151; 11 O. W. N. 132.

ARBITRATION AND AWARD

Industrial possibilities:—In arbitration proceedings to determine the rent of a renewable lease, it is open to the landlord to offer evidence shewing the demised premises to be of greater value for industrial or other purposes than for which it has been used in the past. *Toronto General Hospital Trustees Sabiston Re* (1916) 27 O. W. R. 515; 38 O. L. R. 139; 11 O. W. N. 117.

"Splitting the difference":—In arbitration proceedings to determine the renewable rent of leasehold property it was alleged that arbitrators did not really make an award; that in truth two of the arbitrators were wide apart in their estimation of a proper rental and that the third arbitrator, without exercising any judgment in the matter had induced or forced the other two to "split their difference" and agree upon a sum half-way between the amount which each had found to be the proper sum. *Held*, that if this had been proven it would be improper, but in this case the attack failed it having been met by the evidence of the third arbitrator—a County Court Judge—and there was no ground for believing that any improper methods or principles had been used in making the award. *Toronto General Hospital Trustees & Sabiston Re* (1916) 27 O. W. R. 515; 38 O. L. R. 139; 11 O. W. N. 117.

ASSESSMENT AND TAXES

Appeal to Court of Revision:—Status of assessor as appellant—Jurisdiction of court of revision—Appeal to County Court Judge—Remedy by prohibition—Assessment Act, R. S. O. 1914 ch. 195, sec. 69 (1), (3), (5), (19), (21)—Further appeal — Assessment amendment Act, 6 Geo. V. ch. 41, sec. 6—Stated case. *Walkerville Assessment Appeals Re* (1916) 27 O. W. R. 647; 11 O. W. N. 25.

Equalization of assessment: — County equalized assessments should not be based upon the *actual value*, but upon only the *actual assessable value* of all properties in the local municipalities, therefore, the properties of companies whose assessments have been fixed for a term of years by a local municipality are not assessable for county rates beyond the amount of their fixed assessments, and for all purposes, except school rates, their fixed assessments must be considered as their actual value. *Re Sarnia & Lambton County* 27 O. W. R. 403.

Exemption by Special Act:—Notwithstanding the Local Improvements Act, R. S. O. (1914) c. 193, s. 47, which provides that land on which a church, university, college, etc., is erected, which is exempted by the Assessment Act, R. S. O. (1914) c. 195, shall be liable to be specially assessed for local improvements, Upper Canada College is by its Act, R. S. O. (1914) c. 280, s. 10 specially exempt from all taxes including local improvements; and following the general rule for contruction of statutes "that local Acts not repealed by public general Acts in the absence of any indication so to do on the part of the legislature?," it was held that Upper Canada Col-

lege is not liable to be taxed for local improvements, and therefore, is not qualified and competent to sign a petition for local improvements; and that the validity of a local improvement by-law of the city of Toronto was not affected by the absence of its signature to the petition although it owned more than one-half in value of the property adjacent to the highway on which the improvements were to be made. *Upper Canada College* v. *City of Toronto* (1916) 27 O. W. R. 186; 37 O. L. R. 665; 11 O. W. N. 63.

Judge's salary is assessable for payment of income tax. *Toronto* v. *Morson* (1916) 27 O. W. R. 681; 11 O. W. N. 195.

Offer of sale evidence of actual value:—Where the owner offers by advertisement to sell certain mineral rights at a certain price the advertisement is evidence, *against* the owner, that the rights which he offers for sale have some value and *for* the owner, in the absence of other evidence of value, and the fact that no sale is made proves that the actual value does not exceed the price advertised. *Re Canada Co. & Colchester North* (1916) 27 O. W. R. 601; 11 O. W. N. 146; 38 O. L. R. 182.

Value of lands for assessment purposes—Uniformity in assessment—Assessment Act, R. S. O. 1914 ch. 195, sec. 69 (16). *Re Lake Simcoe Hotel Co. & Barrie. Re Tuck & Barrie.* 27 O. W. R. 646; 11 O. W. N. 16.

AUTOMOBILE

Employ of owner:—Workmen and others connected with a shop where an automobile has been taken for repairs are not in the employ of the owner of the automobile within the meaning of the Motor Vehicles Act, R. S. O. (1914) c. 207, as amended by 4 Geo. V. c. 36, s. 3. *Hirshman* v. *Beal* (1916), 27 O. W. R. 245; 38 O. L. R. 40; 11 O. W. N. 83.

Stolen Car: — The owner of an automobile is liable under 4 Geo. V. c. 36, s. 3 for violations of the Motor Vehicles Act, R. S. O. (1914) c. 207, when it is in his own possession, that of anyone in his employ (even if that person has stolen it), or of anyone not an employee who has not stolen it. In this case the foreman of a repair shop had taken the car out to test it and had afterwards gone on a tour for his own pleasure. While so driving he injured the plaintiff and the owner was held liable for damages, notwithstanding that the owner had prosecuted and secured a conviction of the foreman, under 9 & 10 Edw. VII. c. 11. The Court holding that such offence is not theft. *Hirshman* v. *Beal* (1916), 27 O. W. R. 245; 38 O. L. R. 40; 11 O. W. N. 83.

BANKRUPCY AND INSOLVENCY

Fraud on incolvency laws:—An agreement for the lease and hire of machinery which provides for the cancellation of the lease upon the insolvency of the lessee and for the payment of sums certain to put the machines in suitable order and condition to lease to another lessee and for deterioration, is not a fraud on insolvency laws and the contract may be enforced in the winding-up of the lessee company. *Durford Elk Shoes Ltd., Re,* (1916) 27 O. W. R. 152, 502; 11 O. W. N. 59, 105.

BANKS AND BANKING

Assignment of book debts:—As at present worded, the usual cast-iron, all-including agreement called an "assignment of book debts, etc.," taken by banks from customers is of insufficient strength to justify the Court in holding that moneys due from insurance companies for loss by fire are book debts, or are *ejusdem generis* with book debts, or that in this case the bank had any claim to them in priority to the claim of the

assignee for the benefit of the creditors of the insolvent customer. *Royal Bank* v. *Healey* (1916) 27 O. W. R. 428; 11 O. W. N. 428.

Breach of instructions ratified:—Where a syndicate gave defendant bank specific instructions to pay certain money upon obtaining an assignment of an oil lease and the bank accepted a document which was not a legal assignment, the syndicate sought to recover the money paid over. *Held*, that the syndicate by organizing a company, transferring to it the property, issuing stock, etc., had ratified the acceptance by the bank of the document and were estopped from repudiating the transaction which they themselves had helped to consummate with full knowledge of the facts. *Barrett Bros.* v. *Bank of Toronto* (1916), 27 O. W. R. 25; 11 O. W. N. 10.

Description of goods hypothecated:—Where goods are hypothecated to a bank according to form "C" and particular warehouses are mentioned in which the goods are said to be and the description covers all the goods, it is sufficient. *Clarkson* v. *Dominion Bank* (1916), 27 O. W. R. 1; 37 O. L. R. 591; 11 O. W N. 2.

Extention of time to debtors:—A father agreed to guarantee advances from a bank to a partnership of which his son was a member to the extent of $10,000. The first advance consisted of a loan of $3,000 for which the son and his partner gave a promissory note. When the said note came due it was renewed without any notice having been given to the said father: *Held*, that the bank in extending to the principal debtor time for payment of the note given on the advance without the consent of the guarantor made a binding agreement to give time which released the latter. *North-Western National Bank of Portland* v. *Ferguson* (1916) 27 O. W. R. 629; 11 O. W. N. 178.

Jobbers hypothecation:—While a bank has, under s. 88 of the Bank Act, the right to advance a wholesale manufacturer, upon the security of the goods, wares and merchandise manufactured by him, or procured for such manufacture, still, it has no authority to take security on goods purchased by him from other manufacturers for the purpose of carrying on a jobbing business as a side line. *Clarkson* v. *Dominion Bank* (1916), 27 O. W. R. 1; 37 O. L. R. 591; 11 O. W. N. 2.

Joint account in bank:—It is immaterial as to the source of money before it was deposited with a bank in a joint account, and after it is so deposited it is not subject to being disposed of by the will of either party, and the surviving joint owner is entitled to the whole unaffected by any testamentary disposition which the deceased joint owner may have made. *Weese* v. *Weese* (1916), 27 O. W. R. 123; 37 O. L. R. 649; 11 O. W. N. 56.

Land security:—Where a customer agrees to give a bank as collateral security, a mortgage on real estate on or before a date named, there is nothing improper or illegal in the bank, in pursuance to such previous agreement, in insisting upon and obtaining the security on such real estate, more than a year subsequent to that date. *Clarkson* v. *Dominoin Bank* (1916), 27 O. W. R. 1; 37 O. L. R. 591; 11 O. W. N. 2.

Renewing security: — Where a bank, from time to time, makes advances and takes security, under s. 88 of the Bank Act, on new goods which come into a customer's business to replace old stock sold out, and for each advance a separate note and security is taken, and at the same time a general security is taken which covers all outstanding notes for which a previous individual note has been taken, it is not a renewal of the security, but is a valid consolidation of securities not prohibited by the Bank Act. *Clarkson* v. *Domin-*

nio Bank (1916), 27 O. W. R. 1; 37 O. L. R. 591; 11 O. W. N. 2.

Winding-up—Contributory — Gift of shares to infant—Repediation by infant at majority—Ratification by Court — Reversion to donor — Liability or contributory. *Sovereign Bank Re, Barnes' Case* (1916) 27 O. W. R. 663; 11 O. W. N. 103.

BILLS, NOTES & CHEQUES

Promise to pay:—The onus is upon the defendant of shewing that he gave a promise to pay dishonoured note, which he had endorsed, or made an admission of liability under a mistake of fact. *Swift Canadian Co.* v. *Duff and Alway* (1916), 27 O. W. R. 555; 38 O. L. R. 163; 11 O. W. N. 140.

Waiver of notice of dishonour:—Where no notice of dishonour is given to the endorser of a promissory note, but he unequivocally promises to pay or admits liability he is deemed to have waived notice of dishonour and protest. *Swift Canadian Co.* v. *Duff and Alway* (1916) 27 O. W. R. 555; 38 O. L. R. 163; 11 O. W. N. 140.

BROKERS

Authority of broker:—A contract between a client and his broker on the Montreal Corn Exchange is one of mandate and can be proven by parol evidence, and the sale and purchase of grain by the broker under that mandate is not a sale of goods within the meaning of Art. 1235 C. C.; it is a commercial matter within Art. 1233 C. C. and may be established by parol evidence. *Carruthers* v. *Schmidt* (1916) 27 O. W. R. 360; 54 S. C. R. 131.

CANCELATION OF INSTRUMENTS

Illegal Combination—Action to Set aside Agreement, Conveyance, and Mortgages—Failure of Proof. *Hutchinson* v. *Standard Bank* (1916) 27 O. W. R. 685; 11 O. W. N. 183.

Relief from voluntary release:—After the expiry of the life interests of her foster parents, plaintiff became entitled, under the will of a person who died in June 1902, to a life interest in a farm. In July of the same year, plaintiff was induced to execute a document whereby she covenanted with defendant (to whom the farm had been devised after plaintiff's death) and the other executors under the said will, that she would upon marrying or "leaving the property", give up possession of the farm to defendant. Plaintiff was paid nothing and she had no independent advice and had no opportunity to secure it and at the time she executed the document she was under the influence of the foster mother who induced her to sign the same. She married in 1908 and left the farm. Her foster mother died in 1913 and her foster father was still alive on 3rd April, 1914, when this action was begun to set aside the document. *Held*, that plaintiff had satisfied the onus which was cast upon her of shewing some substantial reason for setting aside her voluntary deed, and her remedy had not been barred by her long continued acquiescence and laches. *Held*, further, that mere lapse of time unattended by any circumstance which gives rise to an equity in the defendant's favour will seldom, if ever, bar a plaintiff who has a strong equity to relief, otherwise clear. *Walton* v. *Stonehouse* (1916) 27 O. W. R. 531.

