CORRECTION.

On p. 612, ante, line 5 should read—

"in it could be described (mathematically speaking) a right"

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CARTWRIGHT, MASTER. OCTOBER 21ST, 1907.

CHAMBERS.

LEROUX v. SCHNUPP.

Seduction — Examination of Defendant for Discovery — Refusal to Answer as to Promise of Marriage — Irrelevant Question — Damages.

Motion by plaintiff for order striking out statement of defence, on the ground of the refusal by defendant to answer proper questions on his examination for discovery.

D. Henderson, for plaintiff.

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

THE MASTER:—Defendant is a minor who is sued by plaintiff for seduction of his daughter.

On his examination for discovery defendant admitted the seduction.

He was then asked:—

"Q. I believe you asked her to marry you? A. I refuse to answer on the advice of counsel."

"Q. Did you ask her to marry you before you had connection with her? A. We refuse to answer the question."

If the action had been for breach of promise, such a question would have been relevant under Millington v. Loring, 6 Q. B. D. 190. Here, however, it does not seem admissible. . . . .

[Reference to Tullidge v. Wade, 3 Wils, 18.]

Seduction under promise of marriage may increase the damages in an action for breach of promise; but the con-

verse does not hold. This is not one of "the circumstances of time and place when and where the trespass complained of took place which properly affect the damages," as was said by Bathurst, J., in Tullidge v. Wade.

As defendant has admitted the seduction, it will be for plaintiff to consider if there is any need for continuing the examination. I express no opinion, however, as to this.

The motion now made will be dismissed with costs in the cause to defendant.

BRITTON, J. OCTOBER 21ST, 1907.

WEEKLY COURT.

UNION TRUST CO. v. O'REILLY.

Mortgage—Sale under Judgment of Court—Abortive Auction Sale—Subsequent Sale by Tender — Sufficiency of Price—Validity of Sale—Special Grounds for Impugning—Irregularities.

Appeal by infant defendants from the report on sale of the local Master at Ottawa, dated 24th September, 1907.

F. W. Harcourt, for infants.

G. F. Henderson, Ottawa, for purchaser, F. W. McKinnon.

W. N. Tilley, for plaintiffs, and for the Central Columbus Co., execution creditors of Philip O'Reilly.

BRITTON, J.:—The appeal is simply upon the ground that the offer of F. W. McKinnon is insufficient and not equal to the value of the land and premises in question in this action.

Pursuant to the judgment and order for sale, this property was offered for sale at auction at the court house in Ottawa at noon on 13th September, 1907.

It was offered subject to all taxes, local improvement, street sprinkling, and snow cleaning rates, which accrued due thereon after 31st December, 1906, and to water rates after the 30th June, 1907, and to a reserved bid fixed by the Master, and subject to the conditions of sale and advertisement.

The sale was apparently well advertised; there were at least 10 persons present; the bidding opened at $4,000, and advanced through 28 bids to $6,750, which was the highest bid. A reserved price had been fixed higher than the $6,750, so the property was withdrawn and the attempted sale proved abortive.

The attempted sale was conducted by the Master in a fair, open, and proper manner, and afterwards tenders were invited. That was quite proper. A sale by tender is well settled practice. On 24th September the trustee, in presence of solicitors for the parties, and after notice to the adult defendant, considered the tenders and accepted the highest of these, namely, that of Frederick W. McKinnon for $9,060, and declared the property sold to him for that sum. Mr. McKinnon's offer was subject to the same terms as to taxes, title, and generally which were in force at the time of the attempted sale by auction. The proposed purchaser, beyond question, was acting in good faith. There is now no binding offer on the part of any one to give an increased price, but, upon the facts before me, it may be assumed, that, now, persons may be found willing to take over this mortgage security from the plaintiffs, and give the defendants further time, and very likely a purchaser could now be found who would pay something in excess of $9,060 for the property. There is certainly a wide divergence of opinion in the valuators who have made affidavits herein.

I am of opinion that special grounds must now be established, affecting the validity of the sale, before the biddings will be opened. The cases cited in Holmested & Langton, 3rd ed., under Rule 732, shew that now the mere offer to give, or the ability to get, an increased price is not sufficient ground.

I do not think special grounds have been shewn. It is, as is often the case after the event, apparent that for some reason those interested, and would-be purchasers, have not realized the possibilities as to the value of the property in question. There have not been disclosed here any irregularities prior to the sale, but, if there were, such mere irregularities would not affect the validity of the sale as against a bona fide purchaser.

The case Re Jelly, 3 O. L. R. 72, supports the purchaser's contention.

The appeal must be dismissed, with costs to the plaintiffs and to the purchaser out of proceeds of sale, and the costs of official guardian out of the equity of redemption.

RIDDELL, J. OCTOBER 21ST, 1907.

TRIAL COURT.

PATCHING v. RUTHVEN.

Will—Charge on Land—Declaratory Judgment — Reformation of Deed—Removal of Executor—Administration—Receiver.

Action for reformation of a deed and to establish a charge and for other relief.

O. E. Fleming, Windsor, for plaintiff.

J. H. Rodd, Windsor, for defendant.

RIDDELL, J.:—Plaintiff is the step-father of defendant. By the will of the late mother of defendant, the plaintiff's wife, the defendant took certain personal estate and also certain real estate, including a hotel and 2 lots, on the latter of which was built the house in which the deceased lived at the time of her death, as did plaintiff and defendant, deceased's husband and daughter.

This will gave "to my daughter Elizabeth N. Ruthven all my property, real and personal, including the house and lots . . . provided my husband A. E. Patching is to have a home in the house No. 107 at any and all times he may wish, and I direct my daughter Elizabeth N. Ruthven . . . . to pay my said husband the sum of $30 per month, payable monthly, as long as he lives. The said real estate now stands in the name of my said husband and myself, and the above payment to him of $30 per month is for his interest therein, which he is to convey to my said daughter."

The will then proceeds to dispose of the other property, including the hotel, and devises this to the daughter, the defendant—and the plaintiff and defendant are appointed executors.

After the death, the plaintiff accepted the terms of the will, and conveyed to defendant his interest in the lots in "consideration of the directions in the will of Anna M. C. Patching and $1." Subsequently an agreement was entered into whereby the parties agreed to a payment of $2 per week in lieu of plaintiff's right to reside in the house.

Plaintiff says he is not satisfied with the manner in which defendant is dealing with the property, and asks to have the deed which he made of his interest in the property reformed, for a declaration that he has a charge upon all the estate of the deceased, for the removal of defendant as executor, for administration, and for a receiver.

Defendant says that the deed was not intended to interfere with the rights of plaintiff under the will, and repudiates any desire or intention to deprive him of any rights he may have had. She asserts that she has been and is administering the property prudently.

I may say at once that I find as a fact that the alleged suspicions of plaintiff are groundless, and that defendant, a woman of more than ordinary business capacity, has been and is conducting the business in a prudent and careful manner. So that, even had the law been that the allegations of plaintiff being proved, he would be entitled to relief, he has entirely failed.

The correspondence before action and what took place at the trial make it manifest that this action was really brought to compel the defendant to give some kind of security to the plaintiff for the payment of what he calls his "dowry." I am unable to see how he can have any such right to security, and it is not specifically asked in the statement of claim.

As to the declaration sought, it is important to remember that the sums have been paid practically as and when they became due, and that there is no complaint that any amount whatever is in arrear. The defendant does not dispute her liability to pay these sums, and the only controversy between the parties is whether the plaintiff has a charge upon the real estate for the payment of these sums.

Under the old practice, no such declaration would have been made, the plaintiff not having actually sustained damage: Brooks v. Conley, 8 O. R. 549, and cases cited.

