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APPELLATE DIVISION.

JANUARY 12TH, 1914.

*RE ONTARIO BANK PENSION FUND.

Bank—Winding-up—Pension Fund—Bank Act, R.S.C. 1906 *ch.* 29, *sec.* 18, *sub-sec.* 2—*Inchoate Scheme—Claim on Assets of Bank—Money Raised by Assessment of Shareholders for "Double Liability"—Fund Impressed with Trust—Charitable Trust—Cy-près Application of Fund—Jurisdiction of Referee—Order Disallowing Claim—Remedy by Action—Parties—Attorney-General.*

Appeal by the petitioners from an order of BOYD, C., ante 134, dismissing an appeal from an order of KAPPELE, Official Referee, in the winding-up of the bank, disallowing the claim of the petitioners.

The appeal was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, and HODGINS, JJ.A.

Wallace Nesbitt, K.C., and J. A. Worrell, K.C., for the appellants.

J. A. Paterson, K.C., for the liquidator and shareholders.

A. McLean Macdonell, K.C., also for the liquidator.

The judgment of the Court was delivered by MEREDITH, C.J.O.:—The appellants presented a petition in the winding-up praying that it should be declared that they were entitled to have the amount at the credit of the "Officers' Pension Fund" of the bank, as shewn by the books of the bank, paid over to the Pension Fund Society of the Bank of Montreal, in consideration of the petitioners and the other officers of the Ontario Bank having been admitted to membership in the Pen-

*To be reported in the Ontario Law Reports.

sion Fund Society of the Bank of Montreal as of the date on which they entered the service of the Ontario Bank.

The claim was disallowed by the Official Referee . . . and his decision was affirmed by the Chancellor. . . .

The Referee certifies that, in making his order for a call upon the shareholders, "the pension fund amount was neither brought to" his "attention or considered by" him "in any way," and that "the pension fund amount did not appear in the estimated statement of assets and liabilities, no doubt for the reason that on the 30th November, 1907, the amount had been transferred on the books of the bank to deficit account."

It was argued before the Official Referee that the $30,000 placed in the books of the Ontario Bank to the credit of an account called "Officers' Pension Fund of the Ontario Bank" was impressed with a trust in the nature of a charitable trust in favour of the officers and employees of the Ontario Bank and their families; and that, as the officers and employees of the bank went over practically as a body to the Bank of Montreal and became members of the Pension Fund Society of that bank, the trust fund should be administered on the principle of cy-près and paid over to the president of that society.

The Official Referee did not give effect to that contention, being of opinion that the scheme of forming a pension fund for the officers and employees of the Ontario Bank and their families, which the bank had in contemplation, was "only in the making and was never consummated;" and that, therefore, no trust in favour of the appellants was created in respect of the amount at the credit of the "Officers' Pension Fund of the Ontario Bank" in the books of the bank; and with that opinion the Chancellor agrees.

Upon the argument before us it was contended on behalf of the appellants:—

(1) That what was done had resulted in the $30,000 being impressed with a trust for the benefit of the officers and employees of the Ontario Bank and their families.

(2) That what was done evidenced a clear charitable intention; and that, where that is the case, it is never allowed to fail on account of the uncertainty or impracticability of the object, but the particular mode of application will be directed cy-près; and that, therefore, the failure of the bank to formulate a scheme for the administration of the fund had no other result than that the fund must be applied cy-près, as directed by the Court.

We are of opinion that that contention is not well-founded, and that the order of the Chancellor must be affirmed. The by-law passed on the 18th June, 1901, does not establish a pension fund, but only authorises the directors to establish one; and the grant of $5,000 to the fund, which, moreover, is qualified by the provision that "the directors are empowered to contribute the same out of the funds of the bank," coupled with the subsequent opening of the account in question and the placing of that sum at the credit of it, was no more than setting aside money to become part of the pension fund if and when it should be established; and the grants made in the subsequent years 1902, 1903, 1904, 1905, and 1906, and the placing of the sum granted at the credit of the account, stand on the same footing, and they were but additions to a fund which had been set apart to become, as I have said, part of a pension fund if and when the directors should deem it expedient to establish such a fund.

If the appellants are right in their contention, notwithstanding that nothing had been done by the directors towards formulating a pension scheme, had the failure of the bank not occurred, and it was now a going concern, it would be open to any of its officers to bring an action to have it declared that the amount at the credit of the account is impressed with a trust for the benefit of the officers and employees of the bank and their families, and to have a scheme for the administration and application of the fund settled by the Court. Such a result would be manifestly unjust to the bank, as it would take from it the power of determining in what cases and under what conditions officers and employees of the bank and their families should be entitled to an allowance from the fund, as well as the amount to be allowed. These matters were of the very essence of the pension fund scheme that was proposed; and the fact that nothing had been determined as to them leads, I think, irresistibly to the conclusion to which I have come, that no trust was intended to be created and no pension fund to be established until the directors should have determined to establish the fund —when, no doubt, these matters would be considered and dealt with in a pension scheme regularly formulated.

There was no communication made to the officers and employees of the bank as to the action which had been taken with reference to the establishment of a pension fund; and, during the whole of the period that elapsed between the passing of the by-law and the suspension of the bank—a period of upwards

of five years—no one appears to have supposed that any pension fund existed. No pensions out of it were applied for or granted or paid, and beyond the annual sums placed at the credit of the account nothing was contributed to the fund by any officer or employee of the bank; but, on the contrary, the two pensions or retiring allowances which appear to have been granted to officers of the bank were granted and paid without any reference to the fund and out of the other money of the bank.

Even if the purpose to which the fund was to be applied was such a charitable purpose as the appellants contend it was, the case at bar is one to which the observations of Bacon, V.-C., in Sinnett v. Herbert (1871), L.R. 12 Eq. 201-206, are peculiarly apposite. . . .

I am also of opinion that, assuming that the fund existed and was impressed with a trust for the "officers and employees of the Ontario Bank and their families," the trust was not a charitable one. There is nothing to indicate that the benefit of the fund was to be available only to worn out or aged or poor officers or employees, or that any element of charity was to enter into the scheme. . . .

[Reference to In re Gosling (1900), 44 W.R. 300, [1900] W.N. 15.]

It may well be that the circumstances on which reliance was placed for the conclusion that the bequests was a good charitable gift warranted that conclusion; but there are in the case at bar no such indicia of intention as existed in that case, which is, therefore, I think, quite distinguishable. The fund in question here is, no doubt, called a "pension" fund, but the use of the word "pension" in itself is quite insufficient to indicate a charitable intention, and I apprehend that, if the words "pensioning off" had not been associated with the other expressions mentioned by Byrne, J., he would have reached a different conclusion. . . .

[Reference to In re Gassiot (1901), 70 L.J. Ch. 242.]

Being, therefore, as I am, of opinion that no trust was created, and that, if there had been, it was not a charitable one, and it being conceded, and properly so, that the appellants' case must fail unless a charitable trust had been created, it follows that the appellants are not entitled to the relief claimed by them, and that the appeal fails and should be dismissed with costs.

If I had come to the conclusion that a charitable trust was

created in respect of the $30,000, it would have been necessary to consider whether the relief which the appellants seek could have been obtained by the proceedings then taken, apart from the difficulty due to the fact that the assets of the bank have been realised and distributed among its creditors, and that it has been necessary to make a call upon the shareholders in respect of their double liability, to meet the debts of the bank which its assets were insufficient to pay; and, as there is no fund in existence, I very much doubt the jurisdiction of the Official Referee to make such an order as the appellants seek to obtain. At most he may have had the power under sec. 133 of the Winding-up Act to determine whether or not a trust was created, and, if created, the nature of it. But it is, I think, clear that he had no jurisdiction over the cy-près application of the fund; and I incline to the opinion that the petitioner should have proceeded by action, to which the Attorney-General should be a necessary party, and for the bringing of which the leave of the Court should be necessary: sec. 22.

The Attorney-General was a necessary party to the proceedings which the appellants have taken, and up to the time of the argument of the appeal he had not been notified of them, but since the argument he has been communicated with, and has intimated that he is satisfied that judgment should be given without further argument.

JANUARY 12TH, 1914.

MAPLE LEAF MILLING CO. v. WESTERN CANADA FLOUR MILLS CO.

Execution—Fi. Fa. Goods—Seizure of Goods under Writ against Member of Partnership—Claim by Execution Creditor of Partnership—Interpleader Issue—Evidence—Sale to Partnership—Transfer to Individual Partner—Onus of Proof.

Appeal by the plaintiff company from the judgment of LATCHFORD, J., at the trial of an interpleader issue, finding in favour of the defendant company.

The appeal was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, and HODGINS, JJ.A.

J. T. White, for the appellant company.

R. McKay, K.C., for the defendants.

The judgment of the Court was delivered by MAGEE, J.A.:—The plaintiff company appeals from the judgment of Latchford, J., at the trial of an interpleader issue, by the terms of which the plaintiff company affirms and the defendant company denies that the proceeds of the sale of certain goods seized by the Sheriff, under the defendant company's writs of attachment and execution against the goods of C. A. Hancock, carrying on business as the Wholesale Warehouse Company, should be applied in settlement pro tanto of the plaintiff company's execution against the goods of Gallagher & Hancock, in priority to the claim of the defendant company under its said attachment and execution.

By the interpleader order, which was made on the application of the Sheriff, he was directed to sell the goods seized and pay the proceeds of sale into Court to abide further order, and it was ordered that these parties should proceed to the trial of the issue, and costs and all further questions were reserved to be disposed of by the Judge at the trial of the issue, or else to be disposed of in Chambers.

Latchford, J., determined the issue in favour of the defendants, with costs of the issue and of the interpleader proceedings, and directed the payment to them of the moneys in Court. He held that the goods in question, which consisted of flour and feed, had been sold by the plaintiffs to the firm of Gallagher & Hancock, but that Gallagher had parted with the goods to his partner Hancock in the separate business carried on by the latter under the name of the Wholesale Warehouse Company, and they passed into the possession of and became the goods of the Wholesale Warehouse Company, and were subject to seizure under the defendant company's writs.

From the evidence it appears that Gallagher & Hancock entered into co-partnership in November, 1911, and thereafter carried on business at Porcupine as dealers in coal and wood. Hancock, in January, 1912, began a separate business, under the name of the Wholesale Warehouse Company, at Haileybury, with a branch at South Porcupine. In this business he sold on commission and dealt in flour, feed, grain, and produce, and he had a warehouse at each of the two places. Gallagher says that he was not connected with that business except as agent; and he says that, until the purchase from the plaintiffs, the co-partnership had nothing to do with flour and feed, and had dealt exclusively in coal and wood.

The two men seem to have been on intimate terms. It does not appear whether Gallagher took any active part in either

business. He was township clerk and treasurer. For some reason the Wholesale Warehouse Company had no bank account at South Porcupine or Porcupine, and all cheques and moneys received by it there were deposited in a bank account kept in the name of Gallagher & Hancock at Porcupine, and were sometimes handed to Gallagher for that purpose. Sometimes, also, Gallagher signed the Wholesale Warehouse Company's name to drafts on customers or on endorsement of cheques for deposit. He says: "Hancock instructed me to put in moneys from collections given by Mr. Evans (Hancock's agent at South Porcupine) in to the credit of Gallagher & Hancock, from which place he (Hancock) transferred them to Haileybury, and he issued cheques for the payment (that is, apparently to transfer them). He never opened an account in Porcupine."

Evans was in charge of the Wholesale Warehouse Company's business at South Porcupine; but, although many, if not all, of the goods there were sold on commission, though in the Wholesale Warehouse Company's name, Evans says he was not aware of it, and supposed that Hancock was owner and selling as such. Evans made his returns to the Haileybury office of the business done.

In June, 1912, Hancock went to the plaintiff company's office in Toronto, and stated that he had entered into partnership in Haileybury with Gallagher, and he ordered, in the name of the firm of Gallagher & Hancock, five car-loads of flour and feed to be shipped to the firm, three of them to be consigned to Haileybury and two to South Porcupine, but all to be invoiced to the firm at Haileybury. For the price, the plaintiff company was to draw on the firm at Haileybury at thirty and sixty days, with bills of lading attached to the drafts to be delivered up on acceptance of the latter. The plaintiff company's Toronto office forwarded instructions to mills at Kenora to send on the five car-loads. They were shipped from Kenora to Haileybury and South Porcupine on the 27th June, and ten drafts bearing that date, drawn at Toronto, were sent on through a bank at Haileybury with the bills of lading attached. By that time Hancock had left the country; and he never returned. The drafts were accepted by Gallagher in the firm name, and the bills of lading were delivered up to him, and by him given to the railway company with instructions where to place the cars. The drafts for the three cars were accepted by him on 12th July, and those for the two cars on the 18th July.

The five drafts at thirty days were duly paid, but those at sixty days were not met, and the plaintiff company's execution against the firm is upon a judgment for their amount. The flour and feed mentioned is part of the two car-loads shipped to South Porcupine, and we are not concerned with those which went to Haileybury, except in so far as the dealings which took place there may shew what was done with regard to the other two.

Thus we find the goods ordered by one partner in the name of the firm, and received by the other partner, who accepts in the firm name the drafts for the price, having full knowledge of what they were drawn for. The finding of the learned trial Judge that the goods were sold to the firm is fully warranted, as well as his apparent conclusion that they became and were the property of the firm.

Gallagher's statement is, that "Hancock, upon his own authority, went to Toronto and purchased from the Maple Leaf Milling Company these goods, and I never knew anything about it. The Gallagher & Hancock account was opened, and not doing anything except anything outstanding from the old business; and Hancock ordered these goods and he came in and told me to accept them and that there was plenty of funds to meet the responsibility; and then he disappeared, after I accepted the drafts."

In fact, he had left the Province about four weeks before the drafts were accepted. Counsel for the defendants in the next question varied Gallagher's statement as follows: "You were accepting these (drafts) for Mr. Hancock upon his statement to you that he had plenty of funds to meet them?" To this the answer was: "Yes;" but this is not necessarily contradictory of Gallagher's own way of putting the facts, with reliance upon Hancock in the affairs of the partnership. All this is quite consistent with a fuel partnership having little or no active business going on in June, and with readiness of both partners to have a dealing in another commodity. Indeed, it is not inconsistent with an agreement to go into partnership in flour and feed, as asserted by Hancock to the plaintiff company.

Elsewhere, to the question, "And as far as selling and dealing with flour and feed they (the firm) had nothing to do?" his answer was, "Not till Hancock purchased this consignment from the Maple Leaf."

Nowhere throughout the evidence, when closely examined, is there any intimation of any objection being made by Gal-

lagher to the purchase for the firm, or any disclaimer by him of ownership in the firm.

In another place Gallagher says that they did not get the goods till after the acceptance of the drafts, and that Hancock had gone at that time, but he did not know that he had gone permanently, and that he had left about the 15th or 20th June. He says: "Mr. Hancock came up and told me that these were coming in about the 15th or 20th June, that he had ordered them in Toronto, and he said to protect them—to accept the drafts."

I take this to mean probably that Hancock had told him about the 15th or 20th June that the goods were coming in. There is in all this nothing whatever to shew either an acquiescence by Gallagher in a purchase by Hancock for his own sole benefit in the name of the firm nor any transfer or relinquishment by Gallagher to Hancock of his interest in the goods. The two men never met afterwards.

Both at Haileybury and at South Porcupine the cars were unloaded into the warehouses of Hancock, and at both places sales were made thence. Those at South Porcupine would seem to have been made in the name of the Wholesale Warehouse Company, and probably the sales at Haileybury were made in the same way, though that is not shewn. Evans says that these goods were treated the same as other goods, and in making returns to Haileybury he kept these goods separate.

The fact of the sales being so made does not bear much significance when we find that the defendants' goods were being sold there in the same way, although really only held and sold on commission for the defendants. What became of the proceeds of sales at Haileybury does not appear; but the proceeds at South Porcupine went into the bank account of Gallagher & Hancock. The five drafts first falling due were met apparently out of proceeds of sales. There is no evidence that Gallagher abandoned his oversight of the goods, but the contrary. . . .

Bearing in mind that Hancock had left the country, and that to effect a transfer of the goods to him would require his assent to assume the risk, as well as Gallagher's, there is not here any evidence that he had given such assent when his partner had agreed to accept the bargain. There is not here evidence, even, of Gallagher having ever assented to parting with his property or the firm's property in the goods, which were his protection.

With much deference to the opinion of the learned trial Judge, the evidence of Gallagher appears to me to point all

the other way. There is no evidence as to whether it was a profitable transaction or not; and Gallagher's statement, a year later, that he would have been satisfied to have been cleared of his liability, throws no light on the question of his having no property in the goods.

The onus is clearly on the defendants to displace the undoubted sale to the firm; and, in my opinion, they have failed to satisfy it.