COMPANY

Approval of directors' irregular acts:—The rule that "if an act, not *ultra vires* of the corporation, and which therefore might be done with the approval of a majority, be done irregularly and without such approval, then the majority are the only persons who can complain, and the

Court will not entertain the complaint except at the instance of the majority, and in which the corporation is plaintiff,'' applies only where the approval of the majority depends simply on the passing of a resolution or by-law which the shareholders are competent to meet and pass, and does not apply where the shareholders must, as a condition precedent to approval, themselves acquire some further qualification or status which they may or may not be able to attain, therefore, a single shareholder, either alone or on behalf of himself and others, may make the company a co-defendant and may sue in respect of an act which is *ultra vires* of the corporation and which a majority are consequently unable to affirm. *Crawford* v. *Bathurst Land & Development Co.* (1916), 27 O. W. R. 76; 37 O. L. R. 611; 11 O. W. N. 51.

Breach of trust by directors:—A director commits a breach of trust if he accepts, or is a party to the acceptance by his co-directors of, any money or property as a gift or bribe from persons dealing with the company, and is liable to repay to the company such money, or to account to the company for such property or its full value if parted with by the director. *Crawford* v. *Bathurst Land & Development Co.* (1916), 27 O. W. R. 76; 37 O. L. R. 611; 11 O. W. N. 51.

Impairment of capital:—Where directors illegally declare and pay out a dividend which impairs the capital of the company, the directors may be compelled, by the company, to repay the dividend to the company, or so much of it as may have impaired the capital of the company; but any person who receives and *retains* a dividend which impairs the capital of a company cannot maintain an action against the directors for the return to the company of the dividend, and neither is his action maintainable because he sues on behalf of himself and all other shareholders of the company. *Crawford* v. *Bathurst Land & Development Co* (1916), 27 O. W. R. 76; 37 O. L. R. 611; 11 O. W. N. 51.

Leave to bring action: — Where an order has been made under s. 110 of the Dom. Winding-up Act delegating the powers of the S. C. O. to a Local Master, in order to prevent confusion the parties should save in exceptional cases, apply to the Master for leave to bring an action against the company in liquidation, but the order delegating such powers does not absolutely prevent the Court from exercising its powers except by way of appeal; and where a Judge of S. C. O. has granted a creditor leave to bring an action instead of proving his claim in the liquidation, the Appellate Division will entertain an appeal from the order granting such leave, if ''future rights'' may be involved. *Re McCarthy & Sons Co., Ltd.* (1916) 27 O. W. R. 167; 38 O. L. R. 2; 11 O. W. N. 48.

Payments to directors illegal:—Ont. Co. Act, R. S. O. (1914), c. 178, s. 92, prohibits a director from receiving any payments from the company, either in his capacity as a director or for services rendered by him to the company in another capacity (in this case a commission for sale of lands, of the company), unless such payments are first authorized by a by-law and subsequently confirmed at a general meeting of shareholders. *Crawford* v. *Bathurst Land & Development Co.* (1916), 27 O. W. R. 76; 37 O. L. R. 611; 11 O. W. N. 51.

Presents to directors:—The shareholders, at a meeting duly convened for that purpose, can, if they think proper, remunerate directors for trouble or make presents to them, for their services, out of assets properly divisible amongst the shareholders themselves. Further, if the company is a going concern, the majority can bind the minority in such a matter, but to make presents out of profits is one thing and to make them out of capital or out of money

borrowed by the company is a very different matter. Such money cannot be lawfully divided amongst the shareholders themselves, nor can it be given away by them to their directors so as to bind the company in its corporate capacity. *Crawford* v. *Bathurst Land & Development Co.* (1916), 27 O. W. R. 76; 37 O. L. R. 611; 11 O. W. N. 51.

Winding-up—Contributory

Bank—Gift of shares to infant—Repudiation by infant at majority—Ratification by Court—Reversion to donor—Liability as contributory. *Sovereign Bank Re Barnes' Case* (1916) 27 O. W. R. 663; 11 O. W. N. 103.

Order of Judge in Court—Leave to appeal—Winding-up Act R. S. C. (1916) c. 144, s. 101. *Port Arthur Wagon Co.* v. *Smith, Re* (1916) 27 O. W. R. 677; 11 O. W. N. 162.

Wage-earneers and Material — men—Priority of claims of—Construction of contract—Moneys payable to company in respect of contract—assignment to Bank. *Can. Mineral Rubber Co. Re* (1916) 27 O. W. R. 672; 11 O. W. N. 135.

CONSTITUTIONAL LAW

Commission in lieu of School Board:—Ont. statute 5 Geo. V. c. 45, s. 3, providing for the suspension of the powers of Ottawa Separate School Board and conferring such powers upon a Commission, held *ultra vires* of the provincial legislature as prejudicially affecting certain rights and privileges with respect to denominational schools conferred by U. C. Separate Schools Act, 1863, and reserved under provision 1 of sec. 93 of the B. N. A. Act, 1867. *Ottawa Separate School Trustees* v. *Ottawa* (1916) 27 O. W. R. 484.

Contitutional rights:—The class of persons to whom the right or privilege of enjoying seperate schools in Ontario is reserved in the B. N. A. Act (1867), is a class to be determined according to religious belief, and not according to race or language. *Mackell* v. *Ottawa Separate School Trustees* (1916) 27 O. W. R. 505.

Imperial Parliament has the sole power of passing an Act which prejudicially affects the rights or privileges reserved to denominational schools under B. N. A. Act, 1867. *Ottawa Separate School Trustees* v. *Ottawa* (1916) 27 O. W. R. 484.

Parliament of Canada has no jurisdiction in relation to education except under B. N. A. Act (1867) s. 93 (4). *Ottawa Separate School Trustees* v. *Ottawa* (1916) 27 O. W. R. 484.

Notice to Minister of Justice:—The validity of a Provincial Statute is not open to attack in an action, until notice has been given to the Minister of Justice, as required by sec. 33 of the Judicature Act. *Elect. Devel. Co.* v. *Atty.-Gen.* v. *Hydro-Elect.* (1916), 27 O. W. R. 53; 38 O. L. R. 383; 11 O. W. N. 17.

CONTEMPT OF COURT

Husband may be committed for contempt, if he refuses to carry out his undertaking, given by his counsel in Court, to receive his wife back and treat her in all things as a husband should. *Evans* v. *Evans* (1916), 27 O. W. R. 69; 11 O. W. N. 34.

CONTRACT

Agreement as to Land by tenants in common—Intention to sell—Judgment for partition or sale—Postponement of proceedings under, until expiry of period mentioned in agreement. *Morris* v. *Morris* (1916) 27 O. W. R. 652; 11 O. W. N. 37.

Conveyance of land—Oral agreement to account for proceeds of land when sold—Failure to prove

— Absence of fraud — Account — Statute of Frauds—Limitations Act. *Moffatt* v. *Beardmore* (1916) 27 O. W. R. 684; 11 O. W. N. 195.

Court will refuse aid:—No Court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal, if the illegality is duly brought to the notice of the Court, and if the person invoking the aid of the Court is himself implicated in the illegality. It matters not whether the defendant has pleaded the illegality or not. If the evidence adduced by the plaintiff proves the illegality, the Court ought not to assist him. *Georgian Bay Milling & Power Co.* v. *Gentles* (1916) 27 O. W. R. 135.

Fairness of provisions: — The Court should ascertain from the contract itself its force and effects quite irrespective of any consideration of the fairness of its provisions, and so long as it represents the bargain actually made, and no case of fraud of undue influence is made out, it is the duty of the Court to give effect to the contract. *Re Durnford Elk Shoes Ltd.* (1916) 27 O. W. R. 152, 502; 11 O. W. N. 59, 105.

Formation — Sale of goods — Correspondence—Failure to shew consensus ad idem *Hay* v. *Green* (1916) 27 O. W. R. 659; 11 O. W. N. 97.

Fraud on insolvency laws:—An agreement for the lease and hire of machinery which provides for the cancellation of the lease upon the insolvency of the lessee and for the payment of sums certain to put the machines in suitable order and condition to lease to another lessee and for deterioration, is not a fraud on insolvency laws and the contract may be enforced in the winding-up of the lessee company. *Re Durnford Elk Shoes Ltd.* (1916) 27 O. W. R. 152, 502; 11 O. W. N. 59, 105.

Indemnity and guaranty—Action to enforce—Defence—Fraud and misrepresentation—Failure to prove —Finding of trial Judge—Appeal. *Baldry Yerburgh & Hutchinson* v. *Williams* (1916) 27 O. W. R. 677; 10 O. W. N. 309; 11 O. W. N. 173.

Material alteration: — Where a contract is materially altered, while in the custody of the plaintiff, one of the contracting parties, and without the knowledge or consent of the defendant, the other contracting party, the contract is vitiated. Public interests require the denial of indulgence to persons who unwarrantably fix up contracts to suit their own purpose after they are completely executed. *Flexlume Sign Co. Vise* (1916), 27 O. W. R. 180; 11 O. W. N. 44.

Measure of damages:—Where a sub-contractor failed to furnish the contractor the steel sash required for a large building, in time to enable the building to be closed in before the frost came, and the contractor was compelled to enclose the building himself to avoid damage, the measure of damages is what would be a reasonable charge for doing that which the sub-contractor failed to do, not what the contractor suffered from imperfectly enclosing the building. *Norcross Bros.* v. *Hope & Sons* (1916) 27 O. W. R. 451; 11 O. W. N. 156.

Promise to Pay Money—Evidence —Forgery — Scheme to Defraud— Findings of fact by trial Judge— Appeal. *Laurin* v. *St. Jean* (1916) 27 O. W. R. 654; 11 O. W. N. 65.

Public policy:—Where the evidence shewed that plaintiffs and defendants had entered into a contract for the sale of timber lands in contravention of the Free Grants & Homesteads Act, R. S. O. (1897) c. 29, now Part II Public Lands Act, R. S. O. (1914) c. 28, both an action on a promissory note given as part payment and defendants' counterclaim for damages for fraud and

misrepresentation as to quantity of timber, were dismissed on the grounds of public policy. *Georgian Bay Milling & Power Co.* v. *Gentles* (1916) 27 O. W. R. 135.

Restoration to original condition: —The proposition laid down in *Clarke* v. *Dickson* (1858) E. B. & E. 148 that "a party can never repudiate a contract after, by his own act, it has become out of his power to restore the parties to their original condition," has no application to a contract which is rescinded by the Court for fraud and misrepresentation by a vendor and no matter how difficult it may be for him to get restored to the position in which he was, by reason of any act of his own promoted in pursuit of his fraudulent purpose, he must abide by the legal consequences following therefrom. *Georgian Bay Milling & Power Co.* v. *Gentles* (1916) 27 O. W. R. 135.

COSTS

Exaggerated claims:—Where plaintiff made grossly exaggerated and fictitious claims amounting to $12,235 and recovered judgment for only $905.78, he was refused costs on the ground that there could be but little doubt that had a reasonable bill been presented it would have been paid. *Norcross Bros.* v. *Hope & Sons* (1916) 27 O. W. R. 451; 11 O. W. N. 156.

Fixing costs:—Where a plaintiff might have reasonably expected a considerable larger verdict (having regard to his own personal injuries and the incidental expenses flowing therefrom in addition to the damage to his motor car) costs were fixed against defendants at $200 without set off. *Nairn* v. *Sandwich, Windsor & Amehrstburg Ry.* (1916) without set off. *Nairn* v. *Sandwich, Windsor & Amherstburg Ry.* (1916) 27 O. W. R. 237; 11 O. W. N. 91.

Insufficient material: — An affidavit shewing insolvency of plaintiff is insufficient material upon which to make an order for security for costs. *Simpson* v. *Belleville Board of Health* (1916) 27 O. W. R. 552; 38 O. L. R. 244; 11 O. W. N. 139, 226.