The statute which was passed (30th March, 1885), after and no doubt in consequence of that decision, viz., 48 Vict. ch. 13, sec. 5, and which is now sec. 57 (5) of the Judicature Act, provides that "no action or proceeding shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the Court may make binding declarations of right, whether any consequential relief is or could be claimed or not."

This section has, in turn, been judicially considered in such cases as Bunnell v. Gordon, 20 O. R. 281; Thomson v. Cushing, 30 O. R. 123; and Stewart v. Guibord, 6 O. L. R. 262, 2 O. W. R. 168, 554. Without referring to the English cases, which will be found referred to in Holmested & Langton, pp. 49, 50, 51, it seems quite clear that a declaration will not be made in a case in which the question is a mere academic one, as it is here.

The defendant does not deny her liability to pay; any purchaser or mortgagee of any of the real estate will take with express notice of the terms of the will, as the conveyance of the two lots refers specifically to the will, and the only title the defendant has to any other real estate is derived through the will.

If and when there is any default in payment, the plaintiff may exercise all the rights he may have under the will. But until then and until a contest of any rights he may claim, if he has no right to a charge on the realty, he is not entitled to a declaration; if he has, there is no need of such declaration. Moreover, some of the property is subject to a mortgage, some of it has been sold, and no judgment could be given, in the absence of mortgagee or purchaser, which would be of any present advantage.

There is no reason for removing the defendant, nor for an order for administration, and the plaintiff wholly fails.

The action will be dismissed with costs.

I should add that the evidence of the defendant is wholly to be relied upon in matters of fact.

RIDDELL, J. OCTOBER 21ST, 1907.

TRIAL.

BEAUDRY v. READ.

Company—General Meeting—Election of Directors—Shareholders Prevented from Voting—Meeting Voting Shares to Directors as Remuneration for Services—7 Edw. VII. ch. 34, sec. 88 (O.)—By-law Authorizing Payment to Directors—Necessity for Passing by Board and Confirmation by Shareholders — Consideration for Shares Voted — Abandonment of Appeal in Previous Action—Validity—Directors Lending Money to Company—Repayment—Illegality—Costs.

Action by Beaudry, Thorpe, and others against the Ruethel Mining Co. and the de facto directors thereof, for an

injunction and certain declarations as to the acts of the directors and shares allotted to them, as appears in the judgment.

A. R. Bartlett, Windsor, for plaintiffs.

A. St. G. Ellis, Windsor, for defendants.

RIDDELL, J.:—The defendant company is incorporated under the Ontario Companies Act, and the other defendants are the de facto directors. The plaintiff Thorpe was the holder of over 14,000 of the shares of the company, but, by an interim order made in an action brought against him by the company, he had been restrained from voting upon them at any meeting of the company. The action came on for trial before Anglin, J., 29th and 30th April, 1907, and that learned Judge, in a judgment delivered 9th May, 1907 (9 O. W. R. 942), found in favour of Thorpe. Then, by a document dated 15th May, 4 of the present plaintiffs (including Thorpe) and another requested Thorpe, who was president of the company, to call a general meeting:—

"1. To elect directors of the said company in the place of the present directors, whose term of office has expired.

"2. To amend the by-laws in such manner as the shareholders may think proper."

"3. To transact such business as might properly come before the annual meeting of the shareholders of the company."

This requisition, it was asserted at the trial without contradiction, was got up by Thorpe himself.

Thereupon a call for a general meeting of the company was sent out by Thorpe, and the call expressed that the meeting was called pursuant to the said requisition, and that it "is for the transaction of the following business"—setting out 1, 2, and 3 as above.

The meeting was called for 29th May, and was on that day, as it appears, adjourned till 5th June. No objection is taken to the manner of calling the meeting, nor is it alleged that, had it not been for the injunction which it was believed existed restraining Thorpe from voting upon his stock, there could be any complaint.

Anglin, J., having decided in favour of Thorpe, it appears that the judgment had not been actually taken out by 5th June—and at all events notice of appeal had been served. I may say incidentally that this appeal was dismissed by

a Divisional Court (10 O. W. R. 222), and an appeal is now pending to the Court of Appeal.

The legal advisers of Thorpe were of the opinion that the interim injunction was still in force against him at the time of the meeting—it is not necessary for me to decide whether that opinion was well-founded.

Thorpe attended the meeting on his own behalf and with proxies for voters, and stated to those persons present that the meeting was illegal, and, after refusing to act as chairman himself, and voting against the defendant Read, who was nominated to take the chair, left the room.

The election of directors proceeded, which election seems regular under by-law No. 13 of the company. But it is contended that Thorpe and those associated with him being entitled to a majority of the stock, and Thorpe being prevented from voting, it would not be fair to allow this vote to stand. I can find no semblance of authority for such a contention; and it is without foundation in principle.

If it be the fact that Thorpe could not vote, he might have applied to the Court for an injunction against the election proceeding, or to have the injunction against him suspended so far as to allow him to vote for an adjournment of the meeting or to vote thereat. But he did neither, and I cannot think that, having neglected the ordinary precautions, he can now complain, and this without at all considering the fact that he it was in truth who procured the calling of the meeting. Moreover, I fail to see how any other shareholder can now complain. This ground of attack, therefore, fails.

At the meeting, in the absence of Thorpe, the shareholders voted to one Newcombe 2,000 shares, to Reese 2,500, to Hooey 1,400, to McPhail 2,000, to Tisdale 2,500, to Munsell 1,000, to Walsh 500, and to Read 500, for services rendered to the company pending and since its incorporation. The resolution does not say so in so many words, but it is plain that this was intended to be and was remuneration to the directors for services rendered to the company. I have no doubt that all those who were given stock by this resolution had done a great deal of work for the company in their capacity of directors, and I have no doubt that the defendant Tisdale had performed valuable legal services as well. And, if the law permitted, I should gladly confirm this action by the company.

Prima facie, directors of a company are not entitled to any remuneration in the absence of statutory authority: Dunstan v. Imperial Gas Co., 3 B. & Ad. 125; Hutton v. West Cork R. W. Co., 23 Ch. D. 672. The provision in our statute is to be found in the Act of 1907, 7 Edw. VII. ch. 34, sec. 88: "No by-law for the payment of the president or any director shall be valid or acted upon until the same has been confirmed at a general meeting."

I think that this means that a by-law for the remuneration of directors shall first be passed by the board of directors, the directors thus taking the responsibility of definitely asserting their claim to payment, and fixing the amount so claimed—and then this by-law shall be laid before a general meeting and passed upon by the body of shareholders.

The directors being thus by implication given power to pass such a by-law, the body of shareholders are deprived of this power which otherwise they might have: Rex v. Westwood, 4 Bli. N. S. 215, 4 B. & C. 781, at p. 799; Dampson v. Price's Patent Candle Co., 24 W. R. 754; Stephenson v. Vokes, 27 O. R. 691, per Street, J., at p. 696; and see what is said in York Tramways Co. v. Wilson, 8 Q. B. D. at p. 689, by Manisty, J., and at p. 695, by Coleridge, C.J.

Nor is it entirely without importance that such a course should be pursued—there may be many instances in which a majority of the board of directors for the time being cannot be procured, while a majority of votes in a general meeting may; and there may be an instance in which a wily director would not take upon himself the responsibility, and perhaps odium, of openly asking for remuneration, when he would, with more or less shew of reluctance, accept it if voted. I think no complaint can fairly be made if it be decided that the provisions of the statute must be lived up to, and the rigour of the statute applied. . . .

I accept Tisdale's evidence throughout and in all matters. . . . While I do not think (and this with some regret) that the allotment of stock to him can stand, this judgment will be without prejudice to any claim he may make against the company for legal or other services, in any court of competent jurisdiction in this or his own land.

