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MASTER IN CHAMBERS. MAY 1ST, 1913.

ANTISEPTIC BEDDING CO. v. GUROFSKY.

4 O. W. N. 1221.

Discovery—Further Affidavit on Production—Books of Incorporated Company—Alleged Identity of Company with Defendant—Discovery not Warranted by Pleadings—Leave Given to Set up Contention—Conditional Order.

MASTER-IN-CHAMBERS refused a motion for a further and better affidavit on production in which the books of an incorporated company should be scheduled, plaintiffs claiming that defendant and the company in question were substantially identical, upon the ground that no such contention was set up in the pleadings, but made an order that if plaintiff should set up such a contention in his reply, defendant should file a further affidavit setting out the documents desired by plaintiff.

Playfair v. *Cormack*, 24 O. W. R. 56, referred to.

Motion by plaintiff for further and better affidavit on production.

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

C. A. Moss, for the defendant.

CARTWRIGHT, K.C., MASTER:—The statement of claim alleges that the defendant agreed to obtain insurance for the plaintiff company and delivered to them policies aggregating $3,600—that the necessary premiums were given to defendant, who did not pay them; that in consequence the policies were cancelled, and two days thereafter the plaintiff company suffered loss by fire of nearly $3,000, which the defendant is, therefore, called on to pay.

The statement of defence is briefly that the policies in question were placed through the Insurance Brokerage & Contracting Co. Ltd., as he had told the plaintiff company, and that the defendant paid them the premiums received

from the plaintiff company and defendant denies liability at the most for anything more than the premiums. The cause is apparently at issue without any reply being delivered.

On the examination of defendant for discovery, it was sought to prove that defendant and the Insurance Brokerage Company were really the same person under different names —and production was asked from him of the company's books which was refused. The examination was thereupon enlarged and a motion made for a further affidavit on production by defendants to include these books and other documents on the hypothesis of the identity of the defendant and the Insurance Brokerage Co.—being true.

No such allegation appears in the pleadings at present, and as discovery is relevant only to what appears there, this motion cannot succeed at present. See *Playfair* v. *McCormack*, 24 O. W. R. 56,.

The proper course to take now is to give plaintiff leave to reply so as to set up the present contention—and direct defendant to file a further affidavit in which these documents will be produced or their non-production justified or accounted for in some way.

The plaintiff will then be entitled to further examine defendant if desired. Under the facts of this case, costs will be in the cause.

HON. MR. JUSTICE MIDDLETON. MAY 2ND, 1913.

RE ELIOT.

4 O. W. N. 1198.

Will—Construction—Testamentary Exercise of Power of Appointment—Rule against Perpetuities—Reading of Instruments Together—Income—Payment to Guardian—Surplus over Maintenance—Vesting of Shares.

MIDDLETON, J., *held*, that in order to ascertain whether a power of appointment and the exercise thereof infringed the rule against perpetuities "you must wait and see how in fact the power has been executed and in order to test the validity of the appointment you must treat the appointment as if written in the original instrument creating the power."

In re Thompson 1906, 2 Ch. 199 and *Re Phillips*, 4 O. W. N. 751, followed.

That therefore a testamentary exercise of a power of appointment in favour of the children of the testatrix when they should arrive at the age of 25 years was valid as all the children were over 4 years of age when the appointment became operative, but an attempt to confer a power of appointment upon her daughters in favour of their unborn issue was invalid.

Hancock v. *Watson*, 1902, A.C. 14, followed.

Originating notice to determine certain questions under the will and marriage settlement of the late Frances Ellen Wood Eliot, argued 18th April, 1913.

J. W. Bain, K.C., for Green & Lewis, executors of the will of the late Frances Ellen Wood Eliot, and trustees under her marriage settlement.

F. W. Harcourt, K.C., for the infants, other than the eldest, Margery.

C. A. Moss, for Margery and for her father, Chas. A. Eliot.

HON. MR. JUSTICE MIDDLETON:—The testatrix was a daughter of the Honourable John Hamilton, who by his will directed his residuary estate to be divided among his children, and that the portions allotted to the daughters—should be set apart and invested, the income being paid over to them until they marry or attained the age of thirty years, when their portions should be settled, if they are then married, in such a way as to be free from the control of any husband and to be inalienable during their lives.

Pursuant to this provision, a marriage settlement was executed on the 5th October, 1891; the property coming to the testatrix being vested in trustees for the use of the testatrix during her natural life and upon her decease the trustees are directed to divide and apportion the same among the issue of the contemplated marriage in such shares and in such manner as she may by her will appoint.

Mrs. Eliot died on the 11th December, 1905, having first made her will. By it she recites her father's will and the marriage settlement and the power of appointment by will thereunder, also that two sons and two daughters, all of tender years, had been born to her. Pursuant to this power, she directs her property to be divided among the children in equal shares; "the share of each of my sons to be vested in and transferred to him upon his attaining the age of twenty-five, and the share of each of my daughters to be vested in her on her attaining the age of twenty-five years or on her marriage previously with the consent of her guardian herein named and not otherwise, whichever event shall first happen"

The will then provides that the share of each daughter shall not upon the vesting be transferred to her, but that a settlement shall be executed to secure to the daughter the free use and enjoyment of her share free from the control of

her husband as provided in the fifth paragraph of the marriage contract of the testatrix; i.e., in trust for the daughter for her life without power of alienation and with power of appointment by will among the issue of her marriage, and with appropriate provisions in the event of death without issue or without exercising the power of appointment.

The testatrix next provides that if either of the sons die under the age of twenty-five years or either of her daughters die under the age of twenty-five years, without having been married, the share of the one who died shall vest in the survivor. The income from the presumptive share of each child is, pending the vesting, to be applied by the trustees for the benefit of the child—"and shall be from time to time paid to the guardian herein appointed of each of my children for and toward his or her maintenance, education, and support in their accustomed manner and style of living, until such share of each of my said children shall be vested," and she nominates and appoints her husband Charles A. Eliot guardian of the children.

The questions raised upon this motion are:—

1. Are the trustees justified in paying the whole income to the father; (a) during minority; (b) after majority, pending the vesting of the estate?

2. Is the father entitled to retain so much of the income of the children as may not be necessary for their due maintenance and to invest the same for their benefit?

3. Is the share of each child vested on attaining majority or on attaining the age of twenty-five years?

4. When a daughter attains twenty-five is her share absolutely vested or has she merely a life interest and a power of appointment by will among her issue; in other words, does the provision requiring the trustees to settle the share of the daughter offend against the rule with respect to perpetuities?

5. Does the will of the testatrix itself offend against the rule as to perpetuities in postponing the period of vesting until children respectively attain the age of twenty-five years?

I have set forth the questions in the form in which they were presented by counsel upon the argument rather than in the form indicated by the notice of motion.

Dealing first with the question as to the position of the father. The mother purports to appoint him guardian of the children. It is clear she had no power so to do. The

effect is, however, to create him a trustee having the power conferred upon him by the will. He is, therefore, entitled to receive the entire income arising from the estate in question for the maintenance education and support of the children. The fact that the testatrix directs the payment to be made to the husband as guardian indicates to me that she contemplated the guardianship to cease on each child attaining age; and although the father would be entitled to receive the money until the estate vested on the child attaining twenty-five he would receive it after each child attained majority, merely as trustee for the child. Any surplus received by him during the minority of the infants, he would hold in trust for the children, and it should be invested for their benefit. This is the course that has been adopted by the executors and by Mr. Eliot, and it is, I think, in accordance with the provisions of the will. This answers the first and second questions.

On the third question it is clear that the estate of the children does not vest until they respectively attain twenty-five years of age. The language of the will is plain.

The remaining questions turn upon the law relating to perpetuities. I had recently a somewhat similar case before me *Re Phillips,* 4 O. W. N. 751; and I need not again review the earlier cases. In *Re Thompson* (1906), 2 Ch. 199, Joyce, J., states the rule to be applied when the validity of the exercise of a power of appointment is called in question; and this rule has recently received the approval of the Court of Appeal in *Re Fane,* 29 T. L. R. 306—"you must wait and see how in fact the power has been executed, and in order to test the validity of the appointment you must treat the appointment as if written in the original instrument creating the power."

So treating this case, the power was validly executed by the wife; because the appointment she had made is in favour of her children who were all then more than four years old and the estate becomes vested in them at twenty-five, within twenty-one years from the date of her death.

Applying the same test to the attempt to confer upon the daughters a power to be executed by them by will in favour of their unborn issue, this provision, for the reasons pointed out in *Re Phillips,* offends against the rule with respect to perpetuities; and is bad; and, applying here the decision in

Hancock v. *Watson* (1902), A. C. 14, the same result follows as in *Re Phillips*, and the daughters take absolutely.

The costs of all parties may be paid out of the estate; costs of the executors as between solicitor and client.

HON. MR. JUSTICE MIDDLETON. APRIL 30TH, 1913.

CALDWELL v. HUGHES.

4 O. W. N. 1192.

Costs—Scale of—Set-off by Defendant — Balance Found Due in County Court Jurisdiction—No Assent to or Agreement as to Set-off—High Court Scale Proper Scale.

MIDDLETON, J., *held*, that a County Court has not jurisdiction merely by reason of the existence of a set-off unless the set-off has been assented to by both parties so that in law it constitutes a payment and that therefore where plaintiff had recovered $3,699.22 and defendant $3,013.62 upon a set-off, leaving a balance due plaintiff of $685.50 he was entitled to High Court costs.

Osterhout v. *Fox*, 14 O. L. R. 599 and other cases referred to.

Gates v. *Seagram*, 19 O. L. R. 216, distinguished.

Appeal by the defendant from the decision of the Master at Belleville, allowing the plaintiff costs upon the High Court scale.

At the trial the case was referred to the Master, under sec. 121 "b" of the Judicature Act; and the costs of the action and reference were directed to be in the discretion of the Master.

By his report the Master found the plaintiff to be entitled to $3,699.22, and the defendant, under the various items in his set-off and counterclaim, to be entitled to $3,013.62; leaving a balance due to the plaintiff of $685.50, which the plaintiff is entitled to recover, "together with full costs of action."

D. I. Grant, for the defendant.

H. E. Rose, K.C., for the plaintiff.

HON. MR. JUSTICE MIDDLETON:—It is now contended that the claim of the defendant being at any rate in part a set-off and not a counterclaim, the action might have been brought in the County Court and that the plaintiff is, therefore, only entitled to County Court costs, with the set-off. The Master has allowed High Court costs, and certificates

quantum valeat, that if any question had been raised before him as to the "scale of costs he would have awarded High Court costs without set-off.

I think the learned Master is right in the conclusion at which he has arrived. There is nothing to suggest that a set-off had been assented to or agreed upon so as to amount to payment and reducing the plaintiff's claim to a sum below $800. This being so, the case falls within the decisions of *Myron* v. *McCabe* (1867), 4 P. R. 171; *Furnival* v. *Saunders* (1866), 26 U. C. R. 119; *Sherwood* v. *Klein* (1888), 17 O. R. 30; and *Osterhout* v. *Fox*, 14 O. L. R. 599. These cases establish that the inferior Court has not jurisdiction merely by reason of the existence of a set-off, unless the set-off has been assented to by both parties, so that it in law constitutes a payment. In the absence of such an agreement a plaintiff having a claim against which a defendnt may, if he pleases set up a set-off, must sue in the Superior Court; for he cannot compel the defendant to set up his claim by way of set-off, and he cannot by voluntarily admitting a right to set-off confer jurisdiction upon the inferior Court.

The case relied upon by Mr. Grant—*Gates* v. *Seagram*, 19 O. L. R. 216—turns upon an entirely different point. There a plaintiff was met by a set-off which exceeded the amount of his claim, as set-off constitutes a defence. It was held that the plaintiff had failed in his action, and must pay the costs throughout, even though all the expense of the litigation was incurred with reference to the claim set up by the plaintiff. There was no discussion there as to the form to which resort should have been had.

The appeal, therefore, fails, and must be dismissed with costs.

HON. MR. JUSTICE MIDDLETON. APRIL 30TH, 1913.

BIGHAM v. BOYD.

4 O. W. N. 1193.

Malicious Prosecution—Assault—Reasonable and Probable Cause—Findings of Jury.

MIDDLETON, J., dismissed an action for malicious prosecution arising out of plaintiff's arrest for the theft of certain documents belonging to defendant, holding that there had been reasonable and probable cause for the prosecution, but gave plaintiff $25 damages upon a claim for assault upon the findings of the jury.

Action for malicious prosecution and assault, tried at Woodstock on April 16th, 1913.

W. T. McMullen, K.C., for the plaintiff.

No one for the defendant.

HON. MR. JUSTICE MIDDLETON:—The plaintiff is a real estate dealer at Woodstock; the defendant is a real estate dealer residing at Regina.

In July, 1912, the defendant came to Woodstock endeavoring to there float a subdivision of real estate near Swift Current. He thought that the plaintiff was opposing him and obstructing his attempts at sales by giving hostile advice to would-be purchasers. Determining to make an end of this, he went to the plaintiff's office with the view of seeking his co-operation. This being declined, an altercation took place; the defendant was asked to leave the office; and, refusing, a struggle took place. After the defendant had left the plaintiff's office it was found that he had left a bundle of papers connected with his transactions and contemplated transactions as to the Swift Current property, on the counter in the plaintiff's office. The plaintiff, noticing these papers, took them home with him, for safe keeping, as he says; but he admits that he read them, and, in fact, slept with them under his pillow. When he went to his office in the morning he forgot to take the documents with him.

The defendant, having discovered that his documents were missing, concluded that he might have left them in the plaintiff's office. He asked a local broker, whose office he shared, to go to the office of the plaintiff and get the documents for him. This gentleman called the first thing in the morning, and asked the plaintiff for the documents. The plaintiff denied that he had them.

In his evidence the plaintiff says that he believed the messenger's statement that he came for the documents, and had no reason to suppose that he had not the authority of the defendant to ask for them, although producing no written instructions.

Thereupon the plaintiff went to his house and obtained the documents. The defendant laid the facts before the police magistrate, and a search warrant was issued. When the chief of police called upon the plaintiff with the warrant, the plaintiff took the documents from his pocket, and handed them over to the chief of police; but he did not then authorize

the documents to be handed to the defendant. Thereupon the defendant laid an information before the police magistrate, through the Crown Attorney, for stealing, and asked for a warrant. The plaintiff was immediately taken before the magistrate and, upon a preliminary investigation being had that afternoon, was committed for trial. He elected to be tried before the County Judge, and was ultimately acquitted.

I left the question of malice and damages to the jury; reserving the question of reasonable and probable cause. The jury found $500 damages for the prosecution and $25 damages for the assault which took place in the office

On the facts outined I think there was reasonable and probable cause for the prosecution and, therefore, the action fails as to it. Judgment will be for the plaintiff, twenty-five dollars, and costs.

HON. MR. JUSTICE MIDDLETON. APRIL 30TH, 1913.

PLAYFAIR v. CORMACK.

4 O. W. N. 1195.

Broker—Purchase of Stock through—Sale of Broker's Own Stock—Undisclosed Profit—Loss on Transaction—Third Party—Claim against—Costs.

MIDDLETON, J., *held*, that where plaintiffs' brokers were employed by defendant to purchase certain stock and sold him stock owned by themselves upon which they made a profit without first disclosing the fact, they could not recover from defendant a loss sustained upon such stock, although they claimed that the sale in question was permitted by the rules of the exchange.
Bentley v. *Marshall*, 46 S. C. R. 477, followed.

Action brought to recover $4,263.57 alleged to be a balance due to the plaintiffs as brokers and agents for the defendants in respect of the purchase of ten thousand shares of the capital stock of the Swastika Mining Company, Limited. Tried at Toronto without a jury on the 24th and 25th April, 1913.

W. N. Tilley, K.C., and H. Ferguson, for the plaintiff.

R. McKay, K.C., and W. C. McKay, for defendant Steele.

J. J. Gray, for the defendant Cormack.

HON. MR. JUSTICE MIDDLETON:—The facts are not complicated. At the time of the occurrence mentioned Steele

was treasurer of the Swastika Mining Company. He was also the largest individual stock holder. On the 18th May an agreement was arrived at between the company, Steele and the plaintiff firm, by which the plaintiffs agreed to buy a large block of stock at 45 cents. This stock they contemplated placing upon the market in such a way that the price would be speedily raised and might possibly reach a dollar. Steele agreed not to market any of his stock except through the plaintiff firm.

Steele practised as a physician at Tavistock, in partnership with Cormack, also a physician. Cormack had only recently come to that village and was a man of very small means. He had not theretofore had any stock transactions. He found himself surrounded in Dr. Steele's office by an atmosphere of speculation and optimism. He knew something of Steele's relations to the company. partly from Steele himself, and partly from outside gossip. Yielding to his environment Cormack determined to augment the sixty dollars per month which he was entitled to draw under his partnership arrangement by some of the unearned increment which it was thought the public was all too anxious to contribute to the fortunate owners of the stock in question.