Invitation to litigation:—Where a municipality practically invited litigation by disregard of the plain words of the statute regarding the registration of a by-law, they were deprived of costs of a successful action. *Harvey Township* v. *Galvin* (1916), 27 O. W. R. 125; 11 O. W. N. 38.

Municipality assuming defence:—Even though a municipality, under s. 26 of the Public Health Act, R. S. O. (1914) c. 218, assumes the defence of an action brought against the local board of health, still the board has the right to demand that plaintiff give security for costs as provided by the Public Authorities Protection Act. *Simpson* v. *Belleville Board of Health* (1916) 27 O. W. R. 552; 38 O. L. R. 244; 11 O. W. N. 139, 226.

Partnership action—Incidence of costs—Contribution — Interlocutory costs — Trustee — Misconduct — Parties. *Stirton* v. *Dyer* (1916) 27 O. W. R. 649; 11 O. W. N. 15.

Public officials:—Where an action is brought under the Fatal Accidents Act, against any of the persons mentioned in the Public Authorities Protection Act such persons are entitled to security for costs. *Simpson* v. *Belleville Board of Health* (1916) 27 O. W. R. 552; 38 O. L. R. 244; 11 O. W. N. 139, 226.

Third party praecipe:—Where a defendant, under R. 165 (2), served a third party notice and a copy of the writ issued by plaintiff, and the notice did not shew defendant's address as without the province, *held* that the third party was not justified in inferring that defendant had ad-

mitted that he was resident without the province because his address was so given in the writ of summons, and where such a third party obtained a praecipe order for security for costs against such a defendant, the order was set aside. *Toronto General Trusts* v. *Kinzie* (1916), 27 O. W. R. 67; 11 O. W. N. 29.

COURTS

Master in Chamber has no jurisdiction to remove a cause from a County Court into the Supreme Court of Ontario—Rule 208 (14) *Brown Engineering Corp.* v. *Griffin Amus. Corp.* (1916) 27 O. W. R. 676; 11 O. W. N. 163.

Ont. Ry. & Mun. Board not arbitrators:—Where the Ont. Ry. & Mun. Board acts in assessing compensation payable to land owners, under the Toronto & Hamilton Highway Commission Act, 5 Geo. V. c. 18, they act under the powers conferred upon them by their own Act, R. S. O. (1914) c. 186, and not as arbitrators. *Re Toronto & Hamilton Highway Com.* v. *Crab* (1916) 27 O. W. R. 155; 37 O. L. R. 656; 11 O. W. N. 47.

CRIMINAL LAW

Absence of conviction:—The accused was charged before the Magistrate that on the 8th of October, 1914, and previous dates he did unlawfully and wilfully neglect by reason of his drunkenness and disorderly habits cause to be neglected his two children, both under the age of sixteen, he having the custody and care of them, contrary to the form of the statute in such case made and provided. The Magistrate made an endorsement on the back of the information to the effect that if the accused did not dispose of his property, move out of the community, and undertake to deliver the children in question to one John Dodge for care within 30 days the sentence imposed of one year in Central Prison with hard labour would be enforced. No formal conviction was drawn up. On the 26th of September, 1916, a warrant of committment was issued by the Magistrate which erroneously stated that the accused was charged before him on the 26th day of September, 1916, and also erroneously stated that the charge was that on the 9th of October, 1914, and for some time previous he did neglect care of his children. Upon this warrant the accused was arrested and imprisoned. A writ of *habeas corpus* having been granted, a motion was made for the discharge of the accused from custody: *Held*, that the accused should be released from custody as there was no conviction on which the warrant of committment could properly be based. *Held*, also, that the Magistrate had no power to make such a disposition of the case as he did in the memorandum on the information. *Rex* v. *Knight* (1916) 27 O. W. R. 641; 11 O. W. N. 190.

Admissibility: — It is proper for the trial Judge to admit evidence by affidavit shewing that a Grand Juror did not take part in the deliberations of the Jury on a particular case in which he was disqualified. *Verroneau* v. *The King* (1916), 27 O. W. R. 276; 54 S. C. R. 7.

Annoying persons sleeping:—Disturbing the slumbers of a person 85 years of age, at half-past eleven o'clock at night, and telling him untruly that his horse had got into his garden and was destroying it, does not constitute the offence of vagrancy under Criminal Code s. 238. *Rex* v. *Gieger* (1916), 27 O. W. R. 195; 11 O. W. N. 66.

Bail—Application for—Charge of rape—Bail refused. *Rex* v. *Pyburn* (1916) 27 O. W. R. 652; 11 O. W. N. 61.

Disqualification: — Notwithstanding that the party complainant before the Magistrate was sworn as a member of the Grand Jury and gave

evidence before them, but took no part in their deliberations in the particular case in which he was interested, although present in the Grand Jury room and also in the Box when they returned a true Bill, *held*, that the Grand Jury was regularly constituted and the indictment should not be quashed. *Verroneau* v. *The King* (1916), 27 O. W. R. 276; 54 S. C. R. 7.

Injuring persons by furious driving:—In order to constitute an offence under Cr. Code, s. 285, it must be shewn that an injury was caused to some one; furious driving alone is not an offence under this section. *R.* v. *Nelson* (1916), 27 O. W. R. 50.

Overdriving horse: — One Justice of the Peace has no jurisdiction to try an offence of overdriving as provided in s. 542 Cr. Code. *R.* v. *Nelson* (1916), 27 O. W. R. 50.

Premature warrant:—Where sentence is suspended under Sec. 1081 of the Criminal Code, a warrant of committment issued without calling upon the accused to appear and receive sentence is prematurely and improperly issued. *Rex* v. *Knight* (1916) 27 O. W. R. 641; 11 O. W. N. 190.

DAMAGES

Deceit — Measure of damages — Method of establishing — Master's report—Appeal — Reference back—Costs. *Peppiatt* v. *Reeder* (1916) 27 O. W. R. 665; 10 O. W. N. 263; 11 O. W. N. 100.

Land—Injury to by operations on neighbouring land — Water lots — Assessment of damages. *Jessop* v. *Cadwell Sand & Gravel Co.* (1916) 27 O. W. R. 667; 10 O. W. N. 392; 11 O. W. N. 110.

DEED

Claim against Grantee's representatives:—Where a Grantee does not execute a conveyance, his personal representatives cannot, at common law, be held liable for breach of any of the covenants contained in the conveyance and any relief to which the grantor may be entitled must be founded upon equity. *Campbell* v. *Douglas* (1916) 27 O. W. R. 129; 54 S. C. R. 28.

Deed founded upon illegal consideration:—An employee of an Insurance agent misappropriated the company's funds. As a result of the agents threats to prosecute his employee the plaintiffs executed a deed of land to the agent who agreed that he would not dispose of the land conveyed to him but that he would hold the deed as security for the payment to him by his employee of the amount misappropriated. *Held*, that the deed was void as it was founded upon an illegal consideration. *Boone* v. *Fair* (1916) 27 O. W. R. 623; 11 O. W. N. 117.

DISCOVERY

Affidavit on production is conclusive, unless it appears from the examination for discovery of the party, or from admissions made by him, that it is untrue, or unless it is made to appear that the affidavit was sworn under a misapprehension as to what was in truth material and therefore proper to be produced. *Forbes* v. *Davidson* (1916) 27 O. W. R. 399; 11 O. W. N. 86.

Ingredients of secret process:—Plaintiff sold a certain process to defendant and brought action alleging that this process was re-sold by the said defendant to his co-defendant. The defendant upon his examination for discovery, stated the process sold by him to his co-defendant was altogether different from that which the plaintiff sold him. *Held*, that the defendant in refusing to divulge the process and the ingredients thereof sold to his co-defendant was strictly within his rights. *Ware* v. *Henderson* (1916) 27 O. W. R. 560; 11 O. W. N. 167.

Production should not be ordered:—When what is desired is in effect the contradiction of an affidavit on production, an order for production should not be made. *Forbes* v. *Davidson* (1916) 27 O. W. R. 151; 11 O. W. N. 61.

Resident out of jurisdiction:—A person for whose benefit an action is brought or the assignor of a chose in action can only be examined for discovery when such person is within Ontario; but a defendant by counterclaim, resident within a foreign jurisdiction, may under Rule 328, be ordered to come within Ontario and submit to examination for discovery upon matters relating to the counterclaim and if he fails to so attend his defence to the counterclaim may be struck out. *Stockbridge* v. *McMartin* (1916), 27 O. W. R. 401. 38 O. L. R. 95; 11 O. W. N. 121.

Rule 336:—It was not intended by Rule 336 that the defendant should be allowed to examine the plaintiff for discovery immediately after delivery of the statement of defence, when particulars thereof had been ordered, but not delivered. *Foster* v. *McLean* (1916) 27 O. W. R. 420; 10 O. W. N. 457; 11 O. W. N. 31, 109.

Wife of judgment debtor:—Where a judgment debtor had supplied his wife with the money to purchase a house and the deed was taken in her name, an order directing her to attend for examination in aid of execution should not be issued *ex parte*. *Re Sovereign Bank* v. *Wallis* (1916) 27 O. W. R. 559; O. W. N. 160.

ELECTRICITY

Permissive franchise:—Companies supplying electricity for the purposes of light, heat, and power have under 45 Vict. (Ont.) c. 19, s. 2, a permissive right to conduct electricity through, under and along the streets, highways and public places of the municipality *only upon* the condition precedent of first having entered into an agreement with the municipality by which it shall be authorized so to do upon such terms and conditions as the municipality may impose. Such agreement need not be under seal, but it must be at least a formal agreement as distinguished from mere silent acquiesence or implied consent. The municipality may, however, with absolute impunity, refuse to permit such companies to erect any poles or wires whatever upon the streets, highways, or public places of the municipality. *Toronto Electric Light Co.* v. *Toronto*, (1916) 27 O. W. R. 382; 38 O. L. R. 72; 11 O. W. N. 169.

EVIDENCE

Action by personal representative to set aside mortgage made by deceased person — Denial of signature of subscribing witness—Conflict of evidence—Finding of fact by trial Judge — Appeal — Mortgage account. *Way* v. *Shaw* (1916) 27 O. W. R. 655; 10 O. W. N. 124; 11 O. W. N. 27.

Entries in book: — In an action, brought in 1914, for specific performance of an agreement for sale of lands, it was admitted that some kind of an agreement in respect to said lands was entered into in 1903. Plaintiff alleged an agreement for sale of vendor's entire interest and produced an incomplete agreement for sale supporting his contention. Defendant produced a counterpart of said document, which shewed that plaintiff was to have only an undivided half interest. Defendant also produced certain entries in a Land Sales Book kept by deceased vendor which further supported his contention. *Held*, that under the circumstances the entries in the book were admissible as evidence. *Clergue* v. *Plummer* (1916), 27 O. W. R. 259; 38 O. L. R. 54; 11 O. W. N. 85.

Seamen as witnesses : — Seamen engaged in their calling, when required as witnesses, should be called

up from the sea to testify only when they are needed and when their ship is in port, if it will be in port within a reasonable time. It is unreasonable to require their attendance in Court at all unless they are needed. *Wedemeyer* v. *Canada Steamship Co.* (1916) 27 O. W. R. 161; 10 O. W. N. 284; 11 O. W. N. 40.

Parol evidence to contradict deed: —Notwithstanding that a conveyance purports to be made "in consideration of an exchange of lands and one dollar," parol evidence is admissible to shew that no exchange of lands were actually made and to shew what the real transaction actually was. *Campbell* v. *Douglas* (1916) 27 O. W. R. 129; 54 S. C. R. 28.

EXECUTION

Appointing equitable receiver:— A judgment creditor, who, *ex parte*, obtains an order apponting a receiver of certain shares of stock in a company held by brokers in trust for the judgment debtor, is not entitled to have such order amended by adding a direction to the receiver to sell the stock, because a receiver by way of equitable execution cannot sell; his function is to receive and hold, and sale cannot be indirectly brought about by declaring the judgment to form a charge upon the stock, unless the case can be brought within the Jud. Act, s. 140 *et seq.;* the judgment creditor must follow the statutory provisions and obtain first the order *nisi* and finally the charging order. A receivership as auxillary to this is quite proper, but the *ex parte* order should be regarded as an interim order and there should be a motion, at the same time as the charging order is moved for, to continue the receivership until the charge is at an end. *Herold* v. *Budding* (1916) 27 O. W. R. 47; 37 O. L. R. 605; 11 O. W. N. 12.