The stock was given to defendants Reese, Hooey, and McPhail, however, on condition that they would not appeal from the judgment of Anglin, J., 9 O. W. R. 942.

By that judgment it had been ordered that Hooey should deliver up 5,000 shares of stock which had been assigned to him by Thorpe, McPhail 5,000 shares, and Reese 14,500 shares, similarly assigned. Reese appealed, but this condition was acceded to by 2 of these 3 defendants, Hooey and McPhail, so that the substance of the transaction was that these two were receiving shares in consideration of their past services and the abandonment by them of a right to appeal. It is clear that the abandonment of an action brought to enforce a doubtful right or claim is a sufficient consideration for a promise, and so is the abandonment of a disputed claim, even though it ultimately turns out that the claim was wholly unfounded: Callister v. Bischoffstein, L. R. 5 Q. B. 449; Miles v. New Zealand Co., 32 Ch. D. 266.

I have no grounds for believing that the claim by these two to the shares of which they were deprived by the judgment already referred to was not made bona fide, or that they knew that there was no reasonable ground of appeal. I think they were giving up something, and that this was a sufficient consideration for the stock they received. It is impossible to say what part of the stock received should be allotted to the abandonment of the right to appeal, and what part to the services, but I think that the arrangement made at the general meeting, with these 3 defendants, is binding.

I am asked also to make a declaration that it is illegal for the defendants who are directors of the company to borrow money from themselves; and also to declare that they must not use the money of the company to repay themselves. It appears that when the company was in dire straits, the directors put their hands in their own pockets and advanced money to keep it afloat. I shall not declare that that was wrong—if it was illegal, no good will be done by my saying so. And I shall not, in advance, prevent the directors repaying themselves as they are able out of the funds of the company. If they do so, and it is illegal for them so to do, an action may then be brought.

As against defendants Hooey and McPhail the action should be dismissed with costs; so far as the claim for a declaration as to the powers of directors to borrow, etc., the action will be dismissed with costs as against all the defendants; as regards the other claims there will be no costs, as there has been part success on both sides.

CARTWRIGHT, MASTER. OCTOBER 22ND, 1907.

CHAMBERS.

DOWN v. KENNEDY.

Summary Judgment—Rule 603—Action against Executor for Interest on Legacy—Defence in Law.

Motion by plaintiff for summary judgment under Rule 603.

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

L. V. McBrady, K.C., for defendant.

THE MASTER:—The particulars indorsed on the writ of summons are substantially for interest at 5 per cent. on a legacy of $5,000 given to plaintiff by her father under his will, of which the defendant is executor.

The bequest to her is as follows: "I give, devise, and bequeath to my daughter Margaret M. Down the sum of $5,000, to be paid to her immediately after my decease."

The testator died on 17th February, 1906, and the principal of the legacy was paid on 9th July, 1907. The plaintiff claims interest between those dates, amounting to $347.26.

The defendant's affidavit sets up that interest is only payable from a year after testator's death, and says: "I have, therefore, as executor of the estate of my late father, a good defence to this action, and I am informed that in law I have a good defence."

He states that a similar legacy is payable to a granddaughter of the testator, and that the same question will arise there. He continues: "As the executor of my father's estate, I have a right to have this action determined and the question at issue settled." He concludes with the assertion that "the plaintiff is not entitled to summary judgment in a matter of this kind." I do not clearly apprehend what defence this affidavit sets up. The law seems well settled ever since the decision in Wood v. Penoyre, 13 Ves. 333.

In Williams on Executors, 9th ed., pp. 1290, 1291, the principle is recognized that in cases like the present the time

fixed for payment by the testator will govern—and further that where, as here, the legacy is to a child, and there is no other provision, interest will run from the death, if the legatee is under age, but this rule does not always apply to a grandchild. It would not, therefore, follow that a decision in the present case would decide the question of the right of the grandchild to interest.

Mr. McBrady contended that if any question of law was raised judgment could not be given except at a trial or by a Judge in Court. I was of that opinion in Canadian General Electric Co. v. Tagona Water and Light Co., 6 O. L. R. 641, 2 O. W. R. 1055. But in the case of Grose v. Tagona Water and Light Co., 3 O. W. R. 353, Street, J., overruled that case. It would, therefore, follow that I am bound to consider, as was done in the Grose case, if there is any plausible defence in law—and let the parties, if dissatisfied, carry the matter further, as was done in that case.

If Mr. McBrady is right, it is most desirable that the rule he contends for should be formally declared, so that an allegation by a defendant that he wishes to raise a question of law shall be a sufficient answer to a motion for judgment under Rule 603. At present I do not see how it can be said that any such rule has been laid down, and I think the plaintiff here is entitled to judgment, and should not be obliged to wait until the defendant is satisfied as to the law. In addition to delay, the plaintiff would also be mulcted in solicitor and clients costs if this matter was tried and then perhaps taken to a Divisional Court.

Judgment will, therefore, issue within a week for the interest and costs, unless, in the meantime, defendant gives notice of appeal from this order.

TEETZEL, J. OCTOBER 22ND, 1907.

CHAMBERS.

COATES v. THE KING.

Pleading — Amendment — Petition of Right — Consent of Crown—Rules of Court — Particulars — Commission on Sale of Treasury Bills and Bonds—Names of Purchasers.

Appeal by the suppliants from order of Master in Chambers, ante 462, requiring them to give particulars of the

9th and 14th paragraphs of the petition of right, and from order of the Master in Chambers, ante 522, refusing to allow the suppliants to amend the 14th paragraph.

J. H. Moss, for the suppliants.

N. Ferrars Davidson, for the Crown.

TEETZEL, J., allowed the appeal from the second order, holding that there was power to make the amendment, and that it should be made. In view of the amendment, the particulars would not be necessary. Costs of both appeals to be costs in the cause.

BOYD, C. OCTOBER 22ND, 1907.

TRIAL.

EDE v. CANADA FOUNDRY CO.

LYNN v. CANADA FOUNDRY CO.

Master and Servant — Injury to Servant and Consequent Death—Negligence—Finding of Jury—Inconclusive Verdict—Failure to Establish Cause of Injury—Evidence—Dismissal of Action.

Actions to recover damages for the death of a person employed by defendants while engaged in construction work, plaintiffs alleging that the death was caused by the negligence of defendants.

BOYD, C.:—The plaintiff and one of his witnesses attributed the accident by which the deceased was killed to the car going off the track at the end of the rail taken up for the purpose of placing the gauntry leg in position, but this view the jury did not accept. The rest of the plaintiff's witnesses and the defendants' witnesses could not account for the accident, and the jury at the trial, like the coroner's jury, were unable to place legal liability upon anybody. They deliberated for more than 4 hours, from 6 to after 10 p.m., and put in writing their conclusions, pursuant to my request. The finding is as follows: "We be-

lieve there was some neglect of some one in connection with the works, or the car could not have fallen off, and we would award to the plaintiff Ede $2,700 and to the plaintiff Lynn $500."

The effect of this is, that the verdict proceeds upon the view that damages should be paid by the company because the accident occurred in the prosecution of their work in constructing the bridge. But no specific negligence is found inculpating the defendants or any of their officers or men in charge of the work. Therefore plaintiff has failed to prove his case—the onus lay on him—and though I would be willing to regard the matter as still open for further trial—a course which the jury probably contemplated when the foreman said that evidence had been kept back—yet I do not think the practice would justify such procedure. The action has been brought to trial, and plaintiff has failed to prove his case, and so failing the action also fails and must stand dismissed: Farmer v. Grand Trunk R. W. Co., 21 O. R. 299. I speak of the consolidated trial of both actions . . . ; both rest upon the same evidence, and have the same result.

The defendants do not ask for costs.