The appeal should, I think, be allowed, with costs to the appellant company; and the respondents should bear the costs of the issue and the interpleader proceedings and the Sheriff's costs and fees, and reimburse the plaintiff company any sum paid to the Sheriff therefor; and the moneys in Court, to the extent of the plaintiff company's judgment and such costs and sums, should be paid to the plaintiff company.

Appeal allowed.

JANUARY 12TH, 1914.

RE THERRIAULT AND TOWN OF COCHRANE.

Municipal Corporation—By-law of Town Providing for Levying Tax Rate—Separate Schools—Requisition of School Board for Fixed Sum—By-law Providing for Larger Sum to Cover Uncollectible Rates—Powers of Council—Separate Schools Act, 3 & 4 Geo. V. ch. 71, secs. 67, 70—Public Schools Act, 9 Edw. VII. ch. 89, secs. 47, 72 (n)—Imposition and Collection of Rates—Quashing Part of By-law—Costs.

Appeal by Louis Therriault from the order of LENNOX, J., ante 26, dismissing without costs an application made by the appellant to quash by-law No. 81 of the Town of Cochrane, "as regards the rate on all property liable for taxation for separate school purposes."

The appeal was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, and HODGINS, JJ.A.

J. M. Ferguson, for the appellant.

S. Alfred Jones, K.C., for the respondent corporation.

The judgment of the Court was delivered by MEREDITH, C.J.O.:—The separate school board of Cochrane, assuming to

act under the Separate Schools Act, 3 & 4 Geo. V. ch. 71, sec. 70, requested the municipal council to levy from the supporters of the schools of the board $3,608.70, which was the sum required for the support of the schools for the current year.

By-law number 81 was passed to fix and provide for levying the tax rate for the year 1913. It recites that "the amount of money required for the purposes of the requisitions of the separate school board is the sum of $3,608.70;" and it provides that "there shall be levied upon all ratable property in the town of Cochrane and in the unorganised district adjacent thereto liable for taxation for school purposes" certain rates, and among them "a rate of 23 mills on all property liable for taxation for separate school purposes." This rate, if the taxes were all collected, would produce $4,150, a sum exceeding by $541.30 the amount of the school board's requisition; and the controversy is as to the right of the council to raise this excess.

The council claims to be entitled to add to the amount mentioned in the requisition a sum sufficient to cover the contingency of part of the rates not being collectible, and this is disputed by the appellant.

It is difficult to understand why any such question should have arisen. If the school board insisted on a rate being struck sufficient to produce the exact sum mentioned in the requisition, why should the council have objected? All that the corporation is bound to do is to pay over the rates and taxes, as and when collected, to the school board, not later than the 14th December; and, if it should turn out that a part of them was then unpaid, owing to the inability of the collectors to collect it, any resulting loss or inconvenience would be borne by the school board and the separate school supporters, and not by the corporation.

It is equally difficult to understand why the school board should object to the course taken by the council. If more should be collected than the $3,608.70, the excess would not belong to the corporation, but to the school board; and why the board should insist upon a rate being struck which, in all probability, would not produce the sum required for the support of its schools, I do not understand.

It could hardly be that the motion to quash was made in the belief that, if the rate which it is contended by the appellant the council should have imposed did not produce the amount mentioned in the requisition, the council would be bound to make up the deficiency out of its general funds, and in that way cast upon public school supporters part of the burden of the support of the separate schools. For such a belief the Separate

Schools Act affords no foundation. It is true that where the board adopts the plan provided for by sec. 67, and collects its own rates, the council of the municipality in which the separate school is situate is required to make up the deficiency arising from uncollected taxes charged on land, out of the funds of the municipality; but the uncollected taxes belong to the municipal corporation, and, being charged on land, the corporation runs no risk and can incur no loss, as the interest would be added to the arrears, and the whole collected, if necessary, by the sale of the land. There is no such provision where the Board acts under sec. 70; but, as I have pointed out, in that case all that the corporation is required to pay the Board is what is collected as it is collected.

If I had come to the conclusion that sec. 70 confers upon the council power to impose the rates for the support of separate schools, I should also have concluded that the contention of the appellant is not well-founded. In the nature of things it is necessary, and is, I think, the invariable practice of all taxing bodies in making estimates for the purpose of fixing the rates to be levied, to provide for them to include a sum to meet the contingency of some of the persons upon whom or upon whose property the rates are imposed failing to pay them and the rates being uncollectible; and I find nothing in sec. 70 to indicate that it was not intended, if power to impose the rates is conferred upon the council, that the council should not be at liberty to make the rate to provide the sum required by the school board sufficient to allow for the contingency I have mentioned.

I am, however, of opinion that sec. 70 does not confer on the council power to impose the rates. The scheme of the Act seems to be that the board itself shall impose the rates, and, having imposed them, it has two courses open to it for the collection of them: either, as provided by sec. 67 (1), to collect them by its own collector; or, as provided by sec. 70 (1), to require the council to collect them by its collectors and other municipal officers.

The only place where any reference to the imposition of the school rates occurs is in sub-sec. 1 of sec. 67, which confers upon the school board power to impose them. What the council under sec. 70 (1) has to do, is, "through their collectors and other municipal officers," to "cause to be levied in such year upon the taxable property liable to pay the same all sums of money for taxes imposed thereon in respect of separate schools." The subsection contemplates that the rates have been already imposed—

that is, I think, by the school board—and it is these rates that the council is to cause to be levied through its collectors and other municipal officers. Imposing a rate is an act of the council, and it is not done through the collector or any other municipal officer; and "levied" must, therefore, be read as meaning "collected." The misapprehension on the part of the council which has led to the adoption of the course it has taken must, I think, have arisen from confounding their duties under sec. 70 with those in respect to public schools. Under the Public Schools Act, 9 Edw. VII. ch. 89, the school board submits to the council the estimate for the current year of the expenses of the schools under its charge (sec. 72 (n)); and sec. 47 makes it the duty of the council to levy and collect upon the taxable property of public school supporters the sum so required. Under the Separate Schools Act, the municipal machinery is used at the option of the school board, but only for the collection of the rates imposed by the board, and there are no provisions in the Act similar to those of the Public Schools Act to which I have referred.

So much of the by-law as provides for levying the rate of 23 mills on "all property liable for taxation for separate school purposes" must, therefore, be quashed; but there will be no costs to either party of the proceedings before my brother Lennox or of this appeal.

Although the appellant has succeeded in his attack upon the by-law, he has failed upon the ground on which the attack was based; and his success will result in the separate school board, of which he is the secretary-treasurer, being deprived of the means of carrying on its schools during the present year, unless the board may yet exercise the powers conferred by sec. 67 of imposing the rates and collecting them by its own collector.

Appeal allowed.

JANUARY 12TH, 1914.

EMPIRE LIMESTONE CO. v. CARROLL.

Lease—Reformation—Limitation of Purpose of Lease to Removal of Sand—Limitation of Description—"Sand Bank"—Ascertainment of Proper Boundaries and Description—Reference—Master's Report—Appeal—Evidence—View of Locus Taken by Master.

Appeal by the defendants from an order of LENNOX, J., 4 O.W.N. 1579, dismissing the defendants' appeal from a report of the Local Master at Welland, dated the 28th February, 1913, made upon a reference directed by the judgment at the trial, dated the 25th April, 1912.

The appeal was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, and HODGINS, JJ.A.

H. D. Gamble, K.C., for the appellants.

W. M. German, K.C., for the plaintiffs, the respondents.

The judgment of the Court was delivered by MEREDITH, C.J.O.:—The action was brought by the respondents, claiming to be entitled for the term of a lease to the south-west part of lot number 5 in the 1st concession of the township of Humberstone, which was demised to Samuel S. Carroll by a lease from Annie Benner and her husband, dated the 14th April, 1899, by the terms of which the privilege was conferred upon the lessee of "removing the whole of the sand bank situate on the northern portion" of the demised land "and for no other purpose," for an injunction to restrain the appellants from going upon the land and laying any railway track on it, or removing sand or gravel from it or in any way interfering with the rights of the respondents under the lease.

The appellants by a counterclaim claimed that the lease should be reformed by striking out the covenant for quiet enjoyment which it contains, and substituting for it the following, "The said lessors covenant with the said lessee for quiet enjoyment as far as may be necessary for the purpose only of taking sand as aforesaid from the sand bank situate on the northern portion of the said described premises," or such other words as might be deemed to be proper as expressing the true intent and meaning of the lease, which, according to the allegations of the

counterclaim, was, that it should confer upon the lessee "leave and licence to remove sand from the sand bank on the northern portion of the said land, with the right to ingress and egress and such possession as might be necessary for that purpose, and no other being amply sufficient for the object in view, namely, to remove sand from the said sand bank, for which purpose actual possession of the whole of the premises described in the said lease was not necessary, the said Annie Benner and Alexander Benner, as the fact was, to remain, as they did remain, in quiet possession and enjoyment of the said premises save and except for the purpose aforesaid until the making of the conveyance to the said Samuel S. Carroll in April, 1905, as mentioned in par. 4 of the statement of defence."

By the judgment pronounced at the trial the respondents' action was dismissed, and it was declared and adjudged that the lease should be "varied and rectified so as to limit the description in it," and certain assignments of it, under which the respondents claimed "to the northern sand bank situate on the south-westerly 25 acres" of the lot "and limiting the purpose of the lease and the rights of the assignees thereunder to the removal of sand from the said sand bank during the term of the said lease;" and it was referred to the Local Master at Welland "to ascertain and settle the proper boundaries and description of the said northern sand bank to be substituted for that contained in the said instruments in order to carry out the provisions of this judgment."

By his report the Master at Welland found, ascertained, and settled the proper boundaries and description to be as follows: "Commencing at an iron stake in the north-east corner of the Annie Benner property, thence south 8 degrees 45 minutes east 715 feet to a point in the Halpin road, thence westerly on a curve of 400 feet radius a distance of 628 feet 3 inches, thence south 54 degrees 30 minutes west a distance of 280 feet to the westerly boundary of lot number 5, thence north measured along the west boundary of lot number 5 a distance of 400 feet to the north-west corner of the Benner lot, thence north 65 degrees east a distance of 1,000 feet 5 inches to the place of beginning."

The contention of the appellant is, that this description includes more than is comprised in the northern sand bank; and whether or not that is the case is the sole question on the appeal.

There is nothing in the evidence adduced before the Master to shew that any part of the sand bank had acquired the name of or had come to be known as the northern sand bank, and the

question in issue must be decided according to what is the proper view, having regard to the configuration of the sand banks as to what falls within that description.

There is upon the land described in the lease a sand bank or a series of sand banks somewhat in the form of the letter S, which at the north almost touches the northerly limit of the Benner lot, and reaches at the south almost to its southerly limit, and which extends at the northerly and easterly and westerly points into the adjoining lots, and near the southerly end extends into the lot lying to the west of the Benner lot.

The Master viewed the property and came to the conclusion that the southerly limit of the northern sand bank was the line of the Halpin road, which lies in a depression or valley several feet deep crossing the sand bank from east to west, and down to which the banks on either side slope.

It may be quite true, as Mr. Gamble pointed out, that there may have been some difficulty from an observation on the ground in determining where the southerly end of the northern sand bank is situate, owing to the greater part of the most northerly portion of it, and much of the sand at the north-east having been removed; but, notwithstanding this fact, the Master must have been much aided in coming to a proper conclusion by the observation which he made on the ground.

If the Halpin road is not to be taken to be the southerly boundary, there is great difficulty in selecting any other as that boundary. As it seems to me, none of the other points at which it was contended the southerly line should be drawn would suggest themselves as points where the northern sand bank terminated and another sand bank began. The point most relied on by the appellants' counsel is where there is a slight depression crossing the bank from the north-east to the south-west; but no one looking at the bank, as it existed before the sand was removed, would, I think, have pointed that out as the southerly boundary of the northern sand bank. What would have presented itself to his eye would have been a practically continuous bank, with but a slight depression, which may or may not have been at the point at which, geologically speaking, two separately formed banks met, but which would present to the eye the appearance of a single bank, with an undulation in it, at the point just referred to, extending to the Halpin road; and for the purpose of construing the lease as reformed, irrespective of what a geologist might say, that part of the sand bank which lies

northerly of that road must, I think, be taken to be what the contracting parties meant by the expression "northern sand bank."

It is perhaps not without significance that in the lease the expression which the parties used to describe the right to remove the sand is "the privilege of removing the whole of the sand bank situate on the northern portion of the said described premises." Why that expression is not to be used in the reformed lease does not appear, but the fact is that it is to be described in it, not as "the sand bank situate on the northern portion," but as "the northern sand bank situate on the southwesterly 25 acres . . . ;" and it is probable that the expressions were treated as being synonymous, though it is manifest that the former is wider than the latter; and I apprehend that, if it had been used in the judgment, it must have been held to include all that is claimed by the respondents.

Upon the whole, I am of opinion that the Master came to a right conclusion, and that the appeal should be dismissed; and I see no reason why the rule as to the costs of an unsuccessful appeal should not be followed.

Appeal dismissed with costs.

JANUARY 12TH, 1914.

*RE ONTARIO AND MINNESOTA POWER CO. AND TOWN OF FORT FRANCES.

Assessment and Taxes—Assessment for School Purposes of Company's Property in Town—Confirmation by Court of Revision—Appeal to Ontario Railway and Municipal Board—Consent Order Allowing Appeal—Subsequent Order Reopening and Dismissing Appeal—Jurisdiction of Board—Construction of Assessment Act and other Statutes—Appeal to Appellate Division of Supreme Court of Ontario—Leave to Appeal—Extension of Time.

Appeal by the Ontario and Minnesota Power Company from an order of the Ontario Railway and Municipal Board, dated the 14th July, 1913, affirming the decision of the Court of Revision of the Town of Fort Frances as to the assessment for school purposes of the property of the appellant company.

*To be reported in the Ontario Law Reports.

The appeal was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, and HODGINS, JJ.A.

Glyn Osler, for the appellant company.

G. H. Watson, K.C., and E. Coyne, for the Corporation of the Town of Fort Frances, the respondent.

The judgment of the Court was delivered by MEREDITH, C.J.O.:—Upon the opening of the appeal, it was objected by counsel for the respondent that the appeal was not set down for hearing within the prescribed period, and that it did not lie without the leave of the Court, which had not been obtained. . .

We are of opinion that leave to appeal should be given and the time for appealing extended. The question which the appellant has raised is an important one, and there was some room for doubt as to leave to appeal being necessary, although we are of opinion that it was necessary.

In considering the case on the merits, it appeared to us that a point not raised upon the argument was fatal to the respondent's case, viz., the jurisdiction of the Board to make the order complained of; and the attention of counsel was called to the point, and written arguments as to it have been put in.

The matter in question is as to the assessment for the year 1911, and the appellant appealed to the Board against its assessment as confirmed by the Court of Revision, and on the 12th February, 1913, an order was made by the Board, on the consent of the appellant and the corporation of the town, allowing the appeal and fixing the assessment of the appellant's lands and buildings for school purposes at $100,000. The Public School Board of the town and a ratepayer subsequently applied to the Board to reopen the appeal and grant a hearing on the merits, and after argument the Board, on the 5th March, 1913, made an order setting aside its previous order, and proceeded to hear the appeal, and on the 14th July, 1913, made the order complained of confirming the assessment for school purposes of the appellant's property at $600,000.

The jurisdiction of the Board to hear assessment appeals, at the time when the appeal to it was launched, and the order reopening the appeal was made, was conferred by sub-secs. 1 of sec. 52 of the Ontario Railway and Municipal Board Act, 1906.

By that sub-section it is provided that, instead of the appeal provided for by sub-sec. 1 of sec. 48*a* of the Act respecting the establishment of Municipal Institutions in Territorial Districts being to a Judge of the High Court in Chambers at Toronto, it shall be to the Board.

Section 48*a* was enacted by sec. 3 of ch. 24 of the statutes of 1905. . . .

The powers and duties of County Court Judges on appeals from assessments are prescribed by the Assessment Act, ch. 23 of the statutes of 1904, secs. 68 to 75 inclusive; and, by sec. 69, the assessment roll is to be altered and amended in accordance with the decision of the Judge upon the appeal; and, by sub-sec. 7 of sec. 68, power is given to the Judge to adjourn the hearing of the appeal, and he may defer judgment, but so that (subject to the provisions of secs. 53 to 56 and to the provisions of the Act respecting the establishment of Municipal Institutions in Territorial Districts, and to the provisions of special Acts relating to particular municipalities), all the appeals may be determined before the 1st August.

It is clear that, when the decision upon the appeal is given by the County Court Judge, he is functus officio, and has no jurisdiction afterwards to reopen the appeal. His decision is "final and conclusive in every case adjudicated upon" (sec. 75); and, besides this, his duties are purely statutory; and, in the absence of express authority to reopen an adjudged case —and there is none—he has not that power.