On the evening of the 21st May or the morning of the 22nd he had some conversation about this with Steele, resulting in a determination to "plunge" either alone, as is said by Steele, or along with Steele, as he says; and Steele telephoned to Martens, the partner of the plaintiff firm having the matter in charge, inquiring whether stock could be purchased, and informing Martens that a medical friend of his was deirous of buying some stock if he could purchase on time. Martens consented, and Cormack sent a telegram May 22nd: "Buy for me, sixty days, five thousand Swastika." It is important to note that no price is named. The brokers, having received this telegram, did not purchase the stock from any outsider, but "put through" a transaction upon the stock exchange. As explained by Martens, this means that, desiring to sell the stock which he holds and at the same time having a customer who desires to buy, the broker makes an offer upon the floor of the exchange to buy or sell at a price named by the broker. No one desiring to sell or buy at that price, the broker himself sells to the secretary of the stock exchange and then buys from the secretary; the transaction thus being regarded as an actual transaction intending to fix

the market price. This course, it is said, was justified by By-law 26, sec. 7, of the Stock Exchange.

I should have mentioned that when Playfair, Martens & Company made the arrangement with the mining company, although the transaction was carried through in their name, they were acting on behalf of themselves and Warren, Gzowski & Company, and that as between these two brokerage firms they were to share equally in the profits and losses of the transaction. This partnership was called in the evidence the "syndicate."

The transaction thus "put through" upon the floor of the exchange was treated as a sale by the syndicate, and Playfair, Martens & Company credited the syndicate with the proceeds; thus treating themselves as purchasers. They then sold to Cormack at this price, plus 2 1-2 cents, to represent their brokerage and carrying charges. In pursuance of this they sent to Cormack a bought note, stating "We have this day bought for your account and risk 5,000 Swastika at 62, sixty days buyer's option; commission, $50; amount, $3,150." Playfair, Martens & Company in this way profited as members of the syndicate by half the difference between 45 and the price at which the transaction was put through, 59 1-2, in addition to their charges for carrying and brokerage.

No disclosure of the fact that they were the vendors was at any time made by them. They justify this course of procedure by the view that the fact that they offered to buy or sell at this price on the open market can be taken as fixing the market price.

In a similar way a second purchase of like amount was made by Cormack on the 8th June.

Contrary to expectations, the stock did not go up, but steadily went down. Cormack renewed from time to time; and finally in January 5,000 shares were sold at 24 1-2, and in February the remaining 5,000 shares at 23 1-4 and 23 1-2. The proceeds were credited, leaving the balance now claimed.

These sales are not in any way impeached, and were carried through by a transfer of the stock from the mining company to the purchaser. No stock was issued on the former transaction.

It is conceded that the rule which prohibits an agent employed to purchase from transferring his own property and fom being himself the vendor would prevent the plaintiff from recovering if the transaction is to be regarded—as it has been

regarded by the plaintiff—as a brokerage transaction. The plaintiffs seek to take the case out of operation of this rule because the defendant Cormack, in his pleading and in an affidavit filed in answer to a motion for judgment, speaks of the transaction as "a purchase of stock from the plaintiffs."

I do not think that this is sufficient. The facts are absolutely plain and free from any uncertainty or controversy; and the pleading ought to be amended so as to conform to the facts. The first telegram constituted the brokers' agents to purchase. Throughout they acted as though they were agents, and they cannot divest themselves of that fiduciary relationship without making that full disclosure pointed out as being necessary in *Bentley* v. *Marshall,* 46 S. C. R. 477. I do not think that this wholesome rule can be frittered away by any suggestion that the purchaser must have known from the circumstances that it was extremely likely that the agent was transferring to him his own stock. Nothing short of the fullest and most ample disclosure on the part of the agent will suffice to free him from disability. For this reason I think the action fails.

The plaintiffs' claim against Steele is based upon the allegation that when Cormack purchased he purchased in truth as agent for himself and Steele. This claim is not made out. Cormack so states but is denied by Steele; and the circumstances surrounding the transaction, with the inconsistencies in Cormack's evidence compel me to find that the allegation is not proved. The plaintiff therefore fails against Steele on this ground as well.

Cormack claimed indemnity against Steele upon the theory that when the agreement to share the profit was made Steele agreed to bear all the loss. This theory is not supported by the evidence at all. The action will therefore be dismissed, with costs to be paid by the plaintiff to both defendants; and Steele will be entitled to the costs of the third party proceedings against Cormack.

HON. MR. JUSTICE MIDDLETON. APRIL 30TH, 1913.

WOOD v. BRODIE.

4 O. W. N. 1190.

Executors and Administrators—Action against Executor—Charges of Misfeasance—Consent—Judgment for Reference—Abandonment of Charges—Refusal of Master to Investigate Same.

MIDDLETON, J., *held*, that by a judgment of reference in an action against an executor under which the accounts of the latter were taken, all charges of misconduct against defendant had been abandoned and that the Master at Perth was correct in his refusal to investigate same.

Appeal by the plaintiff from interim certificate of the Master at Perth upon a reference in an action brought by one of the beneficiaries against Brodie as executor of the late Alexander Wood. In the pleading a number of charges of misconduct are specifically set forth.

C. A. Moss, for the plaintiff and others.

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

E. C. Cattanach, for the infants.

HON. MR. JUSTICE MIDDLETON:—The judgment, pronounced by consent, removes Brodie from his office and refers to the Master the taking of an account of the trust estate and fixes compensation, and directs that, in the taking of the accounts the certificate of J. D. Watson, Chartered Accountant, is to be taken by the Master as being conclusive as to the state of the accounts and the balance which is or ought to be in the hands of Brodie.

Watson has now completed the taking of the accounts, and has certified the balance due by Brodie; and Brodie has paid it into Court. This certificate leaves open the question of liability in respect to certain matters placed by Watson in a suspense account. Upon the certificate being taken before the Master he is asked to allow the plaintiff, and those beneficially interested in the estate, to go into the complaints with reference to previous transactions referred to in the pleadings. The Master has declined to permit this, holding that the certificate of the Accountant is conclusive.

Upon the argument it appeared to me entirely improbable that the judgment intended to delegate to the Accountant the duty of investigating the matters complained of, and that the judgment must have been pronounced upon the theory

that the charges made in the pleadings were expressly withdrawn, although this is not recited in the judgment.

I have spoken to my brother Sutherland, who pronounced the judgment; and he tells me that this is so and that when the matter was under discussion before him at the hearing, Prodie, through his counsel, took the position that he would not consent to be removed from the executorship unless the charges were expressly withdrawn. Some discussion then took place and the judgment was pronounced upon that understanding.

Had the judgment been more carefully drawn, the fact that these charges were withdrawn would have appeared as a recital. This being the case it is clear that the Master is right in deciding that the matter in question cannot now be reopened in his office.

As to the matters not dealt with by Watson and left by him in suspense, the Master must proceed to dispose of them upon evidence. If necessary this must be so declared. Otherwise, the appeal is dismissed, with costs to be paid by Mr. Moss's clients.

MASTER IN CHAMBERS. APRIL 30TH, 1913.

JACKMAN v. WORTH.

4 O. W. N. 1220.

Inspection—Mining Property—Action by Shareholder against other Shareholders—Inspection of no Assistance to Plaintiff's Case—Refusal of Motion for.

MASTER-IN-CHAMBERS refused to permit a mine to be inspected by plaintiff, a shareholder of the company owning same in an action against certain other shareholders and officers of the company where the proposed inspection could not advance plaintiff's case as appearing upon the pleadings.

Motion by plaintiff for inspection of a mine owned by a company in an action by a shareholder against other shareholders and officers of the company.

T. P. Galt, K.C., for the plaintiff.

F. Aylesworth, contra.

CARTWRIGHT, K.C., MASTER:—The facts of this case appear in part in the report in 24 O. W. R. 252. It is only necessary to premise that the alleged fraud with which the

defendants are charged is that in October last they discovered an extremely valuable vein in the company's property and then sold the treasury stock or divided it among themselves at about a tenth or less of its real value.

The plaintiff now moves for an order for inspection of the mine to see what the vein shewed when it was first struck. He thinks this will strengthen the presumption (if such a thing is possible) if not the proof of the fraud with which he seeks to affect the defendants.

It was urged by Mr. Aylesworth that the motion should not be granted. If as a shareholder and a director of the company he has the right to go on the property he does not require an order. If this does not give him the right then it should not be given him in view of his hostile attitude to what are now the controlling interests of the company and therefore to the company so long as it is controlled as at present. It was urged that the plaintiff might in this way acquire information which it would be injurious to the company to disclose and so be in a position to prejudice the stock. It was also urged that inspection would not disclose anything that was relevant to the case as presented on the pleadings.

The defendants are charged with having knowledge which they were bound to disclose to the other members of the company and without having done so with making allotments of shares at a price infinitely "below their proper value," and without any authority to do so. The defendants are attacked on these three grounds, and the point for decision now is only whether inspection will be of assistance to the plaintiff as to any of these alleged facts. The fact of the discovery of the vein in October and of its probable value at that time are not in dispute. But if it is necessary to shew that defendants knew the value in October, this cannot in any way be done by shewing the present value and condition of the mine. The defendant Lyman who is the mine manager says that you cannot judge the future in mining; that it is always uncertain how a vein will hold out; that "at present the mine is paying handsomely." He also says in answer to the question 145, "Did you cut the vein in what you call a very good place? At no time have we cut the vein in a better place." In the next question he says even more strongly, "At no time have we cut that vein with such an encouraging appearance."

This is the evidence of the mine manager who has been in charge since 1st July and was there when the rich vein was struck on 10th or 11th October.

This is the best evidence obtainable on this point; and far more cogent than anything that could be said by any one visiting the mine now for the first time.

Under these circumstances the motion will be dismissed with costs in the cause to the successful party.

SUPREME COURT OF ONTARIO.

FIRST APPELLATE DIVISION. APRIL 7TH, 1913.

J. J. GIBBONS LTD. v. BERLINER GRAMAPHONE CO. LIMITED.

4 O. W. N. 1068.

Appeal to Appellate Division—Order of Judge in Chambers—Necessity for Leave to Appeal — Con. Rule 777 (1278) — Order "which Finally Disposed of the Action."

FIRST APPELLATE DIVISION, *held*, that an order staying proceedings in an action until the conclusion of any action which plaintiff might bring in the province of Quebec was an order "finally disposing of the action within the meaning of Con. Rule 777 (1278).

An appeal by the plaintiffs from an order of HON. MR. JUSTICE MIDDLETON, 27 O. L. R. 402; 23 O. W. R. 544; 4 O. W. N. 381, came on for hearing before HON. SIR WILLIAM MEREDITH, C.J.O., HON. MR. JUSTICE MACLAREN, HON. MR. JUSTICE MAGEE, and HON. MR. JUSTICE HODGINS, on the 17th January, 1913.

R. C. H. Cassels, for the defendants, took the preliminary objection that the order appealed against was not one "which finally disposed of the action," within the meaning of Con. Rule 777 (1278); and, therefore, leave to appeal was necessary. Leave had not been obtained. The order stayed proceedings in the action until after the conclusion of any action which the plaintiff might bring in the province of Quebec. He cited *Gibson* v. *Hawes*, 14 O. L. R. 543.

J. F. Boland, for the plaintiffs.

THEIR LORDSHIPS, after consideration, overruled the objection and decided to hear the appeal.

HON. MR. JUSTICE BRITTON. MARCH 15TH, 1913.

SHAVER v. SPROULE.

4 O. W. N. 968.

Mortgage—Covenant by Grantee to Assume and Indemnify Grantor—Default—Enforcement of Covenant—Payment not Condition Precedent.

BRITTON, J., *held*, that a covenant by a grantee of lands to indemnify the grantor against a mortgage thereon could be enforced notwithstanding the fact that the grantor had not paid the mortgagee the sum due upon such mortgage.

Re Richardson, 1911, 2 K. B. 705, followed.

Motion by the plaintiff for judgment upon the statement of claim, in default of defence, heard at the Ottawa Weekly Court.

The plaintiff claimed a declaration that the defendant was bound, under a covenant of indemnity contained in a conveyance from the plaintiff to the defendant, to procure the plaintiff's release or discharge from his liability to the mortgagor from whom the plaintiff bought the lands in question, and to whom the plaintiff had given a similar covenant of indemnity, for principal, interest, and costs under the said mortgage, and a judgment directing the defendant to procure such release or discharge by payment of the said liability or otherwise and to indemnify the plaintiff against the said liability.

George Halliday mortgaged certain lands in the township of Gloucester to J. P. Band, to secure $8,000 and interest. Subsequently, Halliday conveyed the equity of redemption to the plaintiff, and the plaintiff covenanted to pay the mortgage and to indemnify the mortgagor against all actions, claims, and demands on account thereof. The plaintiff, in turn, conveyed the same equity of redemption to the defendant, and the defendant gave the plaintiff a covenant of indemnity in the same terms. The mortgage fell in arrear, and the mortgagee recovered a personal judgment against the mortgagor Halliday on his covenant to pay the mortgage-moneys, and the usual order *nisi* for foreclosure was made. The mortgagor threatened to sue the plaintiff upon his covenant of indemnity, but the plaintiff, instead of first paying the amount due upon the mortgage to the mortgagor or the mortgagee, commenced this action,

in the Supreme Court of Ontario, against the defendant upon the covenant of indemnity entered into by the defendant.

F. A. Magee, for the plaintiff.

No one appeared for the defendant.

HON. MR. JUSTICE BRITTON, following *Re Richardson, Ex p. Governors of St. Thomas's Hospital*, [1911] 2 K. B. 705, and other cases cited in Halsbury's Laws of England, vol. 22, p. 390, foot-note (k), held that the covenant of indemnity could be enforced, notwithstanding that the plaintiff had not paid the debt.

The judgment as entered contained a declaration in the terms asked for, an order that the defendant should pay into Court to the credit of the cause on or before the 1st April, 1913, the amount due to the mortgagee for principal, interest, and costs, the same to be applied in payment of what was due to the mortgagee; or, if the mortgagor had paid the mortgagee, then in payment of what was due to the mortgagor. The judgment further directed that, in default of such payment into Court, the plaintiff should recover from the defendant the sum due for principal, interest, and costs.

[See *Boyd* v. *Robinson*, 20 O. R. 404.]

MASTER IN CHAMBERS. MAY 7TH, 1913,

SMITH v. STANLEY MILLS.

4 O. W. N.

Discovery — Inspection of Plaintiff by Physician—Motion for—Alleged Mental and Physical Incompetence—Action to set aside Agreements — Jurisdiction — Con Rule 462—Damages from Interim Injunction—Particulars of—Motion Premature.

MASTER-IN-CHAMBERS *held* that he had no jurisdiction to order that a plaintiff be examined by a physician or alienist to be appointed by defendant as to his alleged physical and mental incompetency in an action brought to set aside two certain agreements as to certain real property alleged to have been entered into by plaintiff while mentally incompetent and lacking independent advice.

That particulars of damages alleged to have been suffered by an interim injunction were unnecessary before the trial.

Motion by defendant for an order for the attendance of the plaintiff at his own expense and that "a duly qualified

physician or alienist or both to be appointed by the defendant" may be present thereat; or that the "plaintiff may be medically examined by the defendants' medical adviser or alienist or both or some other duly qualified medical practitioner or alienist with regard to his alleged physical and mental incapacity complained of in this action."

H. A. Burbidge, for defendant.

A. O'Heir, for plaintiff.

CARTWRIGHT, K.C., MASTER:—The plaintiff, a man of over 84 years of age, brings this action to set aside two agreements made by him in respect to certain real property at Hamilton, leased by him to the defendant company, on the ground that he was unable from illness and advancing age to attend to business or appreciate the value of his property. It is alleged that he was approached by a member of the defendant company and induced by him to enter into the said agreements without any independent advice. An appointment was taken out for the examination of plaintiff for discovery at his residence. But the plaintiff did not appear. It was stated by his only attendant as well as by his physician's certificate that he was not in a condition to give evidence at that time, though previously arranged. This motion was then brought.

There is no difficulty in making an order for further examination. At such examination it would be desirable that plaintiff's medical adviser should be present as was provided in a similar motion in *Lindsay* v. *Imperial Steel & Wire Co.*, 13 O. W. R. 872. It cannot be presumed that plaintiff will not be able to submit to such examination at his own house—as it is difficult to see how he can hope to get judgment to set aside the later agreement at least unless he can himself appear at the trial—a much more serious and trying ordeal even in a non-jury action.

The defendants' solicitors should take out another appointment after ascertaining from the other side what will be the most convenient time. No further payment will be necessary. The other branches of the motion cannot be granted by me. This case has some likeness to that of *Angevine* v. *Gould*, 24 O. W. R. 376. Afterwards on 11th April defendant moved before Middleton, J., to have action dismissed under C. R. 616. This was not acceded to but an order was made that plaintiff should attend for examination

before a physician named therein and that plaintiff take steps to properly constitute the action. It may be that if plaintiff here were shewn on examination to be in a similar mental condition that an application might result in an order that would meet the views of the defendant. But it is to be remembered that the most important of the two transactions impeached was made over 3 years ago—the other last January. As to the first the present mental condition of the plaintiff may differ very materially from and furnish no guide as to what it was on 18th March, 1910, when he gave an option to the company to buy, at the expiration of the lease, which will be on 28th February, 1918 or 1923, for $40,000, property which it is alleged was then worth over $60,000, and at the time fixed for purchase may be worth perhaps $200,000 or even more. The case is no doubt one of great importance to the defendant company. But I cannot see that Con. Rule 462 can be applied either as *per se* or by analogy under Con. Rule 3—to grant the examination moved for. Nor can any assistance be had from 9 Edw. VII. ch. 37, secs. 8 and 9, sub-sec. (2), amended by 1 Geo. V. ch. 20. Secs. 1 and 2 of the latter may give the Court power to aid the defendant as desired. But lunacy matters are excluded from my jurisdiction by Con. Rule 42, cl. (5), and what cannot be done directly cannot be done indirectly.