The evidence said to be kept back refers to other workmen who were at the bridge who might have been called—but it was open to either party to call them, and plaintiff relied on the evidence he had.

OCTOBER 22ND, 1907.

DIVISIONAL COURT.

McCLELLAN v. POWASSAN LUMBER CO.

Way—Private Way—Easement—Extinguishment—Unity of Ownership—Revival on Severance—Implication—Necessity for Fresh Grant—Land Titles Act.

Appeal by defendants from judgment of TEETZEL, J., at the trial at North Bay, in favour of plaintiff, in an action for damages caused to plaintiff's property by reason of defendants blocking up a roadway claimed by plaintiff as ac-

cess to and egress from her grist mill property situate on South River, and for an injunction restraining defendants from continuing the obstructions placed by them upon this alleged roadway.

The appeal was heard by BOYD, C., MACLAREN, J.A., and MABEE, J.

E. D. Armour, K.C., and J. McCurry, North Bay, for defendants.

W. Laidlaw, K.C., for plaintiff.

BOYD, C.:—As I view the case of the plaintiff, it appears to be one of great hardship, but, however much disposed to help him, relief can only be given according to law.

I do not regard the fact that the title to the lands in question of plaintiff and defendants has been brought under the Land Titles Act, R. S. O. 1897 ch. 138, as necessitating a new application to the doctrine and principles relating to the ownership and enjoyment of lands. The Act does not affect the substantive body of law respecting real estate, but is framed with a view (as stated in the title) "to simplify titles and to facilitate the transfer of land." Apart from the Act, the law has been definitely settled by Wheeldon v. Burrows, 12 Ch. D. 33, and the line of decisions which follow and apply its rules, that unity of ownership or seisin in fee extinguishes all pre-existing easements or private right of way over one part of the land for the accommodation of another part. When the whole is in the hands of one owner, he is proprietor of the soil, and his manner of using any piece of it or part of it is an incident of ownership, and not in any sense an easement. To constitute an easement there must be some privilege which the owner of one tenement has the enjoyment of in respect of or over the tenement of another. When the ownership of the two tenements unites for the same estate in fee, the easement ceases entirely, is extinguished, and it can only be revived or brought into being again by a fresh grant, and then the right granted is of a new thing: see Goddard on Easements, 6th ed., p. 553.

The severance of the land in respect of which an easement existed over one part for the benefit of the other does not per se revive the extinguished easement, if the dominant part is first granted and the servient part retained by

the owner who made the severance. Such is the condition of the land in question here, and I do not read the provisions of the Land Titles Act as operating to a different result.

Unity of tenure and seisin existed in 1891. The owner of the whole conveyed by transfer in 1894 to Wardell and Howard all the land, excepting out of said designation certain lots then on the plan filed—one of which lots was No. 4. On that lot stood the grist mill owned by plaintiff, and that lot, being retained by the owner of the whole after he had disposed of the rest of the tract, afterwards came to the hands of plaintiff. In the document of transfer, which excepts lot 4, there were no words to indicate that any right of way over the rest of the land conveyed is also excepted—failing which express reservation, I think the law forbids its implication. Section 26 of the Act does not carry the matter further, as I read it. True it is that there was on the land a road or means of access for waggons, etc., well defined on the ground, leading from the highway to the grist mill over the open space of land fronting the highway between lots 4 and 5, which had been formed, perhaps, before the issue of the patent, and was well defined thereafter down to the time of unity of ownership and subsequent thereto down to the present day. But this right of way, which existed when the grist mill and saw mill properties were in different holders before 1891, ceased to exist in that year, and became extinguished in law. When the transfer of 1899 was made, it was not a "subsisting" easement or right of way, though it was marked upon the ground as a former right of way, which continued to be used for the convenience of the owner of the whole property after he became such owner.

That is not, I think, an existing or subsisting easement such as the statute is intended to conserve, and which it deals with as an outstanding liability to which the registered land shall be subject.

The whole matter is in narrow compass, and I am unable so to apply the Land Titles Act as to give the plaintiff the right he claims over this disputed road.

I may note that it is not enough to raise an implied reservation that the way is highly convenient; if it falls short of being a way of absolute necessity, Wheeldon v. Burrows forbids any implication in plaintiff's favour. That seems

to be the present result of the cases which are collected in Goddard, pp. 360, 361.

I think the appeal should succeed and the action be dismissed with costs.

MACLAREN, J.A., for reasons stated in writing, agreed with BOYD, C.

MABEE, J., dissented, stating his reasons in writing.

OCTOBER 22ND, 1907.

DIVISIONAL COURT.

STACK v. DOWD.

Promissory Note—Signing by Wife of Maker after Maturity —Promise — Consideration — Agreement not to Sue— Alteration of Note—Bills of Exchange Act—Release of Maker.

Appeal by plaintiff from the judgment of the junior Judge of the County Court of Wellington dismissing a motion by the plaintiff for a new trial of an action on a promissory note, in which action the Judge had decided in favour of defendant and dismissed the action.

The appeal was heard by FALCONBRIDGE, C.J., BRITTON, J., RIDDELL, J.

M. Wilkins. Arthur, for plaintiff.

C. Swabey, for defendant.

RIDDELL, J.:— . . . The plaintiff had had an auction sale on 18th December, 1903, at which Maurice Dowd had bought articles to the amount of $163, for which he gave a promissory note of that date, at 12 months, signed by himself and one James Stack.

On 6th December, 1904, plaintiff signed with Maurice Dowd a promissory note for $100 at 3 months. This was for the accommodation of Maurice Dowd, and she (plaintiff) had to pay it. In April, 1904, Maurice Dowd sold all his

stock, including what he had bought from the plaintiff, and, leaving the farm on which he had been residing, went with his wife, the defendant, to Teeswater to keep hotel, and subsequently he went to the North-west.

On 2nd February, 1905, the plaintiff went up to Teeswater to see if she could not get the defendant to sign the note, Maurice Dowd having before this time made an assignment, and being in financial difficulties. The following is the whole story of what took place, as given in the evidence of the plaintiff:—

"Before going up I had a note prepared for $263, which was the amount of both notes, and I asked Rosanna Dowd to sign it. Rosanna Dowd said that her husband had no need of the $100, and she would not be responsible for it, but she said she would sign the $163 note, and she did so. I am sure that was the 2nd February. I went there. She signed the note on 3rd February, 1905. Maurice Dowd had at this time made an assignment, and was in financial troubles, at least so I heard. Just as Rosanna Dowd was going to sign the note, she was complaining that there would be so much debt against the land, and I told her that, as they had received full value, and I had a family of 9 young children, I thought they were in duty bound to either pay me or give me security for the note. She then signed the note in my presence." She adds that she has proved against the estate of Maurice Dowd upon both notes, i.e., the $163 and the $100 notes, and has received $4 from the assignee on account of the $100 note. This, it seems, must have been after the transaction in question, as at that time the $100 note was not due.

The learned Judge, in his written memorandum, further says that the plaintiff at the trial was pressed by her own counsel to say that there was an agreement or understanding for an extension of time or for forbearance, and she stated positively that there was nothing said about either.

For the defendant it is contended, first, that she is a lunatic, and there is no corroboration of the promise; second, that there was no consideration for the promise, if one were in fact made.

I pass over the first point, merely saying that the Court could not permit the case to go off upon that.

The second is the ground upon which the learned Judge proceeded, and, after an examination of the legislation and the cases, I think he was right.

The first argument addressed to us for the plaintiff is that the procurement by the plaintiff of the signature of the defendant to the note was in effect equivalent to an agreement not to sue.