Attachment of Co. Shares:—Shares in a company may be charged, under Ont. Jud. Act, s. 140 *et seq.*, with the payment of a judgment debt, whether the shares stand in the name of the judgment debtor or in the name of a trustee for him, but the charging order can only be obtained after an order *nisi* has been received upon the debtor, and no proceedings can be taken to have the benefit of the charge until after six months from the date of the order, and then only in a new action. *Herold* v. *Budding* (1916) 27 O. W. R. 47; 37 O. L. R. 605; 11 O. W. N. 12.

C. P. Ry. Shares: — *Quære*, are shares in the C. P. Ry. Co., which has its head office in Montreal, Que., exigible under an Ontario writ of execution? Middleton, J., *obiter dictum*, thinks they are. *Herold* v. *Budding* (1916), 27 O. W. R. 47; 37 O. L. R. 605; 11 O. W. N. 12.

EXECUTORS AND ADMINISTRATORS

Allowance to Executors:—Even though the Court may not be entitled to go behind an interim passing of executors' accounts, still the amount then allowed executors may be taken into consideration in determining the amount that should be allowed them on the final passing of their accounts. *Re Cormack Trusts* (1916) 27 O. W. R. 199; 11 O. W. N. 74.

Continuing business:—Where a retail liquor business was continued by the executors for five years and by reason of the advice and legal services rendered by a solicitor-executor and the active managment of the business by the co-executor, the estate increased from $26,237 to $230,126, it was held, that the executors were entitled to a reasonably large sum as compensation for their time and services and for their care, pains and trouble in administering the estate; and the Court on appeal would be loath to interfere with the

amount allowed by the Surrogate Court, even though it seemed that it was more liberal than the Court would have given if applied to in the first instance. *Re Smith* (1916), 27 O. W. R. 271; 38 O. L. R. 67; 11 O. W. N. 103.

Claim against estate of deceased: —Where it was sought to recover from the executors of a mortgagee the amount of a promissory note alleged to have been given and paid by mortgagor on account of the mortgage, and the evidence shewed that the mortgagee had several thousand dollars invested in promissory notes, representing loans, *held*, that the giving of the note was quite as consistent with a specific loan as it was with payment on the mortgage, and the mortgagor had failed to satisfy the corroboration of his evidence required by the Evidence Act, R. S. O. (1914), c. 76, s. 12. *Bender* v. *Toronto General Trusts* (1916), 27 O. W. R. 32; 11 O. W. N. 9.

On appeal additional evidence was allowed to be put in. This evidence shewed that at the time the note was given the mortgagee was overdrawn at his bank and that the note was discounted to cover the overdraft. *Held*, this evidence was sufficient to satisfy the Statute. *Bender* v. *Toronto Gen. Trusts Corp.* (1916) 27 O. W. R. 669; 11 O. W. N. 129.

Remuneration:—Where an estate consisted chiefly of real estate and the only money realized by the executor was $18.75 from the sale of some personal property, he was allowed $50 for commission and $75 for pains and trouble in connection with the management of the estate for a year, he having personally advanced the estate $676.10. *Re Nesbit Estate* (1916), 27 O. W. R. 213; 11 O. W. N. 93.

Right to property of testator—Intention of relatives in possession of assets to oppose grant of probate of will—injunction. *Lonastreet* v. *Sanderson* (1916) 27 O. W. R. 680; 11 O. W. N. 166.

EXPROPRIATION

Bonus over compensation: — In awarding compensation for lands expropriated only full compensation should be allowed; there is no justification for adding anything in the nature of a bonus for compulsory taking. *Re Watson & Toronto*, (1916) 27 O. W. R. 367; 38 O. L. R. 103; 11 O. W. N. 111.

Cases not authoritative:—All cases as to compensation for lands expropriated depend so much upon questions of fact that any other case is of but little authoritative value: Each case must be decided upon its own facts, and care must be taken not to decide any case upon the facts of some other case. *Re Watson & Toronto*, (1916) 27 O. W. R. 367; 38 O. L. R. 103; 11 O. W. N. 111.

Market value:—The price paid for one lot on a quiet market may well prove the value of others just like it, but a single sale on a boom market does not prove the value of adjoining lots. *Re Watson & Toronto* (1916) 27 O. W. R. 367; 38 O. L. R. 103; 11 O. W. N. 111.

Special benefits accruing to the owner of land adjacent to a public work (in this case a main highway) may properly be set off against any compensation due the landowner for damages sustained by reason of its construction. *Re Toronto* N *Hamilton Highway Com.* v. *Crab* (1916) 27 O. W. R. 155; 37 O. L. R. 656; 11 O. W. N. 47.

Speculative lands: — Where lands are held solely for the purpose of making money out of them, on a sale or sales of them, the question to be determined is, how much would they have brought by sale, if sold to the best advantage, at the time they were expropriated. *Re Watson & Toronto*, (1916) 27 O. W. R. 367; 38 O. L. R. 103; 11 O. W. N. 111.

FIXTURES

Sale of land — Articles not affixed to freehold — Evidence — Intention—Money paid into Court —Costs. *Lahey* v. *Queenston Quarry Co.* (1916) 27 O. W. R. 667; 11 O. W. N. 18, 120.

HUSBAND AND WIFE

Interim alimony not asked: — Where no application for interim alimony has been made and judgment is obtained on motion in default of defence, permanent alimony may be granted from the teste of the writ. *Hargrave* v. *Hargrave* (1916) 27 O. W. R. 150, 678; 11 O. W. N. 54, 130.

Money paid by wife to husband —Action to recover as money lent —Onus—Finding of fact of trial Judge—Appeal. *Biggar* v. *Biggar* (1916) 27 O. W. R. 686; 10 O. W. N. 368; O. W. N. 145.

Rule 354: — In an action for alimony, where the husband does not file a statement of defence, he is, under Rule 354, deemed to admit all the statements of fact set forth in the statement of claim, and the wife is entitled to judgment for an amount which the facts thus admitted justify. *Hargrave* v. *Hargrave* (1916) 27 O. W. R. 150; 11 O. W. N. 54.

App. Div. varied above judgment bysustituting a declaration that plaintiff was intitled to alimony and directing a reference to the Master in Ordinary to fix amount of permanent alimony. *S. C.* 27 O. W. R. 678; 11 O. W. N. 130.

Statement of claim—Amendment of in alimony action *Bulmer* v. *Bulmer* (1916) 27 O. W. R. 672; 11 O. W. N. 180.

Undertaking by husband, given by his counsel in Court, to receive his wife back and treat her in all things as a husband should, is a complete answer to an action for alimony. *Evans* v. *Evans* (1916), 27 O. W. R. 69; 11 O. W. N. 34.

INJUNCTION

Motion to continue interim—Granted on terms *Southby* v. *Southby* (1916) 27 O. W. R. 674; 11 O. W. N. 163.

INSURANCE

1. Life Insurance

A. O. U. W. rates:—6 Geo. V. (Ont.) ch. 106 provided that the amount of the certificates of the A. O. U. W. outstanding on the 1st of July, 1916, should be reduced to the amount justified by the assets of the association. Sec. 5 provided that any member might maintain his insurance at the original amount by paying the additional premium proper upon his attained age upon the difference between the new and the original amount of his insurance. The statute required a statement to be filed before a certain day from which would be ascertained the amount of premium to be paid. After the 1st of July and before the statement was prepared and filed, plaintiff notified the society that he was willing to continue his policy and to pay the increased premium. Sec. 9 provides that where death takes place between the 1st of July and the filing of the statement, the amount to be paid shall be the reduced amount. *Held,* that the assured had exercised the right given him by Sec. 6. Therefore Sec. 9 did not apply to his case. *Anderson* v. *Ancient Order United Workmen* (1916) 27 O. W. R. 562; 11 O. W. N. 174.

Change of beneficiary by will to member of preferred class:—A testator who had received a certificate of insurance during his life time for $1000, one third of which was stated therein as payable to his wife as beneficiary, the remaining two-

thirds was directed therein to be paid to his executors. By his will the testator bequeathed the said $1,000 to two children. *Held*, that the widow did not take the third as the insured was at liberty to alter the provision made for the widow by virtue of R. S. O. (1914) c. 183 s. 171 (3) and s. 179. *Re Honsberger* (1916) 27 O. W. R. 636; 11 O. W. N. 187.

Default in payment of premium:—Where a policy provides that if any premium subsequent to the first one be not paid when due, the policy will cease to exist, "subject to the privileges regarding reinstatement, etc.," the failure of the insured to pay the third premium when due does not render the policy null and void for any purpose, and the insured may avail himself of the privilege of reinstatement. *Sussex* v. *Aetna Life Ins. Co.* (1916) 27 O. W. R. 575; 11 O. W. N. 154; 38 O. L. R. 365.

Proof of Insurability means that the insured at the time of the application for reinstatement is a proper risk for insurance upon the basis of the original contract and under the circumstances of this case, the only matter to which it could apply was the health of the insured. *Sussex* v. *Aetna Life Ins. Co.* (1916) 27 O. W. R. 575; 11 O. W. N. 154; 38 O. L. R. 365.

Reinstatement—A policy of insurance contained a stipulation that it contained no restrictions regarding service in the militia in time of war or peace. The policy further stipulated that within 5 years after default in payment of premium it might be reinstated upon evidence of insurability satisfactory to the company. It also provided that the endorsement thereon and the application constituted the entire contract between the parties. The plaintiff failed to pay the third premium on his policy within the presented time and sought to have the policy reinstated under the said stipulation with regard to reinstatement. The company were willing to continue the insurance and to reinstate the policy of the plaintiff who had become a soldier for overseas service on condition that he pay the company an extra premium. *Held*, that the generality of the condition with reference to reinstatement should not be restricted in the absence of clear notice to the insured somewhere on the face of the policy. *Sussex* v. *Aetna Life Ins. Co.* (1916) 27 O. W. R. 575; 11 O. W. N. 154; 38 O. L. R. 365.

Satisfactory to company:—Where a policy of insurance stipulates that the evidence of insurability is to be satisfactory to the company, the company will not be allowed to act arbitarily or unreasonaly. *Sussex* v. *Aetna Life Ins. Co.* (1916) 27 O. W. R. 575; 11 O. W. N. 154; 38 O. L. R. 365.

2. *Live Stock*

Commencement of Liability:—Where a policy of insurance issued on the life of a horse provided that the death of the animal must occur "from a disease occuring or contracted after the commencement of the company's liability" and the policy further provided that the company's liability commenced after payment of the premium and receipt of policy or protection note by the insured, *held* that the company was not liable for the death of the horse which died on the same day as the policy was delivered and premium was paid, from a disease contracted before the delivery of the policy. *Sharkey* v. *Yorkshire Insurance Co.* (1916) 27 O. W. R. 535; 54 S. C. R. 92.

INTERPLEADER

Wife claiming ownership:—A married woman now stands in precisely the same position as any one else, and where it is shewn that goods are

actually in her possession, then, *prima facie* they are hers as against all the world; and where an execution creditor of her husband attacks her title to the goods, he should be the plaintiff in an interpleader issue; but where the husband is the owner or tenant of the house, then, the goods are in his apparent possession and the wife is rightly plaintiff: However, the form of an interpleader issue is immaterial, for whatever be the form, the substance must be looked at, as the object of the issue is to inform the conscience of the Court, and it matters not which party is made plaintiff. *Young* v. *Spofford* (1916) 27 O. W. R. 191; 37 O. L. R. 663; 11 O. W. N. 58.

Sheriffs having no interest in interpleader issues should be refused costs where they appear in Court. *Young* v. *Spofford* (1916), 27 O. W. R. 191; 37 O. L. R. 663; 11 O. W. N. 58.