When, by the Act of 1905, jurisdiction was conferred upon a Judge of the High Court in Chambers at Toronto, the like powers were conferred and the like duties were imposed upon him as were conferred and imposed upon County Court Judges in the like cases in other municipalities, i.e., in municipalities not in unorganised districts, and it follows that, when the jurisdiction conferred by the statute of 1905 was transferred to the Board by the statute of 1906, the powers and duties of the Board were the same as those which had been possessed by and imposed upon County Court Judges by the statute of 1904.

It is, I think, highly improbable that a Legislature which, recognising the importance of the prompt disposal of appeals, had provided by an enactment which, as interpreted by the Court of Appeal, was imperative in its terms, had made it necessary that appeals should be finally disposed of not later than the 1st August, would have conferred upon the Board jurisdiction at any time to reopen an appeal which had been disposed of.

It is argued that that jurisdiction is conferred on the Board by sub-sec. 4 of sec. 19 of the statute of 1906. . . .

It is plain, however, that the sub-section refers only to the matters dealt with in the preceding sub-sections of sec. 19—which are matters relating only to railways.

That what, as I have said, is, in my opinion, the effect of the enactment in force when the Board assumed to reopen the appeal, is made still clearer by the legislation of 1913.

The provisions as to appeals from assessments are dropped from the Ontario Railway and Municipal Board Act of 1913, and now form part of the Assessment Act, statutes of 1913, ch. 46, sec. 13; and, by sub-sec. 4 of the amended sec. 76 of the Assessment Act, enacted by sec. 13, it is provided that secs. 68 to 75, and secs. 77 and 78 (i.e., of the Assessment Act of 1904), shall apply to all appeals taken under sub-sec. 1 or sub-sec. 2, and the Board shall possess the powers and duties which by those sections are assigned to a Judge of the County Court.

The provision of sub-sec. 5 of sec. 4 of the statute of 1906, that the Board shall have all the powers of a Court of record, did not give to it jurisdiction to reopen the appeal after it had been finally dealt with on the 12th February, 1913. An order of the Board was then made and entered, allowing the appeal, and fixing the assessment at $100,000 for school purposes; and, if the order had been a judgment of a Court of record, after it had been passed and entered, it could not have been set aside by the Court by which it was made.

The effect of this provision is to vest in the Board such jurisdiction as is inherent in a Court of record, but not powers which are conferred on particular Courts by statute or by Rules of Court passed under the authority of a statute.

For these reasons, the appeal must be allowed, leaving the order of the Board of the 12th February, 1913, to stand unaffected by the order of the 5th March, 1913, which was made without jurisdiction; and, under all the circumstances, there should be no costs of the appeal to either party.

Appeal allowed.

JANUARY 12TH, 1914.

*RE CANADIAN NIAGARA POWER CO. AND TOWNSHIP OF STAMFORD.

Assessment and Taxes—Assessment for School Purposes of Company's Property in Township—By-law—Exemption—Exception as to School Rates—Construction of Statutes.

Appeal by the Canadian Niagara Power Company from an order of the Ontario Railway and Municipal Board, dated the 26th September, 1913, confirming the assessment for school purposes by the Corporation of the Township of Stamford, of the appellant company's property in the township.

The appeal was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, and HODGINS, JJ.A.

Wallace Nesbitt, K.C., and A. Monro Grier, K.C., for the appellant company.

A. C. Kingstone, for the township corporation, the respondent.

The judgment of the Court was delivered by MEREDITH, C.J.O.:—By a by-law of the council of the respondent, passed on the 11th May, 1903, it was enacted that "the annual assessment of all the real estate, property, franchises, and effects of the Canadian Niagara Power Company, situate from time to time within the municipality of the township of Stamford, be and the same is hereby fixed at the sum of $160,000, apportioned as follows, namely, $100,000 upon the tunnels, wheel-pits, power-houses, inlets, and inlet bridges, and other principal works of the said company from time to time situate in the Queen Victoria Niagara Falls Park, and $60,000 upon the other property of the said company from time to time situate in the said park or elsewhere in the said municipality, for each and every year of the years 1903 to 1923, both years inclusive, and that the said company and its property in the municipality be and are hereby exempted in each year of the said years from all municipal assessment or taxation of any nature or kind whatsoever beyond the amount to be ascertained in each of such years by the application of the yearly rate levied by the municipal council in each such year to the said fixed assessment of $160,000 apportioned as

*To be reported in the Ontario Law Reports.

aforesaid." This by-law was passed under the authority of sec. 8 of ch. 8 of the statutes of 1892. . . .

At the same session an Act, intituled "An Act to Amend and Explain certain portions of the School Laws," was passed (ch. 60), the fourth section of which provides that "no municipal by-law hereafter passed for exempting any portion of the ratable property of a municipality from taxation, in whole or in part, shall be held or construed to exempt such property from school rates of any kind whatsoever."

The authority which municipal councils then had to pass by-laws exempting manufacturing establishments from taxation was conferred by sec. 366 of the Consolidated Municipal Act, 1892. . . . This section was a re-enactment of sec. 366 of R.S.O. 1887 ch. 184.

Before the by-law now under consideration was passed, a change in the policy of the Legislature as to exemptions from taxation had taken place, and by-laws for granting such exemptions were treated as the granting of bonuses (statutes of 1900, ch. 33, sec. 10); and, by sec. 591 (12) of the Consolidated Municipal Act, 1892, as amended by sec. 9 of ch. 33 of the statutes of 1900, it was made requisite to the passing of a by-law for granting aid by way of bonus for the promotion of manufactures that the by-law should have received the consent of the electors in conformity with the provisions of the Act, which are those contained in sec. 366a, as enacted by sec. 8 of ch. 33 of the statutes of 1900.

In conformity with the policy which had been adopted in 1892, that there should be no power to exempt from school rates, a proviso was added to the provision that exemptions from taxation should be deemed bonuses, that nothing contained in the Act should be deemed to authorise "any exemption, either partial or total, from taxation for school purposes, or any by-law or agreement which directly or indirectly has or may have the effect of such an exemption."

The provisions of sec. 4 of ch. 60 of the statutes of 1892 were also in force when the by-law was passed, having been re-enacted in the revision of 1897 as sec. 93 of ch. 292, and again re-enacted in the Public Schools Act of 1901, ch. 39, as sec. 77.

If sec. 8 of ch. 8 of the statutes of 1892 were alone to be considered, we should be bound by the decision of the Supreme Court of Canada in Canadian Pacific R.W. Co. v. City of Winnipeg (1900), 30 S.C.R. 558, to hold that the enactment conferred upon the council of the respondent authority to exempt

from school rates, and that, under the by-law in question, the appellant is entitled to exemption from these rates to the extent to which the fixed assessment provided for has the effect of exempting from taxation.

It has, however, been held by the Court of Appeal in Pringle v. City of Stratford (1909), 20 O.L.R. 246, that, in view of the settled policy of the Legislature, as indicated by the enactment to which I have referred, that municipal councils should not have power to exempt from school rates, an agreement, validated by a special Act, which provided that property should be exempt from taxation, did not confer exemption from school rates.

In that case, as in the case at bar, the exemption provided for was for a longer period than that authorised by the Municipal Act, and in that case the agreement and by-law were ultra vires the corporation, because they provided for guaranteeing a loan, which at that time a municipal corporation had no power to do, and the view of the Court of Appeal was, that the purpose of the special Act was to validate the agreement and by-law in these respects only; and that, in the absence of anything in the special Acts to indicate that they were to have a larger meaning, and to exclude the exception as to school rates, "it ought to be held that the Legislature did not intend to do more than to alter the general law in so far as it was necessary to permit a longer period of exemption than by that law the council could grant, or to abandon . . . the settled policy of the Legislature in respect of school rates since the year 1892:" per Osler, J.A., at p. 254. . . .

The case at bar is not, I think, distinguishable from Pringle v. City of Stratford.

It was argued by Mr. Nesbitt that the fact that the special Act and the provisions of the general Act upon which the respondent relies were passed at the same session points to the conclusion that, as there is no exception of school rates in the special Act, it was intended that the power to exempt from taxation was not to be subject to that exception; but I should come to the opposite conclusion. The policy of the Legislature as to the matter was being given effect to by the enactment of sec. 4 of ch. 60, and it would appear to be unlikely that, if it had been intended that the powers of exemption which were being conferred by sec. 8 of ch. 8 should not be subject to the exception as to school rates, it would not have been expressly so declared in that enactment; and it is more probable, I think, that the idea of the draftsman of the special Act was, that, because, by sec. 4

of ch. 60, it was provided that no by-law thereafter passed for exempting ratable property from taxation should be held or construed to exempt it from school rates, any by-law thereafter passed, however wide its terms might be, must be construed as subject to an exception of school rates, and that it was, therefore, unnecessary to introduce into sec. 8 any words excepting those rates.

It is not the case of an enactment prohibiting the granting of an exemption from school rates, but of a mandate to all Courts to hold and construe by-laws exempting from taxation as not extending to school rates. . . .

[Stratford Public School Board v. Stratford (1910), 2 O.W.N. 499, referred to and distinguished.]

Appeal dismissed with costs.

JANUARY 12TH, 1914.

*RE ONTARIO POWER CO. OF NIAGARA FALLS AND TOWNSHIP OF STAMFORD.

Assessment and Taxes—Assessment for School Purposes of Company's Property in Township—By-law—Exemption — Exception as to School Rates—Validation of By-law by Statute—"Of any Nature or Kind whatsoever"—"Notwithstanding Anything in any Act Contained to the Contrary"—Exemption by Means of Fixed Assessment—Construction of Statutes.

Appeal by the Ontario Power Company of Niagara Falls from an order of the Ontario Railway and Municipal Board, dated the 26th September, 1913, confirming the assessment for school purposes by the Corporation of the Township of Stamford of the appellant company's property in the township.

The appeal was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, and HODGINS, JJ.A.

Glyn Osler, for the appellant company.

A. C. Kingstone, for the township corporation, the respondent.

*To be reported in the Ontario Law Reports.

MEREDITH, C.J.O.:—The exemption which the appellant claims is conferred by a by-law of the council of the respondent, passed on the 10th October, 1904; and it provides that the annual assessment "of all the real estate, property, franchises, and effects of the Ontario Power Company, situate from time to time within the municipality of the township of Stamford, and used for the corporate purposes of the company, be and the same is hereby fixed at the sum of $100,000, apportioned as follows, namely, $30,000 upon the gate-houses, penstocks, inlets, inlet bridges, and other principal works of the company situate in the Queen Victoria Niagara Falls Park, and $70,000 upon the other property of the said company situate in the said park or elsewhere in the said municipality, for each and every year of the years 1904 to 1924, both years inclusive, and that the said company shall not be liable for any assessment or taxation of any nature or kind whatsoever beyond the amount to be ascertained in each of such years by the application of the yearly rate levied by the municipal council in each such year to the said fixed assessment of $100,000 apportioned as aforesaid."

On the application of the appellant, an Act was passed on the 25th May, 1905, ch. 78 of the statutes of that year. The Act contains but one section, which reads as follows: "By-law No. 11 of the Municipal Corporation of the Township of Stamford" (i.e., the by-law in question), "set forth as schedule 'A' to this Act, is legalised, confirmed, and declared to be legal, valid, and binding, notwithstanding anything in any Act contained to the contrary."

Oddly enough, the by-law provides that "this by-law and the provisions thereof shall come into full force and effect immediately after the municipality shall be authorised by sufficient legislation or other authority to pass the same;" and, therefore, reading it literally, the event upon which it was to come into full force and effect has not happened, for the special Act does not confer authority to pass the by-law, but confirms it; and, strictly speaking , all that has been confirmed is a provision for exemption, to take effect when authority is obtained to pass the by-law.

This case is not distinguishable from the Electrical Development Company's case (ante), notwithstanding the use in the by-law of the words "any assessment or taxation of any nature or kind whatsoever." The addition of the words "of any nature or kind whatsoever" does not add anything to the force of the preceding words, and is but the flourish of the draftsman's pen; nor are the concluding words of the special

Act, "notwithstanding anything in any Act contained to the contrary," sufficient, according to the principle of the decision in Pringle v. City of Stratford (1909), 20 O.L.R. 246, to bring the school rates within the exemption. It is forbidden by sec. 77 of ch. 39 of the statutes of 1901 to hold or construe the by-law as exempting the appellant's property "from school rates of any kind whatsoever;" and, therefore, all that the special Act effected, if it effected anything, was to validate a by-law into which the exception of school rates had been practically written by the Legislature.

It was argued by Mr. Osler that the by-law does not exempt from taxation, and is, therefore, not within this prohibition or the exception contained in the Municipal Act; but that contention is not, in my opinion, well-founded.

The provisions of sec. 77 of ch. 39 of the statutes of 1901 are wide enough to embrace a by-law providing for a fixed assessment. The section provides that "No by-law passed by any municipality after the 14th day of April, 1892, for exempting any portion of the ratable property of a municipality from taxation, in whole or in part, shall be held or construed to exempt such property from school rates of any kind whatsoever."

The words "in whole or in part" appear to me to have been introduced for the very purpose of including an exemption by means of a fixed assessment. They were evidently not intended to apply to an exemption of part of the property, for that is provided for by the use, in the earlier part of the section, of the words "any portion of the ratable property." The effect of a fixed assessment is to exempt from taxation the property to which it applies to the extent by which its assessable value exceeds the amount of the fixed assessment; but, if there were any doubt as to the application of the section to fixed assessments, the fact that the by-law in question expressly provides that the company shall not be liable for any assessment or taxation of any nature or kind whatsoever, beyond the amount to be ascertained in each year by the application of the yearly rate levied by the municipal council in that year to the fixed assessment, brings the by-law clearly within the scope of the section.

In my opinion, the appeal should be dismissed with costs.

MACLAREN, J.A., concurred.

HODGINS, J.A., also concurred, for reasons stated in writing.

MAGEE, J.A., dissented, for reasons stated in writing.

Appeal dismissed; MAGEE, J.A., *dissenting.*

JANUARY 12TH, 1914.

*RE ELECTRICAL DEVELOPMENT CO. OF ONTARIO AND TOWNSHIP OF STAMFORD.

Assessment and Taxes—Assessment for School Purposes of Company's Property in Township—By-law—Exemption—Exception as to School Rates—Construction of Statutes.

Appeal by the Electrical Development Company from an order of the Ontario Railway and Municipal Board, dated the 26th September, 1913, confirming the assessment for school purposes made by the Corporation of the Township of Stamford upon the appellant company's property in the township.

The appeal was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, and HODGINS, JJ.A.

D. L. McCarthy, K.C., for the appellant company.

A. C. Kingstone, for the township corporation, the respondent.

MEREDITH, C.J.O.:—Although the facts of the case are somewhat different from those of the case of the Canadian Niagara Power Company (ante) the result of the appeal must be the same; for the reasons that led to a conclusion adverse to the appeal in that case apply equally to this.

The enactment applicable to this case is contained in sec. 3 of ch. 12 of the statutes of 1905, which provides that "it shall be lawful for the corporation of any municipality in any part of which the works of the company" (i.e., the appellant) "or any part thereof pass or are situate, by by-laws specially passed for that purpose, to fix the assessment of the property of the said company, or to agree to a certain sum per annum or otherwise in gross, or by way of commutation or composition for payment, or in lieu of all or any municipal rates or assessments to be imposed by such municipal corporation, and for such term of years as to such municipal corporation may seem expedient, not exceeding 21 years, and any such by-law shall not be repealed unless in conformity with a condition contained therein; and this section shall be deemed to have been in force and shall take effect from and after the first day of September, 1904."

The by-law under which the exemption is claimed was passed

*To be reported in the Ontario Law Reports.

on the 10th October, 1904, and provides that "the annual assessment of all the real estate, property, franchises, and effects of the Electrical Development Company of Ontario Limited, situate from time to time within the municipality of the township of Stamford, and used for the corporate purposes of the company, be and the same is hereby fixed at the time of $225,000, apportioned as follows, namely, $140,000 upon the lands, tunnels, wheel-pits, power-houses and gate-houses, penstocks, inlets and inlet bridges, and other principal works of the company situate in the Queen Victoria Niagara Falls Park, and $85,000 upon the other property of the said company situate elsewhere in the said municipality, for each and every year of the years 1904 to 1924, both years inclusive, and that the said company and its property in the municipality shall not be liable for any assessment or taxation of any nature or kind whatever beyond the amount to be ascertained in each such year by the application of the yearly rate levied by the municipal council in each such year by the rate levied by the municipal council in each such year to the said fixed assessment of $225,000 apportioned as aforesaid."

The general law was substantially the same as that in force when the by-law granting exemption to the Canadian Niagara Power Company was passed, except that the provisions of the Municipal Act relating to exemptions in force when the later by-law was passed were consolidated in 1903, and appear in that Act as secs. 366*a*, 591(12), and 591*a* (g).