The law is laid down in Byles on Bills, 15th ed., p. 146: "A subsisting debt due from a third person is a good consideration for a bill or note payable at a future day." "But," it is added in a note on p. 147, "if the note be payable immediately, it is conceived that the pre-existing debt of a stranger could not be a consideration, unless it were taken in satisfaction, or unless credit had been given to the original debtor at the maker's request." This was cited in Croft v. Beale, 11 C. B. 172, 87 R. R. 626, and there apparently approved.

This point came before the Common Pleas Division in Ryan v. McKerral, 15 O. R. 460, and it was by that Division held that where after a note is after maturity signed by a third person without any consideration moving directly to such third person or any agreement to extend the time of payment, such third person is not liable thereon.

It is true that we are not bound by this decision, but, after an examination of the cases and principles upon which the decision is founded, I am of opinion that it should be followed. This implies a finding that the execution by a third party of a past due note does not imply an agreement not to sue.

But it is argued that the statute has changed the law as laid down in Ryan v. McKerral—I can find no semblance of support for such a contention.

Then it is said that a further contention now to be adverted to was not raised in the Ryan case. It is argued that, by the execution of the note by the defendant, the former makers were released, and therefore there was consideration sufficient to support the promise. I adopt the law as laid down in Falconbridge on Banking, etc., p. 583: "At common law a material alteration, by whomsoever made (e.g., by a stranger, Davidson v. Cooper, 11 M. & W. at 739, 13 M. & W. 343), avoided and discharged the bill, except as against a party who made or assented to the alteration: Martin v. Miller, 4 T. R. 320," etc.

Carrique v. Beatty, in our own Court of Appeal, 24 A. R. 309, holds that where a promissory note after maturity is signed by a third party without the privity of the original

makers, the alteration is a material one. That decision has not since been questioned, and should be followed.

The statute R. S. C. 1906 ch. 119, sec. 145, provides: "Where a bill or acceptance is materially altered without the assent of all parties liable on the bill, the bill is voided, except as against a party who has himself made, authorized, or assented to the alteration, and subsequent indorsers."

Not to press the point that there is no evidence that this alteration was not proved to have been without the assent of the other parties to the note, and therefore for all that appears the note may still be perfectly good as against them —and passing over the argument that the statute really means that no one who assents to the alteration can be heard to say that his rights are interfered with by the alteration —I shall say a word as to the alleged consideration.

Whatever definition of "consideration" be adopted, it seems clear that anything—I am using the largest and most comprehensive term I know of—to be a consideration, must be given, done, or suffered at the request, express or implied, of the person making the promise. The Indian Contract Act of 1872 gives the following, which I adopt: "When, at the desire of the promisor, the promisee, or any other person, has done or abstained from doing, or does or abstains from doing, or promises to do or abstain from doing something, such act or abstinence or promise is called a consideration for the promise." And Bowen, L.J., in Carlill v. Carbolic Smoke Ball Co., [1893] 1 Q. B. 256, at p. 271, says: "Then as to the alleged want of consideration. The definition of 'consideration' given in Selwyn's Nisi Prius, 8th ed., p. 47, which is cited and adopted by Tindal, C.J., in the case of Laythoorp v. Bryant, 3 Scott 238, 250, is this: 'Any act of the plaintiff from which the defendant derives a benefit or advantage, or any labour, detriment, or inconvenience sustained by plaintiff, provided such act is performed or such inconvenience suffered by the plaintiff with the consent, express or implied, of the defendant.'" There is a metaphysical difference between "the desire of the promisor" in the former definition and "the consent, express or implied," of the latter, but in this case at least there is no practical difference. There was a desire on the part of the defendant that the other parties to the note should be released, and, had she been asked, it could not be that she would have consented to the release of the joint maker.

An argument might be advanced that, by executing the note as she was asked, she by implication must be taken to have desired or consented to the legal consequence of such execution. No doubt, for some purposes every one is bound to know the law, but the law is not so absurd as to say to a defendant: "The law is thus; true, you did not know that it was so, and acted in that ignorance; you must be judged as though you had acted with a full knowledge of the state of the law, and therefore all your intentions, desires, and consent must be gauged upon that hypothesis, admittedly untrue."

Ex p. Mercer, 18 Q. B. D. 290, is a valuable decision in that sense.

I can find nothing here indicating any desire or request or consent on the part of the defendant that the other parties to the note should be released, and neither party imagined that such would be the result.

Therefore, while under the rule in Currie v. Misa, L. R. 10 Ex. 153, or under any other definition of "consideration," the release of the makers might be a valid consideration, it is not, under the circumstances of this case, such as would support the promise.

The appeal should be dismissed with costs.

FALCONBRIDGE, C.J., and BRITTON, J., agreed that the appeal should be dismissed with costs.

OCTOBER 22ND, 1907.

C. A.

REX v. CAPELLI.

Criminal Law—Conviction for Murder—Application for Leave to Appeal and to Compel Trial Judge to State a Case—Limits of Jurisdiction of Court of Appeal—Provisions of Criminal Code—Evidence for Jury—Absence of Misdirection and of Improper Admission or Rejection of Evidence — Two Prisoners Tried together — Witness Named on Back of Indictment not Called by Crown nor Present in Court—Failure of Crown to Procure Attendance of all Persons Present at Commission of Act—Prejudice—Application to Executive for New Trial.

Motion by prisoner for leave to appeal from his conviction for murder upon a trial before TEETZEL, J., and

a jury, and for a direction to the Judge to state a case, and for a new trial.

The prisoner was charged with the murder of one Dow and convicted in June, 1907, at the Parry Sound assizes, and sentenced to be hanged on 1st August last. A respite was granted at first until 15th August (10 O. W. R. 443), and then until 7th November.

The grounds of appeal were that the evidence of two eye-witnesses was not put in at the trial; that Dr. Robertson, who performed the autopsy on Dow, was not called, though his name was indorsed on the indictment; that the evidence of stabbing of three others by the prisoner should not have been admitted at the trial; and that the prisoner and one Marano should not have been put on trial together.

The motion was heard by MOSS, C.J.O., OSLER, GARROW, MEREDITH, JJ.A., and ANGLIN, J.

T. C. Robinette, K.C., and C. A. Moss, for the prisoner.

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

OSLER, J.A.:—The appellate jurisdiction and procedure under the Criminal Code, R. S. C. 1906 ch. 146, remain as they were before the revision of the Acts formerly in force. The limits of the Court's jurisdiction and the mode in which it was exercised were well settled. No new or extended right in either respect has been conferred upon the accused or upon the Crown. We cannot entertain a motion to grant a new trial on the ground that the verdict is against the weight of evidence, unless the trial Court has given the accused leave to move for that purpose: sec. 1021. Where leave has not been granted, the only remedy of the accused, when the verdict is not open to any objection in point of law, is under sec. 1022, by an application to the mercy of the Crown, upon which the Minister of Justice, instead of advising His Majesty to remit or commute the sentence, may order a new trial, as was done in Regina v. Sternaman, 1 Can. Crim. Cas. 1. No authority has been conferred upon the Court to entertain an application for a new trial upon the facts upon affidavits corroborative of the case for the defence or disclosing new evidence. Such affidavits are proper for the consideration of the Minister of Justice under the section last referred to.

Our jurisdiction is:—

(a) To hear any question of law arising either on the trial or on any of the proceedings preliminary, subsequent, or incidental thereto, or arising out of the direction of the Judge, which the trial Court, either during or after the trial, may reserve for our opinion: sec. 1014 (former sec. 743.)

(b) If the trial Court refuses to reserve the question, i.e., the question of law, we may hear an application for leave to appeal: sec. 1015; and, if leave is granted, may hear the case directed by us to be stated thereon as if the question had been reserved: sec. 1016.

Sections 1018 and 1019 shew that in dealing with the case reserved or directed to be stated the Court considers only the questions of law.