INTOXICATING LIQUORS

Building divided into sections:— On motion to quash the conviction of a restaurant keeper for selling or keeping liquor for sale, it was shewn that he occupied one part of a building which was divided into sections with inter-communications and that liquor was found in a closet opening off a chamber and in proximity to the door between the "chamber" and a store and opposite to the door leading from the "store" to the "restaurant", and that the defendant had the key to the closet. *Held* that the magistrate could properly find that the whole building was one "premises," and in the absence of any explanatory evidence ignore the suggestion that there were separate holdings of the different sections, Conviction confirmed. *Rex* v. *On Kee* (1916) 27 O. W. R. 529; 11 O. W. N. 137.

Receiving order for Liquor within Province:—After the coming into effect of Ontario Temperance Act one C. who had previously kept a liquor store continued to carry on a store business at the said store thereafter. C. supplied B. with a blank form of an order for the purchase of liquor which was signed by B. and directed to a company in Montreal which conducted a business for receiving and filling liquor orders. B. purchased from A. an express order in the company in Montreal, covering the price of the liquor ordered and posted it himself. The express company subsequently delivered to B. the liquor which he had ordered. *Held*, that the receipt of the blank form from B. signed by him and the filling up by C. rendered C. guilty of the offence of receiving an order for liquor for beverage purposes within the Province of Ontario. Under Sec. 42 of the Ontario Temperance Act, the offence being complete when C. received the order from B. *Held*, also, that even if C. was the agent of the Montreal company that he would still be personally liable within the meaning of the said section *Rex* v. *McEvoy* (1916) 27 O. W. R. 638; 11 O. W. N. 188; 38 O. L. R. 202.

JUDGMENT

Correcting formal judgment: — Where the formal judgment does not express the intention of the Judge, he may order that the same be made to conform to and be in accordance with his findings. *Clifton* v. *Towers* (1916) 27 O. W. R. 35; 11 O. W. N. 11.

Counterclaim: — **Where plaintiff moves under Rule 57 for summary judgment, it is not improper for the defendant to set up a counterclaim in his affidavit of defence on merits, under Rule 56, and where this is done the Court will, on terms, stay, under Rule 117, the proceedings respecting the claim until the** counterclaim is disposed of. *Cox Coal Co.* v. *Rose Coal Co.* (1916) 27 O. W. R. 398; 11 O. W. N. 22.

Question of propriety of the members of the Ont. Ry. & Mun. Board discussing a proceeding before them with a member of that Board who did not sit on the case, discussed. *Re Toronto & Hamilton Highway Com.* v. *Crab* (1916) 27 O. W. R. 155; 37 O. L. R. 656; 11 O. W. N. 47.

Triable issue: — Where lands are sold under a sale agreement which prohibits the purchaser from assigning his equity without the consent of the vendor and where the purchaser does assign his equity without that consent and the assignee covenants to pay the unpaid purchase money, the vendor has no right to summary personal judgment against the assignee to recover the unpaid purchase money, because, he not being a party to the assignment, his rights at the most would be a triable issue. *City Estates* v. *Birnbaum* (1916) 27 O. W. R. 62; 11 O. W. N. 33.

JUSTICE OF THE PEACE AND POLICE MAGISTRATE

Jurisdiction — Motion for prohibition—Refusal by Judge in Chambers—Appeal to Divisional Court—Proper remedy — Order quashing Appeal. *Re Rex* v. *Scott* (1916) 27 O. W. R. 686; 10 O. W. N. 366; 11 O. W. N. 132,

Jurisdiction—Petty Trespass Act. R. S. O. (1914) c. 111, s. 2. *Re Broom* 27 O. W. R. 663; 11 O. W. N. 95.

Order for protection:—Where a Police Magistrate convicted a father for an offence committed by his son it was held that an unqualified order for protection should not be given the Magistrate; it should not extend to things done (if any) maliciously and without reasonable and probable cause. *Laselle* v. *Wholehan* (1916) 27 O. W. R. 51; 526; 38 O. L. R. 119; 11 O. W. N. 113

Order quashing conviction: — There is a right of appeal to the Appellate Division from an order quashing a conviction and providing protection to the convicting Magistrate. *Laselle* v. *Wholehan* (1916) 27 O. W. R. 51, 526; 38 O. L. R. 119; 11 O. W. N. 113.

LANDLORD AND TENANT

Fitness for habitation:—A warranty at or before the making of a lease that a house is in a fit state for habitation, whether as regards repairs or drainage, may be given as an express contract or may be implied from a representation as to the state of the house, but it is well settled law that in the absence of an express stipulation or a statutory duty the landlord is under no liability to put the demised premises into repair at the commencement of the tenancy nor to do repairs during the continuance thereof, nor is there any implied warranty by the landlord that the premises shall be fit for the purpose for which they are taken. *Miles* v. *Constable* (1916), 27 O. W. R. 222; 11 O. W. N. 89.

Interest of Assignor of lease:—Where an assignee of a renewable lease assigns his interest in the lease less one day, he still retains a substantial interest in the leasehold property. *Toronto General Hospstal Trustees & Sabiston* (1916) 27 O. W. R. 515; 38 O. L. R. 139; 11 O. W. N. 117.

Resisting improper distress: — Where a tenant desires to resist what he considers improper or illegal distress, his ordinary remedy is by replevin: It is questionable whether the remedy by injunction is open to him, but in this case the tenant was allowed to continue an interim injunction until trial on terms of paying into Court the value of the goods distrained. *Farr* v. *Kert* (1916) 27 O. W. R. 447; 11 O. W. N. 122.

Taxes:—Where a renewable lease provides that taxes are to be paid by the lessee in addition to rent, the renewal rent is the only thing for arbitrators to determine. They have no right to consider or adjust taxes. *Toronto General Hospstal Trustees & Sabiston* (1916) 27 O. W. R. 515; 38 O. L. R. 139; 11 O. W. N. 117.

LIMITATION OF ACTIONS

Acts constituting adverse possession:—On the 3rd September, 1897, the plaintiff obtained a certificate of ownership of certain land and the certificate set forth that he had been located thereon on Oct. 17th, 1885, under the Free Grants and Homesteads Act. H. married J. L. in 1881 or 1882 and died on Oct. 22nd, 1895. From the time of their marriage H. and J. L. lived on the said land and since her husband's death J. L. continued to live on the land until recently without any interruption. H. erected a dwelling house on part of the land during his lifetime and some additions were made by J. L. after his death. The fences around the said part were built by H. and J. L.: *Held*, that there had been actual, constant and visible occupation and possession to the exclusion of the plaintiff of the said part enclosed by fences and that J. L. was therefore entitled thereto as against the plaintiff. *Held*, further, that as the part of the said land not enclosed was uncleared and uncultivated land and was used by the said J. L. and others alike for pasture and other purposes as common land, that there was not under the circumstances such unequivocal evidence of entry and possession as necessary to bar the right of the plaintiff in whom was the registered title. *Held*, also that the payment by J. L. of the taxes for the whole lot of which the said enclosed land was a part was not in the circumstances an act so enuring to the said J. L. as to deprive the owner of the remaining part of his right thereto. *Lefevre* v. *Leduc* (1916) 27 O. W. R. 582; 11 O. W. N. 152.

Railway Act, R. S. C. (1906) c. 37, does not prescribe any limitation of time in which an action must be brought against a railway to recover damages for injury sustained by a passenger owing to the negligence of the railway. *Traill* v. *Niagara, St. Catharines & Toronto Ry. Co.* (1916) 27 O. W. R. 196; 38 O. L. R. 1; O. W. N. 70.

True Test of Dispossession of Rightful owner is whether ejectment will lie at his suit against some other persons. The mere going out of possession by the rightful owner is not enough. In order that the statute of limitations may operate there must also be actual exclusive possession for the statutory period y some one else. *Lefvere* v. *Leduc* (1916) 27 O. W. R. 582; 11 O. W. N. 152.

LIS PENDENS

Alimony action — *Lis pendens* should not be issued and registered in an alimony action; not even where a wife has advanced money to her husband and he has invested it in land, because the wife thereby acquires no lien on the land and she is not entitled to register a certificate of *lis pendens*. *Bulmer* v. *Bulmer* (1916) 27 O. W. R. 239; 11 O. W. N. 73.

LUNATIC

Life insurance money: — The provisions of the Hospitals for the Insane Act, R. S. O. (1914) c. 295 s. 36 override *pro tanto* those of the Insurance Act, R. S. O. (1914) c. 183 s. 176; therefore, the Inspector of Prisons and Public Charities is entitled to be paid any money which becomes due under a certificate of life insuranec to a beneficiary after having been confined in an asylum. *Re Nash* v. *Canadian Order of Chosen Friends* (1916) 27 O. W. R. 240; 11 O. W. N. 65.

MECHANICS LIEN

Interim advances unpaid:—Where the owner fails to make the builder *interim* payments as provided for in the contract, the builder is entitled to abandon the contract and collect for what he has done as a *quantum meruit*, and he may enforce a Lien to recover same. *Cragnoline* v. *Southwick* (1916) 27 O. W. R. 445.

MORTGAGE

Action upon—Motion for summary judgment — Dispute as to amount due — Judgment directing account to be taken—Notice of assignment of Mortgage—Stay of proceedings—Mortgagors and purchasers Relief Act, 1915—Rule 760 *Halsted* v. *Priestman* (1916) 27 O. W. R. 650; 8 W. N. 32.

Payment — Second Mortgage — Priority—Masters report — Appeal. *Stothers* v. *Borrowman* (1916) 10 O. W. N. 367; 11 O. W. N. 77; 27 O. W. R. 657.

Oral agreement to vary mortgage: Where mortgagee orally agreed that so long as certain monthly payments were received by way of rent he would take no proceedings under the mortgage, *held*, that the agreement was not binding as any agreement to vary the terms of a mortgage is required to be in writing. *Cooper* v. *Abramovitz* (1916), 27 O. W. R. 71; 11 O. W. N. 35.

App. Div. allowed appeal and set order aside in so far as it permitted plaintiff to have judgment for possession against appellant. Parties to go to trial on question of tenancy if they choose to do so. *S. C.* (1916) 27 O. W. R. 654; 11 O. W. N. 77.

Without notice: — Where a mortgagee does not notify persons appearing in the Registry Office as interested in the mortgaged property subsequent to date of mortgage, and proceeds to exercise his power of sale, the purchaser obtains a good title in so far as they are concerned, when the mortgage provides that "if default continues for two months the power of sale may be exercised without notice," and further provides that such a sale shall not be invalidated by reason of want of notice and that the vendors alone shall be responsible. *Brass* v. *Wall* (1916), 27 O. W. R. 65; 11 O. W. N. 30.

NEGLIGENCE

Bolt-head in sidewalk:—It is negligence on the part of a municipality to leave in the centre of a sidewalk a cap of a water cut-off pipe projecting five-eighths of an inch above the level of the walk, where the defect was obvious, and one which should have been remedied when the walk was first put down. *Trombley* v. *Peterborough* (1916) 27 O. W. R. 107; 11 O. W. N. 62.

Bridge over railway:—In an action by a man and wife to recover damages for injuries sustained while descending the 44 steps of an overhead bridge crossing railway tracks and connecting two highways in Toronto, the trial Judge found that the steps were in a dangerous condition owing to snow and ice and that the defendant municipality neglected their duty to keep them in proper repair and awarded the woman $1,000 and the man $100 damages and costs. An Appellate Division, S. C. O., *held*, that there was not sufficent evidence to support such finding, therefore, defendants' appeal was allowed. Lennox, J., dissented. *Palmer* v. *Toronto* (1916) 27 O. W. R. 224; 38 O. L. R. 20; 11 O. W. N. 79.

Collision between Street Car and Automobile — Motorist under 18 years—Evidence—Contributory negligence—Ultimate negligence — Colour of paper covers of certified Copies of Pleadings. *Dissepolo* v. *Fort William* (1916) 27 O. W. R. 653; 11 O. W. N. 73.