The costs of the motion will be in the cause. In the same case the plaintiff asks for particulars chiefly of damages caused to defendant by the injunction. On this motion F. Morrison appeared for plaintiff. H. A. Burbidge shewed cause.

Mr. Burbidge pointed out that no claim was to be gone into at present. It was only an intimation of what they would ask if successful at the trial. He cited Kerr on Injunctions, 4th ed., p. 591, 592, as shewing that it could not be determined until after the trial whether an inquiry as to damages would be granted. Even if the action was dismissed defendants would not necessarily recover damages.

It therefore appears that no particulars should be ordered, especially as the case is at issue and has been ordered to be tried on the 19th inst. The motion is therefore dismissed with costs in the cause. The plaintiff was justified in finding out exactly what course defendant intended to take just as the defendant is justified in making every reasonable effort to have evidence as to the mental condition of the plaintiff in 1910 and at the present time.

SUPREME COURT OF ONTARIO.

SECOND APPELLATE DIVISION. MARCH 6TH, 1913.

LECKIE v. MARSHALL.

4 O. W. N. 889, 913.

Judicial Sale—Order of Court—"Forthwith"—To Satisfy a Vendor's Lien—Order of Court—Former Nugatory Sale—Necessity of Reserve Bid—Early Date for Sale—Costs.

Certain mining properties were, under a judgment of the Court of Appeal, directed to be sold, under the direction of the Master-in-Ordinary, forthwith, to satisfy a vendor's lien. The Master-in-Ordinary fixed a reserve bid, and offered the properties for sale on December 23rd, 1912. Substantial bids were received, but, as the reserve was not reached, the properties were withdrawn from sale, and, later, the Master directed that they be re-offered for sale on June 16th, 1913, subject to another reserve bid. On appeal

BRITTON, J., (24 O. W. R. 92; 4 O. W. N. 826) *held*, that, as plaintiffs were entitled to a sale *ex debito justitiæ*, the sale should be held earlier, on May 5th, 1913, if possible and without any reserve bid.

Costs of appeal to plaintiffs.

SUP. CT. ONT. (2nd App. Div.) *held*, that as the property would admittedly sell to better advantage if prospective purchasers were permitted to inspect the same and as inspection was impossible owing to physical conditions prior to May 12th, the date fixed by the Master-in-Ordinary for the sale should be restored, with liberty to him to extend the time until July 16th if in his opinion circumstances warranted such extension.

That the practice of fixing a reserve bid was a proper safeguard to adopt and was only to be dispensed with in cases of necessity.

Appeal allowed with costs.

An appeal by the defendants, William Marshall and Gray's Siding Developments Limited, from an order of HON. MR. JUSTICE BRITTON, *ante* 92, 4 O. W. N. 826.

The appeal to the Supreme Court of Ontario (Second Appellate Division), was heard by HON. SIR WM. MULOCK, C.J.EX., HON. MR. JUSTICE CLUTE, HON. MR. JUSTICE RIDDELL, HON. MR. JUSTICE SUTHERLAND, and HON. MR. JUSTICE LEITCH.

George Bell, K.C., for the defendants, appellants.

Glen Osler, for the plaintiffs, respondents.

THEIR LORDSHIPS' judgment was delivered by

HON. SIR WM. MULOCK, C.J.EX. (V.V.):—In this case an order was made directing the sale of the property in question, with the approbation of the Master in Ordinary; and

the Master, in settling the advertisement, gave two directions: one fixing the date of sale, the 16th June, 1913; and the other, that the property be offered for sale subject to a reserved bid.

The respondents, who had a lien on the property, appealed from these two directions to Mr. Justice Britton; and he (*ante* 826), allowed the appeal in part, dispensing with a reserved bid, and changing the date of sale from the 15th June to a date not earlier than the 5th nor later than the 12th May, 1913.

The defendants appeal from the order of Mr. Justice Britton, and ask to have the two directions of the learned Master restored.

As to the proper date to fix for the sale, regard should be had to the nature of the property. In this case it consists of some five hundred acres of land in the Temagami Forest Reserve, said to contain valuable minerals, such as gold, copper, and arsenic. The defendants, we are told, have expended a large sum of money, in the vicinity of $50,000, in improving the property, examining and testing, sinking of shafts, etc.

At this moment, it may be assumed, that there is a blanket of snow over the whole 500 acres of land, and that the shafts, which we were told in the argument were sunk in different portions of the land, are at this moment filled with water and ice.

This is the kind of property which is directed to be sold not later than the 12th May.

Certain materials (evidence) not used before Mr. Justice Britton were before us; in their absence we might perhaps have been led to rule as did that learned Judge.

It is the duty of the Court to endeavour to promote a sale to the best advantage of all the parties concerned, and for such end to select a date of sale and prescribe such other proper terms and conditions as are likely to realize the desired results.

During the argument of counsel for the plaintiffs, the respondents, before us, he was asked whether this particular property would not, in all probability, realize a better price if an opportunity were given to contemplating purchasers to examine it, and he admitted that it was much more likely to realize a good price if such an opportunity were given for

an inspection. That admission, in our judgment, disposes of the case that went before Mr. Justice Britton. Perhaps the material before him would have led us to the same conclusion that he has reached. But, certainly, all doubt of the wisdom of the course we are taking is removed when counsel opposing this motion tells us that a better price will, in all likelihood, be obtained if an opportunity be given for an inspection by prospective purchasers.

What opportunity would there be to ascertain the mineral value of the land, if there is a blanket of snow over it up to nearly the date of sale, and the test pits are filled with water and ice?

On this point we entertain no doubt that the sale should not take place as early as the 12th May; and we doubt if it should take place as early as the 16th June.

The examination will, naturally, occupy a considerable period of time after the snow disappears; and, thereafter, must follow a period to enable contemplating buyers to arrange for the financing of the amount required in such a proposition as this, involving some hundreds of thousands of dollars.

We, therefore, think that, in addition to restoring the direction of the Master as to the date of sale, there should be included in the order the right to him to postpone the date of sale to a date not later than the 16th July, if he thinks it expedient to do so.

As to the other direction of the learned Master, we are of opinion that this is a property which particularly calls for protection by means of a reserved bid. It is the practice of the Court to sell subject to a reserved bid. It is a means to protect parties in such matters from having their interests sacrificed; and experience tells us that conditions surrounding a case like the present—a property like this—particularly call for a reasonable date for sale; and it is particularly desirable that the best terms be realized upon such peculiar property as this, inasmuch as the security is of such variable nature; and more variable the security the more is the need of the protection of the Court to prevent the sacrifice of the property.

We have reason to be aware of the advantage of adopting the policy of protection by the Court, in a recent case that was satisfactorily disposed of in this way, viz., *Re Imperial Pulp Mills Co.*, where a stay of proceedings was

asked for until an inspection could be made by contemplating purchasers, and where reserved bids were fixed. On, I think, two occasions at least, the sale was advertised; but the course taken by the Court, of maintaining the reserved bid and giving ample opportunity for it being reached, resulted ultimately in the reserved bid being reached, and there was a successful sale of the property.

It may be that if at the sale, the reserved bid should prove abortive, later on, if circumstances should so demand, another policy may be prescribed.

Mr. Osler, for the respondents, offered, as an argument against a reserved bid, to give to the Court an undertaking, an unconditional undertaking, that the respondents would, when this property was offered for sale, bid a sum equal to $210,000 and interest; but we are of opinion that we could not accept that undertaking in lieu of the adoption of the safeguard provided by the practice of the Court—a reserved bid. That undertaking, however, may prove of service to the parties concerned. It will also be incorporated in the order.

We think that the appellants are entitled to the costs of this appeal and of the motion below before Mr. Justice Britton.

HON. MR. JUSTICE MACLAREN, IN CHRS. MAY 7TH, 1913.

TOWNSEND v. NORTHERN CROWN BANK.

4 O. W. N.

Appeal—Motion for Allowance of to Privy Council—Sum in Controversy not $4,000—Disallowance of Security.

MACLAREN, J.A., *held*, that where the only question in an action was as to whether defendants were entitled to the whole of a sum of $2,900, assets of a company in the hands of the assignee under certain securities held by them or only to rank thereon *pro rata* with the other creditors, which would give them approximately one-third of the said sum, the matter was not one appealable to the Privy Council, the matter in controversy not exceeding the sum or value of $4,000.

Motion by plaintiff for the approval of a security bond and the allowance of his appeal to His Majesty in His Privy Council from a judgment of this Court which affirmed the judgment dismissing his action.

H. S. White, for plaintiff.

Arnoldi, K.C., for defendant.

HON. MR. JUSTICE MACLAREN:—This appeal is governed by sec. 2 of the Privy Council Appeals Act, 10 Edw. VII. ch. 24, the material part of which reads as follows: "Where the matter in controversy in any case exceeds the sum or value of $4,000 . . . an appeal shall lie to His Majesty in His Privy Council; and except as aforesaid, no appeal shall lie to His Majesty in His Privy Council."

This action was brought by an assignee for creditors to set aside certain securities under sec. 88 of the Bank Act given by the insolvent to the bank. The securities have been upheld in so far as regards the lumber covered by them.

Before the trial the parties agreed that the assignee should go on and sell the assets of the estate, the proceeds to stand in substitution for the property so sold, according to the respective rights of the parties. The plaintiff's evidence shewed that the assets realized $3,900. This included $1,000 received for the mill to which the bank made no claim. It also included goods, chattels, and accounts to which the bank was held not to be entitled; its claim being limited to the lumber alone and its proceeds.

The whole controversy in the case was whether the bank was entiled to the whole of the proceeds of the lumber under its securities or whether it should rank concurrently thereon with the unsecured creditors. The total liabilities are $12,800, the bank's claim $4,100. The plaintiff does not dispute the amount of the bank's claim. The question is whether the bank is entitled to the whole of that part of the $2,900 which comes from the lumber, or only to its *pro rata* share of it which would be approximately one-third. The amount in controversy in this action is therefore brought down to two-thirds of a portion of $2,900. Even if it were the whole of that sum it would still be too small to justify an appeal to the Privy Council under the section above quoted, which requires over $4,000.

I am consequently of opinion that the appeal is incompetent and the application must be dismissed with costs.

HON. MR. JUSTICE BRITTON. MAY 7TH, 1913.

PAGLIAI v. CANADIAN PACIFIC RW. CO.

4 O. W. N.

Railway—Loss of Goods in Transit—Evidence—Damages.

BRITTON, J., gave judgment for $850 and costs in an action brought for the loss of certain artists' models entrusted to defendants as carriers and lost in transit.

Tried at Toronto without a jury.

Action for damages for goods entrusted to defendants for carriage by them and lost in transit. The plaintiff, now doing business at Toronto, on 18th December, 1911, delivered to the agents of the defendants, at Minneapolis, Minn., a cask of moulds, and a cask of models, to be carried to Toronto. The moulds arrived safely, but the models did not, being apparently lost in transit.

W. N. Proudfoot, K.C., for plaintiff.

A. MacMurchy, K.C., for defendants.

HON. MR. JUSTICE BRITTON:—Upon the evidence, the defendants are liable for the loss of the models. In fact—liability was conceded at the trial by counsel for defendants, but it was contended that the amount claimed by the plaintiff was exorbitant. When the articles were shipped at Minneapolis nothing was agreed upon as to value. There was no inspection or valuation. Nothing to assist in arriving at amount of damage in case of loss. There was nothing on the shipping bill about models. No doubt, and I so find, one of the casks did contain the models mentioned in plaintiff's claim. The plaintiff says that he told the agent of the railway company at Minneapolis, that one cask contained models, and he was not asked to distinguish in value between the moulds and models. It may be assumed that there was a slight difference in freight rate, according to the tariff schedules of the railway company—but that does not, in my opinion, affect the question of amount of plaintiff's damages. That was a matter for the company. There was no fraud or deception or attempted deception of any kind by the plaintiff in shipping his property. The plaintiff did not

know—nor was he told that there was any difference between models and moulds as to rate. The plaintiff said he purchased these models in Toulouse, France, from a person whom he named, and that he paid prices which would aggregate $1,110. The person from whom plaintiff purchased was a sculptor and an artist. This person was about to retire from business and sold these models cheap. The plaintiff's manner in giving his evidence impressed me favourably. The vendor may not have been retiring from business. He may to some extent have imposed upon the plaintiff, as sales by persons retiring from business may be known as well in France as in Canada. If these models were made as such by an artist—then the plaintiff is corroborated as to their value.

The expert witness from Montreal called by the defendants, stated that the price placed by plaintiff upon these models, if models made by a sculptor, was quite low enough, perhaps too low. There is other corroboration of plaintiff—abundant corroboration—if these models were as represented by him. The witness from Montreal—who pronounced these models, copies—had never seen them.

The plaintiff, assuming that he is honest and making an honest claim, is placed at a great disadvantage by the models being lost. There can be no inspection—not even of the fragments—and no comparison with copies about which witnesses spoke. The evidence given by witnesses under commission is not satisfactory. They know very little even by hearsay and less in fact of the plaintiff's work—or his models. They give an account of their own work in plaster paris, and alabaster—or alabastine—but evidence as to the models in question was vague.

Nothing in my opinion is determined by the plaintiff's declaration in passing his entry at the customs. The entry purports to be, and was in fact only of "settlers' effects." Whether the moulds were intended to be entered or not as settlers' effects, they were upon the shipping bill produced, and were received by plaintiff. The models were not received by plaintiff, and not valued by him. The bill calls for 6 packages. Only 5 were passed. The models were not included in what was valued at $25. Such a valuation would be only by mistake, or for some fraudulent purpose, as the value in fact of the models even at the lowest, and rejecting plaintiff's evidence altogether, was much more.

I do not accept the view of plaintiff's counsel as to loss of moulds, and their being of no use without the models. For ordinary practical purposes these moulds were of some value to produce statuary which could be used as models for the cheaper, or inferior kind of that work. If these moulds were not good enough for that, their destruction was no loss to the plaintiff.

I accept the plaintiff's evidence, but considering the time when he purchased and the use the plaintiff has made of these models, the trade he has been and is now engaged in, I am of opinion that his damages are not so great as the amount he says was paid for these models.

Upon full consideration of all the evidence, I assess the damages at $850 and direct that judgment be entered for the plaintiff for that amount with costs.

Thirty days' stay.

SUPREME COURT OF ONTARIO.

FIRST APPELLATE DIVISION. APRIL 11TH, 1913.

ROSE v. TORONTO RW. CO.

4 O. W. N. 1069.

Negligence—Street Railways—Collision between Street Cars—Injury Denied—Evidence—New Trial—Costs.

BRITTON, J., 24 O. W. R. 84, 4 O. W. N. 833, in an action for damages for personal injuries alleged to have been sustained by plaintiff, a dental surgeon, while a passenger on defendants' street railway, by reason of a collision between two of defendants' street cars, entered judgment for plaintiff for $650 and costs in the second trial of the action.

Costs of former trial to plaintiff, no costs of appeal to Divisional Court to either party.

SUP. CT. ONT. (1st App. Div.) affirmed above judgment.

An appeal by the defendants from a judgment of HON. MR. JUSTICE BRITTON, 24 O. W. R. 84; 4 O. W. N. 833.

The appeal to the Supreme Court of Ontario (First Appellate Division), was heard by HON. SIR WM. MEREDITH, C.J.O., HON. MR. JUSTICE MACLAREN, HON. MR. JUSTICE MAGEE, and HON. MR. JUSTICE HODGINS.

T. Herbert Lennox, K.C., for the defendants, appellants.

J. W. McCullough, for the plaintiff, respondent.

THEIR LORDSHIPS (V.V.) dismissed the appeal with costs.

SUPREME COURT OF ONTARIO.

FIRST APPELLATE DIVISION. APRIL 8TH, 1913.

RE FELIX CORR.

4 O. W. N. 1068.

Administration—Report as to Next-of-kin—Appeal—Evidence—Costs.

KELLY, J., 24 O. W. R. 103, 4 O. W. N. 824, dismissed appeal by one Mary E. Donnelly from the judgment of the Master-in-Ordinary, to whom it was referred, to find and report upon whom, if anyone, were the next-of-kin of Felix Corr, deceased, declaring that the said appellant was not one of such next-of-kin.

SUP. CT. ONT. (1st App. Div.) affirmed above judgment.

Appeal by Mary Elizabeth Donnelly from an order of HON. MR. JUSTICE KELLY, 24 O. W. R. 103; 4 O. W. N. 884.

The appeal to the Supreme Court of Ontario (First Appellate Division) was heard by HON. SIR WM. MEREDITH, C.J.O., HON. MR. JUSTICE MACLAREN, HON. MR. JUSTICE MAGEE, and HON. MR. JUSTICE HODGINS.