The evidence which the Court is empowered to receive under secs. 1015 (3) and 1017 (2) is such evidence, if any, in addition to the evidence at the trial, as may be necessary to shew the questions of law upon which it is sought to appeal.

If there is no evidence upon which a conviction could legally have taken place, that of course raises a question of law which may be the subject of a reservation or stated case.

That is not the case before us. It very plainly appears that there was evidence upon which the jury might find the prisoner guilty of the more serious offence. Whether they were influenced in doing so by the suggestion that he was attempting to commit a rape upon the woman McCormack when he was pushed off her by the deceased, we do not know. It is only too likely that they were, and, no doubt, some of the witnesses gave colour to the suggestion. It is, I must say for myself, a suggestion which ought to have been rejected by the jury as ridiculous and of no weight whatever, under the circumstances, situated as the parties were in a crowded room, to say nothing of the age of the woman. Everything which the witnesses depose to on this point is, I would say, more sensibly to be referred to the fact that both parties had been drinking and had fallen together on the floor while engaged in their maudlin horseplay. The sudden rage of the accused, and his instant, though inexcusable, use of his weapon, upon the deceased's interference, is intelligible upon this theory. It was all, no doubt, for the jury, and can now only be considered elsewhere.

A careful examination of the evidence and of the charge of the learned Judge satisfies me that there was no mis-

direction on his part, and that no evidence was improperly admitted or rejected.

The fact that the prisoners were tried together may in some respects have reflected unfavourably upon the prisoner Capelli, impossible as it often must be for the jury to avoid forming impressions unfavourable to both out of evidence applicable to the case of one of them alone: Rex v. Martin, 9 O. L. R. 218, 5 O. W. R. 317. This, however, was entirely for the jury under the direction of the Judge, and can only be considered elsewhere.

The further objection was raised on behalf of the accused that Dr. Robertson, whose name was on the back of the indictment, but who had not been sworn before the grand jury, was not called by the Crown and was not produced by the Crown or present in court so that he might be cross-examined or called by the accused. No authority was cited, and I have found none, to shew that this affects the validity or regularity of the proceedings.

Section 876 of the Code provides that the name of every witness examined or intended to be examined shall be indorsed on the bill of indictment, and that the foreman of the grand jury shall write his initials against the name of each witness sworn and examined upon the bill; and by sec. 877 the name of every witness intended to be examined on any bill must be submitted to the grand jury by the prosecuting officer, and that no others shall be examined before such grand jury, unless upon the written order of the presiding Judge.

In Archbold's Crim. Pldg., 23rd ed. (1905), p. 414, it is said: "Although in strictness it is not necessary for the prosecutor to call every witness whose name is on the back of the indictment, it has been usual to do so that the defendant may cross-examine them. If the counsel will not call them, the Judge in his discretion may. . . . However, the prosecutor is not bound to call them all, though he ought, it has been said, to have them in Court that they may be called for the defence if the prisoner chooses." Roscoe's Crim. Ev., 12th ed., p. 119, is to the same effect. The case of Regina v. Edwards, 3 Cox C. C. 82, is cited, in which it is laid down that it is in general a matter entirely within the discretion of counsel whether all the witnesses at the back of the bill should be called on behalf of the Crown or not, and,

although the Judge has power to interfere (by calling them himself), he will only exercise it in extreme cases.

Similar principles apply to the question which has also been made a point of here, whether in a case like this the Crown should have in Court all the witnesses present at the time of the commission of the act, so that the accused may at least have the opportunity of calling them, and of thus "enabling the jury to draw their own conclusions as to the real truth of the matter."

No absolute obligation appears to rest upon the Crown in either respect, and if the Crown declines to place the witness in the box, or has not subpœnaed him, the prisoner must do so or make out a case for the postponement of the trial. If any real prejudice has been caused to the prisoner by the course which was pursued in the present instance, that also must form the subject of an application in another quarter.

We have no power to interfere, and the motion for leave to have a case stated must, therefore, be refused.

MEREDITH, J.A., and ANGLIN, J., each gave reasons in writing for the same conclusion.

MOSS, C.J.O., and GARROW, J.A., agreed in the result.

CARTWRIGHT, MASTER. OCTOBER 23RD, 1907.

CHAMBERS.

ARNOLDI v. COCKBURN.

Evidence—Attempted Examination of Plaintiff in Support of Motion by Defendant for Better Particulars—Refusal to be Sworn—Discovery.

After the decision of RIDDELL, J., in this case, ante 373, plaintiff on 28th September, 1907, delivered particulars of the statement of claim, covering 13 type-written pages. These were not satisfactory to defendant, who on 7th October, 1907, gave notice of motion for further and better particulars, or for such other order as might seem proper, on grounds stated therein. The notice also stated that in support of this

motion would be read "the examination of the plaintiff to be taken before a special examiner."

On 15th October the plaintiff and counsel for him and the defendant attended before a special examiner to take the above examination. Plaintiff declined to be sworn, on the ground that this was an attempt to have discovery before the proper time. Counsel for defendant stated that he was not going to examine for discovery, but only on the question whether or not defendant was entitled to further and better particulars. But plaintiff still refused to be sworn, and the proceedings ended.

Defendant then moved to dismiss the action because of plaintiff's refusal to be sworn.

F. E. Hodgins, K.C., for defendant, cited Clark v. Campbell, 15 P. R. 338; McClennaghan v. Buchanan, 7 Gr. 92.

R. McKay, for plaintiff, cited Smith v. Odell, 6 O. W. R. 47, 179, and Dryden v. Smith, 17 P. R. 500, as shewing that a party cannot do indirectly what he cannot do directly; Hopkins v. Smith, 1 O. L. R. 659, and Miller v. Race, 16 P. R. 330, as shewing that it was proper to object to be sworn and so stop in limine an examination if it cannot be had in any case. He also relied on Beeton v. Globe Printing Co., 16 P. R. at p. 286.

THE MASTER:—The cases cited for plaintiff would be conclusive if any discovery was being asked. But any intention of that kind is disclaimed by Mr. Hodgins. Under Clark v. Campbell, 15 P. R. 338, it is clear that there are cases in which a party can be examined on a motion made by his opponent, and I cannot say that this is not one of them. What questions will be asked cannot be known (or usefully imagined) beforehand.

Plaintiff must attend and submit to be sworn. If any questions are asked which are considered improper, they can be dealt with under Rule 455 as practically followed.

The costs of this motion will be to defendant in the cause.

BRITTON, J. OCTOBER 24TH, 1907.

CHAMBERS.

LOGAN v. DREW.

Judgment — Amendment after Entry — Neglect to Provide for Interlocutory Costs Reserved for the Trial Judge— Disposition of Costs.

Motion by plaintiffs to amend the formal judgment in this action in such a way as to provide for the disposition of the costs of an interlocutory motion heard before FALCONBRIDGE, C.J., and of the appeal from his decision to a Divisional Court.

J. H. Spence, for plaintiffs.

H. D. Gamble, for defendants.

BRITTON, J.:—The motion before the Chief Justice was by the plaintiff W. I. Logan to have an alleged settlement made at Sarnia, at the assizes there in October, 1906, enforced according to the meaning of that settlement put upon it by the plaintiffs.

The defendants opposed the motion, but asserted a settlement according to a construction they put upon it, and asked to have that settlement carried out.

Upon that motion defendants succeeded. The plaintiff W. I. Logan appealed to a Divisional Court: the appeal was allowed to the extent of setting aside the order of the Chief Justice, and the case was sent down for trial, with liberty to all parties to amend, and to set up any alleged settlement as a matter of defence in the action. The Divisional Court further ordered that the costs of the motion and of the appeal should be disposed of by the presiding Judge at the trial of the action. The trial took place before me at Sarnia in the spring of 1907, and I dismissed the action with costs, but counsel omitted to call my attention to the costs of the motion and appeals, reserved for my decision.