Contradictory findings of jury:—Where a jury answered "yes", to the question, "was the plaintiff guilty of any negligence which caused or contributed to the said injuries?" and also found the defendants guilty of negligence and awarded plaintiff $200 damages, *held*, that the effect of the answer was that in the opinion of the jury the plaintiff had been guilty of some initial negligence but that defendants' negligence was the ultimate cause of the accident. *Nairn* v. *Sandwich, Windsor & Amherstburg Ry.* (1916) 27 O. W. R. 237; 11 O. W. N. 91.

Depression in sidewalk: — It is gross negligence on the part of a municipality to allow a sidewalk to remain for three years below the level of the ground beside it with the result that water from rain and melted snow flows upon it and freezes making a dangerous spot unobserved when fresh snow has fallen. *Killeleagh* v. *Brawford* (1916) 27 O. W. R. 241; 38 O. L. R. 35; 11 O. W. N. 81.

Failure to stop car: — Where a motorman sees 180 feet ahead, a man on a bicycle who is in danger of being struck by the tramcar, and where the motorman can stop his car within 120 feet by applying the brakes with full force, it is negligence for him to only successively apply the brakes if by so doing he fails to stop the car in time to prevent an acident. *Roswell* v. *Toronto Ry. Co.* (1916) 27 O. W. R. 177; 11 O. W. N. 41.

Fire caused by sparks from railway engine—Evidence—Finding of fact by trial Judge. *Willox* v. *Michigan Central Ry. Co.* (1916) 27 O. W. R. 675; 11 O. W. N. 15, 145.

Fixing compensation:—Where a woman broke her leg through the negligence of defendants, and the evidence shewed that she was unable to walk, more than seven months after the accident, except with the aid of crutches, and then only with great difficulty, that improvement was likely, but that she would continue to suffer for an indefinate time, and that one leg would be about 1 1-2 inches shorter than the other, she was awarded $2,000 damages and her husband $600 for expenses, loss of consortium and services. *Trombley* v. *Peterborough* (1916) 27 O. W. R. 107; 11 O. W. N. 62.

Fumes and dust in factory:—Notwithstanding that a jury found that a servant's disease (tuberculosis) was "the reasonable and probable consequences" of his employer's negligence in "not taking proper and reasonable precaution by some mechanical or other device for disposing of fumes and dust" in his factory, the Appellate Division *held*, that there was no evidence on which the jury could find that the employer's negligence was the proximate cause of the disease, and, therefore, he could not recover damages. *Reid* v. *Ellis* (1916) 27 O. W. R. 490; 38 O. L. R. 123; 11 O. W. N. 114.

Knowledge of risk assumed:—A servant cannot be heard to say that he did not know, appreciate and voluntarily assume the risk of employment, when he had been for 14 years previously engaged in the same employment, in the same factory and for the same master. *Reid* v. *Ellis* (1916) 27 O. W. R. 490; 38 O. L. R. 123; 11 O. W. N. 114.

Latest devices:—A master is not bound to provide all the latest devices for the care or benefit of those he employes; he is bound to take reasonable means to protect them from injury in his service; and if a manufacturing company it should have the advice of competent men as to the proper methods of carrying on their business in regard to fumes and dust, and their effect upon the workmen, and should, in good faith, act in accordance with that advice.

If this has been done no jury should be permitted to find that they did not take reasonable means to protect their workmen, even if a case should arise in which it turned out that such means were not sufficient to prevent a particular injury. *Reid* v. *Ellis* (1916) 27 O. W. R. 490; 38 O. L. R. 123; 11 O. W. N. 114.

Lowering disease resisting power: —In all cases in which the negligence of a master lowers the disease resisting power of a servant, the master is answerable in damages for the loss sustained by the servant through any and all ailments that flesh is heir to, attributable to impaired resisting power so caused, providing that the negligence is the proximate, not a remote, cause of the injury: The difficulty lies in the proof, which must be convncng *Reid* v. *Ellis* (1916) 27 O. W. R. 490; 38 O. L. R. 123; 11 O. W. N. 114.

Medical evidence:—The question as to gases and dust and their effect upon human beings cannot be answered out of common knowledge; it must be dealt with by those skilled n chemistry and pathology. *Reid* v. *Ellis* (1916) 27 O. W. R. 490; 38 O. L. R. 123; 11 O. W. N. 114.

Municipal Corporation — Ditches and Watercourses Act—Failure to Provide Sufficient Outlet—Inquiry to land — Damages — Evidence — Findings of fact of trial Judge—Appeal. *McConnell* v. *Toronto* (1916) 27 O. W. R. 674; 10 O. W. N. 234; 11 O. W. N. 38.

Notice of claim for damages given pursuant to the Municipal Act, R. S. O. (1914) c. 192, s. 460, is not defective because no date is given on which the accident occurred, nor because it states that the accident occurred on the south instead of the north side of the street. *Killeleagh* v. *Brawford* (1916) 27 O. W. R. 241; 38 O. L. R. 35; 11 O. W. R. 81.

Ont. Workmen's Compensation Act has no application to seaman, on a Glasgow ship, upon high seas, serving under a contract made in Nova Scotia for a voyage from Sydney, N.S., to Manchester, Eng., and return. *Wedemeyer* v. *Canada Steamship Co.* (1916) 27 O. W. R. 161; 10 O. W. N. 284; 11 O. W. N. 40.

Projecting boulder in channel: — A vessel while proceeding down a dredged channel in a navigable river grounded upon a large boulder, which had been projected into the channel by a dredging company, in the course of its operations under a Government contract. The evidence shewed that the boulder had been marked by a buoy but the buoy had been carried away at least 2½ hours before the accident. *Held*, that the whole duty of the dredging company was not performed by placing the buoy without provision that it should remain where it was placed; that 2½ hours was an unreasonable time to allow an obstruction to remain without warning and more than a reasonable time to allow the discovery of the absence of the buoy and to replace it; therefore, the dredging ocmpany was liable for the damages sustained by the vessel. *Shenango Steamship Co.* v. *Soo Dredging and Construction Co.* (1916) 27 O. W. R. 291.

Seaman Drowned: — Where a heavy wave sweeps the deck of a ship, washing a seaman overboard, the owners of the ship are not liable when the evidence shews that it was an accident for which no one was blamable, or that it was an accident caused by the neglect of duties by the crew. In the latter case the doctrine of common employment applies. *Wedemeyer* v. *Canada Steamship Co.* (1916) 27 O. W. R. 161; 10 O. W. N. 284; 11 O. W. N. 40.

Scope of employment: — A company employing an agent on commission on goods sold by him, which hires a horse and waggon and rehires them to the agent for use in his business as a sales agent, is li-

able in damages to a pedestrian who is knocked down and injured by said horse and waggon when being driven by said agent on his way back to the company's stables, after his day's work is done, where the jury finds that the agent was acting within the scope of his employment and where there is evidence to support such a finding. *Duffield* v. *Peers* (1916) 27 O. W. R. 183; 37 O. L. R. 652; 11 O. W. N. 45.

Wearing rubbers: — Failure of pedestrians to wear rubbers is not contributory negligence. *Trombley* v. *Peterborough* (1916) 27 O. W. R. 107; 11 O. W. N. 62.

Workmen's Compensation Cases are of but little authoritative value in deciding negligence cases under the common law. *Reid* v. *Ellis* (1916) 27 O. W. R. 490; 38 O. L. R. 123; 11 O. W. N. 114.

NUISANCE

Character of locality:—An arbitrary standard cannot be set up which is applicable to all localities; there is a local standard applicable in each particular district, but though the local standard may be higher in some districts than in others, yet the question in each case ultimately reduces itself to the fact of nuisance or no nuisance, having regard to all the surrounding circumstances. *Oakley* v. *Webb* (1916) 27 O. W. R. 544; 38 O. L. R. 151; 11 O. W. N. 132.

Injunction—Temporary suspension —Damages. *Cotton* v. *Ontario Motor Co.* (1916) 27 O. W. R. 664; 11 O. W. N. 100.

Stone-cutting:—The business of a stone cutter and sawyer is not a nuisance when carried on, on premises adjoining railway tracks and situate in a city block which has by city by-law been excepted from residential districts, and the residents within such a block cannot restrain said business, notwithstanding that the residents suffer considerable annoyance from noise and dust. *Oakley* v. *Webb* (1916) 27 O. W. R. 544; 38 O. L. R. 151; 11 O. W. N. 132.

PARTICULARS

Part of pleadings:—When particulars are ordered, they necessarily form part of the statement of claim or the statement of defence, and such statement is not complete without them. Upon the particulars depend the issues to be tried. *Foster* v. *McLean* (1916) 27 O. W. R. 420; 10 O. W. N. 457; 11 O. W. N. 31, 109.

PARTIES

Issued by one of two defendants:—Where it was urged that the issue of a third party notice was irregular because only one of two parties interested in any relief over applied for the notice, *held*, that as the party who applied for the notice was liable to the plaintiff, if at all, for the whole sum claimed, and entitled, if at all, to claim indemnity in regard to that sum, he was obviously not bound to seek or obtain the co-operation of his co-defendant before issuing a third party notice. *Flanagan* v. *France* (1916) 27 O. W. R. 73; 11 O. W. N. 50.

Right to invoke third party procedure:—The right to invoke third party procedure exists whenever the plaintiff's claim against the defendant, if successful will result in the defendant having a claim against the third party to recover from him the damage which he has been compelled to pay to the plaintiff. *Per* MIDDLETON, J., in *Swale* v. *C. P. Ry.* (1912), 21 O. W. R. 225 at 234; 25 O. L. R. 492 at 504. *Flanagan* v. *France* (1916), 27 O. W. R. 73; 11 O. W. N. 50.

Syndicate action:—All members of a syndicate are necessary parties to an action by the syndicate and an action brought by only certain mem-

bers of it is defective for want of parties. *Barrett Bros.* v. *Bank of Toronto* (1916) 27 O. W. R. 25; 11 O. W. N. 10.

PAYMENT

Admission of liability :—Payment into Court is not necessarily an admission of liability; (Con. Rule 308) and where the money is not taken out it is still open for the defendant to contend that he did not owe so much. *Bull* v. *Stewart* (1916) 27 O. W. R. 170; 11 O. W. N. 43.

Claim for price of goods sold and delivered—Payment by promissory notes and assignment of mechanic's lien—Destruction by fire of building on land covered by lien—Application of insurance moneys—Mechanics and Wage-Earners Lien Act, R. S. O. 1914 ch. 140, sec. 9. *Agnew* v. *East* (1916) 27 O. W. R. 657; 10 O. W. N. 428; 11 O. W. N. 78.

PLEADING

Amending counterclaim: — Where a counterclaim has been set up there is no decision shewing that it cannot be enlarged or amended. *Henderson* v. *Henderson* (1916) 27 O. W. R. 422; 38 O. L. R. 97; 11 O. W. N. 69, 123.

Counterclaim to specially endorsed writ: — The practice in Ontario is the same for writs specially endorsed as it is for writs not so endorsed, and a defendant is within his rights when he sets up a counterclaim to a specially endorsed writ, and it matters not that his counterclaim is, strictly speaking, really a set-off, so long as it is a claim which he desires to enforce over and above his defence, and he sets it out in his affidavit of defence on merits. *Henderson* v. *Henderson* (1916) 27 O. W. R. 422; 38 O. L. R. 97; 11 O. W. N. 69, 123.

Defence arising after action: — Rule 150 provides that any ground of defence, which has arisen after action, but before delivery of statement of defence, may be pleaded. Held, that directors of a company, in an action against them, could set up in their defence, a by-law which they had passed after the writ had been issued. *Crawford* v. *Bathurst Land & Development Co.* (1916), 27 O. W. R. 76; 37 O. L. R. 611; 11 O. W. N. 51.

Ineffective service: — Any irregularity in regard to service is waived by entering an unconditional appearance. *Flanagan* v. *France* (1916), 27 O. W. R. 73; 11 O. W. N. 50.