G. S. Hodgson, for the appellant.

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

THEIR LORDSHIPS dismissed the appeal with costs.

SUPREME COURT OF ONTARIO.

FIRST APPELLATE DIVISION. MARCH 27TH, 1913.

SMITH v. BENOR.

4 O. W. N. 985.

Deed—In Trust—Refusal to Reconvey—Fraud—Statute of Frauds no Defence—Amendment—Set-off—Reference.

KELLY, J., *held* (23 O. W. R. 912, 4 O. W. N. 734), in an action for a declaration that certain property conveyed by plaintiff to defendant was conveyed to him as trustee only and for a reconveyance and damages, gave effect to plaintiff's claim and ordered a reconveyance and $5 damages, with costs.

"The Statute of Frauds does not prevent proof of a fraud."

Rochefoucauld v. *Boustead*, [1897] 1 Ch. 196, and *McMillan* v. *Barton*, 20 S. C. R. 404, followed.

SUP. CT. ONT. (1st App. Div.) increased amount of damages, but otherwise affirmed above judgment.

An appeal by the defendant from a judgment of HON. MR. JUSTICE KELLY, 23 O. W. R. 912; 4 O. W. N. 734.

The appeal to the Supreme Court of Ontario (First Appellate Division) was heard by HON. SIR WM. MEREDITH, C.J.O., HON. MR. JUSTICE MAGEE, HON. MR. JUSTICE HODGINS, and HON. MR. JUSTICE LATCHFORD.

I. F. Hellmuth, K.C., for the defendant, appellant.

McGregor Young, K.C., for the plaintiff, respondent.

THEIR LORDSHIPS (V.V.) varied the judgment below by directing that, instead of an account being taken, the $500 referred to in the judgment be paid by the plaintiff to the defendant, in addition to the $200 ordered to be paid. With this variation, the judgment was affirmed. The defendant to pay the plaintiff's costs up to and including the judgment below. No costs of the appeal to or against either party.

SUPREME COURT OF ONTARIO.

FIRST APPELLATE DIVISION. MARCH 27TH, 1913.

RE GRAND TRUNK RW. CO. & ASH.

RE GRAND TRUNK RW. CO. & ANDERSON.

4 O. W. N. 985.

Arbitration and Award—Railway Act (Dom.)—Costs of Arbitration—Offer of Damages and a Right of Way—Award not Exceeding Offer—Contestants not Entitled to Costs—Jurisdiction of Arbitrators as to Costs—Award not Appealed from—No Waiver.

Application on behalf of the Grand Trunk Rw. Co. for an order directing the taxation of their costs of certain arbitrations. The company had offered the claimants the sums of $20 and $40 damages, and a right of way over certain lands, in exchange for the lands taken. The arbitrators found that the claimants were entitled to no more than had been offered them, and assumed to award the company costs. Claimants did not appeal.

BRITTON, J., *held*, (24 O. W. R. 43, 4 O. W. N. 810), that the arbitrators exceeded their powers in awarding costs, and that, as the offer of the company was not of a definite sum of money, they were not entitled to costs under the statute, and, further, that claimants had not waived their rights to oppose the payment of costs to the company by their acquiescence in the award.

Nolin v. *Great West Rw. Co.*, [1910] 2 K. B. 252, referred to.

SUP. CT. ONT. (1st App. Div.) affirmed above judgment.

An appeal by the Grand Trunk Rw. Co. from orders of HON. MR. JUSTICE BRITTON, 24 O. W. R 43; 4 O. W. N. 810.

The appeal to the Supreme Court of Ontario (First Appellate Division) was heard by HON. SIR WM. MEREDITH, C.J.O., HON. MR. JUSTICE MAGEE, HON. MR. JUSTICE HODGINS, and HON. MR. JUSTICE SUTHERLAND.

D. O'Connell, for the appellant railway.

J. Grayson Smith, for the respondents.

THEIR LORDSHIPS (V.V.) dismissed the appeal with costs.

SUPREME COURT OF ONTARIO.

SECOND APPELLATE DIVISION. MARCH 18TH, 1913.

MILLAR v. HAND.

4 O. W. N. 956.

Principal and Agent—Secret Profits—Purchase by Agent—Measure of Damages.

Action for an account of the secret profits made by defendant while acting as agent for plaintiff for the sale of certain lands. Defendant had purported to sell them to one McDougall at $100 per foot, but in reality purchased them himself and a few months later sold them for $160 per foot.

BRITTON, J., *held* (23 O. W. R. 288, 4 O. W. N. 245), that plaintiff was entitled to treat the latter sale as made on his account, and that he was, therefore, entitled to all profits thereof, less proper deductions.

Judgment for plaintiffs with costs.

SUP. CT. ONT. (2nd App. Div.), affirmed above judgment.

An appeal by the defendant from a judgment of HON. MR. JUSTICE BRITTON, 23 O. W. R. 288; 4 O. W. N. 245.

The appeal to the Supreme Court of Ontario (Second Appellate Division) was heard by HON. SIR WM. MULOCK, C.J.Ex., HON. MR. JUSTICE CLUTE, HON. MR. JUSTICE RIDDELL, HON. MR. JUSTICE SUTHERLAND, and HON. MR. JUSTICE LEITCH.

G. H. Watson, K.C., for the defendant, appellant.

G. H. Kilmer, K.C., for the plaintiff respondent.

THEIR LORDSHIPS' judgment was delivered by

HON. SIR WM. MULOCK, C.J.Ex. (V.V.)—We are of opinion that this judgment cannot be disturbed. The learned trial Judge has found that the defendant was an agent of the

plaintiff merely for the sale of lot 35, and continued as his agent throughout, until the sale was completed; and he was paid for his agency a certain stipulated sum of money.

During the whole of the period, from the time of Hand's appointment until the completion of the sale, the finding of the learned trial Judge as to the question of fact is, and we concur in it, that the plaintiff was not aware that Hand was interested in the sale which he had credited to his principal. It is true that in the examination of the plaintiff in another action he used loose expressions, which, if uncontroverted, would seem to lead to the conclusion that he was willing to sell to Hand; but, immediately after those expressions, he states that he had no knowledge of Hand being interested. Some months afterwards, McDougall sold the property at a substantial advance; and, later on, the plaintiff learned of the fraud, and brought this action.

For the appellant the question was raised as to what principle should be applied in fixing the damages. So long as the land remained in McDougall, so long as it had not passed into the hands of a *bona fide* purchaser for value without notice, it was recoverable by the true owner; and Miller was entitled to set aside the fraudulent deed.

Therefore, until the actual conveyance to Stubbs, the purchaser, the property is reality was the the property of the plaintiff, and was thus sold to Stubbs to realize a certain sum of money; and the plaintiff is content to have the damages fixed by regard to the amount of money realised from that sale. His right thereto appears to us to be unassailable. If he chooses to adopt it; and, therefore, we hold that he is entitled to judgment for his share in the profits. He had a co-partner in the enterprise, who is not a party to this action; and, therefore, Miller, the plaintiff, is to recover only to the extent of his damage.

Therefore, we dispose of the case, dismissing the appeal with costs, without, in any way, prejudicing the co-partner, Hearst, in bringing any action such as he may be advised in respect of his claim.

MASTER IN CHAMBERS. APRIL 29TH, 1913.

JORDAN v. JORDAN.

4. O. W. N. 1219.

Pleading—Statement of Claim—Motion to Amend—Claim for Assault and False Imprisonment—Barred by Lapse of Time—10 Ed. VII. c. 34, s. 49 (j).

MASTER-IN-CHAMBERS refused to permit a statement of claim to be amended to claim in respect of an assault and false imprisonment alleged to have taken place over 13 years ago, holding that the claim was barred by 10 Ed. VII. c. 34, s. 49 (j).

Motion by plaintiff to have statement of claim amended by adding a claim for assault and false imprisonment.

Plaintiff in person.

H. E. Stone, for the defendant.

CARTWRIGHT, K.C., MASTER:—This action was begun on 28th October, 1911. On 6th December of that year the writ was amended by adding a claim for assault and false imprisonment—against the defendant, who is the husband of the plaintiff. The writ was amended and re-served.

This amendment was not carried into the statement of claim, which was delivered on 30th January, 1912, by solicitors then acting for plaintiff, but who are no longer acting for the plaintiff. The action has never gone to trial.

It appears from the material filed on this motion by the defendant that an action for this claim now sought to be added was begun on 5th January, 1898, but was discontinued by plaintiff's then solicitors, on 3rd June, 1898, after defendant had served notice to set aside the statement of claim as shewing no cause of action.

To this view the plaintiff's solicitor apparently acceded as appears from an affidavit made in the action then pending for alimony between the same parties.

It was admitted on the argument of this present motion that the alleged assault and false imprisonment now asked to be added to the statement of claim are the same as were the subject of the action discontinued nearly 13 years ago.

That being so, the claim was long since barred by 10 Edw. VII., ch. 34, sec. 49 (j).

To allow the amendment would, therefore, be useless and of no possible benefit to plaintiff—apart from the question whether such an action by a wife against her husband will lie—see R. S. O. (1897), ch. 163, sec. 115.

For this reason the motion must be dismissed with costs to defendant in the cause, as was done in a similar case of *Clark* v. *Bartram*, reported 3 O. W. N. 691; 21 O. W. R. 259.

It should be noted that plaintiff was examined for discovery as long ago as March, 1912, without any objection the the statement of claim, as it then appeared or any question as to the omission of the amendment either by the plaintiff or the solicitor who appeared for her at that time.

HIS HONOUR JUDGE REYNOLDS. MAY 7TH, 1913.

SOPER v. PULOS.

Bankruptcy and Insolvency—Assignment Act—Creditors' Relief Act —Interpleader Order—Preference of Contesting Creditors.

Plaintiff under execution having seized certain goods claim was made under chattel mortgage, usual interpleader order directing sale if security not given, and issue as to mortgagee's claim with provision for creditors to take part within a certain time. No security being given, Sheriff advertised goods for sale, and interpleader issues were delivered and returned, but not yet tried. On 3rd May, execution debtors assigned for benefit of creditors and assignee claimed goods from Sheriff.

REYNOLDS, Co.C.J., held that the assignee was not entitled to receive goods on paying or securing preferential costs and that Sheriff's sale should proceed.

That as soon as interpleader order was made and contesting execution creditors took upon themselves the burden of the issue they obtained a right of preference of which the assignment did not take precedence under sec. 14 of Assignment Act. The sale when held would be under order of the Court, *Reid* v. *Murphy*, 12 P. R. 334; and interpleader sections of Creditors' Relief Act, sec. 6, sub-sec. (4), (5) govern.

The principle of Re *Henderson Roller Bearings*, 22 O. L. R. 306, 24 O. L. R. 356, affirmed *sub nom Martin* v. *Fowler*,

46 S. C. R. 119, applies even though issue has not been tried. Judgment debtor by now making an assignment cannot overrule the order of the Court, and change the rights of the parties.

APPELLATE DIVISION.

MAY 5TH, 1913.

RICE v. PROCTOR.

4 O. W. N.

Principal and Agent—Real Estate Broker—Sale by Former Employee—Claim for Commission—Terms of Interpleader Order—Evidence.

SUP. CT. ONT. (First Appellate Division) dismissed appeal from judgment of Denton, Co. J., in favour of plaintiff in an interpleader issue holding that defendants' contention that a sale of certain real estate negotiated by plaintiff was practically negotiated by him while in their employ and that they were therefore entitled to the resultant commission was incorrect.

Appeal by defendants in an interpleader issue from judgment of HIS HONOUR JUDGE DENTON, awarding plaintiff certain moneys paid into Court by the vendor of certain real property as commission upon the sale thereof. Defendants claimed that plaintiff, who negotiated the sale, practically did so while in their employ.

The appeal to the Supreme Court of Ontario (First Appellate Division), was heard by HON. SIR WM. MEREDITH, C. J. O., HON. MR. JUSTICE MACLAREN, HON. MR. JUSTICE MAGEE, and HON. MR. JUSTICE HODGINS.

J. Bicknell, K.C., and M. Lockhart Gordon, for appellants (defendant.)

W. H. Irving, for respondent (plaintiff).

HON. MR. JUSTICE HODGINS:—An interpleader order was made on the 14th November, 1912, by His Honour Judge Denton in an action in the C ounty Court of the County of York, between the appellants, as plaintiffs therein, and one R. A. Baldwin, directing an issue to be tried between the respondent (described in the order as Omer Rice, but apparently intended for Morley B. Rice), and the appellants.

In that action the appellants were suing Baldwin for a commission on the sale of 33 Whitney avenue, Toronto.

That sale was evidenced by an agreement in writing, exhibit 1, dated 28th May, 1912, in which Rice and McMullen now represented by the respondent, are described as the agents of Baldwin & Woods, the vendors (now and at the date of the interpleader order represented by the said R. A. Baldwin). In the agreement it was provided that the agent's commission was to be paid out of and to form part of the purchase money.

It is not disputed that the respondent procured the actual signing of this offer. The action of the appellants was apparently begun upon the theory that the respondent, while their servant, had acquired his knowledge on the subject and had really made all the arrangements which enabled him to procure the signing of the agreement above recited, and that the commission, therefore, belonged to the appellants. This is the only foundation upon which an interpleader order could be made, relating, as it did, to the specific commission which Baldwin had, in the agreement, consented to pay to the respondent.

It now transpires and was so stated during the argument that the appellants may have a claim to a commission, depending upon their introduction, while they were Baldwin's agents, of the property in question to the purchaser Trow. The interpleader order, while purporting to release the said R. A. Baldwin in respect of the commission referred to in the statement of claim in the action first mentioned, must be taken to be limited to the state of facts which I have mentioned as then asserted by the appellants. If it were construed so as to bar the appellants' claim to any commission arising out of their dealings with Baldwin just referred to it would be too wide, and would to that extent be beyond the competence of the County Court to make, upon an application for an interpleader order. See Consolidated Rule 1103, and *Greatorex* v. *Shackle* (1895), 2 Q. B. 249.

The purpose of an issue is to inform the conscience of the Court; and in this case its trial disclosed to the County Court that there was or might be a claim for commission, quite apart from that properly dealt with in the interpleader order. But the judgment in appeal does not deal with anything beyond the money in Court; and if the respondent is entitled to that money the appeal should be dismissed.

It appears that No. 33 Whitney avenue was not listed with the appellants until after the middle of March, 1912, and that on the 7th of March, 1912, the respondent left their service, and, while doing business on his own account was asked by Trow to get the property for him at the lowest price. To do so, the respondent finally agreed to hand back to Trow $200 of his commission.

I am unable to see how under the circumstances and upon the evidence adduced the appellants can claim this particular commission, earned in the way I have stated and dealt with by the agreement just mentioned.

I think the appeal must be dismissed; but the order should contain a statement that the dismissal is without prejudice to any right or claim which the appellants may have for commission other than that which could properly be dealt with by the interpleader order of the 14th November, 1912.

HON. SIR WM. MEREDITH, C.J.O., HON. MR. JUSTICE MACLAREN and HON. MR. JUSTICE MAGEE agreed.

SUPREME COURT OF ONTARIO.

FIRST APPELLATE DIVISION. MAY 5TH, 1913.

VALCI v. SMALL.

4 O. W. N.

Negligence—Injury to Employee — Kicking Horse—Volenti non fit Injuria—Discussion of Doctrine—Non-Suit—New Trial—Amendment of Pleadings—Costs.

Action by plaintiff a driver in employ of defendant for injuries sustained by reason of a kick from a horse which he was driving. The evidence shewed that both plaintiff and defendant knew that the horse in question was in the habit of baulking and kicking, and that plaintiff at defendant's suggestion had purchased a kicking strap on this account. Upon the day of the accident the kicking strap had become disarranged and afforded no protection.

LATCHFORD, J., at the trial withdrew the case from the jury upon the ground that plaintiff had voluntarily incurred the risk incident to the driving of the horse.

SUP. CT. ONT. (First Appellate Division) *held* that the case should not have been withdrawn from the jury as upon the evidence it was open to the jury to find that plaintiff did not fully appreciate the risk he was running in driving such a horse.

Thomas v. *Quartermaine*, 18 Q. B. D. 685, 696, referred to.

Judgment appealed from reversed and new trial ordered.

Appeal by the plaintiff from the judgment of LATCHFORD, J., dated 27th January, 1913, after the trial before him sitting with a jury on that day, at Toronto, of an action

for damages for personal injuries sustained by plaintiff while in the employ of defendants as a driver through a kick from a horse.

The appeal to the Supreme Court of Ontario (First Appellate Division) was heard by HON. SIR WM. MEREDITH, C.J.O., HON. MR. JUSTICE MACLAREN, HON. MR. JUSTICE MAGEE and HON. MR. JUSTICE HODGINS.

John MacGregor, for appellant.

Jas. Haverson, K.C., for respondent.

HON. SIR WM. MEREDITH, C.J.O.:—The appellant is an Italian labourer who was employed by the respondent as driver of a delivery waggon; he entered into the employment on the 29th October, 1911, and continued in it until the 16th December following, when the accident in respect of which the action is brought occurred.