Upon hearing the parties, and considering that the plaintiff failed in his motion before the Chief Justice, and that the Divisional Court did not affirm any settlement as contended for by either party, and that the issue as to the settlement

raised by the defendants was decided adversely to them, I am of opinion, and so order, that neither party should get, as against the other, any costs of the motion before the Chief Justice, or of the appeal to the Divisional Court, or any costs at the trial of attempting to uphold or to resist the settlement. The defendants are entitled to the general costs of defence in the action, as already ordered, but, if the parties do not agree, it will be for the taxing officer not to allow to either plaintiffs or defendants any costs, so far as they can be ascertained, pertaining solely to the alleged settlement, as above stated.

The costs of this motion to be costs in the cause.

Formal judgment to be amended accordingly.

RIDDELL, J. OCTOBER 24TH, 1907.

TRIAL.

BECK v. CANADIAN PACIFIC R. W. CO.

Railway—Animals Killed on Track—Negligence—Duty to Fence—Lease by Railway Company of Land Adjoining Railway—Escape of Horses therefrom—Covenant of Lessee to Erect and Maintain Fences—Owner of Animals Using Lands under License from Assignee of Lessee—Escape of Animals Due to Negligence of Owner—Railway Act, 1903, secs. 199, 237.

Action to recover the value of some horses killed upon defendants' railway.

A. B. Morine, for plaintiffs.

W. R. White, K.C., and W. H. Williams, Pembroke, for defendants.

RIDDELL, J.:—At Wahnapitae, in the district of Nipissing, defendants, being the owners of a parcel of land adjoining the line of their railway, leased it on 31st July, 1902, for 5 years, to one Picard. In the lease there is a covenant as follows: "And the lessee, for himself, his heirs, executors, administrators, and assigns, covenants, promises, and agrees to and with the company, its successors and assigns, that the

lessee and those claiming under him as aforesaid will forthwith clear the land . . . and that the lessee (and those claiming under him as aforesaid) will forthwith erect, and at all times during the term hereby mentioned maintain, around such lands hereby demised, fences suitable and sufficient to prevent horses, cattle, and other animals from getting upon the track." The original lessee assigned to the Victoria Harbour Lumber Company; the defendants did not in terms assent to this assignment, but they knew that the assignment had been made, and have not in any way interfered with the occupation of the property by the Victoria Harbour Lumber Co.

Upon this parcel, by whom or when erected does not appear, is a stable, and separating it for the most part from the railway track, is a fence, built by whom or when does not appear. The Victoria Harbour Lumber Co. permitted plaintiffs to have the use of this property, including the stable.

On the night of 12th January, 1907, a car load of horses arrived at defendants' station at Wahnapitae, and, being taken out of the car into the stockyard at the station, were afterwards taken across the river Wahnapitae on the ice, and finally a number of them escaped upon the line of defendants' railway at the point at which the fence had not been built. Five of these were killed upon the line of the railway by an engine of defendants; their value is admitted to be $1,001.

Plaintiffs contend that they have a right to compensation, and plead the statute in their favour; the defendants say that they were not bound to fence as against these plaintiffs, and in any event they are protected by the fact that the animals escaped by the negligence of plaintiffs.

As this accident occurred before the coming into force of the R. S. C. 1906, the Act to be looked at is the Railway Act, 1903, 3 Edw. VII. ch. 58.

Section 199 of that statute provides that:

"The company shall erect and maintain upon the railway fences . . . as follows:

"(*a*) Fences of a minimum height of 4 feet 6 inches on each side of the railway. . . .

"2. Such fences . . . shall be suitable and sufficient to prevent cattle and other animals from getting on the railway."

An exception is made by sub-sec. 3 of lands not improved or settled, not of importance to be considered here, as, if it be necessary for plaintiffs to negative the exception, I should allow it to be proved by affidavit.

In the factum for the appellants in Grand Trunk R. W. Co. v. McKay, 34 S. C. R. 81, will be found a history of the legislation in Canada concerning the duty of railway companies to fence, and English, Scottish, Ontario, and Manitoba cases are collected. I do not think it would serve any good purpose to retrace that history and review those cases here—the legislation is, I think, clear.

The obligation is, to "erect and maintain upon the railway." "Railway" is defined by the Act (sec. 2 (s)) as including "property real and personal connected" with "any railway which the company have authority to construct or operate." A fence built at any place on the company's property sufficient to keep out cattle, and of the required height, would satisfy the statute. There was, before the lease, no duty cast upon the railway company to fence so that animals might not get from their own land upon the line of rail—there was no duty to place a fence along the side of the railway line proper. A lease being made containing a provision that the lessee should himself build and maintain a fence—does that thereby create a duty on the company to build a fence themselves? I should think that to ask the question answers it in the negative.

But the case is not without authority. In Yeates v. Grand Trunk R. W. Co., in part reported in 9 O. W. R. 423, and in full in 14 O. L. R. 63, a Divisional Court . . . held that the owner of land adjoining a railway track who had agreed to keep up gates, etc., could not claim against the railway company for defect in such gates, and that his tenant was in no better position. My brother Britton points out that the knowledge of the tenant of such an agreement is immaterial, and that the right of the tenant is no higher than that of the landlord, even though he might be ignorant of the existence of the agreement. Unless I am prepared to overrule this decision, I ought to hold against the right of a tenant being higher than that of his landlord. I have re-read the cases cited in the Yeates judgment, and am of the opinion that the decision is right. There can be no difference in principle between the relative right of owner and

tenant on the one hand, and tenant and assignee on the other. The Victoria Harbour Lumber Co. can have no rights higher than those of Picard, and the licensees of the Victoria Lumber Co. can have no higher rights than that company.

Upon that ground the action should be dismissed.

I think also the plaintiffs must fail upon another ground. The statute, sec. 237 (4), exempts the company from liability if the company, in the opinion of the Court or jury trying the case, establishes that an animal got at large through the negligence of the owner or his agent. These horses were a lot bought in Toronto, brought out to Wahnapitae with halters on, and allowed to rush out pell-mell into the stockyard, instead of being led out by the halter and tied up to be taken away. Plaintiffs' witness Beck said this was not the right way to take them out of the car. . . . This alone would not conclude plaintiffs. The horses, strange as they were to each other, were most of them allowed to run, 5 or 6 being led by the halter, and the remainder following as they liked. This method of taking the horses was adopted because, while plaintiffs' servants really wanted to keep them back, they did not think there was much danger, and they did not take very much trouble to keep them back.

Sitting as a jury, I was allowed by consent of counsel "to use my knowledge of horses acquired on the farm and in my experience." Sitting as a jury and using my knowledge, I say that, beyond question, the method adopted with these strange horses was a negligent one, and that this negligence was the cause of the animals getting and being at large. Without any such knowledge or experience, and using common knowledge, I think that conclusion would equally be arrived at, and the last sentence of sub-sec. 4 does not avoid the consequences of this finding—that only provides that the mere fact of the animals not being in charge of some competent person shall not deprive the owner of his right to recover—in other words, the fact of the animals not being in charge of some competent person shall not ipso facto be deemed negligence.

In any view, plaintiffs cannot succeed. The action will be dismissed with costs.

RIDDELL, J. OCTOBER 25TH, 1907.

WEEKLY COURT.

REINHARDT v. JODOUIN.

Costs — Motion for Judgment on Report before Confirmation — Appeal from Report not Contemplated — No Costs of Motion.

Motion by plaintiffs for judgment on further directions and costs.