PROCESS

Damages for wrongful dismissal is clearly not a subject of special endorsement of a writ. *Henderson* v. *Henderson* (1916) 27 O. W. R. 422; 38 O. L. R. 97; 11 O. W. N. 69, 123.

Exhibiting original order:— There is no rule requiring the original of an order to be exhibited at the time of the service of a copy of it. *Flanagan* v. *France* (1916), 27 O. W. R. 73; 11 O. W. N. 50.

Special endorsement:—A writ may be endorsed specially and at the same time may contain another claim with respect to which there cannot be special endorsement; but plaintiff is not entitled to have speedy trial save in cases where the whole claim is specially endorsed. *Henderson* v. *Henderson* (1916) 27 O. W. R. 422; 38 O. L. R. 97; 11 O. W. N. 69, 123.

Substituted Service:—Where a defendant is out of the jurisdiction and a writ for service within the jurisdiction is issued, service of the said writ cannot be effected indirectly by substituted service. *Goodman* v. *Brull* (1916) 27 O. W. R. 564; 11 O. W. N. 175.

REVENUE

Escheats:—Lands in the Province of Alberta escheated to the Crown for want of heirs belong to the Dominion and not to the Province. *Trusts & Guarantee Co.* v. *Rex* (1916) 27 O. W. R. 342; 54 S. C. R. 107.

SALE OF GOODS

Formation of contract from correspondence—Acceptance of offer—Absence of ambiguity—Breach by failure of vendor to deliver goods — Abandonment — Rise in market-price — Failure to prove damage — Time of breach.—*Powers & Son* v. *Hatfield & Scott.* (1916) 27 O. W. R. 666; 10 O. W. N. 198; 11 O. W. N. 109.

No. 1 Timothy:—The representation that hay is No. 1 Timothy is not a mere *warranty* in the narrow sense of that term, but is what is known in law as a *condition*, and in case of a breach the purchaser has a right to reject the hay if exercised within a reasonable time: He need not have the hay sold and sue for the difference in price. *Niagara Grain & Feed Co.* v. *Reno* (1916) 27 O. W. R. 549; 38 O. L. R. 159; 11 O. W. N. 134.

Rejection after re-sale:—Where a vendor knows that a purchaser is buying goods for re-sale, the purchaser is not estopped from rejecting the goods because he re-sells them, providing that inspection and rejection takes place within a reasonable time. *Niagara Grian & Feed Co.* v. *Reno* (1916) 27 O. W. R. 546; 38 O. L. R. 159; 11 O. W. N. 134.

Time for rejection:—A car load of hay arrived in Toronto on 24th Dec. Christmas day and Sunday immediately followed, then the car was moved to North Toronto where the hay was inspected on 30th Dec. On 31st Dec. purchaser wired the vendor rejecting the hay. *Held*, that the inspection and rejection were within a reasonable time. *Niagara Grian & Feed Co.* v. *Reno* (1916) 27 O. W. R. 549; 38 O. L. R. 159; 11 O. W. N. 134.

Title to goods in storage:—Where a company previous to becoming insolvent entered into a contract for the purchase of a certain quantity of goods, and where the vending company in order to save freight charges stored a large quantity of such goods in building not owned by the purchasing company and paid the fire insurance on the goods so stored, but gave the purchasing company the right to use such of the goods as they might require and at the end of each month pay for what they had used, *held*, that the goods so stored belonged to the vending company and the assignee of the purchasing company had no claim to them. *McArthur Irwin Co.* v. *Gausby* (1916) 27 O. W. R. 217; 11 O. W. N. 93.

SCHOOLS

Continuation School—Vacancies in Board—Duty of township council to Fill — Mandamus. *Re West Nissouri Continuation School* (1916) 27 O. W. R. 651; 11 O. W. N. 33; O. L. R. 207.

Language of instruction: — The power of determining what language shall be used as a medium of instruction in the schools of Ontario is vested in the provincial legislature, and Regulation No. 17 of 1912-13 of the Department of Education requiring teachers in certain schools to understand the English language is not an infringement of any constitutional right which the supporters of those schools enjoy under the B. N. A. Act, 1867. *Mackell* v. *Ottawa Separate School Trustees* (1916) 27 O. W. R. 505.

Limitation of action: — Where an union school section if formed out of parts of two or more townships and arbitrators accordingly appointed by the townships and an award has been made and appealed against

under Public Schools Act, R. S. O. (1914), c. 266, s. 22 (1), to the County Council, which, under s. 22 (2), appointed three arbitrators and their award has been confined by township by-law, a County Judge has no authority, under s. 20 (3) to make any order respecting the bylaw or the award, unless notice of an application to quash such by-law or to set aside such award is given to the township clerk within one month after the publication of such bylaw or award, as provided by s. 30 (1). *Re Union School Section "A." West Flamborough* (1916), 27 O. W. R. 14; 11 O. W. N. 5.

Members of Separate School Boards are in no different position from other Boards or bodies of trustees entrusted with the performance of public duties and if they fail or decline to perform their statutory duties they are liable to process of the Supreme Court of Ontario. *Ottawa Separate School Trustees* v. *Ottawa* (1916) 27 O. W. R. 484.

Qualification of teachers in Ontario schools is a matter within the exclusive jurisdiction of the provincial legislature, and school boards have no authority to engage teachers who do not possess the qualifications prescribed by the Department of Education. *Mackell* v. *Ottawa Separate School Trustees* (1916) 27 O. W. R. 505.

SEDUCTION

Resemblance of child to alleged father:—The Court will not open up a judgment in an action for seduction on the ground that the child of of the girl seduced resembles some one else than the defendant who has been foud guilty. *Baldwin* v. *Hesler* (1916) 27 O. W. R. 588; 11 O. W. N. 151; 38 O. L. R. 172.

SHIPS

Rules for Navigation, Art. 25: — Where the *Honoreva* collided with the *Maggie* in the Soulanges Canal, owing to the failure of the *Honoreva* to observe Art. 25 of the Rules for Navigation, etc., which required her to keep to the starboard side of mid-channel, she was held liable for the damages sustained by the *Maggie*. *Bonham* v. *The Honoreva* (1916) 27 O. W. R. 324; 54 S. C. R. 51.

STATUTES

Marginal notes to a statute are no part of the statute. Some marginal notes are grossly inaccurate. *Hirshman* v. *Beal* (1916), 27 O. W. R. 245. 38 O. L. R. 40; 11 O. W. N. 83.

STREET RAILWAYS

Crossing sidewalk:—Privy Council confirmed an order of the Ont. Ry. & Mun. Board, approving of certain plans of the Toronto & York Radial Ry., for the construction of a spur line, on the level across a portion of the sidewalk on the west side of Yonge street, Toronto, connecting its railway with a site purchased to provide necessary terminal accommodation *Toronto & York Radial Ry. Co.* v. *Toronto* (1916) 27 O. W. R. 414; 38 O. L. R. 88; 11 O. W. N. 171.

TIMBER

Delivery not made as agreed—Deduction from price — Quality of timber—Inferiority — Counterclaim — Damages — Extinction of plaintiff's claim—Dismissal of action—Costs—Appeal. *Thorne* v. *Hodgson*, (1916) 27 O. W. R. 671; 10 O. W. N. 461; 11 O. W. N. 135.

Trespass—Claim for conversion of timber — Damages — Evidence — Counterclaim. *Mylam* v. *Rat Portage Lumber Co. & Fraser* (1916) 27 O. W. R. 673; 11 O. W. N. 165.

TRIAL

Common knowledge: — The jury are at liberty to apply common

knowledge in arriving at their verdict. *Roswell* v. *Toronto Ry. Co.* (1916) 27 O. W. R. 177; 11 O. W. N. 41.

Defence under Cr. Code: — In an action against a police constable, for forcible entry and arrest, he has a right to rely upon the provisions of the Cr. Code as a defence and where the trial Judge refused the defendant leave to amend his pleadings at trial and base his defence upon s. 30 of the Code, a new trial was ordered. *Altman* v. *Majury* (1916), 27 O. W. R. 120; 37 O. L. R. 608; 11 O. W. N. 21.

Jury Notice — Venue — Rights of plaintiff. *Helsdon* v. *Bennett* (1916) 27 O. W. R. 671; 11 O. W. N. 162.

Rule 132:—Questions of law raised by way of motion under Rule 132, should not be determined before the trial of other issues in the action unless it is made to appear that the point missed is one which is reasonably clear ought to be resolved in favour of the applicant. ved in favour of the applicant; *Port Arthur Waggon Co.* v. *Trusts & Guarantee Co.* (1916) 27 O. W. R. 211; 11 O. W. N. 88.

Service too late:—Notice of trial served on 30th Sept. as for 10th Oct. is too late, where the commission day for holding Court was 9th Oct. notwithstanding that that day was appointed Thanksgiving Day. *Whittaker* v. *Toronto Ry. Co. & Dom. Transport Co.* (1916), 27 O. W. R. 258; 11 O. W. N. 74.

TRUSTS AND TRUSTEES

Conveyance of land — Alleged trust for execution debtor—Action by execution creditors for declaration—Evidence—Bona fide sale for value — Findings of fact of trial Judge—Appeal. *Seagram* v. *Halberstadt* (1916) 27 O. W. R. 656; 10 O. W. N. 308; 11 O. W. N. 28.

VENDOR AND PURCHASER

Agent's fraud:—A vendor is liable for misrepresentations made by his paid agent which induces a purchaser to buy his land. *Georgian Bay Milling & Power Co.* v. *Gentles* (1916) 27 O. W. R. 135.

Agreement for sale of land—Authority of agent of vendor—Ratification — Specific performance —Reference—Costs. *Mooney* v. *McCuaig* (1916) 27 O. W. R. 661; 11 O. W. N. 163.

Belated claim: — Where an agreement for sale of lands was entered into in 1903, and an action for specific performance was brought in 1914; *held*, that the equitable remedy of specific performance is not given unless sought with great prompitude, and that in this case the claim was altogether too belated, no attempt having been made to excuse the great delay; however, the purchaser was allowed a return of the money paid on account of the purchase price. *Clergue* v. *Plummer* (1916) 27 O. W. R. 259; 38 O. L. R. 54; 11 O. W. N. 85.

Disclosure by vendor-promoter: — A vendor-promoter of a company is bound to make the fullest disclosure as to the price he paid and the profit he is taking, otherwise he is liable to the company for damages for non-disclosure. *Crawford* v. *Bathurst Land & Development Co.* (1916), 27 O. W. R. 76; 37 O. L. R. 611; 11 O. W. N. 51.

Exchange of lands—Fraud and misrepresentation — Deficiency in acreage—Value of standing timber — Opportunity of inspection — Husband agent for wife. *Wake* v. *Smith* (1916) 27 O. W. R. 658; 11 O. W. N. 94.

Fiduciary trustee: — Where lands are devised to executors in trust and the widow is entitled to the income therefrom, she is not a life tenant nor a trustee of the lands; and where the taxes are allowed to fall

in arrears and the lands are sold to a stranger for taxes and the widow afterwards purchases them from the stranger she obtains a good title. *Re McCurdy & Janisse* (1916), 27 O. W. R. 193; 11 O. W. N. 67.

Grantee's liability re encumbrances: —Where a mortgagor or owner of an equity of redemption, transfers his equity, as security for advances, to one person and then exchanges his equity to another person for another equity, the person holding the title simply releasing his claim in consideration of receiving a transfer of the other property to hold in lieu of the security surrendered, and where he does not execute the conveyance to him, he cannot be held to indemnify the grantor against the mortgages on the property transferred to him, as security, notwithstanding a recital in the description that "the assumption of mortgages upon the property conveyed is part of the consideration" for the transfer, his real position being that of a mortgagee and not a purchaser. *Cam-* mortgagee and not a purchaser. *Campbell* v. *Douglas* (1916) 27 O. W. R. 129; 54 S. C. R. 28.