The appeal should be dismissed with costs.

MACLAREN, J.A., concurred.

HODGINS, J.A., also concurred, for reasons stated in writing.

MAGEE, J.A., dissented, for reasons stated in writing.

Appeal dismissed; MAGEE, J.A., *dissenting.*

JANUARY 12TH, 1914.

*ALABASTINE CO. OF PARIS LIMITED v. CANADA PRODUCER AND GAS ENGINE CO. LIMITED.

Sale of Goods—Contract—Machinery—Implied Warranty—Defective Workmanship—Use of Improper Material—Fitness for Purpose of Purchaser—Specifications—Power Capacity—Five-year Guarantee—Refusal to Accept—Title to Remain in Vendor until Payment in Full—Findings of Fact of Trial Judge—Acceptance on Appeal—Rights of Purchaser—Conditions Precedent to Payment—Provisions of Contract—Exclusion of Unspecified Terms and Conditions—Non-exclusion of Implied Conditions—Provision for Return of Defective Parts of Machinery—Inapplicability in Absence of Acceptance—Return of Portion of Purchase-money Paid—Damages.

Appeal by the defendant company from the judgment of CLUTE, J., 4 O.W.N. 486.

The appeal was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, and HODGINS, JJ.A.

I. F. Hellmuth, K.C., and W. A. Boys, K.C., for the appellant company.

G. H. Watson, K.C., for the plaintiff company, respondent.

The judgment of the Court was delivered by MEREDITH, C.J.O.:—The action is brought for the rescission of an agreement made between the parties on the 5th May, 1911, by which the appellant agreed to furnish to the respondent a 3-cylinder 19 x 20 natural gas engine, with extended shaft arranged for outboard bearing, and outboard bearing complete, together with a pulley of specific dimensions, and a gas regulator, and to supply all piping within 10 feet of the engine and foundation plans and foundation bolts, the work to be done in accordance with the specifications annexed to the agreement, which, together with the guarantee and special agreements mentioned in the specifications, were made part of the agreement, for the sum of $6,000; and the claim of the respondent is for rescission of the agreement, for the repayment of $5,500 which had been paid on account of the purchase-price, with interest, and for damages for alleged

*To be reported in the Ontario Law Reports.

misstatements and misrepresentations by the appellant, by which the respondent was induced to enter into the agreement.

In the statement of claim it is alleged that the engine and machinery "did not work properly and were not fit for the purpose for which the same were, to the knowledge of the "appellant, purchased by the" respondent; that they were not "merchantable or marketable," and "were of no use or value" to the respondent for the purposes for which they were required; that, in the course of the operation of the engine and machinery in the respondent's factory in the month of March, 1912, and not long after they had "been attempted to be used from time to time" by the respondent, they "exploded and collapsed and broke down, became smashed and for the most part destroyed, from the defective and improper construction and bad workmanship and material of the same," and they "became and were useless and of no value" to the respondent.

The evidence is conflicting, especially as to the cause of the engine having broken down in March, 1912; the contention of the appellant being that it was due to the neglect of the respondent's engineer in charge of it, and the contention of the respondent that the break-down was caused by defects in the engine itself, due to improper workmanship and the use of improper materials; and the finding as to this is against the appellant.

The learned trial Judge also found that there was an implied warranty that the engine should be fit for the purpose for which it was intended to be used, and that it was not fit and was never made fit for that purpose.

According to the specifications it was provided that the engine should develope 250 actual brake horse power; and the finding is, that it was never capable of continuously carrying 250 horse power.

There is no finding as to the immediate cause of the break-down. According to some of the testimony, it was the breaking of the crank shaft, and, according to other testimony, the weakness of the crank case and other parts of the engine. I mention this because, if the break-down had been due to the defects in the crank case and to that only, the contention of the appellant that the remedy of the respondent was confined to a claim on the 5-year guarantee which was given after the existence of cracks in the crank case was discovered, would probably have prevailed.

Although there is no express finding as to the cause of the "break-down," it is manifest from the reasons for judgment that

the learned trial Judge was of opinion that it was due to defective workmanship and the use of improper material in various parts of the engine, and not only to the defects in the crank case.

It is impossible for us to reverse the findings of fact to which I have referred. There was evidence to support them, and we cannot say that the conclusions to which the trial Judge came are clearly wrong.

It is reasonably clear, we think, that there was no such acceptance of the engine as precluded the respondent from rejecting it if it did not fulfil the requirements o fthe contract. It was being "tried out" from September, when it was set up in the respondent's factory, until the time of the break-down in the following March. The evidence, no doubt, shews that throughout this period the respondent's manager was hoping, and perhaps believing, that the appellant would succeed in making such changes in the engine as would put it in a condition to meet the requirements of the contract; but there is nothing to shew that the respondent at any time accepted the engine as answering those requirements. And, besides this, by the terms of the contract, "the title to the machinery or material" furnished was to remain in the appellant until the purchase-price should be fully paid.

Upon this state of facts, what were the remedies to which the respondent, assuming that they were not abridged by the terms of the contract, was entitled, and how far, if at all, are they abridged by the terms of the contract?

One of the rules deduced from the authorities is, that, when the subject-matter of the sale is not in existence, or not ascertained, at the time of the contract, an engagement that it shall, when existing or ascertained, possess certain qualities, is not a mere warranty, but a condition, the performance of which is precedent to any obligation upon the vendee under the contract, because the existence of those qualities being part of the description of the thing sold, becomes essential to its identity, and the vendee cannot be obliged to receive and pay for a thing different from that for which he contracted: Benjamin on Sale, 3rd Am. ed., par. 895, quoting from the Leading Cases, vol. 2, p. 27. . .

[Reference to Wallis v. Pratt, [1910] 2 K.B. 1003, 1012, 1013, [1911] A.C. 394.]

What then is the application of the law to the facts of this case? The engine did not possess the qualities which the appellant agreed that it should possess. It was neither of 250 horse power, nor was it reasonably fit for the purposes for which it was required, and the respondent was, therefore, not bound to

receive or pay for it. As I have said, the property in it did not pass to the respondent, and there was no such acceptance of the engine by the respondent as to exclude the right to treat the contract as repudiated. It is, I think, the proper conclusion, on the evidence, that the "trying out" of the engine was, as understood by both parties, to be for the purpose of discovering whether or not it answered the conditions of the contract; and what was done by the respondent in "trying out" the engine cannot be treated as an acceptance of it, or as evidence that it had been accepted by the respondent.

There remains to be considered the question whether there is any provision of the contract which has the effect of abridging what otherwise would have been the rights of the respondent.

The contract contains a provision in these words: "It is expressly agreed that there are no promises, agreements, or undertakings outside of this contract with reference to the subject-matter: that no agent or salesman has any authority to obligate this company by any terms, stipulations, or conditions not herein expressed."

This provision, it was contended, had the effect of excluding the condition that the engine should be reasonably fit for the purposes for which it was required, but the argument was not pressed to the extent of contending that it excluded the condition that the engine should be of 250 horse power. . . .

[Reference to Wallis v. Pratt, [1911] A.C. at p. 396.]

It is, I think, quite clear that the provision with which I am dealing does not exclude the condition that the engine should be a gas engine of the 3-cylinder type and of 250 horse power. What the respondent contracted to furnish was an engine of that type and power, and the furnishing of an engine of a different type or power would be no more a performance of the contract than was the delivery of giant sainfoin when the contract was to deliver common English sainfoin (as in Wallis v. Pratt).

If, as has been found, the engine was to be suited for the purpose of the respondent's business—what the appellant has delivered is not such an engine, and the respondent was not bound to accept or pay for it.

The language of the provision is more appropriate to express promises, agreements, or understandings, than to an agreement or condition which the law implies from a given state of circumstances; and, if the appellant intended that such an agreement or condition should be included, clearer language should have been used to express that intention.

The other provision of the contract on which the appellant

relies—that as to the appellant not being liable for damages on account of defects of design, material, or workmanship, other than to furnish without charge repairs or new parts "as mentioned in the preceding paragraph"—does not help the appellant.

The provision of the preceding paragraph referred to is that "it is understood that the machinery is to be free from latent defect in material and workmanship; and, should any part of it be found within one year from the date of shipment to have been defective at the time furnished, the company will repair said part f.o.b. the company's works, or will furnish without charge f.o.b. the company's works a similar part to replace, provided the original part is returned to the company's works freight prepaid, and the company's inspector establishes the claim."

These provisions, in my opinion, have no application where there has been no acceptance of the machinery by the buyer, at all events if the property in it has not passed to him, but were intended to protect the appellant from claims for damages where the machinery has been accepted, and defects of the character mentioned are afterwards discovered. The language used is more consistent with that being the purpose of the provisions than with the intention being that they were to be applicable where the purchaser had still the right to reject. Under ordinary circumstances, a purchaser who elects to treat a contract as repudiated is bound to restore the article which has been furnished to him. In the case at bar the respondent is not in a position to return the engine in the condition in which it was when set up. But his inability to do so is not the result of anything he has done, but is due to the engine having broken down owing to defects for which the appellant is responsible, and the offer and readiness to return it in the condition in which it was after the break-down were sufficient to entitle the respondent to claim the relief which is sought.

The judgment may also, I think, be supported upon the provision of the contract that "the plant shall not be rejected for any cause except for failure to meet the duty guaranteed," which implies the right to reject in the excepted case. . . .

The trial Judge was right in giving judgment for the respondent for the amount which had been paid on account of the purchase-price, with interest, and for damages for breach of the contract to furnish the engine; and there is no reason to complain of the amount at which damages have been assessed.

Appeal dismissed with costs.

JANUARY 12TH, 1914.

*CARLYLE v. COUNTY OF OXFORD.

Public Schools—County Inspector—Salary—Action for Arrears—By-law of County Council—Public Schools Acts—"School"—"Department"—Rate of Payment according to Number of Schools—Limitation of Actions—Specialty—Action upon Statute—Period of Limitation—Acceptance of Salary Paid—Estoppel.

Appeal by the plaintiff from the judgment of BRITTON, J., sitting at the trial without a jury, dismissing the action.

The appeal was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, and HODGINS, JJ.A.

W. M. Douglas, K.C., and W. T. McMullen, for the appellant.

James Bicknell, K.C., and S. G. McKay, K.C., for the defendant county corporation, the respondent.

The judgment of the Court was delivered by MEREDITH, C.J.O.:—The deceased William Carlyle was public school inspector of the county of Oxford from the 1st July, 1871, to the 31st January, 1910, and the action was brought by him to recover arrears of salary alleged to be due to him for the years 1876 to 1904, both inclusive, and interest on the arrears.

The respondent, besides denying that any arrears of salary were due to the deceased, pleads the Statute of Limitations in bar of the action.

Pending the action, William Carlyle died, and it was continued by his widow as administratrix of his estate, and upon her death the action was continued by the appellant as his administrator de bonis non.

The deceased was appointed to office by by-law passed on the 8th June, 1871, which provides that his remuneration shall be $5 per school per annum and a stated allowance for travelling expenses.

By the school law then in force, 34 Vict. ch. 33, sec. 8, every county council was required to appoint a public school inspector, subject to dismissal at the pleasure of the council; and by sec. 10 it was provided that the remuneration of a county inspector

*To be reported in the Ontario Law Reports.

should be not less than $5 per school per annum, and the council was given authority to determine and provide for the allowance of travelling expenses.

The main question to be determined is as to the meaning of the word "school," as used in sec. 10 and in the provisions as to the remuneration of county inspectors in the various Public Schools Acts, down to that of 1896.

It appears that from the year 1871 the Department of Education treated every department of a school for which there was a teacher occupying a separate room with a separate register as a "school" within the meaning of the Acts; and the Government grants were paid on that basis.

The respondent appears in the earlier years to have taken the same view; and the deceased was paid accordingly, although some question appears to have arisen before 1876 as to the proper basis for determining the remuneration. In 1876 the council came to the conclusion that the basis which had been adopted was erroneous, and directed the treasurer to pay for schools only, and not for departments; and from that time on, during the whole of the period for which the claim is made, the deceased was paid on that basis.

The Public School law was consolidated in 1874 by 37 Vict. ch. 28, which made no change in the provision of the existing law to which I have referred except as to the tenure of the office; and the provision as to it was that an inspector should be subject to dismissal by a majority of the council in case of misconduct or inefficiency, or by a vote of two-thirds of the council "without such cause" (sec. 105).

No change in the law was made in the consolidation of 1885, 48 Vict. ch. 49, except that the provision as to the remuneration of county inspectors was recast (sec. 182) and was made to read: "It shall be lawful for the Lieutenant-Governor to direct the payment, out of the Consolidated Revenue Fund, of a sum, not exceeding $5 per school per annum, to each county inspector, and the county council shall pay quarterly at the rate of not less than an equal amount per school, and in addition thereto the reasonable travelling expenses of such county inspector, the amount to be determined by the county council."

In the revision of 1887 the provisions of the Act of 1885 were re-enacted as secs. 176, 180, and 181.

The Public School law was again consolidated in 1891, 54 Vict. ch. 55, but no change affecting the question under consideration was made in these sections, which appear in the Consolidated Act as secs. 150, 152, and 153.

In the consolidation of 1896, 59 Vict. ch. 70, no change was made except as to the remuneration, and the provision as to it (sub-sec. 8 of sec. 82) was that "the county council shall pay to every county inspector at the rate annually of $5 for every teacher occupying a separate room with a separate register, and in addition reasonable travelling expenses, such expenses to be determined by the county council."

It is unnecessary to trace further the subsequent consolidations of the Public School law; but, for the purposes of the case, it is sufficient to say that no change affecting the question between the parties was made, and that in the Act of 1901 the provisions as to the dismissal and remuneration of county inspectors are substantially the same as in the Act of 1896.

Why, after the passing of the Act of 1896, which required the council to pay the inspector at the rate annually of $5 for "every teacher occupying a separate room with a separate register," the deceased was not paid on that basis, does not appear, but the fact is, that he was not so paid, but was paid according to the number of schools only, not departments.

After the action of the council in 1876, to which I have referred, was taken, until the year 1909, beyond a protest in 1876 or the following year, nothing was done by the deceased, at all events by way of formal protest, to indicate that he did not acquiesce in the conclusion to which the council had come as to the measure of his remuneration; but, on the contrary, he accepted payment throughout on the basis that he was to be paid according to the number of schools only, not departments; and, according to the testimony of the treasurer, the practice was for the deceased himself to "figure out" the amount to which he was entitled, and for the treasurer to pay him "according to his own statement;" and in the case of substantially all the payments the deceased gave receipts acknowledging the sums paid "as salary" for the periods for which they were made, and in some cases stating that the payment was in full.

It was contended, without success, before my brother Britton, that the word "school" as used in the Acts prior to that of 1896 is to be interpreted as meaning "department" for which there is a teacher occupying a separate room with a separate register, and the same contention was made on the argument of the appeal.

I am of opinion that this contention is not well-founded and that the word "school" is to be given its ordinary and popular meaning—a place or establishment for instruction (the Oxford English Dictionary). According to the same authority the word

is "applied (with defining word as upper, lower school) to a division of a large school comprising several forms or classes."

The word "department" involves the idea of something which forms part of a larger thing, and, in the case of a school, of part of a school. . . .

That it was the duty of the respondent, after the Act of 1896 was passed, to have paid the deceased $5 for every teacher occupying a separate room with a separate register, is not open to question; and the appellant is entitled to recover the amount claimed for arrears from the time that Act came into force, unless the Statute of Limitations is a bar to her action or the conduct of the deceased was such as to estop him and his personal representative from making the claim, or the receipt of what was paid to him operated, by force of paragraph 8 of sec. 58 of the Judicature Act (R.S.O. 1897 ch. 51), to extinguish the obligation of the respondent.

If the claim of the appellant is upon a specialty, her cause of action is not barred, for the period of limitation is 20 years: 10 Edw. VII. ch. 34, sec. 49 (*b*).

Under the old forms of pleading, a declaration in debt upon a statute was a declaration upon a specialty: Cork and Bandon R.W. Co. v. Goode (1853), 13 C.B. 826; and "not the less so because the facts which bring the defendant within the liability are facts dehors the statute:" per Maule, J., at p. 835; or because assumpsit or case would also lie (ib.) That case was followed in Shepherd v. Hills (1855), 11 Ex. 55, 105 R.R. 386. . . .

Cork and Bandon R.W. Co. v. Goode has also been followed and applied in this Province, in Ross v. Grand Trunk R.W. Co. (1886), 10 O.R. 447, and Essery v. Grand Trunk R.W. Co. (1891), 21 O.R. 224, in the case of claims for compensation for lands taken by railway companies, and in Beatty v. Bailey (1912), 26 O.L.R. 145, in the case of a covenant included or implied by virtue of the Land Titles Act, and was also followed by an Irish Court in Guardians of the Poor of the Union of Magherafelt v. Gribben (1889), 24 I.R. C.L. 520.