There was evidence that the horse by which the waggon was drawn was in the habit of baulking and kicking, and that this was known to the respondent. The appellant testified that on several occasions before the accident happened the horse had kicked violently, so violently as to endanger the safety of the driver, though no injury had been done to him on any of those occasions. At the suggestion of the appellant the respondent had directed him to purchase a kicking strap, and that was done, and the horse was driven with this strap on him and it appears to have answered the purpose for which it was intended until the time of the accident when some part of the harness appears to have become disarranged with the result that the kicking strap fell down and the horse kicked violently and struck the appellant as he sat in the waggon seat and injured him severely.

The appellant admitted that he knew that it was dangerous to drive the horse on account of its kicking habits, but there is nothing to indicate that he meant that there was danger when a kicking strap was in use.

The learned trial Judge was of opinion that the appellant had voluntarily incurred the risk incident to the driving of the horse and that he was, therefore, not entitled to recover, and he also held that the claim of the appellant was based only on liability at the common law, and that he was therefore not entitled to avail himself of the provisions of the Workmen's Compensation for Injuries Act.

In my opinion the case should not have been withdrawn from the jury. It was open to the jury upon the evidence to come to the conclusion that although the appellant knew of the danger incurred in driving a kicking horse he was imperfectly informed as to its nature and extent or, as it is put in some of the cases, that he did not fully appreciate the risk he was running in driving such a horse. As said by Bowen, L.J., in *Thomas* v. *Quartermaine* (1887), 18 Q. B. D. 685, 696: "The maxim, be it observed, is not '*scienti non fit injuria*,' but '*volenti!*' It is plain that mere knowledge may not be a conclusive defence. There may be a perception of the existence of the danger without comprehension of the risk; as where the workman is of imperfect intelligence, or, though he knows the danger, remains imperfectly informed as to its nature and extent. There may again be concurrent facts which justify the inquiry whether the risk, though known, was really encountered voluntarily." See also *Smith* v. *Baker* (1891), A. C. 325.

As the case should, in my opinion, be tried again, I refrain from further comment upon the evidence.

The appellant should, I think, have leave to amend by making his claim in the alternative under the Workmen's Compensation for Injuries Act. Upon his present pleading he has not made a case for recovery under the Act, not because he does not in terms claim the benefit of it, but because the statement of claim does not set up facts sufficient to found a claim under the Act. I refer to the omission of an allegation that notice of the injury was given within the time and in the manner prescribed by the Act, or of such facts as would excuse the giving of the notice if it was not given.

The respondent should pay the costs of the appeal and the costs of the last trial should abide the event of the action.

HON. MR. JUSTICE MACLAREN, HON. MR. JUSTICE MAGEE, and HON. MR. JUSTICE HODGINS agreed.

HON. MR. JUSTICE LENNOX. MAY 5TH, 1913.

NORMAN v. McMURRAY.

4 O. W. N.

Vendor and Purchaser—Specific Performance—Agreement for Exchange of Lands—Delay of Plaintiff in Closing—Time of Essence—Reciprocal Obligations—No Attempt by Defendant to Fulfil His Obligations—Waiver of Tender—Waiver of Right of Rescission by Conduct.

LENNOX, J., gave judgment for specific performance of an agreement for the exchange of certain lands which had been repudiated by defendant upon the ground that plaintiffs had not been ready to close at the appointed time, time being of the essence of the contract, upon the ground that defendants had taken no steps to carry out the contract and there was no priority of obligation, the respective obligations of the parties being reciprocal, and upon the further ground that defendant had by his subsequent conduct waived whatever rights of rescission he had had.

Foster v. *Anderson*, 15 O. L. R. 362; 16 O. L. R. 565 and other cases referred to.

Action for specific performance of a contract for exchange of lands, and damages.

Joseph Montgomery, for plaintiffs.

G. R. Roach, for defendant.

HON. MR. JUSTICE LENNOX:—Through the default of a third party with whom one of the plaintiffs was dealing the plaintiffs although active in trying to close the transaction were not ready to complete the contract upon their part on the day agreed upon, the 14th of December, 1912, but upon that date their deed was duly executed and the adjustment money ready to be handed over, as the defendant knew.

The agreement contained this clause: "Time shall be the essence of this agreement." The defendant recognized the agreement as an existing contract and continued to negotiate after the 14th of December. The plaintiffs had reason to believe from the telephone communication between Mr. Charleton, the agent of both parties, and the defendant's solicitors on the day fixed for closing, and subsequent negotiations, that it would be satisfactory if closed by the following Saturday; and the plaintiffs were ready and anxious to close the transaction with the defendant on that day. On the 17th December the defendant's solicitors wrote the plaintiffs' solicitor saying "the transaction is now considered at an end."

There is no evidence that either party actually tendered an executed deed of the land he was conveying to the other, and there was no priority of obligation—their obligations were reciprocal in this respect. Until one acted the other was not in default. In Hals. L. of E., vol. 7, p. 434, it is said, "Where a contract consists of mutual promises . . . they may be dependent upon one another so that the due performance by one party of his promise is a condition precedent to the liability of the other." There either party could preserve the vitality of the time clause by doing everything to be done upon his part within the time limited, and refusing negotiations of any kind after that day. But the defendant did not complete his part of the contract and as held in *Foster* v. *Anderson,* 15 O. L. R. 362, 16 O. L. R. 565, a person who has not himself within the time fully performed his part of the contract cannot make this condition a ground of defence against the other party, and as shewn in *Upperton* v. *Nicholson,* L. R. 16 Chy. App. 436, once the time has thus gone by the subsequent rights of the parties are governed by the general principles of the Court. See also *Snell* v. *Brickles,* 24 O. W. R. 28.

Does it follow on the other hand that the plaintiff not having actually tendered the deed and adjustment money cannot maintain this action? I do not think so in the circumstances of this case. The defendant wholly repudiated the contract and agreed to sell to another within four or five days of the day fixed for closing and when the plaintiff was ready, although the total delay was only a week, he was told by the defendant's solicitors that the defendant would not do anything. The defence on the pleadings and in Court is in line with this attitude; and tender is dispensed with where it would be a mere idle formality. *Gundy* v. *Gives,* 20 O. R. 500.

Again, on the broader question as the effect of the subsequent negotiations the defendant is prevented from setting up the condition as to time: *Webb* v. *Hughes,* L. R. 10 Eq. 281; and once allowed to pass he must give notice and allow a reasonable time. Judgment of Malins, V.-C., pp. 286, 287.

The plaintiffs are entitled to specific performance of the agreement with costs.

It is not a case of damages in addition to specific performance.

HON. MR. JUSTICE LENNOX. MAY 5TH, 1913.

JOHN MACDONALD & COMPANY LIMITED v. HENRY E. TEASDALE AND HELENA AUGUSTA KATE TEASDALE.

4 O. W. N.

Judgment—Lands in Name of Debtor's Wife — Evidence—Debtor Found to Have Interest in—Judgment for Payment or Sale.

LENNOX, J., *held*, that defendant Henry S. Teasdale was beneficially interested in certain lands held by his wife to an amount sufficient to pay the debt due and owing plaintiff, a creditor of his and ordered that in default of payment such lands should be sold to pay such debt.

Action by a judgment creditor of defendant, Henry E. Teasdale for a declaration that certain property standing in the name of his wife and co-defendant was in reality his own property and exigible to satisfy plaintiffs' judgment.

T. Herbert Lennox, K.C., for plaintiff.

R. D. Moorehouse, for defendants.

HON. MR. JUSTICE LENNOX:—There is not much assistance to be got from the cases cited by either counsel. The evidence satisfies me that the defendant Henry E. Teasdale has a financial interest in the land standing in the name of his wife and that money which ought to have gone in payment of the plaintiffs' claim went in the payment of this property. So far as this money was derived from the boarding account or from conversion of the horse there never being any completed gift of these chattels to the wife, and so far as there were profits from these investments or accumulations or surpluses from the husband's earnings was the husband's money and must be accounted for. It all went into the common fund now in part invested in the land in question. Whether the business alleged to have been carried on by Mrs. Teasdale could be regarded as her business I have not stopped to determine as without this there is, in my opinion, a resultant trust in favour of Henry E. Teasdale of more than sufficient to satisfy the plaintiffs' claim. The evidence as to advances made by Mrs. Teasdale and the chattel mortgage transaction leaves a serious question upon my mind as to the detailed account of the money in ques-

tion including the separate handling of the initial $150 can be depended upon.

There will be judgment declaring that the defendant Henry E. Teasdale is beneficially interested in the lands in question to an extent sufficient to satisfy the plaintiffs' claim, and for payment and sale upon default and for the costs of this action.

The plaintiffs will amend their statement of claim by striking out from paragraph 1 of the prayer for relief the words, "and all other creditors of the defendant Henry E. Teasdale."

HON. MR. JUSTICE MIDDLETON. MAY 5TH, 1913.

MYERSCOUGH AND THE LAKE ERIE & NORTHERN Rw. CO.

4 O. W. N.

Arbitration and Award—Lands Taken under Railway Act—Appeal from Award—Evidence—Severance—Meaning of—Enhancement by Proposed Work—Uncertainty of—Fixing of Time for Making of Award—Necessity of—View of Property—Weight Given to be Stated—Arbitration Act 9 Ed. VII. c. 35 s. 17.

MIDDLETON, J., on an appeal by a railway from the award of arbitrators appointed under the Railway Act fixing the compensation for certain lands taken for the purposes of the railway dismissed the appeal upon all substantive grounds but gave appellants the option if they so desired to have the award remitted to the arbitrators so that they might certify in accordance with section 17 of the Arbitration Act 9 Ed. VII. c. 35 what influence a view of the property had upon their award, the motion to stand in the meantime.

Appeal by railway from the award of the County Judge of Haldimand and J. H. Spence, the arbitrator appointed by the railway, allowing to the land owner $623 for the land taken, and $677 for the severance occasioned by the railway, argued in Weekly Court, 1st May, 1913.

W. S. Brewster, K.C., for the railway.

W. T. Henderson, K.C., for the vendor.

HON. MR. JUSTICE MIDDLETON:—The material dates are as follows: The railway registered its plan and book of reference on February 20th, 1912. Notice of expropriation dated 12th October, 1912; served 17th October, 1912.

Thomas Myerscough (who owned the land at the date of the filing of the plan), on the 8th of July, 1912, conveyed to his wife Rebecca Myerscough. On the 27th June Thomas Myerscough agreed to sell part of the land to Smith, *et al.*, for $28,000. On the 5th August, 1912, a by-law was passed by the council of the city of Brantford, by which permission was given to Rebecca Myerscough, the owner of the portion of lands mentioned in the agreement with Smith, *et al*, to lay out upon these lands certain highways of a uniform width of fifty feet. These highways connect with Mount Pleasant street, the main thoroughfare, and provide a highway bordering upon the lands taken by the railway. They cover all the lands on the one side of the railway allowance.

An agreement was entered into between the purchasers under the Smith agreement, and the municipality, providing that these streets should not be opened up as highways until certain works were done thereon.

The appeal is upon several grounds. First it is said that the award is against evidence and the weight of evidence. Subject to what is to be said as to the particular grounds to be dealt with later, there is abundant evidence to support the award. There is the usual conflict between expert real estate valuators. Some place the value of the land and the injury to the land by severance at far higher figures than allowed by the Board. It is not without significance that the award is that of the third arbitrator and of the railway's arbitrator; the land-owner's arbitrator refusing to join in an award for so small an amount.

Secondly, it is said that the arbitrators erred in allowing damages for depreciation for severance, as the sale to Smith of the portion severed by the railway precludes recovery upon this head.

I think this argument is based on a misapprehension of the real meaning of damages by reason of severance. When a railway intersects a parcel of land, damages are allowed in the first place, as here, for the land actually taken, and a further sum is allowed for the injury done, to the land not taken, by reason of compulsory subdivision. In other words, the entire parcel has been rendered less valuable, not only by reason of the reduced acreage but by reason of access from the main highway being only obtained after crossing a railway. Often, this damage may be as here, confined entirely to the reduced value of that parcel by reason of its severance,

as compared with the value it would have had if the severance had not been made.

The fact that after the land had been injured in this way the land-owner chooses to sell one parcel, even if that sale should be without any reservation of the right of way to the main highway, seems to me to be quite irrelevant. It may have been the most prudent thing the owner could do, or it may have been utterly imprudent. The effect of the taking by the railway is to be judged in view of the situation created at the time by the taking of the land and not in view of the subsequent developments.

Quite apart from this, I do not think that there was, in this case, a sale without ample provision being made for access. It was the intention of the parties that the land should be laid out as shewn in the plan. The agreement for sale was made, too, before the property was conveyed; and while Mrs. Myerscough was still the owner she obtained the necessary municipal consent, and registered the plan. This was apparently done with the full approval of the purchasers and in pursuance of the real understanding between the vendor and purchaser.

Upon the evidence the amount to be allowed for the injuries caused by the severance upon the forty-five acre parcel would appear to me to exceed the amount which has been allowed by the arbitrators.

Then it is said that the arbitrators have not sufficiently appreciated the increased value resulting to the plaintiff's lands from the construction of the railway. The section of the Railway Act, 198, limits the factor to be considered to the increased value "beyond the increased value common to all lands in the locality."

I fail to see that these lands will be materially increased in value beyond other lands in the neighbourhood by reason of the existence of this railway. If the line is to be operated as an electric railway, no doubt it will greatly enhance the value of the lands; but there is no assurance that this is to be the way in which the line is to be used; as the charter provides that the line may be operated by steam. In the latter event a through track crossing over the lands will for many purposes be detrimental. The arbitrators have considered and, they say, given effect to the evidence; and I certainly cannot see any room to differ from the result arrived at, by way of reducing the sum awarded.

Two technical objections are also taken. The arbitrators, it is said, did not at their first meeting fix a date on or before which the award was to be made. This, it is claimed, invalidates the proceedings. The fact is not shewn, and counsel disagree in their recollection.

In *St. Mary's and Western Railway, etc.*, 22 O. L. R. 429, the Divisional Court held that the omission does not invalidate the award and that the objection is waived by proceeding with the arbitration.

Then it is said that the arbitrators took a view of the property and that the award is not in conformity with section 17 of the Arbitration Act, 9 Edw. VII., ch. 35. The section relied upon provides that where the arbitrators proceed wholly or partly on a view or any knowledge or skill possessed by themselves or any of them, they shall also put in writing a statement thereof sufficiently full to enable a judgment to be formed of the weight which should be attached thereto.

In the award the arbitrators recited the hearing of evidence—"and having at the request of the parties concerned, and accompanied by their respective counsel, viewed the lands and premises in question." The arbitrators have not said, nor is it otherwise shewn, that they have proceeded upon anything learned by them upon the view, and possibly the objection is not technically made out; but I think the railway, if it desires, should have an opportunity of having the award referred back to the arbitrators, so that they may certify in accordance with the section in question.

In the case already cited, the Court took the view that the Ontario Arbitration Act applied to arbitrations under a Dominion statute; so the section in question is applicable to this case.

I do not think that the award should be set aside altogether by reason of the failure to certify in accordance with the section, and therefore the only effect that should be given to the objection is a reference back as I have suggested. If the railway company desires this reference back to the arbitrators to certify as referred to, then the motion will be reserved until a supplementary certificate is made; and if the railway does not desire this relief, the motion will be dismissed with costs. The railway must elect as to this within a week's time.

On the argument objection was taken based on the fact that the arbitration was with the wife and that the deed from the husband to her was after the expropriation proceedings. This was not mentioned on the hearing and the point was not taken in the notice of appeal. The husband, it is said, will join in any release the railway desires, so the point is not of any real importance.

SUPREME COURT OF ONTARIO.

FIRST APPELLATE DIVISION. MAY 5TH, 1913.

HUDSON v. SMITH'S FALLS ELECTRIC POWER COMPANY, LIMITED.

4 O. W. N.

Negligence—Injuries from Broken Wire—Findings of Jury—Vagueness and Uncertainty—Possible Liability of Third Parties—New Trial.

SUP. CT. ONT. (First Appellate Division) in an action for damages for personal injuries sustained from encounter with a broken service wire *held* that the jury's finding that defendant's negligence consisted in "insufficient inspection of service wire" was too vague and uncertain a finding upon which to base a verdict having regard to all the circumstances of the case.

New trial directed, costs of former trial and of appeal to abide result thereof.

An appeal by the defendants from a judgment of HON. MR. JUSTICE SUTHERLAND, pronounced 27th November, 1912.

This was an action to recover $2,000 damages for injuries alleged to have been received by coming into contact with a broken live wire of defendants on Beckwith street in town of Smith's Falls. At trial judgment was awarded plaintiff, Mary Hudson, for $800, and plaintiff, Henry Hudson, for $500, with costs.

The appeal to the Supreme Court of Ontario (First Appellate Division) was heard by HON. SIR WM. MEREDITH, C.J.O., HON. MR. JUSTICE MACLAREN, HON. MR. JUSTICE MAGEE and HON. MR. JUSTICE HODGINS.