Inspection by purchaser:—It is a fraud on the purchaser to take him to inspect land which he is about to purchase and shew him only the good part and avoid the worthless part, and then assure him that the land which he has not seen is similar to what he has been shewn, when the purchaser relies on such assurance. *Georgian Bay Milling & Power Co.* v. *Gentles* (1916) 27 O. W. R. 135.

Pretended advance on land:— It is a fraud on the purchaser for the vendor to misrepresent to him that the vendor has loaned a sum of money on the land in question and that he was selling to get his money out. *Georgian Bay Milling & Power Co.* v. *Gentles* (1916) 27 O. W. R. 135.

Ratification:—Where a vendor has practiced fraud and misrepresentation on a purchaser of land, the purchaser cannot be held to have ratified the bargain by simply asking the vendor if he would renew a promissory note given as part of the purchase price. *Georgian Bay Milling & Power Co.* v. *Gentles* (1916) 27 O. W. R. 135.

Time for assessing damages:— Where a purchaser seeks damages from a vendor for fraud and misrepresentation in the sale of timber lands, owing to shortage of timber, the damages should be estimated according to the value of the timber on the land at the time of the sale, not according to its value at the time of the trial. *Georgian Bay Milling & Power Co.* v. *Gentles* (1916) 27 O. W. R. 135.

WATER AND WATER-COURSES

Projecting boulder in channel: — A vessel while proceeding down a dredged channel in a navigable river grounded upon a large boulder, which had been projected into the channel by a dredging company, in the course of its operations under a Government contract. The evidence shewed that the boulder had been marked by a buoy but the buoy had been carried away at least 2½ hours before the accident. *Held*, that the whole duty of the dredging company was not performed by placing the buoy without provision that it should remain where it was placed; that 2½ hours was an unreasonable time to allow an obstruction to remain without warning and more than a reasonable time to allow the discovery of the absence of the buoy and to replace it; therefore, the dredging company was liable for the damages sustained by the vessel. *Shenango* v. *Soo Dredging Co.* (1916) 27 O. W. R. 291

WAY

Failure of plaintiff to prove title to lands enroached upon: — The

Crown in 1857 issued a Patent to one B. of certain land adjoining a small island in the Rideau River "reserving the line of road across the said island." Some years before this time there was a way across the island connected with the mainland on either shore by bridges. In 1913 a new bridge was built higher and wider than the old one. The plaintiff, the successor in title of B., brought action claiming that the defendants had entered upon land not reserved in the said patent, that his property had been damaged by the increased height and width of the bridge; he also claimed an injunction preventing the defendants from trespassing upon his lands and a mandatory injunction that they remove equipment, etc., on his land.

Held, that the patent must be enterpreted by reference to the order in Council upon which it was founded and as there was no evidence that "the line of road" was in 1857 or at any time since less than the regulation width of highways that the said expression meant all the land allotted to a highway; that, at the best, the expression being ambigious could be explained by other documents and transactions and as so explained meant the regulation highway of 1 chain width. *Held*, also, that although the defendants had by the exercise of their right to build a new bridge damaged the plaintiff, the Court could not assume jurisdiction to deal with a claim which could only be enforced by proceedings under the Municipal Act, R. S. O. ch. 192 sec. 325 (2) *Billings* v. *Ottawa & Carlton* (1916) 27 O. W. R. 614; 11 O. W. N. 148.

Width 20 or 66 feet?—In an action to determine whether a highway was 66 or only 20 feet in width, the evidence shewed that the owner of land adjacent to the highway had notice that the highway was a public highway, that he had done statute labour on it and had built a fence on a 66-foot line along the side thereof, *held*, that he was estopped from denying that it was a 66-foot highway, and he could not take advantage of the neglect of the municipality to register the by-law acquiring the land for the highway. *Harvey Township* v. *Galvin* (1916), 27 O. W. R. 125; 11 O. W. N. 38.

WILLS

Abatement:—Where an estate is inadequate to answer the benevolence of the testator the residuary legacies must abate. *Re Fitzgibbon* (1916) 27 O. W. R. 207; 11 O. W. N. 71.

Annuity — Arrears — Dower — Money Lent — Funeral Expenses — Administration. *Wigle* v. *Huffman* (1916) 27 O. W. R. 666; 10 O. W. N. 431; 11 O. W. N. 110.

Capita or stirpes:—Where a testator gave property to "be divided equally, share and share alike, among all my brothers and sisters living, *and also* to the children of those who have died when they attain the age of twenty-one years," *held*, that the words *and also to* indicated that there were two classes of beneficiaries, first, the brothers and sisters living were in one class and one relationship to the testator, and secondly, the children of those who had died were in another class and relationship to the testator, therefore, they took per stirpes. *Re Bauman Estate* (1916) 27 O. W. R. 111; 11 O. W. N. 55.

Capita or stirpes:—Where a fund is to be kept together and divided at one period there is no reason for inferring division per stirpes; but if it is divisible at different times then the distribution per stirpes is to be preferred. *Re Bauman Estate* (1916), 27 O. W. R. 111; 11 O. W. N. 55.

Capita or per stirpes? — The direction in a will, "to divide and distribute the said principal sum equally between and among the children of my half-brother, namely, Joseph, Donald and Annie, and the daughters of Mrs. Nellie Peterman,

one equal share to each child," *held*, that the words *one equal share to each child* shewed it was the testator's intention that the beneficiaries should take per capita and not per stirpes. *Re Walmsley* (1916) 27 O. W. R. 449; 11 O. W. N. 124.

Company shares:—Where a testator, after making his will, exchanged his shares in "W. A. Murray Co., Ltd.," for shares in "Murray-Kay Ltd.," an amalgamation of the W. A. Murray Co. and another company; *held*, that the shares in the Murray-Kay Company were substantially the same as the shares in the W. A. Murray Company, and passed under the will. *Re Murray Estate* (1916), 27 O. W. R. 60; 11 O. W. N. 23.

Conditions attending preparation: — Although a person, in a decayed condition of body and mind, may, under fair conditions, with fair treatment and with, and possibly without, honest and efficient professional or other assistance, be possessed of sufficient mental capacity to make a valid will, yet probate of a document purporting to be the will of such a person will be refused, where these conditions were not attending its preparation and execution and where the alleged testator or testatrix had no correct knowledge of the value of his or her estate. *Menzies* v. *McLeod* (1916), 27 O. W. R. 38; 11 O. W. N. 14.

Election arises where the property given away by the testator belongs to his beneficiaries, even though their title to it is derived only as next of kin or as residuary legatees or devisees of a person dead at the time of the testator's death. *Walmsley Estate, Re* (1916), 27 O. W. R. 17; 11 O. W. N. 6.

Election of beneficiary:—Where a testator devises parts of property, the whole of which another person owns, and confers, by his will, benefits upon that other person, the latter must elect either against the will or to retain the said property, and if he elects against the will the benefits accruing to him thereunder are to be treated in equity as a fund out of which compensation is to be made to the disappointed beneficiaries. *Re Pherrill* (1916) 27 O. W. R. 620; 11 O. W. N. 185.

Election of Widow to take Dower: —There must be some clear indication that a widow is to be deprived of her dower if she takes under her husband's will. Where a widow accepts the benefits given to her by her husband's will, neither a direction to sell and realize nor the formation of a blended fund are sufficient indication of the husband's intention to deprive his widow of her right to dower. *Re Williamson* (1916) 27 O. W. R. 569; 11 O. W. N. 142.

Identification of legatee: — Where a testator was for years connected with the "Women's Welcome Hostel," an incorporated body, it was held that a gift to the 'Hostel" was a sufficient identification of the institution. *Re Fitzgibbon* (1916) 27 O. W. R. 207; 11 O. W. N. 71.

Lands acquired by devisee:—A devisee in tail of land contiguous to a road allowance, after entering into possession, acquired title to that road allowance; *held*, that his title there to was independent of his ownership of or interest in the adjoining lands and enured to his own benefit without obligation to hold it under title similar in character to that which he had in the adjoining property, and the fact that the conveyance thereof from the municipality was not obtained by him, but by the trustees of his estate after his death, could only be treated as confirmatory of his title and not as an admission of any weakness in it. *Walmsley Estate, Re*, (1916) 27 O. W .R. 17; 11 O. W. N. 6.

Lands included in devise:—Where the amount of land included in a devise to a son was questioned and

the evidence shewed that the son had acquired title by possession to a proposed road allowances contiguous to lands owned by his father and devised to the son and that it was not necessary as a means of access to said lands nor was it necessarily appurtenant thereto, and the form of the devise was not such as to include any part of it, *held*, that the proposed road allowance was not included in the devise. *Walmsley Estate, Re* (1916) 27 O. W. R. 17; 11 O. W. N. 6.

Lawfully begotten heirs:—Where a testator devised certain lands to his daughters "to them and their heirs and assigns," and devised other lands to his sons "to have and to hold to them and their lawfully begotten heirs for ever," *held*, that the language of the devises to the sons appeared to have been used deliberately and with the intention of limiting the interests given to them, therefore, they received only an estate tail. *Walmsley Estate, Re* (1916), 27 O. W. R. 17; 11 O. W. ... 6.

Loss in realization: All loss in connection with the realization of an estate, whether by fault of an executor or otherwise must be born by the residuary legatee. *Re Cormack Trusts* (1916) 27 O. W. R. 199; 11 O. W. N. 74.

Perpetual trusts: — A gift to an institution aiding emigrant girls coming to Canada, the income of the gift to be used in awarding annual prizes to domestics who have gone through that institution and who have remained in one place for three years, giving satisfaction to her employer, is a gift for charitable purposes. *Re Fitzgibbon* (1916), 27 O. W. R. 207; 11 O. W. N. 71.

Rejected life estates given by will do not inure to the benefit of the reversioner,they fall into the residuary estate; nevertheless, the rejection of the life estate does not defeat the gift over, but the gift over only takes effect upon the death of the life tenant. *Re Fitzgibbon* (1916) 27 O. W. R. 207; 11 O. W. N. 71.

Representatives of deceased beneficiaries:—A clause in a will giving property to "be divided equally share and share alike among all my brothers and sisters living, and also to the children of those who have died," vests the property at the date of the testator's death, the persons entitled are then to be ascertained, and the property will pass to the personal representatives of any deceased children, therefore, the children of deceased children of brothers and sisters of the testator do not share with the surviving children of the brothers and sisters of the testator, whether such decrease took place before or after the death of the testator. *Re Bauman Estate* (1916), 27 O. W. R. 111; 11 O. W. N. 55.

Retaining poor investments:—A clause in a will directing executors to call in and convert the estate, save such "securities for money which my trustees may in their discretion think it better to retain as part of residuary trust fund investment," gives the executors a discretion to retain investments made by the testator even though these investments are not such as trustees are authorized to make under the general law. *Re Cormack Trusts* (1916) 27 O. W. R. 199; 11 O. W. N. 74.

Specific Bequests Followed by General Bequest — Modification or Revocation—Lapsed Legacy—Devise of Real Estate Subject to Legacies—Executors—Sale of Land — Public Auction. *Re Chambers* (1916) 27 O. W. R. 682; 11 O. W. N. 184.

Specific Legacies — Estate Insufficient to Pay in Full—Cesser of Life Interest in Fund Set apart—Application of Fund to Supplement Abated Legacies. *Re Perrie* (1916) 27 O. W. R. 679; 11 O. W. N. 160.

Time for vesting:—Where a testator used the expression directing property to "be divided equally share and share among all my brothers and sisters living, and also to the children of those who have died *when they attain the age of twenty-one years,*" held, that the vesting of property took place at the death of the testator, there being sufficiently clear intention that the beneficiaries were those living at that time, the words, *when they attain the age of twenty-one years,* having relation only to the time when payment could be made to the children of the deceased brothers and sisters, not that the gift to them was contingent upon their attaining that age. *Re Bauman Estate* (1916) 27 O. W. R. 111; 11 O. W. N. 55.

Unborn children:—Children born after the time has arrived for the distribution of an estate have no claim upon the estate. *Re Walmsley* (1916) 27 O. W. R. 449; 11 O. W. N. 124.

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