There are, no doubt, cases in which a statute enables an action to be brought which nevertheless is not an action on the Act of Parliament, as was said in In re Manchester and Milford R.W. Co., [1897] 1 Ch. 276, 282, by Stirling, J., who treated Tobacco-Pipe Makers' Co. v. Loder (1851), 16 Q.B. 765, as an illustration of this . . .

[Reference also to 10 Edw. VII. ch. 34, sec. 49(*g*); Thomson

v. Clanmorris, [1900] 1 Ch. 718; Mayor, etc., of Salford v. Lancashire County Council (1890), 25 Q.B.D. 384.]

The case at bar falls, I think, within the principle of Cork and Bandon R.W. Co. v. Goode. The obligation to pay imposed by the statute of 1896 is a absolute, and does not depend upon contract—"The county council shall pay to every county inspector." The inspector is not an ordinary officer of the corporation, and his only duties are those imposed upon him by or under the Public Schools Act. The county council has nothing to do with the conduct or management of the public schools, but a duty is imposed upon it to appoint a public school inspector, and the council is required to pay him the remuneration for which the statute provides, and no arrangement between the council and the inspector as to salary is necessary. Having appointed the inspector, the operation of sec. 82 is automatic, and the command of the Legislature is, that the council shall pay him as sub-sec. 8 provides.

It is to be observed that, so far from there being any contract to pay the remuneration provided for by sub-sec. 8, the by-law under which the deceased held his office from 1896 to 1904—by-law number 316, passed on the 17th June, 1889—provides that "the sum of $5 per school per annum be paid quarterly by the County Treasurer to the said Inspector of Public Schools as remuneration for his services as such inspector."

Upon the whole, I am of opinion that the action is an action of debt on the statute, and that 20 years is the period of limitation applicable to the appellant's claim.

I am also of opinion that the appellant is not estopped from asserting her claim for the arrears. What the deceased was entitled to be paid was as well known to the respondent as to him, and the respondent did not act to its damage in consequence of anything said, done, or omitted by the deceased.

I agree with the contention of Mr. Douglas that an agreement for the payment to an inspector of less than the statute provides shall be paid to him would be an illegal agreement. . . .

The principle upon which Corporation of Liverpool v. Wright (1859), 28 L.J. Ch. 868, was decided by Wood, V.-C., is, in my opinion, applicable. . . .

An agreement to pay less than the prescribed remuneration would be contrary to public policy—it would be prejudicial to the public interest, and would have the effect of frustrating the object which the Legislature had in view to accomplish by

prescribing what should be the remuneration of the public school inspectors. . . .

If I am right in this view, the defence founded on the alleged estoppel fails on this ground, as well as for the reasons I have already mentioned, and the provisions of paragraph 8 of sec. 58 of the Judicature Act (R.S.O. 1897 ch. 51), even if otherwise applicable, cannot be invoked to defeat the appellant's claim.

For these reasons, I am of opinion that the appeal should be allowed and the judgment of my brother Britton reversed, and that judgment should be entered for the appellant for the amount of the arrears claimed for the years 1896 to 1904, both inclusive, without interest, and that the respondent should pay the costs of the action and of the appeal.

Appeal allowed.

JANUARY 12TH, 1914.

*RE MEYERS AND CITY OF TORONTO.

Municipal Corporations—Expropriation of Land—Compensation—Award — Value of Land and Buildings—Stock in Trade—Business Disturbance—Capitalization of Net Annual Revenue with Addition of Potential Value—Business Profits—Personal Element — Contingencies — Compensation for Disturbance Based on Three Years' Profits—Adequacy—Goodwill.

Appeal by the claimant from an award of the Official Arbitrator upon an arbitration to ascertain the amount of the compensation to be paid to the claimant by the Corporation of the City of Toronto for land taken for a park.

The appeal was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, and HODGINS, JJ.A.

C. A. Masten, K.C., and J. R. L. Starr, K.C., for the appellant.

G. R. Geary, K.C., for the city corporation, the respondents.

The judgment of the Court was delivered by HODGINS, J. A.:— . . . The claimant . . . was awarded the sum of

*To be reported in the Ontario Law Reports.

$128,956, made up as follows: land, $80,750; buildings, $28,000; business disturbance, $15,500; stock in trade, $4,706.

The Official Arbitrator appears to have allowed for these elements which, as a rule, go to make up the damages in a case such as this; but counsel for the appellant, in their able argument, attacked the award as not being founded upon a proper principle. Apart from that, it does not seem that the figures allowed by the Official Arbitrator are open to much question, except possibly upon one point, namely, the allowance of profits for only three years, which period, it was contended, was altogether too short, in the circumstances.

The principle contended for on behalf of the appellant was, that the net annual revenue produced from the property in question should be ascertained and capitalized at four per cent., and the capital so arrived at allowed as compensation. To this was to be added a sum, similarly calculated, representing potential value if more land was used and the buildings enlarged. Broadly speaking, we were invited to apply to this case the method adopted in calculating damages where tithes or fee farm rents or leasehold interests based upon well-secured rentals, or lands producing an annual rent which formed an unquestioned security (as in Earl of Eldon v. North Eastern R.W. Co. (1899), 80 L.T.R. 723), were being expropriated. And the question is, whether that method, based as it is upon the absolute or relative security of the thing expropriated, or its practical certainty as to revenue, and where the measure of damage is the loss of a definite and fixed income or one which is in its nature susceptible of calculation, can be applied to a case where the profits depend, firstly, upon a suitable location, environment, and equipment, and, secondly, upon application thereto of the personal exertions and talents of the proprietor to produce business profits, this being subject to the conditions of death, bankruptcy, failing health, or the falling away of business. The methods applied in ascertaining compensation, so far as I have been able to see, differ somewhat according to the subject-matter; but a broad distinction seems to be drawn between the cases I first mentioned and those similar to the present case, and it is this. In the former cases the yearly value is multiplied by a certain number of years' purchase in order to arrive at its capital value. This is because the compensation is intended to represent an amount capable of yielding what the thing expropriated produced, and the number of years' purchase is varied according to the class of security being dealt with. This is clearly put in . . . In re Leader's

Estate, [1904] 1 I.R. at p. 373. . . . See also In re White's Estate, [1909] 1 I.R. 35; In re Close's Estate, [1905] 1 I.R. 207; and In re Fitzgerald's Estate, [1902] 1 I.R. 444. In cases similar to the present, the rule seems to have been adopted of ascertaining the value of the land and buildings treated as capable of yielding a certain amount of profit per annum, and then adding to that compensation for disturbance. The latter is the method followed by the Official Arbitrator. The decisive element in this case seems to me to be the importance of the personal equation in producing the results from the carrying on of the business which are shewn. It cannot be denied that that personal element is a precarious one—a circumstance which seems to be considered of great importance in dealing with the amount to be allowed in expropriation proceedings. . . .

[Reference to In re Secretary of State for War and Athlone Rifle Range, [1902] 1 I.R. 433; Penny v. Penny, L.R. 5 Eq. 227; Duke of Northumberland v. Tynemouth Corporation, [1909] 2 K.B. 374; Ex p. Ashby's Cobham Brewery Co., [1906] 2 K.B. 754, 95 L.T.R. 260, 270, 271; Page v. Ratcliffe (1896), 76 L.T.R. 371; Russell v. Minister of Lands (1899), 17 N.Z. L.R. 780; In re Lord Mayor of Dublin (1880), Ir. R. 6 C.L. 502, 509; Commissioners of Inland Revenue v. Glasgow and South Western R.W. Co. (1887), 12 App. Cas. 315, 321, 323; Edinburgh Street Tramways Co. v. Lord Provost of Edinburgh, [1894] A.C. at p. 476.]

But in none of these cases is the exact method of arriving at the additional value given. It is treated as something to be determined in the particular circumstances of each case. Apart from compensation for disturbance, the difference between the principle adopted by the Official Arbitrator and that argued for by the appellant is well illustrated in the case of Kirkleatham Local Board v. Stockton and Middleborough Water Board, [1893] 1 Q.B. 375, [1893] A.C. 444. . . .

I can nowhere find that the method urged upon us is the invariable or only method that can or may be adopted. It is clearly one way of arriving at a valuation and in some cases the obvious way. But where any fluctuating or precarious or personal element enters into the problem, which renders the absolute continuity of the profits doubtful or questionable, either in amount or duration, I think the principle to be adopted may be, and probably should be, that followed here by the Official Arbitrator.

He seems to have allowed a very substantial amount for the

land and buildings in question, and has considered the probability of enlargement and the absolute suitability of the premises for the business then being carried on upon them, and their unique situation—all having in them an element of profit-earning. I can find no reason, nor was any suggested on the argument, why his figures should be disturbed, unless he has in some way departed from the correct principle to be applied.

The only point which has given me doubt is, whether the amount allowed for disturbance, namely, three years' profits, is sufficient. . . .

[Reference to the Irish Land Act, 1870; Martin v. Trodden, Donnell's Land Rep. 417; McCoey v. Renaghan, ib. 412; Devine v. Huey, ib. 411; Prentice's Estate, 40 Ir. L.T.R. 244; Redmond's Estate, 38 Ir. L.T.R. 248.]

I think no objection can be taken to the amount allowed for disturbance unless there is a difference between a case where the business is annihilated so that the owner cannot go elsewhere and acquire a new goodwill, and the case where a move can be made to a property which in a few years can gain as good a reputation as that which has been expropriated.

On principle I do not see much difference between the destruction of the goodwill of the business carried on in a particular property where there is no similar place to which the owner can go, and the destruction of the goodwill where the owner can move elsewhere. In both cases the goodwill attached to or affecting the value of the property in question is wholly gone; and whatever goodwill is thereafter acquired is new and is attributable to a different property. The only goodwill which continues to exist is attributable to the reputation of the owner and goes with him to his new stand. That goodwill ceases where the owner does not resume business; but that personal goodwill is not a thing to be paid for in compensation proceedings. See per Bramwell, L.J., in Bidder v. North Staffordshire R.W. Co. (1878), 4 Q.B.D. at p. 432. . . .

[Reference to Cripps on Compensation, 4th ed., p. 99; Allan on Goodwill, pp. 84, 85; Fletcher on Valuation, p. 88; Curtis on Valuation of Land, pp. 203, 209, 215.]

In most of the reported cases a lump sum has been given: see White v. Commissioner of Works (1870), 22 L.T.R. 591; Bailey v. Isle of Thanet Light R.W. Co., [1900] 1 Q.B. 722; Ripley v. Great Northern R.W. Co. (1875), L.R. 10 Ch. 435.

Goodwill in this case is hardly the appropriate word, because it is not sold or dealt with; but I use it as expressing the

thing which the appellant loses, i.e., her loss of connection in consequence of expropriation. If the Official Arbitrator had not allowed fully for the various heads of loss which he has included in the award, compensation for business disturbances merely on a three years' business would hardly be reasonable. But, in the circumstances, I think, it is not inadequate.

Upon the whole, therefore, I come to the conclusion that the award has been arrived at upon a correct principle; and that, in the circumstances of this case, that principle has been properly applied. To deal with the case otherwise than as has been done would be to give a sum sufficient to purchase a perpetual annuity to the claimant, for the amount of the yearly profits; and there is no evidence that any hypothetical buyer would purchase on those terms.

The appeal should, therefore, be dismissed with costs. The cross-appeal was abandoned on the argument, and the respondents should pay the costs of it on that footing.

JANUARY 12TH, 1914.

*STEWART v. HENDERSON.

Principal and Agent—Agent's Commission on Sale of Right to Use Secret Manufacturing Process — Commission Agreement Based on Sale to Named Person "or his Associates" —Negotiations with Named Person Broken off—Subsequent Sale by Principal to Associate—Evidence of Contemporaneous Oral Agreement Inconsistent with Signed Document—Inadmissibility — Independent Parol Agreement—Reformation of Document — Pleading — Amendment—Quantum Meruit—Amount Fixed by Original Agreement—Sale Brought about by Original Introduction—Construction of Agreements—Commission on Sums Paid—Declaratory Judgment as to Sums to be Paid Set aside—Right to Bring New Actions—Appeal—Costs.

Appeal by the defendant from the judgment of LATCHFORD, J., at the Toronto non-jury sittings, on the 22nd May, 1913, in favour of the plaintiff.

*To be reported in the Ontario Law Reports.

The action was to recover a commission upon the sale to Sir William Mackenzie of the defendant's secret process for the manufacture of steel, known as the Henderson process.

The retainer of the plaintiff by the defendant was not a general one, to find a purchaser for the defendant's process; the arrangement was, that the plaintiff should endeavour to bring the process to the notice of Sir Donald Mann and to interest him in it in the hope that in that way a sale might be brought about; but the sale which the parties had in view was not a sale to Sir Donald Mann only, but to "Sir Donald Mann or his associates."

On the 29th July, 1911, Sir Donald Mann took an option for the purchase of the process, and paid $5,000 to the defendant on account of it.

An agreement of the 2nd August, 1911, made between the defendant, the plaintiff, and one Gordon, provided for the payment by the defendant to the plaintiff of a commission of fifteen per cent. and to Gordon of a commission of seven and a half per cent. of all moneys paid or to be paid, or of all stock or securities received or to be received by the defendant or his assigns from Mann or his assigns, and that "this contract cancels all former contracts and is to be the only commission payable."

Sir Donald Mann's option was never exercised; but in the spring of 1912, there were further negotiations with him; and on the 10th April, 1912, a new commission agreement was made, in the form of a letter from the defendant to the plaintiff, in part as follows: "If I close a contract for the sale of my process for the manufacture of tool steel for Canada and the world with Sir Donald Mann, I will pay you a commission of ten per cent. as and when the moneys or considerations in stock or otherwise are received by me. It is understood that you settle with Mr. Gordon any claim he may have to commission for his introduction. . . . This absolutely cancels any and all former commission contracts to you."

Sir Donald Mann dropped the negotiations and went to England; and shortly afterwards communications took place between the defendant and Sir William Mackenzie, which resulted in a sale of the process to him for $5,000,000. The plaintiff claimed a commission of ten per cent. upon this sum, and his claim was allowed by the trial Judge.

The appeal was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, and HODGINS, JJ.A.

N. W. Rowell, K.C., and J. M. Langstaff, for the defendant, the appellant.

G. H. Watson, K.C., and E. Coyne, for the plaintiff, the respondent.

MEREDITH, C.J.O. (after setting out the facts at length) :— It was argued by counsel for the respondent that the proper conclusion upon the evidence is, that the agreement with Sir William Mackenzie was the result of a continuation of the negotiations which were pending between the appellant and Sir Donald Mann when the latter left for England in April, 1912; that Sir Donald Mann had not definitely abandoned the negotiations; and that they were taken up and continued with Sir William Mackenzie, and resulted in the agreements with him of the 26th and 27th April, 1912.

The evidence does not, in my opinion, warrant any such conclusion, but shews clearly that, before leaving for England, Sir Donald Mann had definitely abandoned all further negotiations, and that the matter was not taken up by Sir William Mackenzie until he was satisfied of this; and that, when it was taken up by him, it was for himself alone and solely on his own account; and it is clear also that the negotiations which Sir Donald Mann carried on were carried on for himself alone and solely on his own account.

If I am right in this view, the respondent cannot succeed upon the letter of the 10th April, 1912, as the event on the happening of which he was to be entitled to the commission of ten per cent.—a sale to Sir Donald Mann being made—has not occurred. Nor can the respondent succeed upon the alleged verbal understanding that he and the witness Kitching deposed to. According to Kitching's testimony it appears that he was present when the letter of the 10th April, 1912, was signed; that he read it and called the appellant's attention to what he (Kitching) thought was an error in it, "leaving out the full name of the firm, that the firm name Mackenzie & Mann ought to have been there, instead of Sir Donald," and that the appellant said that "it was not necessary—Stewart understood that;" that "Stewart and he understood each other;" and that "that is immaterial or something to that effect;" that the respondent said, "That is all right," and they signed the document.

That evidence was not, in my opinion, admissible, as it was evidence of a contemporaneous oral agreement inconsistent with the signed document, and was not admissible as dealing

with a matter collateral to what is dealt with by the document, nor can it be treated as an independent parol agreement to pay the commission in the event of a contract for the sale of the process being closed with Mackenzie & Mann; and, even if it were, such a contract has not been closed.

No case is made on the pleadings for reformation of the document; and, if the respondent desires leave to amend by setting up such a case, the amendment could only be given on the terms that the appellant should have leave also to answer the new case, and have the new issue dealt with upon a new trial.