C. A. Moss and H. A. Lavelle, for the defendants (appellants).

D. L. McCarthy, K.C., for plaintiff (respondent).

HON. MR. JUSTICE HODGINS:—The respondent, Elizabeth Hudson, is found by the jury to have met with an accident caused by the negligence of the appellants, which negligence is, according to the answer to question 2, "insufficient inspection of service wire." There was evidence that the electric light service wire, running into Capt. Foster's house, broke, and fell upon the street and that the respondent, Elizabeth Hudson, while walking along the street came in contact with it and received a shock affecting her health and bringing on a miscarriage. There was a considerable difference among the witnesses called as to whether the wire broke on Saturday night or on Sunday night, the 19th or 20th March, 1910. Mrs. Hudson placed it definitely on Saturday night while Captain Foster was certain it was on Sunday night. Both related circumstances which rendered the true date a question of considerable doubt, but no question was put to the jury on the subject.

If the accident happened on Saturday night, the appellants did not render the wire harmless until Sunday night, whereas if it occurred on Sunday evening they attended to it that night. It was upon the question of negligence in this regard that the pleadings were framed and the case opened.

The Bell Telephone Company having been brought in as third parties, evidence was given throughout the trial upon much larger questions, namely, the cause of the break, the condition of the service wire, of the main street wires of the appellants and those of the Citizens Company, and the Bell Telephone Co. In addition, the stretching by the latter company of a cable along the street and the inspection by each of the other companies of that work, as well as their care and attention to the various wires, was gone into.

The learned trial Judge consequently allowed the respondents, after the evidence was closed, to amend their statement of claim by alleging that the appellants were negligent in allowing one of their wires to break—in addition to the negligence originally charged, i.e., that after the break the electric wire was allowed to remain on the street.

In his charge to the jury the learned Judge went very fully into the facts in evidence; and, had the jury followed his directions, the case would be much clearer than it is put in the answer which they gave. After finding that the appellants were guilty of negligence causing the accident, the jury defined the negligence as "Insufficient inspection of service

wire." There are several possible explanations of this answer if the charge of the learned Judge is examined. The following matters were pointed out by him:

At p. 232 the learned trial Judge said:

"If the plaintiff shew that the defendant company allowed its wire to get out of repair, allowed the insulation to get out of repair, or by lack of proper inspection were negligent, then the defendant company would be liable. If, on the other hand, it is shewn by the evidence that it was the cable of the Bell Company which caused the accident and the defendant could not by reasonable inspection and oversight which they should have exercised, have discovered it in time, then it may be you will come to the conclusion that the defendant company is not liable, that the cause of the accident was the misconduct of the Bell Telephone Company. But even if it were caused by the cable of the Bell Telephone Company or in some way that you cannot see a primary blame to be placed upon the defendant company, and it appears in a satisfactory way to you from the evidence, or you can reasonably deduce it from the evidence, that after the defendant company's wire was broken the matter was brought to their attention, or such a time elapsed that they should have discovered it, and that in the meantime they did not repair it promptly and the injury occurred, then even though the Bell Telephone Company's cable did cause the break, it might be that you would come to the conclusion that owing to the dilatoriness—if there was such—of the defendant company in failing to repair the trouble after they were told of it or after they should have discovered it, they would be liable."

And at p. 240 he said:

"The plaintiffs also say that in any event if the defendants had been watching and inspecting as they should, the possibility or probability of the break would have been apparent and could have been avoided and should have been. And then they say that in any event the defendants had opportunities to learn of the defect in time to have prevented the accident."

At p. 245 he said:

"If it occurred through a defect in the wire through age or otherwise, through lack of proper insulation or anything of that sort, and you find that is the cause of the breaking; if it occurred because the Bell Telephone Company's cable got in such a position that it might break it, and the defendant

company by the exercise of proper precautions and reasonable inspection could have discovered that and rectified it before the break occurred, if in any of these ways you think the wire broke—these are ways which may appear to you to be properly developed in or deducible from the evidence,—the defendant company may in your opinion be properly made liable for the breaking of the wire, and that is negligence which you would hold them liable for."

At p. 248 he said:

"In that connection you will have to determine whether the defendant company's wire was properly insulated at the point where it came in contact with the wire of the Citizens Company. And in considering all this you will have to determine where these wires were situated, the wires of the respective companies, and how close they were to each other."

In discussing question 2 the learned trial Judge thus instructed the jury:

(At p. 256): "If so, that was the negligence? Was it lack of inspection of the wire, was it through leaving a wire up that was not strong enough, was it through lack of inspection of the situation and the nearness of the Bell Telephone Company's cable—if you think that is the case—or what was the negligence of the defendant company? If there is one act of negligence set it out there, if there is more than one act of negligence set them out."

It is therefore clear that there were six points that the jury were asked to consider involving lack of or careless inspection as an element of negligence. They were in regard to the wire, its age, its strength, its insulation, its proximity to the Bell Telephone Co.'s heavy cable, its nearness to the Citizens Company's wire—which is said not to have been properly insulated—and the prompt discovery and removal of it after it fell.

If the accident happened on Saturday night, then negligence in inspecting the wire in the sense of not having an efficient watch for dangerous and possible accidents therefrom, would be enough, apart from any antecedent neglect on the other five points; whereas if it happened on Sunday night the answer might refer to this kind of negligence, the less fragrant, or to any one of the other kinds of inefficient supervision.

The jury may have known what they meant; but this is not sufficient. Their answer must be such that, having regard to the evidence adduced, the Court can say that there is

evidence to support their finding, and that that evidence disclosed a ground of legal liability. In this respect the appellants have a right to complain especially in view of the sharp conflict among the witnesses as to the night of the occurrence and to the fact that throughout the trial the appellants, so far as the respondents were concerned, had their attention fixed on the one issue raised by the pleadings, and dealt only with the other points so far as they afforded an answer to the defence of the third parties.

Upon one of the charges of negligence—and the one perhaps most forcibly presented—a learned Judge has, in *Roberts* v. *Bell Telephone Co.*, 24 O. W. R. 428, expressed the opinion that there is no duty to inspect wires periodically for the purpose of seeing that other wires had not been improperly placed in undue proximity. This, if correct, is an additional reason for ascertaining the exact meaning of the answer to question 2.

I do not think it is unreasonable, under these circumstances to insist that the answers of the jury should be clear and intelligible in order to support their verdict. *Clarke* v. *Rama Timber Transport Co.* (1885), 9 O. R. 68; *Stevens* v. *Grout* (1893), 16 P. R. 210; *Cobban* v. *Canadian Pacific Rw. Co.* (1895), 23 A. R. 115.

I think there should be a new trial, the costs of the former trial and of this appeal to abide the result.

HON. SIR WM. MEREDITH, C.J.O., HON. MR. JUSTICE MAGEE, and HON. MR. JUSTICE MACLAREN, agreed.

HON. MR. JUSTICE LENNOX. MAY 5TH, 1913.

LAPORTE v. WILSON.

4 O. W. N.

Trespass—Action for Possession of Lands—Non-Termination of Existing Tenancy—Proof of Title.

LENNOX, J., dismissed an action for possession of certain lands brought by the alleged owner against the occupant thereof, holding that defendant was in possession as a tenant from year to year and had received no legal notice of termination of his tenancy.

Action by plaintiff, alleged owner of certain lands, for possession, rent and damages.

J. H. Clary, for the plaintiff.

J. A. Milligan, for the defendant.

HON. MR. JUSTICE LENNOX:—The plaintiff claimed title in fee simple to the property in question under an alleged deed from Richard Stephens, but adduced no proper evidence of the title of Stephens or the execution of the deed. As the defendant alleges a tenancy and that subsequently he purchased from the same person, Richard Stephens, and as the defendant actually proved a tenancy acquired derived from this same Richard Stephens the want of clear proof upon this point may not be an answer to the plaintiff's claim.

The failure to prove the execution of the deed is, I think, a fatal objection, but this point is not necessary to the determination of this case. The defendant was in possession at the time of the plaintiff's alleged purchase as the plaintiff knew. The evidence shews that on the 1st of September, 1909, the defendant became a tenant of the premises in question for a year certain and entered into possession under an agreement with the alleged owner Richard Stephens. He has been in possession ever since. Remaining in possession with the consent of his landlord and paying, and the landlord accepting, rent as before he became a tenant from year to year, beginning on the 1st of September, 1910. This tenancy can only be determined by a notice of at least six months, terminating at the end of a year. The notice has not been given. Although not legally proven I feel, no doubt, but that the plaintiff's alleged deed is a sufficient protection to the defendant for payment of rent to the plaintiff, since the time he ceased to pay to Stephens.

The action will be dismissed with costs. If the plaintiff desires it he may deduct from the defendant's costs when taxed the rent of the premises in question from the 1st of July, 1912 (less such sum if any as the defendant in this period has paid for taxes), and in that event the defendant will only be entitled to issue execution for the balance.

HON. MR. JUSTICE MIDDLETON. MAY 5TH, 1913.

RE DORWARD.

4 O. W. N.

Will—Construction—Use of Printed Form—Clumsy Sentence Lacking Grammatical Form—Intention of Testator.

MIDDLETON, J., *held*, that a clause in a will for which a printed will form had been used "all the residue of my estate not hereinbefore disposed of I give, devise and bequeath unto and I nominate and appoint Mrs. Isabella Dorward to be executrix of my last will and testament," conferred the residuary estate upon the said executrix.

May v. *Logie*, 27 O. R. 505; 23 A. R. 785, referred to.

Motion for construction of will of Walter Dorward who died 22nd February, 1911.

S. Denison, K.C., for the executors.

H. M. Ferguson, for Mrs. Darvel and Mrs. Davis, two next of kin.

HON. MR. JUSTICE MIDDLETON:—"The county conveyancer" and "the man who makes his own will" are favourite toasts at lawyers' gatherings. "The man who invented printed will forms" will soon be equally popular. As excellent as these forms often are so many errors arise in filling them up that already a formidable list of cases can be found dealing with the problem prescribed. This testator used the same form as that considered in *Re Conger*, 19 O. L. R. 499, and filled it up in the same way save that he inserted his wife's name in the clause for the appointment of executors and left the space blank in the residuary devise. So the will reads "All the residue of my estate, not hereinbefore disposed of, I give, devise, and bequeath unto, and I nominate and appoint Mrs. Isabella Dorward to be executrix of my last will and testament." This can, I think, be read as an awkward sentence by which the wife is made residuary devisee as well as executrix. Dorward did not mean to die intestate, and I think that from the will itself his intention can be gathered and that intention was to give his property to his wife.

May v. *Logie*, 27 O. R. 505, and 23 A. R. 785, shews that the intention may be gathered and given effect to even when the actual words used do not form a sentence, and are quite incapable of grammatical analysis. Costs may come out of the estate.

HON. MR. JUSTICE MIDDLETON. MAY 5TH, 1913.

RE LLOYD AND A. O. U. W.

4 O. W. N.

Insurance—Life Insurance—Certificate Payable to Two Beneficiaries—Death of Beneficiary in Lifetime of Assured—Policy Payable to Survivor—Ontario Insurance Act—2 Geo. V. c. 33 s. 178 s.-s. 7.

MIDDLETON, J., *held*, that where an insurance certificate was made payable one-half to the wife of the insured and the other half to his daughter and the former predeceased him, the daughter by virtue of s. 178 s.-s. 7 of the Ontario Insurance Act, 2 Geo. V. c. 33, became entitled to the whole.

Motion for payment out of money paid into Court by an insurance company.

J. M. Ferguson, for Alice Lloyd.

G. G. Mills for Mary E. Birtch.

HON. MR. JUSTICE MIDDLETON:—James L. Lloyd was insured in the Ancient Order of United Workmen, on the 5th July, 1884, for two thousand dollars payable "to his wife Sarah Anne Lloyd one-half and the other half to his daughter Mary Eliza Lloyd"—now Mrs. Birtch.

Lloyd died on the 24th February, 1913. His first wife, Sarah Anne Lloyd, predeceased him, dying on the 13th of November, 1909. He married Alice Barton on the 11th January, 1911, and she survives him. There is no question as to the title of Mrs. Birtch to one-half of the money, and this has been paid to her. The remaining thousand dollars has been paid into Court, and is the amount in question here.

No will of the assured has been found but an unsigned document is produced purporting to be a copy of his will. This document is in the handwriting of the assured, and is probably the only document that ever existed. It is not signed, and counsel agree that it has no effect upon the matters in question.

Mrs. Birtch bases her claim to the money upon two contentions.

First, she says: "Assuming the Act, 2 Geo. V. ch. 33, to apply, then upon the true construction of the various subsections of sec. 178, I am entitled. Applying sub-sec. 7, one of the designated preferred beneficiaries has died in the lifetime of the assured. The assured has made no new dec-

laration. I, as survivor of the designated preferred beneficiaries, take the whole fund."

This contention is unanswerable, unless sub-sec. 3 and 4 can be made to apply. By sub-sec. 3, if the assurance "is for the benefit of the assured only or if his wife, and children generally . . . 'Wife' shall mean the wife living at the maturity of the contract;" and by sub-sec. 4 this is to be "whether or not the wife is designated by name." Here the assurance is not for the benefit of the wife of the assured only, nor is it for the benefit of the wife and children generally, but it is for the benefit of the wife, and one named child. It seems to me that the case is not brought within secs. 3 and 4, and that the daughter's claim must prevail. I arrive at this conclusion with regret; but the right is a statutory right and must depend upon the exact terms of the statute.

The alternative contention presented by the daughter is as follows: Under sec. 159 of the Revised Statutes, ch. 203, and its amendments, upon the death of one of two or more designated beneficiaries the right to receive the whole fund in the absence of a new apportionment became vested in the survivors. This right became vested upon the death of the first wife, Sarah, on the 13th November, 1909; and the subsequent legislation, even if sufficient to confer the right upon the second wife, would not operate to divest this vested interest.

In the result I have arrived at it is not necessary for me to discuss this point. I content myself by referring to my recent decision in *Re Jannison*, 24 O. W. R. 391.

It is not a case for costs.

MASTER IN CHAMBERS. MAY 3RD, 1913.

GRILLS v. CANADIAN GENERAL SECURITIES.

4 O. W. N. 1223

Discovery—Practice as to Deposit of Documents—Inspection—Refusal to Permit—Costs.

MASTER-IN-CHAMBERS ordered that all documents referred to in the affidavits on production save those in constant use should in conformity with the usual order be deposited with the Clerk of Records and Writs.

Motion by plaintiff for an order that certain documents, referred to in defendant's affidavit on production be deposited in the Central Office.

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

F. S. Mearns, contra.

CARTWRIGHT, K.C., MASTER:—The facts of this case appear sufficiently in the previous report in 24 O. W. R. 289. A further affidavit on production was made as directed, but the documents therein set out were not deposited in the Central Office. The plaintiff now moves to have this done.

The usual order was made in this case, requiring the production of all relevant documents and their deposit with the Clerk of Records and Writs. The subsequent order of 26th March, 1913, did not in any way relieve the defendants from the previous direction.

Neither in the first affidavit is there any ground stated why the order should not be obeyed, nor is any such set up in the further affidavit. At least this should have been done, if it was not intended to comply with the order.

Instead of so doing the defendants' solicitors gave notice on 14th April that the documents produced could be inspected at their office on the 16th between 2 and 4 p.m. The plaintiff makes affidavit that he attended at that time, and at other times before and since, but without any satisfaction, owing to the conduct of the defendants. He also says that he was put off with promises that statements would be prepared; but that such were not forthcoming on 25th April, and that since 16th April, he has been refused access to the books.

It appears from the affidavit of defendants' book-keeper filed in answer to this motion that the necessary statements would take a long time to prepare, and that he could only take this up after office hours. He estimated the time on 16th April, at ten days or more. On 26th April, he said the extracts would be ready "early next week," and "can then be checked over in a short time."

The week here spoken of is now almost ended, and it must surely be the case that the promised extracts are now ready. If that is so then plaintiff should be given ample time next week to satisfy himself of their accuracy. If they are not ready then it would seem useless to give defendant any further time, and the order now asked for would have to be made. Except by agreement there is no such practice here as to deposit of documents, as is set out in Bray on Discovery, 240, 241. Here the order must be followed except

as to the documents mentioned in the second part of the first schedule as being in constant use. Then the inspecting party can move as in the present occasion, if necessary. As to all that is mentioned in the first part of Schedule I. the order must be complied with if desired by the opposite party unless it is varied on the application of the party affected.

Neither of these courses has been taken in the present case. The present motion was, therefore, rendered necessary and the costs of it will be to plaintiff in any event.

HON. MR. JUSTICE LENNOX. MAY 5TH, 1913.

THE UNION BANK OF CANADA AND A. McKILLOP & SONS, LIMITED.

4 O. W. N.

Company—Powers—Guarantee of Indebtedness of Waggon Company —Guaranteeing Company a Lumber Company—Ultra Vires — Ratification Impossible—Costs.

LENNOX, J., *held*, that a guarantee of the indebtedness of a waggon company was *ultra vires* the powers of a company formed "to buy, sell and deal in timber and lumber, and for the said purposes to operate and carry on saw-mills, bending factories and other woodworking machinery and mills for the manufacture of woodwork implements and carpenters' and builders' supplies and to carry on the business of a farmer and dealer in live stock and farm produce.

Williams Machinery Co. Ltd. v. *Crawford Tug Co.*, 16 O. L. R. 245, and other cases referred to.

Action upon a guarantee given by defendant company to plaintiff to secure certain advances by them to the West Lorne Waggon Co. Ltd.

Hamilton Cassels, K.C., and D. C. Ross, for the plaintiffs.