W. R. Smyth, for plaintiffs.

A. H. Marsh, K.C., for defendant.

RIDDELL, J.:—This action was tried before me at the Toronto non-jury sittings in February last. At the trial I gave judgment declaring that the defendant was liable to pay for certain supplies received by him, and referred it to Mr. Cartwright (an official referee) to take the accounts between the parties upon the basis of my judgment.

The referee has made a report, dated 9th October, in which he finds that the defendant is indebted to the plaintiffs in the sum of $855.25. By Rule 649 such a report is to be treated as a report of a Master, and this by Rule 769 becomes absolute at the expiration of 14 days from the date of serving of notice of filing the same. This is such a report as requires confirmation, and the motion for judgment upon the report should not have been made until after confirmation. Further directions and all questions of costs having been reserved at the trial, the plaintiff moved, on the 21st instant, before my brother Britton for judgment, and the motion was referred to me by that learned Judge. The matter came on before me on the 22nd instant. Mr. Marsh took the objection that the motion was premature. but said that this position was taken only that the defendant should get the costs of this motion; and the case was argued upon the merits. I disposed of all matters upon the argument except the question of the costs of this motion.

The legal position is that if the defendant had insisted upon his objection, he would be entitled to a dismissal of

the motion, and I suppose with costs—then the plaintiffs would be entitled, after waiting a few days (it being admitted that there is no intention to appeal from the report), then to move; and they would be entitled to the costs of that motion. The result would be the same (except to the solicitors and counsel) as though I should now direct that there should be no costs of this motion. The Court must consider the interests of litigants alone, and motions or objections for the sake of costs only are not to be encouraged.

There will be judgment for the plaintiffs for the sum of $855.25, interest thereon from the teste of the writ, and costs of the action and reference, but there will be no costs of the present motion.

OCTOBER 26TH, 1907.

DIVISIONAL COURT.

RE MCLEOD AND TAY (NO. 11) SCHOOL TRUSTEES.

Public Schools—Rural School Section—Acquisition of Site and Providing New School House—Award—Opposition to Site Selected — Meeting of Ratepayers — Refusal to Sanction Issue of Debentures — Mandamus — Public Schools Act, 1901, sec. 74—"May"—Mandamus to Trustees—Power to Change Site—Amendments to Act—Discretion—Interference of Court.

Appeal by McLeod and Morris, the applicants, from an order of TEETZEL, J., dismissing an application for an order in the nature of a mandamus commanding the respondents, as trustees, to purchase or acquire certain property for a school site, and immediately to build or otherwise acquire and provide a school house upon the site.

C. E. Hewson, K.C., for the appellants.

W. A. Boys, Barrie, for the respondents.

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

BRITTON, J.:—The applicants are qualified ratepayers of school section No. 11 in the township of Tay. There was a school house in this section located upon lot 3 in the 6th concession. This was destroyed by fire on 20th August, 1905. Then proceedings were taken by the trustees and ratepayers for changing the site for the school house of that section, and, arbitrators having been appointed, an award was made on 5th May, 1906, changing it to the south-east corner of lot 1 in the same concession.

There was no request to the arbitrators to reconsider their award, and no proceedings have been taken to set aside that award, so it became, under sub-sec. 3 of sec. 34 of the Public Schools Act, 1901, binding upon all parties, for 5 years from its date.

There is very little of fact in controversy between the parties. The applicant McLeod says that since the making of the award a majority of the trustees have always been opposed to the site selected and fixed by the award, and he believes that a majority of the ratepayers of the school section are likewise opposed to the said site.

After the fire, no school was open in this section until about 1st June last, when the trustees leased a building, not in the township, but just across the town line and in the adjoining township of Medonte. This action of the trustees is not complained of as illegal—or rather that cannot be dealt with on the present application. The applicants and others pressed upon the trustees the duty, as the applicants considered it, of erecting a school house on the award site, and on 16th June, 1906, a meeting of the trustees was held for the purpose of considering the matter, and at that meeting the trustees resolved to ask the ratepayers to sanction the issuing of debentures and the raising of $1,500.

The meeting of ratepayers was held on 26th June, 1906, and they, by a vote of 19 for and 28 against, refused to sanction the issue of debentures. A great deal of discussion followed. The trustees . . . in the beginning of 1907 attempted to meet the serious difficulty which had arisen by suggesting two sites, and building two school houses.

A special meeting was called for 25th March, 1907, for the double purpose of deciding whether there should be two school houses, and whether the raising of $2 000 by debentures would be sanctioned. At that meeting two sites were

selected, and, so far as those at the meeting could do so, they agreed to the erection of two school houses. The vote in favour of two school sites and houses was 28, and 20 were against this, and the vote in favour of raising $2,000 by debentures was 27 for and 20 against. This decision was not acted upon, because the proceedings were declared illegal by the public school inspector. Then the trustees attempted to get a settlement by an application to the County Court Judge. Nothing resulted from this.

The trustees then met, and a special meeting of the ratepayers was held on 11th May, 1907, to consider the matter of one levy of $1,500 for the erection of a school house on the award site and for school furniture. At this meeting 25 voted against the levy and none in favour of it. It is said that there is no authority for calling a meeting for such a purpose, and I agree that such a meeting is not in terms authorized by the School Act, but the proceedings taken by the trustees shew that they have acted in perfect good faith in attempting to provide, on terms not onerous, school accommodation for children in the district.

I assume that the applicants and some others, but not a majority of the ratepayers of the section, are willing to submit to one levy for the new school house upon the award site, and for the necessary school furniture; but is this a case where the Court should grant a mandamus to compel the trustees to ask for a large sum of money to be paid by unwilling ratepayers in one year? It is conceded that the money cannot be raised by debentures extending beyond one year, as the necessary sanction by the ratepayers, as required by sec. 74 of the Public Schools Act, 1901, has not been given. No doubt, the word "may" does not necessarily imply a discretion—it sometimes is obligatory.

The strongest cases for the applicants' contention that I have been able to find are Julius v. Bishop of Oxford, 5 App. Cas. 214, and Regina v. Tithe Commissioners, 14 Q. B. 474. The latter of these cases decides "that in public statutes words only directory, promissory, or enabling, may have a compulsory force when the thing to be done is for the public benefit or in advancement of public justice. This case does not, in my opinion, come within that rule. It would, in my opinion, be an injustice to compel the ratepayers in that township to pay the whole amount in one year. It seems to be clear that the majority in number at

least of the ratepayers in the section are dissatisfied with the award site. I am of opinion that there is no power to change the site before the erection of a school house thereon. Two of the amendments to the Public Schools Act of 1901 are important in this connection. . . .

[Reference to 4 Edw. VII. ch. 30, sec. 2, amending sec. 34 of the principal Act by adding a new sub-sec. 4; and to 6 Edw. VII. ch. 53, sec. 22, repealing sub-sec. 1 of sec. 34 of the principal Act and substituting a new sub-section.]

As the law stood in 1901, the power of trustees under the then sub-sec. 1 of sec. 34 was limited to selecting a site for a new school house, or to agreeing upon a change of site for an existing school house.

Under the amended Act, if the trustees, backed up by the ratepayers, can, even after accepting the award site, change it and select a new one, they should not now be compelled to erect a school house upon that award site.

The mandamus asked for would not be an effectual remedy of the trouble of which the majority complain.

In conclusion, I am of opinion that there is no imperative duty cast upon the trustees to ask for the money by a single levy, and to proceed to build upon the site selected by the award. The trustees have considered the whole matter and have come to a conclusion. I am not able to say that that conclusion is an erroneous one—but, right or wrong, if the discretion was theirs to exercise upon their judgment, the Court ought not to interfere. The language of the Chancellor in Wallace v. Township of Lobo, 11 O. R. at p. 656, is applicable. . . .

Appeal dismissed with costs.