I am, however, of opinion that, if the respondent has made out that his retainer was to bring about a sale to Sir Donald Mann or his associates, and the agreement with Sir William Mackenzie was brought about by his introduction of the matter to Sir Donald Mann, the respondent is entitled to recover as upon a *quantum meruit*. . . .

I am of opinion that the retainer was to bring about a sale to Sir Donald Mann or his associates, and that Sir William Mackenzie was such an associate. The use of the disjunctive "or" indicates, I think, that it was not intended that it should be necessary that Sir Donald Mann should himself become the purchaser, or even one of the purchasers; and, having regard to the nature of the process and the businesses in which both Sir Donald Mann and Sir William Mackenzie were interested, what was in the contemplation of the parties was a sale either to Sir Donald Mann or to such an associate in business as was Sir William Mackenzie, or perhaps any of the persons connected with the Canadian Northern Railway Company or the Mackenzie & Mann Company; and, indeed, the recital in the agreement of the 2nd August, 1911, that the appellant had instructed and engaged the respondent and Gordon to sell the process on a certain commission agreed upon by the parties to the agreement, would point to a retainer of an even wider character.

It was contended by counsel for the appellant that the effect of the concluding sentence of the letter of the 10th April, 1912, "This absolutely cancels any and all former commission contracts to you," was to put an end to all agreements between the parties, not only as to the rate of commission, but also as to the right to commission resulting from the employment of the respondent to find a purchaser; but I am not of that opinion. The purpose and the effect of the provision are, I think, merely to

substitute for the *quantum* of commission provided for by the earlier agreements that for which the letter provides. By the then existing contract, if the respondent had been able to put through "a sale of the process for the world" to Sir Donald Mann or his associates, he would have been entitled to a commission of twenty per cent.; and the purpose of the arrangement evidence by the letter was to reduce the commission to ten per cent., and not, I think, to exclude all right to commission if the sale to Sir Donald Mann should fall through, and yet the respondent should succeed in effecting a sale to one of his associates.

There is more difficulty as to the other questions—whether the sale to Mackenzie was the direct result of the respondent's introduction of the appellant and his process to Sir Donald Mann. It was argued by Mr. Rowell that it was not, and that the negotiations with Sir William Mackenzie were brought about not by anything that had been done by the respondent, but by the matter being brought to Sir William Mackenzie's attention by Mr. Annesley after the efforts of the respondent had come to naught by the abandonment by Sir Donald Mann of negotiations.

It was, I think, unfortunate that evidence as to the exact nature of Mr. Keamish's connection with the matter was not allowed to be brought out. It was said that he had been employed by the appellant to endeavour to effect a sale to Sir William Mackenzie, and that Annesley had, at the request of Keamish, brought the matter to Sir William Mackenzie's attention prior to the employment of Whyte and Gordon; and that, after the abandonment of negotiations by Sir Donald Mann, it had occurred to Annesley, acting in the interest if not behalf of Keamish, to endeavour again to interest Sir William Mackenzie in the process with a view to his becoming a purchaser of it.

Annesley's account of the way in which the matter was for the second time brought to Sir William Mackenzie's attention differs . . . from that of the appellant, but it does not support Mr. Rowell's contention, and it leads to the conclusion that the appellant himself made the first move towards having the matter brought to Sir William Mackenzie's attention; and it is, I think, very probable that the appellant, finding that Sir Donald Mann had abandoned the idea of purchasing, and attributing his having done so to his illness, thought it would be well to take the matter up with his associate, Sir William Mackenzie, and, with a view to doing this, communicated with Annesley in order to obtain an interview with Sir William Mackenzie.

However that may be, there was, I think, evidence to support the conclusion of the trial Judge that the agreement with Sir William Mackenzie was the direct result of the respondent's efforts; and, that being the case, in the view I take as to the nature and scope of the respondent's employment by the appellant, he is entitled to remuneration for his services; and I see no reason why his remuneration should not be at the same rate as that provided for by the agreement of the 10th April, 1912. Ten per cent. was thought to be a proper remuneration in case of a sale to Sir Donald Mann, and there is no reason why the remuneration should be less in the case of the sale to Sir William Mackenzie.

I do not understand what the scope of the declaration in the second paragraph of the judgment is intended to be. It declares that "the plaintiff is entitled to receive and to recover from and against the defendant a commission of ten per cent. of all moneys and of all shares of stock and other considerations which the defendant has received and is entitled to receive and recover from Sir William Mackenzie upon the sale and purchase of a so-called secret process known as and called 'the Henderson process,' described in agreements for sale and purchase between the said parties, dated the 26th and 27th April, 1912."

Is it intended that the declaration shall apply to money which may be received from Sir William Mackenzie on account of the purchase-money of the right to use the process in all parts of the world except Canada, in the event of Sir William Mackenzie electing to purchase that right, or is its application confined to the purchase which has been made of the right to use the process in Canada?

Apart from this difficulty, I do not think that the case is one for a declaratory judgment; and all that the respondent is at present entitled to recover is ten per cent. on the $3,000 which has been paid on account of the purchase-money of the Canadian rights, and ten per cent. of the $50,000 of shares that have been issued to the appellant: Bright v. Tyndall (1876), 6 Ch. D. 189; Kevan v. Crawford (1877), 6 Ch. D. 29; Honour v. Equitable Life Assurance Society, [1900] 1 Ch. 852.

What the judgment in effect does is to send to the Master for inquiry and report questions that may hereafter arise as to whether the appellant has received money or shares or other considerations in respect of which the respondent is entitled to commission. The appellant has the right to have such questions, as they arise, tried according to the ordinary course of the Court; and I know of no precedent for such a judgment as has

been pronounced; and it cannot surely be that, if a question hereafter arises as to whether Sir William Mackenzie has exercised the option which has been given to him, it is proper to direct that it shall be tried before the Master. I would, therefore, vary the judgment by confining it to a recovery of $300, and the delivery of ten per cent. of the $50,000 of the capital stock of the company referred to in the agreements of the 26th and 27th April, 1912, which has been issued to the appellant, and directing that the appellant pay the costs of the action.

The respondent will not be prejudiced by eliminating the other provisions of the judgment, because the question as to his right to commission on the Mackenzie purchases is established, and that matter would be res adjudicata in any action which the respondent may hereafter bring for the recovery of any commission which may become payable to him.

There should, I think, be no costs of the appeal to either party.

MAGEE and HODGINS, JJ.A., concurred.

MACLAREN, J.A., dissented; reasons to be given later.

Judgment below varied.

HIGH COURT DIVISION.

MIDDLETON, J. JANUARY 9TH, 1914.

*HOPKINS v. JANNISON.

Sale of Goods—Machine—Implied Warranty—Representation—Fitness for Purpose—Reliance on Judgment or Skill of Manufacturer or Dealer—Evidence.

Action to recover a balance of the price of a steam shovel sold by the plaintiffs to the defendants.

Counterclaim to recover the sums paid on account of the price and damages by reason of the alleged failure of the machine to comply with the contract.

The action and counterclaim were tried without a jury at Sault Ste. Marie on the 19th and 20th September, 1913. Written arguments were afterwards put in by counsel.

*To be reported in the Ontario Law Reports.

R. McKay, K.C., for the plaintiffs.
A. C. Boyce, K.C., for the defendants.

MIDDLETON, J. (after setting out the facts at length) :—The defendants put their contention in two ways. They say that the plaintiffs knew the purpose for which the machine was to be used, and that they expressly represented that it was fit for that purpose, and that they are liable upon this representation, quite apart from any implied warranty. This contention fails on the facts.

In the second place, they say that there is an implied warranty in this case as to the fitness of the machine for the work contemplated.

The plaintiffs, on the other hand, contend that, whatever the situation might have been if the defendants had purchased a model 28, they did not rely in any way upon the plaintiffs' knowledge and skill, but deliberately elected to give a specific order based upon their own idea as to what was required and Macdonald's knowledge and skill. (Macdonald was an associate of the defendants.) The plaintiffs further contend that this is not the case of a sale by a manufacturer, and that a manufacturer's warranty cannot be implied.

Before discussing these questions, I think it desirable to point out that the implied warranty, where goods are sold by a manufacturer or dealer, rests on precisely the same footing as all other implied contracts. This is sometimes lost sight of not only in argument, but in decided cases; and, where that is so, the decision is generally out of harmony with the body of the law. . . .

[Reference to The Moorcock (1889), 14 P.D. 64; Lamb v. Evans, [1893] 1 Ch. 218; Hamlyn v. Wood, [1891] 2 Q.B. 488, 491; Ex p. Ford (1885), 16 Q.B.D. 305; Churchward v. The Queen (1865), L.R. 1 Q.B. 173, 195.]

In the celebrated judgment in Jones v. Just (1868), L.R. 3 Q.B. 197, Mellor, J., classifies the cases relating to implied warranty upon the sale of goods, under five heads. The first two heads have no relation to this controversy. The remaining heads are as follows:—

"Thirdly, where a known described and defined article is ordered of a manufacturer, although it is stated to be required by the purchaser for a particular purpose, still if the known, described, and defined thing be actually supplied, there is no warranty that it shall answer the particular purpose intended

by the buyer: Chanter v. Hopkins, 4 M. & W. 399; Olivant v. Bayley, 5 Q.B. 288.

"Fourthly, where a manufacturer or a dealer contracts to supply an article which he manufactures or produces, or in which he deals, to be applied to a particular purpose, so that the buyer necessarily trusts to the judgment or skill of the manufacturer or dealer, there is in that case an implied term or warranty that it shall be reasonably fit for the purpose to which it is to be applied: Brown v. Edgington, 2 M. & G. 279; Jones v. Bright, 5 Bing. 533. In such a case the buyer trusts to the manufacturer or dealer, and relies upon his judgment and not upon his own.

"Fifthly, where a manufacturer undertakes to supply goods manufactured by himself, or in which he deals, but which the vendee has not had the opportunity of inspecting, it is an implied term in the contract that he shall supply a merchantable article: Laing v. Fidgeon (1815), 4 Camp. 169, 6 Taunt. 108."

What is relied upon by the defendants is the statement under the fourth head, imposing liability upon a manufacturer or dealer "where the buyer necessarily trusts to the judgment or skill of the manufacturer or dealer." It is then only that there is a warranty that the article is warranted to be "reasonably fit for the purpose to which it is to be applied." Here the controversy does not fall in any way under the fifth head, because there is no doubt that the machine supplied was a "merchantable article," in the sense in which that expression was used. There is no defect in its material, workmanship, or design. The only question is its fitness for the purpose to which it was to be applied.

I have come to the conclusion that in each case in which the fourth rule can be applied it must be ascertained upon the facts of the particular case that the buyer trusted to the judgment or skill of the dealer. I am not concerned with the question of onus. It may be that there is the warranty unless the vendor is able to shew that the buyer did not trust to his judgment or skill. In this case I think it is clear upon the evidence that in the purchase of this particular machine the purchaser relied upon his own judgment and skill, and the knowledge and skill of Macdonald, his colleague and prospective partner, and that to read into this contract the term suggested would be, not to give expression to the real intention of the parties, but to make it entirely the opposite of what was their true intention.

For reasons to be explained, I make no distinction between the Marion company (the manufacturers) and F. H. Hopkins & Co. (the vendors), the plaintiffs. I assume for the present that they stand in precisely the same position. When inquiry was made from Osborne as to the guarantee that went with the machine, he pointed to the broad gauge guarantee found in the catalogue. Nothing further was sought. At an earlier stage of the negotiations, the advice and opinion of the vendors was sought and given. It was not accepted. The purchasers chose what they thought would meet the requirements of the case; and that they have received. It is inconceivable that the vendors would have undertaken that the machine would work on the particular soil and under the particular circumstances found at the Soo, without making a thorough investigation into the situation. The machine is capable of digging; its capacity is as great as stated; the difficulty is that the soil on which they sought to operate it will not bear its weight. The question of weight is the very point upon which the purchasers refused to accept the vendors' advice.

Most of the cases upon which the doctrine in question is founded are cases where the subject-matter of the sale was material. . . .

[Reference to Jones v. Bright (1829), 5 Bing. 533; Brown v. Edgington (1841), 2 M. & G. 279; Jones v. Just, L.R. 3 Q.B. 197; Drummond v. Van Ingen (1887), 12 App. Cas. 284; Jones v. Padgett (1890), 24 Q.B.D. 650.]

As contrasted with cases of this type, there are the cases falling under the third rule. These are best understood by reference to the cases on which that rule is based: Chanter v. Hopkins (1838), 4 M. & W. 399; and Ollivant v. Bayley (1843), 2 Q.B. 288. . . .

In our own Courts some cases require notice: Bigelow v. Boxall (1875), 38 U.C.R. 452; . . . Ontario Sewer Pipe Co. v. Macdonald (1910), 2 O.W.N. 483; . . . Canadian Gas Power and Launches Limited v. Orr Brothers Limited (1911), 23 O.L.R. 616.

These cover the most important English cases prior to the Sale of Goods Act and cases in our own Courts. Perhaps Randall v. Newson (1877), 2 Q.B.D. 102, ought to be mentioned. The real value of that case is the discussion of the extent of the warranty, and the holding, in harmony with the earlier decisions, that there is no exception as to latent and undiscoverable defects.

There is a curious divergence of opinion as to the effect of the Sale of Goods Act. Moss, C.J.O., in the Orr case, refers to decisions in which it is said that the Act only formulates the already existing law. In Bristol Tramways, etc., Carriage Co. v. Fiat Motors Limited, [1910] 2 K.B. 831, Cozens-Hardy, M.R., takes an entirely different view: "I rather deprecate the citation of earlier decisions . . . The object and intent of the statute of 1893 was, no doubt, simply to codify the unwritten law applicable to the sale of goods; but, in so far as there is an express statutory enactment, that alone must be looked at, and must govern the rights of the parties, even though the section may to some extent have altered the prior common law."

Conversely, decisions upon the wording of the statute must, it seems to me, be received with caution, where, as here, we still have the common law.

I do not find anything in the subsequent cases which is really in conflict with the law laid down in the earlier cases, so far as they relate to the matters now in controversy. The Bristol Tramways case is much relied upon by the defendants; but, on perusing the case, it will be found that there is, as put by the Master of the Rolls, "ample evidence that the plaintiffs did rely upon the defendants' skill or judgment." That case also turns upon the finding of fact that the goods were not of merchantable quality. The defendants sought to escape liability by an argument based upon the construction proper to be given to the statute.

Throughout this discussion, I have treated the case as if the plaintiffs were manufacturers. I think all the cases, if carefully examined, indicate that there is no distinction between a manufacturer and a dealer. This question is discussed and satisfactorily dealt with in the case of Wallis v. Russell, [1902] 2 I.R. 585; a case which is also of value as shewing the genesis of the clause in the Sale of Goods Act. See also Brown v. Edgington, 2 M. & G. 279.

I have not found it necessary to discuss a question which appears to me of importance if the view I have taken is not entitled to prevail. It seems to me that what is here sought by the defendants is an unwarrantable extension of the warranty upon which they rely. The warranty, as I understand it, is, that the machine shall be "fit for the particular purpose" for which it is to be used. What the defendants seek is really a warranty that they can successfully accomplish their purpose.

The machine was fit to dig. That, as I would understand it, was the purpose. The complaint is not based upon the unfitness of the machine in that sense, but upon the failure of the scheme designed by the defendants of using a steam shovel in sewer excavation in the soft soil found at Sault Ste Marie. See Shepherd v. Pybus (1842), 3 M. & G. 868, where, on the sale of a barge, the implied warranty was held to be that "the barge was reasonably fit for use as an ordinary barge" and applicable to "the general use of the barge" and not "fitness for use for the particular purpose for which it was intended by the buyer."

In all aspects of the case I think the defendants fail, and there must be judgment for the plaintiffs for the amount claimed, with costs.

MIDDLETON, J. JANUARY 12TH, 1914.

*RE NORDHEIMER.

Will — Construction — Marriage Settlements — Covenants to Bring Shares of Estate into Settlement—Application to Interests under Will—Necessity for New Settlements—Form of a "Proper Settlement"—After-acquired Property —Power to Purchase Property for Use as Family Residence—Power of Appointment.

Several questions arising upon the will of Samuel Nordheimer, deceased, were determined by MIDDLETON, J., on the 3rd October, 1913, upon an originating notice: 29 O.L.R. 350, ante 74.

Certain other questions arose after the former decision, and were argued before MIDDLETON, J., in the Weekly Court at Toronto.

D. W. Saunders, K.C., for the trustees.

I. F. Hellmuth, K.C., for Roy Nordheimer.

A. W. Anglin, K.C., for Mrs. Cambie.

Travers Lewis, K.C., for Mrs. Houston.

Christopher C. Robinson, for the remaining daughters of the testator.

H. S. Osler, K.C., for the Official Guardian.

*To be reported in the Ontario Law Reports.