C. A. Moss and J. B. McKillop, for the defendants.

HON. MR. JUSTICE LENNOX:—Archibald McKillop, John Alexander McKillop, Daniel McKillop, Hugh Cummings McKillop, and Isabella Fuller were incorporated as a company "to buy, sell and deal in timber and lumber and for the said purposes to operate and carry on saw-mills, bending factories and other woodworking machinery and mills for the manufacture of woodwork implements and carpenters' and builders' supplies, and to carry on the business of a farmer

and dealer in live stock and farm produce," on the 28th of September, 1904, under the provisions of the Ontario Companies Act.

On the 17th of February, 1905, and before they had organized as a company, these same incorporators executed an instrument by which they jointly and severally bound themselves to be responsible to the Merchants Bank for the indebtedness of The West Lorne Waggon Company, Limited, to the amount of $20,000. These incorporators appear to have regarded this as an obligation of the defendant company, and the reason assigned for not executing as a company is the non-organization of the company. I understand the president of defendant company to say on examination that " when the money was obtained from the Merchants Bank on our guarantee we were the West Lorne Waggon Company." It is a fact that the waggon company was launched by this witness, his brothers, and their friends. The charter members of the waggon company are still the only members of defendant company. It is a family affair—arising out of property and business, which the shareholders inherited from their father. At the time the defendant company executed the guarantee in question they held one share in the West Lorne Waggon Company, and some of the members had shares. These shares were held in the same way when the waggon company assigned. In March or April of 1905, the West Lorne Waggon Company was taken over by the Wilkinson Plough Company, and the shareholders, or many of them, were paid by shares in the plough company. This latter company also assigned and at time of assignment members of the defendant company held shares in the plough company to the amount of $25,000. These shares were held and treated as the property of the defendant company. In March of 1907, the waggon company owed the Merchants Bank about $40,000 and for $20,000 of this the members of the defendant company were responsible upon their guarantee. At this time it was arranged to transfer the West Lorne Waggon Company account to The United Empire Bank—this bank advancing the waggon company the money to enable them to pay off the Merchants Bank. It is admitted that the plaintiffs have succeeded to all the rights of the United Empire Bank. Of this $40,000 credit $25,000 was advanced upon a promissory note of the West Lorne Waggon Company, secured by an assignment of the company's manufactures and

raw material under the provisions of sec. 88 of The Bank Act, and the balance was secured, or supposed to be secured, by a general guarantee of the defendant company for a sum not exceeding $15,000, and interest thereon at 6 per cent. per annum after demand. This is the situation in outline, but so far as the facts or the inferences from facts are concerned there is nothing to assist me which will not be equally available to an Appellate Court in the event of an appeal, as there is no conflict of testimony and nothing turning upon the demeanour of witnesses.

The defence is two-fold, namely, that the guarantee never bound the company, and if it did, that there is now no indebtedness within its terms. The first objection goes to the root of the action. Although not without doubt, I have come to the conclusion that the guarantee sued on did not and does not bind the defendant company. The money loaned to the United Empire Bank upon the faith of this undertaking went in discharge of this amount of the liability of the members of the defendant company to the Merchants Bank. I don't think this matters. The merchants Bank could not have recovered upon their security in an action against the defendant company, and, with all equities counted, the plaintiffs cannot be subrogated with higher rights. This is a family concern, a private company it is said, but it appears to me that, to be binding ta all it must be binding to all intents and so postpone the rights of creditors of the defendant company and its members if insolvency had supervened. The members of a company and the company are separate entities. *Soloman* v. *Soloman,* [1897] A. C. 22. The president and other members of the defendant company were keenly alive to the importance of retaining the operations of the waggon company in West Lorne, and looked forward to profitable sales, but their charter did not authorize the defendant company to engage in the business which the waggon company was incorporated to carry on. How then could it be said that the defendant company had power to finance a business which it could not engage in? Whether imprudent, or probably profitable is not the question, and I cannot think that the transaction now repudiated was so clearly incidental to the purposes for which the defendant company was incorporated that there could be said to be "a potential necessity" for executing the guarantee sued on. *Williams Machinery Co.* v. *Crawford Tug Co.*, 16 O. L. R. 245; *Small*

v. *Smith* (1884), 10 App. Cas. 119; *Attorney-General* v. *Great Eastern Rw. Co.*, 5 App. Cas. 473, at pp. 478 and 481. What is not expressly authorized or incidental is prohibited. *Ashbury Rw. Co.* v. *Riche*, L. R. 7 H. L. 653. Nor do I think that the reference to this guarantee contained in the minute book of the defendant company, and made subsequent to the new Act, constitutes an effective ratification. This may happen if the thing done, though irregularly done, was within the authorized objects of the company, was *intra vires;* otherwise, however, if it was impliedly prohibited by being clearly outside the declared and incidental purposes or objects of the company. Cases clearly marking this distinction are collected in the Appendix to Pollock on Contracts, 7th ed., at pp. 694, 5, and 6. Entertaining the opinion I have expressed, it becomes unnecessary to deal with the other objection to the plaintiffs' claim. The merits are with the plaintiffs, and it, therefore, is not a case for costs to the defendants. I shall not be sorry if my judgment should be shewn to be wrong.

The action will be dismissed without costs.

HON. MR. JUSTICE KELLY. MAY 3RD, 1913.

STORY v. STRATFORD MILL BUILDING CO.

4 O. W. N. 1212.

Private International Law—Foreign Tort — Negligence—Personal Injuries—Law of Quebec—Damages—Forum for Measure of—Findings of Jury.

KELLY, J., *held*, that an action could be maintained in Ontario for a tort committed in Quebec if the wrong was of such a character that it would be actionable if committed here and if it were not justifiable by the law of Quebec.

Carr v. *Fracis Times & Co.* 1902 A. C. 176, followed.

That the measure of damages was governed by the law of Quebec.

Halsbury's Laws of England, Vol. 6 p. 250, sec. 372, referred to.

Action for damages for personal injuries sustained by plaintiff, an employee of defendants, an Ontario company, while engaged in the installation of certain machinery in a mill, in the province of Quebec, through the alleged negligence of defendants' superintendent.

I. Hilliard, K.C., and W. B. Lawson, for plaintiff.

R. S. Robertson, for defendants.

HON. MR. JUSTICE KELLY:—Defendants are an incorporated company carrying on business as general contractors and mill builders, and having their head office in the city of Stratford.

Plaintiff is a millwright, whose residence is in the province of Ontario.

In or about August, 1911, defendants had a contract for the erection of machinery in a mill in Wakefield in the province of Quebec. Plaintiff was employed by them on that contract, the work on which was carried on under the sole direction and superintendence of Harry Cox, their foreman.

On the 30th August, while engaged with others in installing the machinery on this contract, and while doing such work in obedience to the commands of Cox, plaintiff was injured by the falling of a machine called a dust collector, which happened, the jury found, through the negligence of Cox, in not having sufficiently nailed to the rafters of the building a board from which the dust collector was suspended while being put in its place. The board was nailed up by another workman, Muller, by the direction of Cox. The jury assessed the damages at $1,500.

Defendants contend that under these circumstances they are not liable.

At the trial counsel agreed that "by the common law of Quebec, masters are responsible for damage caused by their servants or workmen in the performance of the work for which they are employed; and that the doctrine of common employment as stated in the cases of *The Asbestos & Asbestic Co.* v. *Durand*, 30 S. C. R. (at p. 292); *Filion* v. *The Queen*, 24 S. C. R. 482; Ruegg, 8th (Can.) ed., 975, is not a defence in Quebec.

Counsel also agreed that the Quebec Statute, 9 Edw. VII., ch. 66, "An Act respecting responsibility for accidents suffered by workmen in the course of their work, and the compensation for injuries resulting therefrom," applies.

It is essential to consider the conditions under which the plaintiff is entitled to succeed in an action in this province for a tort committed outside of the jurisdiction. That question was fully gone into in the case of *Carr* v. *Fracis Times & Co.* (1902), App. Cas. 176, where Lord Macnaghten (at p. 182), states the view, with which the other members of the Court unanimously agreed, that "it is well settled

by a series of authorities (of which the latest is the case of *Phillips* v. *Eyre* in the Exchequer Chamber) that in order to found an action in this country for a wrong committed abroad two conditions must be fulfilled. In the first place the wrong must be of such a character that it would have been actionable if committed in England; and, secondly, the act must not have been justifiable by the law of the place where it was committed."

This is a very plain statement of the conditions under which such an action ran be successfully maintained.

Phillips v. *Eyre* was followed by *The M. Moxham* (1876), 1 P. D. 107, both of which were referred to in the judgments in the *Carr Case*.

What is necessary is that the act (committed in a foreign country) be wrongful or "not justifiable," not necessarily that it should be the subject of civil proceedings in the foreign country: *Machado* v. *Fontes* (1897), 2 Q. B. 231.

The present inquiry is therefore to ascertain whether the two conditions mentioned in *Carr* v. *Fracis Times & Co.*, have been fulfilled.

It was argued for the defence that the first condition is not complied with inasmuch as the Quebec law cannot be enforced here. This is, I think, a misconception of what is really required. It is not a question of enforcing in this province the provisions of the Quebec law, but of enforcing the law of this province in respect of a wrong committed in Quebec which is not justifiable by the law of that province.

What is first to be considered is, was the wrong or the act complained of of such a character that it would have been actionable if committed in this province. Of that I think there is no doubt, under the state of the law in this province as it existed at the time of the accident, the provisions of which it is unnecessary to review.

The second condition also I take to be complied with. The law of the province of Quebec as admitted by counsel as being in force, and the facts as found by the jury shew that the act complained of is clearly not justifiable in that province.

9 Edw. VII. ch. 66, sec. 1 (Quebec), above referred to, provides that, "Accidents happening by reason of or in the course of their work, to workmen, apprentices and employees engaged in the work of building; or in factories, manufactories or workshops . . . shall entitle the person

injured or his representatives to compensation ascertained in accordance with " the succeeding provisions of the act.

By sec. 4 it is declared that a foreign workman or his representatives shall not be entitled to the compensation provided by the Act, unless at the time of the accident he or they reside in Canada, etc.

Section 5 provides that no compensation shall be granted if the accident was brought about intentionally by the person injured.

Taken with the above admissions of counsel, this seems to me to make it clear that the casualty was one for which the plaintiff had a right of action in the province of Quebec, or in any event, it was not justifiable there, and therefore the second condition as laid down by Lord Macnaghten has been complied with.

I have not left out of consideration the case of *Tomalin* v. *Pearson* (1909), 2 K. B. D. 61, cited for the defence. This deals with a state of facts different from those presented here and does not conflict with the opinion I have expressed nor limit or modify the law as laid down in the *Carr Case*.

As to damages; it is stated in Halsbury's Laws of England, vol. 6, p. 250, sec. 372; " that the measure of damages in an action in respect of a tort committed abroad is (it would seem) to be governed by the *lex loci actus*; and " it may well be that the rules of the *lex fori* will be allowed to increase the amount of damages in certain classes of torts."

That aspect of the case it is not necessary to further consider here; counsel, when the matter was brought to their attention at the close of the trial, admitted that the amount of the verdict as returned by the jury was within the amount recoverable in the Province of Quebec.

I direct judgment to be entered in favour of the plaintiff for $1,500, the amount assessed by the jury, and costs.

HON. MR. JUSTICE LATCHFORD. MAY 3RD, 1913.

HICKS v. SMITH'S FALLS ELECTRIC POWER COMPANY.

4 O. W. N. 1215.

Negligence—Death of Employe — Caught in Revolving Shaft—Defective System—Common Law Liability—Negligence of Superintendent—Liability under Workmen's Compensation for Injuries Act—Damages—Apportionment.

LATCHFORD, J., *held*, that where a workman was killed by being caught in a revolving shaft when moving with other men a heavy fly-wheel through a door within a foot or so of the shaft in question, defendants were liable at common law for maintaining a dangerous and defective system and also under the Workmen's Compensation for Injuries Act.

Judgment at common law for $4,000 and costs.

Action by the widow and infant child of Robert Hicks, a workman in the employ of the defendants, who was killed while working for the defendants on the 20th May, 1912, owing it is alleged, to their negligence.

J. A. Hutcheson, K.C., for plaintiffs.

Lally McCarthy, K.C., and H. A. Lavell, for defendants.

HON. MR. JUSTICE LATCHFORD:—Between nine and ten o'clock on the morning of the date mentioned the deceased and one Jaecle were engaged with Henderson, the defendants' superintendent, in moving a heavy pulley or fly-wheel from the power house in which the water turbines and connected shafting and machinery were situated into a building adjoining, where the defendants were establishing a steam plant auxiliary to their water power system. The fly-wheel weighed about four and one-half tons. It was forty inches across the face or rim and about four feet in diameter. It had to be moved in the power house a distance of seven or eight feet, up an incline of approximately eighteen inches through a narrow space between the end of a shaft and the east wall of the power house. The space had until January of 1912 being in large part taken up by a stairway leading to the floor above. After the removal of the stairs, the men were in the habit of using the place it had occupied as a passage to a door giving on the engine room.

Ordinarily during the daytime the shaft was not in motion. But on this occasion it had become necessary to

repair the driving belt of the machine generally used for day power; and that generator being out of commission, the shaft projecting into the space through which the fly-wheel was being moved had been linked up with one of the turbines, and was rotating at a speed of 160 revolutions a minute. The shaft which had a diameter of nearly five inches, projected 23 inches beyond a pulley from which a belt led to a generator up-stairs. This projecting end was three feet six inches above the uneven floor of the power house and had cut into it a key-seat a foot or more in length one and a quarter inches in width and three-sixteenths of an inch in depth. The shaft had been installed sixteen or seventeen years, and had when placed in position the key-seat cut into it—no doubt as a means of coupling on an additional length of shafting or attaching another pulley. The angles formed by the key-seat with the periphery of the shaft and were sharp—"auger-like" as one witness described them—and the edges of the key-seat and the end of the shaft itself slightly indented from contact with the tools of the workmen or with other hard bodies.

I credit the testimony of the witnesses who deposed that the passage was dangerous when the shaft was in motion. It is beyond question that the place was extremely dangerous when men were moving through it a wheel of over four tons in weight, requiring on their part very hard labour continued through a period of about an hour. The men were using pinch-bars about five feet in length, and to obtain proper leverage had to lean on the bars in a stooping position at some distance from the fly-wheel. Hicks' position was near the projecting end of the revolving shaft. Henderson, the superintendent, was on the same side of the fly-wheel and Jaecle near the door leading into the engine room. All three by prying and blocking had succeeded in working the fly-wheel up the inclined plane, and in giving it a quarter turn on the platform near the engine room door. Henderson then said "that's all right boys," and rose from the stooping position which he like the others had occupied. Hicks also rose and in straightening himself up stepped, according to Henderson, back towards the projecting shaft, which engaging the jacket of his overalls "made a rope of it" as put by Fraser—the joint superintendent with Henderson—and caused injuries of which the man died a few hours later.

The power house was not a factory as defined by the Factories Act, and no liability under that act attaches to the defendants. But the defendants are I think, liable at common law as well as under the Workmen's Compensation for Injuries Act. It was their duty to take reasonable care that the safety of their servants should not be imperilled as it undoubtedly was imperilled by a thing so dangerous as the sharp points on the rotating shaft. The end of the shaft might have been cut off or securely guarded. But the defendants failed to adopt any of the obviously practicable precautions which would have protected their workmen from danger in the narrow passage.

I therefore find there was in use by the defendants a defective and negligent system which caused the death of Hicks.

There was no contributory negligence. The space in which Hicks had to move between the fly-wheel and the end of the shaft was but fifteen or sixteen inches. A slight movement backward even if it amounted to a step, as Henderson calls it, is not negligence in the circumstances of this case. It is, I think, unreasonable to expect that Hicks recovering as he was from the strain and restricted circulation resulting from heavy labour in a cramped position should have in mind the dangerous shaft end.

The plaintiffs being entitled to recover at common law, I fix the compensation to which they are thus entitled at $4,000. They would not be entitled to so much under the Workmen's Compensation for Injuries Act, which, in my opinion, also undoubtedly applies.

Hicks' death was caused by a defect in the condition of the machinery and premises used in the business of his employers. Henderson was negligent in having the fly-wheel moved through the passage while the shaft was in motion, and in ordering Hicks who was bound to conform to his orders to assist in moving the wheel and was so conforming when injured.

Hicks' earnings were from $55 to $60 a month. Others in the same grade in a like employment were earning about the same wages. Upon the basis prescribed by the Act mentioned the plaintiffs would be entitled to but $2,000 as compensation. I think, however, they are entitled to the larger amount stated, and I accordingly direct that judgment be entered in favour of the plaintiffs for $4,000 and costs—the compensation to be apportioned two-thirds to the widow and one-third to the child. Stay of thirty days.

HON. MR. JUSTICE LATCHFORD. MAY 2ND, 1913.

REX EX REL. SABOURIN v. BERTHIAUME.

4 O. W. N. 1201.

Elections—Municipal Elections—Hiring of Team by Respondent—Bribery—Evidence — Disqualification—Evidence—Taken Down not Read to or Signed by Witnesses — Municipal Act ss. 245, 249, 220, 232—Con. Rules 456, 457, 458, 494—Naming of Witnesses in Notice of Motion Essential—Relator Guilty of Corrupt Practices—Effect on Status—Notice to Respondent as to Charges —Sufficiency of—Appeal — Cross-appeal—Findings of Judge—Costs.

LATCHFORD, J., *held*, that in a trial of a contested election under s. 232 of the Municipal Act it is not necessary that the evidence be taken down by the trial Judge, read over to the witnesses and signed by them.

That under ss. 222 and 248 of the Municipal Act which must be read together, no witnesses can be examined who name does not appear in the notice of motion.

That the fact that the relator had himself been guilty of similar corrupt practices did not disqualify him from acting as relator. *The Dufferin Case*, Hodgins Elec. Cas. 529, and other cases referred to.

That it was unnecessary to warn the respondent that his disqualification was sought, notice that he was accused of acts of bribery being sufficient.

Appeal from the order of HIS HONOUR ADAM JOHNSTON, ESQ., Junior Judge of the United Counties of Prescott and Russell, dated the 18th March, 1913, declaring that the election of the appellant as Mayor of the town of Hawkesbury for the year 1913, is void, and that appellant is disqualified from being a candidate for any municipal office and from voting at any municipal election or upon any by-law for a term of two years from the date of the said order.

The disqualification resulted from a finding of the learned Judge that appellant had hired a team from a livery stable keeper for the purpose of conveying electors on the day of the poll.

A. Lemieux, K.C., and E. Proulx, for appellant.

N. A. Belcourt, K.C., and O'Brien, for relator.

HON. MR. JUSTICE LATCHFORD:—The principal grounds of the appeal are that there was no admissible evidence upon which the Judge could properly find Berthiaume had committed bribery within the meaning of sec. 245 of the Municipal Act, 3 Edw. VII., ch. 19; that that evidence, especially the evidence of the livery stable keeper, Lariviere, was

wrongly admitted; that the relator was himself guilty of bribery, and, therefore, incompetent to question the validity of the election; and that Berthiaume was not given notice his disqualification would be sought.

It is also urged that as the evidence taken down by the County Judge, when the witnesses were examined *viva voce* before him, was not read over to the witnesses and signed by them, the proceedings fail. Sub-section 4 of sec. 220 requires that proceedings before the Judge shall be "entitled and conducted" in the County Court in the same manner as other proceedings in Chambers; and under Con. Rule 494, examinations for the purpose of a motion must, "unless otherwise ordered, be conducted in accordance with the practice upon examination for discovery so far as the same are applicable." Upon such examinations, when the evidence is not taken in shorthand under Con. Rules 457 and 458, the depositions are by Con. Rule 456, to be taken down in writing by the examiner and when completed "shall be read over to the person examined and shall be signed by him in the presence of the parties, or such of them as see fit to attend."

In answer it is stated—and the statement is not disputed—that the manner of proceeding was with the consent of all parties. But apart from any question of consent, it seems clear to me that the rules invoked have no application to a case like this. Section 232 of the Municipal Act prescribes the mode of trying cases of this kind. "The Judge shall in a summary manner without pleadings hear and determine the validity of the election . . . and may inquire into the facts on affidavit or by oral testimony."

Sub-section 4 of sec. 220 and the rules mentioned seem to me not to impose any obligation upon the Judge to transscribe the testimony and have it read over to and signed by the witnesses. The Judge might under sec. 232—without taking down any of the evidence—have declared Berthiaume to have committed an act of bribery. He, however, took very full notes, and the perusal of them and of his reasons for judgment greatly facilitates the disposition of the objections raised on this appeal.

In his reasons for judgment the learned Judge says: "I find that Mr. Berthiaume has been proved to have hired a team from John Lariviere, livery stable keeper, for the purpose of conveying electors to the polls," which by sec. 245,

sub-sec. 7, of the Municipal Act is defined as bribery; and the consequence of this by sec. 249 is the loss of his seat, and disqualification for two years. The evidence is only that Mr. Berthiaume went to Lariviere and asked him to furnish his rig or team, and he said "all right," and sent it with a driver, and it was used to draw voters. Nothing was said one way or the other about payment. Mr. Berthiaume did not ask the price or whether it was volunteered and Lariviere said nothing as to price. I think the presumption and legal conclusion must be that the rig was hired. If a man goes to a livery stable keeper, whose business is to let out horses and carriages and says he wants a horse and driver for such a day and nothing is said about payment, the presumption is that he is hiring it and is liable to pay what it is worth. Mr. Berthiaume, indeed says that he asked the rig from Lariviere because he thought Lariviere was strongly in his favour, and also because he has sometimes got rigs from Lariviere for nothing, as he had often hired rigs there for funerals (Mr. Berthiaume being an undertaker) and had been good to him; but this, I think, is all too indefinite to rebut the presumption of hiring. The team came and drew voters, and it came in consequence of Berthiaume's asking for it, and not from any offer of Lariviere's. Lariviere also furnished a team for the relator (a candidate for the office not of Mayor but of Reeve), shewing that it was a matter of business with him . . . The great mass of corrupt practice set up dwindles down to this; and it seems too bad to unseat and disqualify Mr. Berthiaume for it, especially as Mr. Sabourin appeared to be just as bad, but I do not see any way out of it. The use of the teams probably did not affect a vote—they drew the voters indiscriminately—but the statute, sub-sec. 7 of sec. 245, is positive. It leaves no room for discussion as to motive as do the other sub-sections of this section. It simply and positively defines the hiring of horses, etc., to be bribery; and then sec. 249 declares that any candidate guilty of bribery shall be unseated and disqualified."

While the consequences of the learned Judge's finding are not disputed, it is argued with much force that an act involving penalties so serious should not be held to have been committed except upon clear and convincing testimony. As was well observed by Mr. Justice Gwynne in the *Welland*

Case, Hodgins, 187, if the matters which constitute the offence charged consist of acts or language which are reasonably susceptible of two interpretations, one innocent and the other culpable, a very grave responsibility is imposed upon the Judge to take care that he shall not adopt the culpable interpretation unless after the most careful consideration he is able to give to the matter in hand, his mind is convinced that in view of all the circumstances it is the only one which the evidence warrants his adopting as the true one.

I am satisfied that the finding of Judge Johnston was reached only after great consideration, and that having regard to the circumstances and the ordinary course of business between Berthiaume and Lariviere, as related by the former, the finding was the only one that could be properly reached upon the evidence. It seems to me fully warranted by the evidence of Berthiaume himself.

It is objected that the evidence of Lariviere which places the fact of the hiring beyond any reasonable doubt was inadmissible because Lariviere was not named in the notice of motion as is required by sec. 222 of the Act when *viva voce* evidence is to be taken. The proceedings are statutory. The provisions of the statute that the relator shall name in his notice the witnesses whom he intends to examine is imperative, and must be as strictly complied with as the prior words of sec. 222, which were considered in *Reg. ex rel. Mangan* v. *Fleming* (1893), 14 P. R. 458, where it was held that the relator before serving his notice of motion was obliged the file the affidavits and material upon which he intended to move.

As bribery was alleged on the part of Berthiaume, affidavit evidence was prohibited by sec. 248 and evidence had to be taken *vive voce*. I do not read sec. 248 as unconnected with sec. 222. The two must in my opinion be read together and no witness can be examined whose name has not been mentioned in the notice of motion.

I therefore think the evidence of Lariviere was inadmissible. But rejecting it wholly there remains the evidence of Berthiaume himself—amply sufficient, as I have stated, to warrant the finding made.

There is no express finding that the relator was guilty of corrupt practices nor was that matter in issue. It appears, however, that, like Berthiaume, he had hired a team for

carrying electors on polling day. Though guilty he would not thereby be disqualified from acting as relator. There were no recriminatory charges against him; and his status as an elector was not in question. *The Dufferin Case*: Hodgins' El. Cases, 529: *Re South Renfrew, Ib.* 556, and *Re N. Simcoe, Ib.* 617.

Berthiaume was not notified that his disqualification would be sought. But such notice was unnecessary. He received notice of a charge that he had committed various acts of bribery, and in the particulars furnished such acts are stated to include the hiring of teams. Berthiaume accordingly had notice of a matter which if established results under sec. 249 in disqualification, and nothing more than the notice given was needed.

The motion on all grounds must be dismissed. A cross-appeal was abandoned upon the argument, and in any view that presents itself to me was not material to be considered.

Appeal and cross-appeal failing, I make no order as to costs.

HON. MR. JUSTICE BRITTON. MAY 2ND, 1913.

PEPPERAS v. LE DUC.

4 O. W. N. 1208.

Contract—Illegality of Consideration—Refusal of Court to Interfere with or Enforce—Breach of Promise of Marriage—Subsequent Marriage of Plaintiff.

BRITTON, J., *held*, that an agreement given in consideration of the cessation of illicit co-habitation would not be enforced by the Court, nor would the Court declare the same invalid.

That a plaintiff who has married another has no action for breach of promise of marriage.

Action for cancellation of a certain agreement, for damages for breach of promise and for moneys advanced to plaintiff. Counterclaim for a declaration that a certain lot at North Cobalt registered in plaintiff's name was defendant's property and for possession.

J. H. McCurry, for plaintiff.

G. A. McCaughey for defendant.

HON. MR. JUSTICE BRITTON:—The plaintiff and defendant, without being married, lived together for three or more years as man and wife. While so living the plaintiff, who

is a hard-working woman, purchased lot 40, according to plan M. 67 filed in the office of Land Titles at North Bay, which land is situate at North Cobalt.

Upon this lot the plaintiff, out of her earnings built a house, and she in the main supported the defendant. The defendant did to some extent contribute by his labor to his own support.

The plaintiff, as she states, was anxious that the defendant would marry her, and he repeatedly promised to do so—but for some reason he would never fulfil his promise. On the 9th August, 1909, an agreement, under seal, was entered into by the parties. By this instrument the plaintiff agreed after the sale of the property, to pay over to the defendant one-half of the proceeds of said sale, and that she would not dispose of the property for less than the sum of $1,800 without the written consent of the defendant. The defendant agreed that he would accept one-half of the proceeds of the sale in full of all his claim and interest in the property and he agreed that he would withdraw any caution filed by him in the office of Land Titles at North Bay. Apparently a caution had been filed, but no proof of such was given at the trial.

After the agreement was entered into the plaintiff was married to a man named Pepperas, and is now living with him as his wife. The plaintiff brought this action charging that the defendant falsely and fraudulently represented to the plaintiff that he intended forthwith to marry the plaintiff and by reason of these representations induced the plaintiff to enter into the agreement mentioned. She asks for cancellation of the agreement, for damages for breach of promise to marry and for money advanced for support of defendant, and for money advanced to him for other purposes. The defendant sets up by way of defence that he bought the lot and erected the house at his own expense and he counterclaims asking for a declaration that the property belongs to him, and for possession.

I find that the plaintiff purchased the lot, and paid for the erection of the house, and that the defendant has no right whatever to the property—other than what he may have, if any, under the agreement mentioned. There was no consideration in fact for that agreement other than what is implied in the evidence given by the plaintiff. The promise, and covenant given by the plaintiff were in considera-

tion of the cessation of illicit co-habitation, and void. In such a case, if the agreement is in the form of a bond—or covenant under seal—so there may be *prima facie* a valid contract, "if the security is of such a nature as to hold out an inducement or to constitute to either party a motive to continue the connection, the instrument would be void." There is presumption of illegal consideration from the mere fact of continued co-habitation after security is given. See Leake on Contracts, 5th ed., p. 541. This action to set aside the agreement cannot be successfully prosecuted by plaintiff. "No claim or defence can be maintained which requires to be supported by allegation or proof of illegal agreement." Leake, p. 550.

In my view of the law the defendant cannot enforce this agreement.

The plaintiff's claim for breach of promise of marriage is absurd as she has married a person other than the defendant—so that presumably she has benefited by defendant's breach of that part of his contract.

The plaintiff's action must be dismissed but without costs—and it will be without prejudice to her right of action for any money claim, if any, vitiated by illegality.

The defendant's counterclaim will also be dismissed without costs. Thirty days' stay.

HON. MR. JUSTICE MIDDLETON. MAY 2ND, 1913.

GODSON v. McLEOD.

4 O. W. N. 1205.

Contract—Offer to Sell Machine—"In Place"—Meaning of Under Circumstances—Alleged Acceptance—"In Place" therein Defined as "on Car"—Parties Never ad idem—Interim Injunction—Undertaking—Damages—Demurrage on Cars—Agreement to Accept.

MIDDLETON, J., *held*, that upon the facts of the case an offer to sell a machine for $5,000 "in place" meant in the situation in which it then stood and that no contract was formed by an alleged acceptance which read as follows: We accept your fifteen-ton four-wheel Brown machine at the price you name in your letter of to-day now before me, viz.: $5,000 in place which means we presume on car."

Clyde v. *Beaumont*, 1 De G. & S. 397, distinguished.

Action for delivery of a machine or damages for non-delivery and for an injunction restraining defendants parting with the same, tried at Toronto on 1st May, 1913.

Jas. Haverson, K.C., for plaintiffs.

Britton Osler, for defendants.

HON. MR. JUSTICE MIDDLETON:—The defendants, the owners of a machine known as a Brown hoist, having completed the work for which they required it, offered it for sale. Plaintiffs desired such a machine, and negotiations took place, resulting in a verbal offer of $4,800. Throughout the course of these negotiations it was thoroughly understood that the purchasers were to take delivery of the machine where it stood, and themselves to load it upon the railroad cars for removal to their own works. McLeod desired to communicate with his partner as to the acceptance of this offer. On the 15th April he wrote the letter of that date, declining to accept $4,800, and stating readiness to accept "five thousand dollars for the machine in place." On the same day the plaintiffs wrote a letter as follows:—

"We accept your fifteen-ton four-wheel Brown machine at the price you name in your letter of to-day now before me, viz., $5,000 in place, which means, we presume, on car. We will advise you in a day or two how we want it shipped."

The defendant McLeod, regarding his offer as meaning five thousand dollars for the machine as it stood where it was, and regarding the letter of April 15th as a departure from the terms of that offer and as an attempt to impose upon the vendors the duty of placing the machine upon the cars, interviewed the plaintiffs, pointing out that the letter was not a satisfactory acceptance of the offer, as it purported to add this new term. Some discussion took place with Mr. Godson, during which he intimated that he was ready to pay the five thousand dollars and that his company would itself load the machine; but when Mr. McLeod asked to have this put in writing, the company declined to give any further written document, contending that the letter was an adequate acceptance of the offer. Thereupon McLeod sold the machine to another purchaser.

I do not think that the letter in question constitutes an acceptance of the offer. I take the view that it was a deliberate attempt to engraft upon McLeod's letter a meaning which Godson well understood it did not bear, and that the refusal to clear the matter up by giving an unqualified acceptance indicated a desire to leave McLeod in a position which would be embarrassing and would leave it open to

the company thereafter to have controversy concerning the expense of loading.

When it is borne in mind that this machine weighed between thirty and forty tons and that McLeod had on apparatus at hand which would facilitate loading, the seriousness of the controversy is clearly apparent.

Mr. Haverson argued the case with conspicuous ability. His contention is that the letter can be subdivided; that the first portion of the letter is an unqualified acceptance of the offer; and that all that follows, namely, the words, "which means, we presume, on car. We will advise you in a day or two how we want it shipped," is an erroneous assumption on the part of the purchaser as to his rights under the contract.

I quite agree in the law suggested by Mr. Haverson. I think it is borne out by the case he relied upon, *Clyde* v. *Beaumont,* 1 De G. & S. 397. There may be an acceptance in the true sense of the term, and the parties may thereafter discuss matters in such a way as to indicate a misunderstanding of the agreement without intending to alter or modify the contract.

But that is not the case here. I think this was a deliberate attempt to import into the inapt and ambiguous words used by McLeod a definite meaning, and so leave it open to the company to say to him, "Either there is no contract, or the contract must be construed with the meaning attached by our letter of acceptance." Godson very well knew that the words "in place" in McLeod's letter did not mean upon the car; and by his letter he intended to affix that particular meaning to those words. That being so, on elementary principles, there is no contract.

The principle is well stated in Leake, 5th ed., 219: "A written contract may be expressed in such general or ambiguous terms as to admit of different constructions; in which case, though the written contract must be applied, if possible, according to its terms, it is open to either party to allege, consistently with the terms, that he accepted the contract with a different construction to that charged by the other party, so that there is no real agreement between them."

Put as favourably as possible for Mr. Haverson, this means, as applied to this case, that there is no contract; because McLeod intended the words "in place," to mean "where the machine now is." Godson did not accept the

expression with this meaning, but sought to attribute to it a totally different signification. He is precluded from saying that he did accept the words as he knew McLeod intended them, because in his letter he has stated otherwise.

The action fails, and must be dismissed with costs.

A reference was asked to ascertain damages under the undertaking given upon the injunction motion. The defendants are content to accept the demurrage upon the railway cars. Two cars were necessary. The demurrage is two dollars upon each for the first day and three for each subsequent for each car. This would make a total of $62, which I allow.

This case is an admirable example of the advantage of speedy trial in cases of this character. The dispute arose on the 21st April, the writ was issued on the 23rd, and the case has been disposed of in ten days' time.