MIDDLETON, J.:—The questions arise on the same clauses of the will, clause 15 and clause 18, and upon the effect to be given to covenants to be found in the marriage settlements of the daughters Mrs. Cambie and Mrs. Houston.

In the first place, the testator has directed that the share of each son or daughter in the residue is to be paid over on the youngest child attaining the age of twenty-one years. The time of distribution is now past.

In Mrs. Cambie's marriage settlement she has covenanted with the trustees of the settlement "that she will at all times and from time to time execute and do all these matters and things which may be necessary for more effectually assigning and transferring to and vesting in the said trustees. . . . and also all the property real and personal to which she the said party of the second part may become entitled under the will or as one of the heirs or next of kin of " Samuel Nordheimer, her father. In the settlement it is recited that she has a prospective interest in the estate of her father, and that she agrees that the amount of this prospective interest shall be settled under the terms of the trust deed.

In Mrs. Houston's marriage settlement there is a similar recital and a similar covenant.

I think that these covenants undoubtedly bind the one-third interest in the residue.

I do not think that the covenants apply to the two-thirds interest or to the $100,000 given by clause 15. I think that they are subject to the terms of the will, and that the last part of clause 15, "the shares of my daughters in my estate shall be deemed separate estates free from the control of their husbands respectively and shall not be anticipated, and in the event of the marriage of any of my daughters I direct that proper settlements shall be made to carry out this intention," requires a settlement to be made to carry out the intention of the testator as found in the clause in question. The intention, as I gather it from the entire clause, is, that the property shall be held for the life of the daughter; for the money is to be invested "during the lifetime of such children for their benefit." The daughter is to receive the income, for the provision is that the trustees "do pay the income arising from such sums so invested to them respectively," and then the shares are to be "deemed separate estate free from the control of their husbands respectively," and "shall not be anticipated."

I do not think that it follows that, in the case of the daughters already married and having settlements, the existing

settlement is necessarily such a settlement as is contemplated. I am clear that Mrs. Cambie's settlement is not.

After giving the matter the best consideration I can, I think that a "proper settlement" under the circumstances, is one which will (a) give the income to the wife for life, (b) give her the power to appoint after her death to her husband and children as a class or to any one or more of them to the exclusion of any other or others and for such interests and in such proportions, if more than one appointee, as she may see fit, and (c) give the estate after her death, in default of appointment or in so far as appointment should not extend, to her husband, if he survives, for life, and after his death to issue, and, failing issue, to the wife's next of kin. This, I understand, meets the wishes of all concerned.

I think that there should be power, with the wife's consent and approval, to purchase the property for the use of the wife as a home for herself and her family. The issue of any child who may predecease the wife should be declared to be within the power of appointment, and should take the share of the deceased child in default of the exercise of the power.

Another of the daughters, Mrs. Kirk, married during the lifetime of the testator. I think that her share is to be dealt with in the same way. She will take one-third of her share of the residue absolutely, as she is not hampered by any covenant. The $100,000 and two-thirds of the residue must be settled. The words "and in the case of the marriage of any of my daughters" are general, and do not relate merely to the case of marriage after the testator's death.

This, I think, covers everything that has now been argued. I think that the view that I have expressed with reference to the effect of the covenant in the settlement is in accordance with the decision in In re Bankes, [1902] 2 Ch. 333. The after-acquired property is, I fear, undoubtedly caught by the covenant contained in the settlement.

Loch v. Bagley, L.R. 4 Eq. 122, is of no particular assistance regarding the form of settlement, as there the will directed the property given the daughters to be settled upon themselves strictly. Lord Romilly, endeavouring to follow the testator's direction, directed the property to be settled so that the income would go to the wife for life; if she should die in the lifetime of her husband, to go as she should by will appoint; and, in default of appointment, to her next of kin, exclusive of her husband; and, if she should survive her husband, the property

should go to her absolutely. This will was radically different from the will here, and I think I am more nearly following the testator's wishes, as expressed, by directing a settlement in the form outlined.

Loch v. Bagley was followed in Re Hamilton (1912-13), 27 O.L.R. 445, 28 O.L.R. 534. There the direction was quite different from that here found. The property was to be settled so that, in the event of the daughter's marriage, "it will be impossible for her or her husband to encroach upon the same." Here the dominant ideas are to keep the property for the daughter during her life and to keep it free from the husband's control.

Order accordingly. Costs out of the estate.

If desired, a form of settlement may be prepared and approved.

MIDDLETON, J. JANUARY 12TH, 1914.

McNALLY v. ANDERSON.

Dower—Sum in Gross in Lieu of—Principle of Computation—Dower Act, 9 Edw. VII. ch. 39, sec. 23—Alienation of Land by Husband Subject to Dower—Damages or Yearly Value at Time of Alienation—Improvements—Increase or Decrease in Value.

Appeal by the plaintiff, the widow of James McNally, deceased, from the report of the Local Master at St. Thomas, upon a reference directed by the trial Judge to ascertain the amount due to the plaintiff in respect of her claim to dower in certain lands of her deceased husband: 4 O.W.N. 901.

W. R. Meredith, for the plaintiff.

F. S. Mearns, for the defendant.

MIDDLETON, J.:—James McNally was the owner in fee simple of the lands in question. On the 10th May, 1899, he made an assignment for the benefit of his creditors, but his wife did not join for the purpose of barring her dower. McNally died some twelve years later, on the 22nd October, 1911. The assignee sold the land subject to the wife's dower right, realising a comparatively small sum. After the purchase, the then existing buildings were pulled down, and several erected upon the land.

By the judgment of the trial Judge, 4 O.W.N. 901, the plaintiff was held entitled to her dower, and the action was referred to the Master to fix the value of the dower; the parties apparently assenting to her receiving a sum in gross. The Master by his report has allowed $116.48. The principle upon which this computation was made is now attacked.

The old saw-mill is not of great value, and probably would, at the time of the death, have had no value. The Master has assumed to find the value of the land at the time of the alienation, and to add to it the value of so much of the material of the old buildings as was used in the construction of the new, and then give the widow the capitalised value of the one-third of the income that would be produced upon the investment of this sum.

Prior to the statute which governs this case, now found as 9 Edw. VII. ch. 39, sec. 23, the widow would have been entitled to take one-third of the rental produced by the property as it was on the date of her husband's death. By this statute it is provided that "the value of permanent improvements made after the alienation of the land by the husband . . . shall not be taken into account; but the damages or yearly value shall be estimated upon the state of the property at the time of such alienation . . . allowing for the general rise, if any, in the price and value of land in the particular locality."

In case of the owner who has made improvements, the Legislature has substituted an arbitrary standard, "the state of the property at the time of the alienation." The widow may shew a general increase of value, and so increase the amount coming to her; but she is not subject to having the amount cut down either by a general depreciation of the value of land or upon any hypothetical view that, apart from the improvements, the value would have depreciated.

The witness Deo shews that at the time of the alienation the property would have rented at from $300 to $350 a year. There is no evidence which would justify any finding that there had been a general increase in value.

Wallace v. Moore, 18 Gr. 560, is in accordance with this; and so also is Robinet v. Pickering, 44 U.C.R. 337.

The widow is sixty-seven years of age; and, taking her share of the rental as $100 per annum, she would now be entitled to $722, on the basis of interest at five per cent., the legal rate, and also entitled to $200 for the two years which have elapsed since the death of her husband: a total of $922.

It is some satisfaction that this value of dower is in accord with the view taken by the prospective purchaser, who valued the land at $2,000 as free from dower, but offered only $700 for it subject to dower; stating that he would have gone as high as $1,000.

The report will be varied accordingly, and I can see no reason why costs should not follow the event.

MIDDLETON, J. JANUARY 13TH, 1914.

FURNESS v. TODD.

Mortgage—Sale of Land Subject to—Equitable Obligation of Vendee to Pay—Conveyance not Executed by Vendee—Agreement under Seal—Recital—Specialty Debt—Absence of Covenant—Assignment of Supposed Covenant—Action by Assignee to Recover Mortgage-money — Necessity for Notice of Assignment—Rule 85—Pleading—Statement of Claim Disclosing no Cause of Action—Refusal to Amend—Statute of Limitations—Summary Dismissal of Action.

Motion by the defendant to dismiss the action because the statement of claim disclosed no cause of action. The action was brought to recover the sum of $2,300, which, the plaintiff alleged, the defendant covenanted to pay to the plaintiff's assignor.

The motion was heard by MIDDLETON, J., in the Weekly Court at Toronto, on the 12th January, 1914.

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

A. McLean Macdonell, K.C., for the plaintiff.

MIDDLETON, J.:—On the 19th March, 1891, Peter Furness made a mortgage to Roberts et al. On the 1st April, 1892, Furness sold the lands to the defendant, subject to the mortgage, $2,300, a portion of which the defendant "hereby assumes and covenants to pay off." There was in fact no covenant, and the defendant did not sign the conveyance. The statement of claim improperly describes the obligation of the defendant to pay the mortgage as being a covenant.

On the 13th December, 1893, an agreement was made between Furness and the defendant, wherein it was recited that the defendant had agreed to assume and pay off the mortgage in ques-

tion to the extent of $2,300. This agreement, although under seal, would not operate so as to make the equitable obligation of the defendant a specialty debt: Bank of Montreal v. Lingham (1904), 7 O.L.R. 164. It contains no covenant.

On the 20th March, 1912, by an assignment referred to in the pleadings, but which both counsel agreed should be produced and referred to, Furness, after reciting erroneously a covenant in the deed to the defendant, and his agreement to assign that covenant to the plaintiff, "doth hereby assign to" the plaintiff "all his right, title, benefit, and advantage under said covenant in the said deed of land dated April 1st, 1892, and under the said agreement hereinbefore set out dated 13th December, 1892." Subsequently, on the 30th June, 1912, the mortgage in question was also assigned to the plaintiff.

This action is brought on the 5th November, 1913.

The motion is based upon the ground that the assignment is inoperative, because no notice of assignment was given to the defendant. It is admitted by both counsel that this is the fact.

No amendment should now be allowed, and no new action can be brought, by reason of the lapse of the statutory period, even assuming that the liability is a specialty liability.

Upon the document produced it is clear, I think, that the plaintiff cannot succeed. There is no covenant, and the assignment purports to be an assignment of a covenant, and will not operate to pass an equitable obligation. The case in this aspect is entirely covered by Credit Foncier Franco-Canadien v. Lawrie (1896), 27 O.R. 498.

Taking this view of the case, it is perhaps better that I should not determine the other question. Whether an assignment, which cannot be brought within the statute 1 Geo. V. ch. 25, sec. 45, because no notice has been given to the debtor, can be regarded as an equitable assignment, and the question whether that statute ought to be confined to assignments of legal as distinct from equitable choses in action, ought, I think, to be left to be dealt with when necessary for the decision of the case.

Torkington v. Magee, [1902] 2 K.B. 427, was reversed upon the facts, in [1903] 1 K.B. 644; the Court declining to determine the question raised. Hudson v. Fernyhough, 61 L.T.R. 722, is not an authority on this point, as the motion there was to add an assignor. See also the discussion by my brother Riddell in Sovereign Bank v. International Portland Cement Co. (1907), 14 O.L.R. 511, at p. 517.

Rule 85 may be held to get over the necessity of having the

assignor before the Court. It may be that the only effect of the omission to give notice to the debtor will be that the assignee loses priority, and that a subsequent assignee who gives notice will obtain precedence. See, e.g., Lloyds v. Pearson, [1901] 1 Ch. 865.

The statement of claim, therefore, discloses no cause of action, and the action ought to be dismissed with costs.

MIDDLETON, J. JANUARY 14TH, 1914.

RE ACHTERBERG.

Will—Construction—Bequest to Widow—"Rest"—"Residue" —Encroachment for Maintenance.

Motion by the executor of one Achterberg, deceased, for an order determining certain questions arising in the administration of the estate as to the proper construction of the will.

E. P. Clement, K.C., for the executor and widow.

F. W. Harcourt, K.C., for the infants and the representative of the adults interested other than the widow.

MIDDLETON, J.:—The testator's estate is almost all personal. He gives the widow "the benefit and use of the rest of" his estate during her lifetime. This expression "rest" means the residue after payment of debts and legacies.

After her death, the "residue," i.e., what then remains, is to be divided.

This brings the case within Re Story (1909), 1 O.W.N. 141, and Re Johnson (1912), 27 O.L.R. 472, and indicates that the widow is entitled to encroach upon and use the money for the maintenance.

At the request of the parties, to avoid trouble in the future, I fix the amount proper to be used at $450 per annum. Costs out of the estate.

MIDDLETON, J., IN CHAMBERS. JANUARY 14TH, 1914.

RE MINING LOCATIONS D. 199 ET AL.

Revenue—Supplementary Revenue Act, 1907, 7 *Edw. VII. ch.* 9, *sec.* 20*a*—*Amending Act*, 1 *Geo. V. ch.* 17, *sec.* 3—*Payment of Provincial Taxes—Owners of Mining Locations—Summons to Delinquent Co-owners—Form of—Several Parcels—Interests of Persons in Mining Locations.*

Application by A. M. Hay to make absolute a summons issued under sec. 20*a* of the Supplementary Revenue Act, 1907, 7 Edw. VII. ch. 9, as amended by 1 Geo. V. ch. 17, sec. 3.

E. W. Wright, for the applicant.

MIDDLETON, J.:—The order served was made by my brother Lennox on the 31st July last. I have spoken to him about the matter, and he tells me that an application was made before him for a summons under the statute, but that he is in no way responsible for the form the proceedings have taken.

The so-called summons is in the form of a mandatory order, directed to the owners of the mining locations in question, requiring them to "make payment of the taxes due under section 16 of the Supplementary Revenue Act, 1907, as amended by 1 Geo. V. ch. 17, within three months from the service of a copy of this order." Then follow provisions for service by posting up in the Land Titles office at Kenora and for sending copies by registered mail. Clause 3 is: "And it is further ordered that the return herein be made before the presiding Judge in Chambers at Osgoode Hall on or before the 13th day of January, 1914.

I do not think that this is in any sense a compliance with the statute. I think that the summons should specify the amount of taxes due upon the locations, and should specify clearly the precise sum to be paid by the respective persons to whom the summons is addressed. The summons should then require payment within three months, and name a day after the expiry of the three months when cause must be shewn, before the Judge issuing the summons, to an application then to be made to vest the interest of the delinquent co-owner in the location.

There is another difficulty in the applicant's way. He does not bring himself within the statute; for the statute only applies when it is shewn that the lands are held by two or more

co-owners—an expression which is wide enough to cover the case of joint tenants, tenants in common, and coparceners.

Here the material put in shews, as to five parcels, that the lands are owned by the Cedar Island Gold Mining Company. Against them all, Ahn has registered a caution. Against the third there is a charge in favour of the Dominion Gold Mining and Reduction Company, for the sum of $500, registered prior to Ahn's caution.

As to the sixth parcel, the land is shewn to be owned by one Engledue, and against it a caution has been registered by Hay, the applicant. This is supplemented by an affidavit of Mr. Hay shewing that he had an agreement with Engledue under which he was entitled to a one-third interest in a lease which Engledue had applied for with respect to this parcel.

As to the parcels owned by the Cedar Island Gold Mining Company, Hay claims to be the owner of 8,000 shares in the company, and to have paid all the taxes.

Both the Cedar Island Gold Mining Company and the Dominion Gold Mining Company have gone into liquidation. The nature of Ahn's claim is not disclosed.

Clearly, the statute cannot apply, save possibly as to the lots in which Engledue is interested; and it is doubtful if it applies even there. A mortgagor and mortgagee are not co-owners. Certainly one summons should not be issued with respect to all the parcels.

The material filed does not shew what taxes were paid. The applicant contents himself with saying "all the taxes."

On this material, apart from the technical objections, the order sought cannot be made. To avoid difficulty, in the future under this statute, I have supplied the Clerk in Chambers with a form of summons which may be found of use.

MIDDLETON, J., IN CHAMBERS. JANUARY 14TH, 1914.

RE NORTHERN HARDWOOD LUMBER CO. v. SHIELDS.

Division Court—Want of Territorial Jurisdiction—Notice Disputing Jurisdiction—Failure of Defendants to Attend Court—Judgment Entered for Plaintiffs—Real Defence—Prohibition Limited so as not to Prevent Transfer of Action to Proper Court—Security for Claim—Costs.

Motion by the defendants for prohibition to the First Division Court in the County of Grey.

The motion was heard by MIDDLETON, J., in Chambers, on the 9th January, 1914.

Featherston Aylesworth, for the defendants.

T. L. Monahan, for the plaintiffs.

MIDDLETON, J.:—Under a contract made at Alvinston, in the county of Lambton, the defendants, who reside at Mosa, in the county of Middlesex, contracted to sell certain lumber to the plaintiffs, whose head office is at Owen Sound. The Lumber was not delivered. Action is now brought in the First Division Court of Grey to recover $82.50 damages for this alleged breach of contract. A notice disputing the territorial jurisdiction of the Court was duly filed. The defendants, assuming that the action would be transferred, did not attend the Court. Judgment was given for the plaintiffs, and execution was ultimately issued. The money has been paid into Court, but not yet paid over.

It must be conceded that the Owen Sound Court (First Division Court of Grey) had, in these circumstances, no jurisdiction.

Upon the argument the usual cases were cited.

I do not desire to depart in any way from what I said in Re Canadian Oil Companies v. McConnell (1912), 27 O.L.R. 549; but I think that the case in hand differs from that, in that here it appears to me to be sufficiently shewn that there is a real case to try.

Therefore, exercising the discretion that I have, I grant the prohibition—limited, however, in such a way as not to prevent an order being made to transfer the action to the proper Court, where it may be tried upon its merits.

The money in Court should remain as security for the plaintiffs' recovery if they succeed at the trial; and, as the whole trouble has been brought about by the negligence of the defendants in not appearing at the hearing, I give no costs of the motion. I regret that I have not power to make the payment of costs a condition of the making of the order, though there is perhaps enough in the case to indicate that this would be unduly severe.

MIDDLETON, J. JANUARY 15TH, 1914.

RE JONES AND TOWNSHIP OF TUCKERSMITH.

Highway—Closing and Sale of Unopened Portion of Street as Shewn on Plan—Adoption by Municipality for Public Use not Shewn—By-law of Council—Municipal Act, 1903, *sec.* 632—*Surveys Act*, 1 *Geo. V. ch.* 42, *sec.* 44—*Registry Act*, 10 *Edw. VII. ch.* 60, *sec.* 44, *sub-sec.* 6.

Motion by certain ratepayers of the township of Tuckersmith to quash by-law number 3 of 1913, being a by-law to close and dispose of part of Mill street in the village of Egmondville.

W. Proudfoot, K.C., for the applicants.

R. S. Robertson and R. S. Hays, for the township corporation, the respondents.

MIDDLETON, J.:—The village of Egmondville is an unincorporated village in the township of Tuckersmith. It forms part of lots 10 and 11 in the 2nd concession—Centre street corresponding with the division between the two lots. According to a plan registered on the 8th September, 1857, Mill street extends north from Bayfield street through Queen street one block west of Centre street. On this plan it does not extend north of Queen street.

On the 16th June, 1875, a by-law was passed by the township council "to open up certain streets known as Water and Mill streets in the village of Egmondville, being composed of parts of lots 10 and 11 in the township of Tuckersmith, as registered in the registry office of the county of Huron. This clearly refers to Mill street between East Bayfield street and Queen street, as shewn on the plan of 1857.

In 1873, a plan had been registered of lands to the north of the lands covered by the old plan of 1857, and this shewed an extension of Mill street from the north side of Queen street northward. I do not think that this portion of Mill street was intended to be affected by the by-law of 1875, as it refers to the street as shewn upon the original plan.

The southern portion of Mill street was opened up and has been used as a travelled road for many years. The portion north of Queen street has never been opened. Lots have been sold in accordance with the plans of 1873; but, as far as the material

shews, the municipality has in no way adopted this portion of Mill street, and the street has never been opened.

Richard Kruse owns land adjoining Mill street extension, and for some time there has been a conflict between him and the other land-owners. They have recently petitioned to have the street opened up, but the municipality have refused. He has desired to have it closed and sold. The street is probably of no great value as it now is, and Kruse desires to use it in connection with his brick-yard.

On the 16th November, 1912, according to the minutes, "Mr. R. Kruse applied to the council for the purchase of that portion of Mill street in the village of Egmondville north of the intersection of Queen street for use in connection with a brick and tile yard;" whereupon the council resolved "that, as, in our opinion, Mill street will not be required for purposes as a street, we grant the request of Mr. Kruse, and arrangements be made for the sale of the land, necessary notices posted up and advertised, and the Reeve be authorised to employ a solicitor in the matter." On the 23rd December, the council met, heard the parties interested, and resolved "that in the matter of the opening and sale of Mill street no action be taken at this meeting until further consideration of the question be given."

On the 13th January, the new council met, and, without any notice to the objecting owners, passed a by-law, on three readings, for the closing and sale of the street. In pursuance of this the street has been conveyed by the municipality to Kruse for $136.

Several serious objections are urged to the validity of the by-law. I do not need to consider all, as I think it is plain that the municipality, having failed to accept the proper dedication of the street as a highway, cannot assume to close and sell it and keep the proceeds. Section 632 of the Municipal Act of 1903 relates to original road allowances and other public highways, roads, streets, or lanes.

A road allowance shewn upon a plan which has not been assumed by the municipal corporation for public use does not fall within this designation. For some purposes the street is a highway; but, subject to the rights of the public, it remains to be governed by the Surveys Act, 1 Geo. V. ch. 42, sec. 44. Such a road may be closed under the provisions of the Registry Act, 10 Edw. VII. ch. 60; and, by sub-sec. 6 of sec. 44, the allowance, upon the road being closed and the public rights extinguished, belongs to the owners of the land abutting thereon, and not to

the municipality. The Surveys Act gives the fee to the adjoining lot-owner in place of the original owner.

The by-law is, therefore, bad, and should be quashed. Costs should follow the event.

MIDDLETON, J. JANUARY 15TH, 1914.

*GUELPH WORSTED SPINNING CO. v. CITY OF GUELPH.

*GUELPH CARPET MILLS CO. v. CITY OF GUELPH.

Municipal Corporation—Bridge Erected over River—Obstruction to Flow of Water in Spring Freshets—Injury to Property—Statutory Authority—Duty of Corporation—Negligence — Interference with Private Rights — Evidence — Absence of Expert Advice—Negligence in Construction—Damages—Nuisance—Injunction.

Three actions for damages for flooding the plaintiffs' lands and works.

The works of both the plaintiffs were flooded in the spring of 1912, and the works of the plaintiffs the Guelph Worsted Spinning Company in the spring of 1913, the flooding being caused by the erection of a bridge by the defendants across the river Speed at Neeve street, which proved inadequate to permit the passage of the waters during spring freshets.

The actions were tried at Guelph in June and November, 1913; and argument was heard at Toronto on the 29th November, 1913.

Sir George Gibbons, K.C., and G. S. Gibbons, for the plaintiffs.

I. F. Hellmuth, K.C., J. J. Drew, K.C., and P. Kerwin, for the defendants.

MIDDLETON, J. (after setting out the facts at length) :—The right to the uninterrupted flow of the water past the plaintiffs' property is not disputed, but the defence rests upon the law laid down in Hammersmith, etc., R.W. Co. v. Brand (1869),

*To be reported in the Ontario Law Reports.

L.R. 4 H.L. 171, and Vaughan v. Taff Vale R.W. Co. (1860), 5 H. & N. 679, and the statutory authority of the Municipal Act. The principle is thus put in Canadian Pacific R.W. Co. v. Roy, [1902] A.C. 220; "The Legislature is supreme; and, if it has enacted that a thing is lawful, such a thing cannot be a fault or an actionable wrong. The thing to be done is a privilege, as well as a right and duty." The obvious exception as to negligence is indicated in the words of Lord Blackburn in Geddis v. Proprietors of Bann Reservoir (1878), 3 App. Cas. 430, 455.

. . .

If the very thing authorised necessarily interferes with the common law rights of others, then there can be no right of action, and one expects to find in the statute some provision for compensation; but the absence of such a provision does not create a right of action; it only suggests the more careful scrutiny of the Act to ascertain whether the real intention of the Legislature was to permit the interference with private rights without compensation.

In accordance with this principle, it has been laid down that, where the Legislature has conferred authority by an Act which is permissive in its terms, there is no authority to ignore the common law rights of others. . . .

[Reference to Metropolitan Asylum District Managers v. Hill (1881), 6 App. Cas. 193, 198, 203; Canadian Pacific R.W. Co. v. Parke, [1899] A.C. 535; West v. Bristol Tramways Co., [1908] 2 K.B. 14; Halsbury's Laws of England, vol. 21, secs. 785, 879.]

In the Municipal Act authority is given to erect a bridge, but a bridge could have easily been erected so as not to dam the stream even in times of freshet and cause it to overflow its banks and flood the riparian proprietors.

In this view of the case, there is, it seems to me, liability quite apart from any finding of what I may call actual negligence: (1) because the very thing done here was not authorised by the Legislature, but the construction and mode of construction was left entirely to the municipality; (2) because the legislation was permissive only; and (3) because the construction of a bridge only was authorised, and not the obstruction of the flow of the river.

I might here end my judgment, but it is better for a trial Judge to indicate his view upon all issues presented and so lighten the labours of any appellate Court.

I think that there was in this case negligence in the construction of this particular bridge. There was no reason why

an ample water-way could not have been provided. Nothing in the physical situation invited or required that the water-way should be cut down to the smallest dimension consistent with safety. No investigation is shewn to have been made previous to the construction of the bridge; and, for the reasons given by Mr. Lea and Mr. McCrae, whose evidence appeals most strongly to me, I think that in this case a much larger space should have been left.

Mr. Mitchell and the other engineers called for the defence now give their opinion ex post facto, and justify the design of the bridge.

If negligence, in its ordinary sense, is necessary for the plaintiffs' success, and if the municipality had obtained and acted upon these opinions in the first instance, I could not have found against them, because they would have acted properly and without negligence if they relied upon the advice of competent engineers. But that is not this case. In the first place, I do not think that these engineers would have advised this particular structure if consulted before the work was done. Now the object before them is to ascertain how small a water-way can be justified. If consulted before the work was done, when the reduction of the water-way was not a thing to be sought after, as it was no advantage in any way, the attitude would have been quite different, the motto "safety first" would have had its influence, and an ample space would have resulted. They would not have sought to ascertain the smallest justifiable factor of safety, but would have made ample allowance.

I say this without in any way disparaging either the honesty or ability of these engineers, but to indicate the unconscious effect of the different view-point.

Neither law nor reason justifies the position taken by the defendants that where works are constructed without expert advice, which should have been had before the construction, the defendants can be placed in the same position as if they had obtained advice by producing experts at the trial who say, "If we had been consulted, we would have given advice which would justify the course adopted."

Apart from the infirmity of ex post facto theories already pointed out, the defendants are by this reasoning able to justify by calling one or two engineers whom they select out of the large number available. They may have now laid the situation before a score of engineers, and almost all of them may have condemned and only two or three may uphold the plan adopted. They, and they only, are called.

Where the work is in fact undertaken without expert advice, and expert advice should have been obtained, this is negligence; but it is not enough to entitle the plaintiffs to succeed, for the defendants may have ignorantly constructed a work on quite proper lines, and the sufficiency of what has been done becomes a fact to be ascertained upon the whole expert evidence, weighing and considering the reasons given by the experts on both sides. . . .

[Reference to Jackson v. Hyde (1869), 28 U.C.R. 294.]

The question in issue there was the negligence of the man professing skill, and the case would have been quite in point here if the work had been done by an engineer who had advised it. Then it would not have been open to me to find negligence on his part, in view of the evidence of the engineers at the trial; but, as I have pointed out, when the work is done without advice or skill, the question is, it seems to me, a different one.

Schwoob v. Michigan Central R.R. Co. (1905), 9 O.L.R. 86, is in no way in conflict with this.

Some endeavour was made at the trial to shew that the flooding of the premises in question was not in fact caused by the bridge, but was caused by the small concrete diverting dam erected by the defendants below the bridge. It was also contended that the defendants are not responsible because the flooding would have taken place quite apart from the bridge.

On the evidence, I am against the defendants on both these contentions.

With reference to the damages, I accept the plaintiffs' evidence, and I discredit Miller, when he seeks to attack his former employers. I think that as to the claim there is in some of the details some inflation, and that the amounts should be reduced slightly below the figures given. Absolute accuracy cannot be expected in estimating the exact amount of loss, particularly when the amount is estimated on a percentage of values; and, while the plaintiffs' evidence is fair, I think the amounts should suffer a general reduction, which will cover some of the minor matters in which error may exist.

I would award the Worsted company for the 1912 floods $15,000, and for the 1913 floods $6,000; and the Carpet company for the 1912 floods $5,500.

Costs should follow the event.

The bridge as it stood in 1912 and early in 1913 should be declared a nuisance, and an injunction should be granted. See Alexander Pirie & Sons Limited v. Earl of Kintore, [1906] A.C. 478.

LANG v. JOHN MANN BRICK CO. LIMITED—KELLY, J.—JAN. 12.

Master and Servant—Injury to and Death of Servant—Superintendent of Factory—Negligence—Defective System—Evidence—Workmen's Compensation for Injuries Act—Findings of Jury—Nonsuit.]—William Frederick Lang was in the employment of the defendants at their brick manufacturing plant, and on the 1st April, 1913, met his death in a large hopper, in which sand and lime were placed, and from the bottom of which these materials passed to the machine by which the bricks were made. On the outside of the hopper was a ladder leading up to a platform near its top, around which was a railing. Inside the hopper was a ladder, leading downwards from its top. The sand and lime in the hopper had a tendency to clog which necessitated at times some operation to start again the flow towards the opening at the bottom. On the afternoon of the day of the accident, Lang was found dead in the lower part of the hopper, the sand and lime having run in upon him and smothered him. The plaintiff, the administratrix of the deceased's estate, brought this action alleging negligence on the part of the defendants which caused the death. Substantially the evidence for the plaintiffs was that the deceased, who was a machinist, was in the defendants' employment about two years; at the time of his death he was superintendent of the factory, and had charge of the men and the plant, his duties being to run the plant and see that the bricks were turned out, and to do repairs; he was manager on the repairs; alterations had been made to the hopper previously, by Morrison, the deceased's brother-in-law, under the deceased's direction; an iron rod was provided for use by persons standing on the platform, outside and near the top of the hopper, in starting the sand and lime running at times when they became clogged or inert; a muzzle to go over the nose and mouth was kept in the office, under charge of the deceased, for the use of those having occasion to enter the hopper, which would have protected him had he used it. It was stated by one of the plaintiff's witnesses that it was possible to have put a guard on the ladder, but that he did not think it could be placed far enough down to be of any use. Another witness said that there was no necessity for the deceased's entering the hopper; that the sand was running all right that afternoon; and that the sand and lime were not clogged and did not stop. Some of the witnesses called for the plaintiff thought that the iron bar could not be satisfactorily

operated; while others suggested possible improvements or alterations to the hopper, which they thought might overcome the clogging of the sand and lime; on their own shewing, however, these were not persons of mechanical skill; they were inexperienced in the working of this part of the plant, or of hoppers in general, and so were not competent to say whether any other system of operation or any other design of or addition to the hopper was more satisfactory than the one in use. A motion for a nonsuit was made, upon which judgment was reserved. The case went to the jury, who found negligence of the defendants in not having the ladder in the hopper protected, and assessed the damages at $1,000. The learned Judge (after stating the facts as above) said that there was no evidence that any other system was superior to or safer than this one; and he failed to see that there was any evidence that the defendants committed a breach of their common law duty towards the deceased, especially in view of the position which he occupied in the conduct of the defendants' business. There was equally an absence of the evidence necessary to render the defendants liable under the Workmen's Compensation for Injuries Act. The learned Judge was also satisfied that what the jury found to be the defendants' negligence, namely, failing to have the ladder protected, was not, in the circumstances, negligence for which they were liable. Action dismissed with costs. W. A. Hollinrake, K.C., for the plaintiff. J. Harley, K.C., for the defendants.

RE SCOTT AND WHITE—MIDLLETON, J.—JAN. 12.

Trusts and Trustees—Conveyance by Trustees—Consent of Cestui que Trust—Title to Land—Vendor and Purchaser.]—A petition under the Vendors and Purchasers Act to determine the validity of an objection to title. On the 26th September, 1893, the lands in question were conveyed in fee simple to Macdonald and Barnhart, "trustees for Catharine Barnhart." In the grant these words were repeated. On the 9th November, 1895, Macdonald and Barnhart, again described as trustees, conveyed the land to Catharine Barnhart, she joining in the conveyance for the purpose of expressing her consent thereto. The title was registered. All the parties were dead. The objection was, that evidence should be produced shewing the trusts upon which the trustees held the land; that these trusts

had been fully carried out; and that the trustees had the right to convey. MIDDLETON, J., said that this objection was not well taken. What the registered title disclosed was, that, while the legal estate was vested in Macdonald and Barnhart, they held it in trust for Catharine Barnhart. They conveyed with her assent and approval. There was no room, upon the known facts, for the suggestion that there was ever any trust deed or any trust other than a simple trust for Catharine. The objection taken indicated no defect in the vendor's title. Declaration accordingly. Costs to follow the event unless there was an agreement between the parties. H. R. Welton, for the vendor. G. T. Walsh, for the purchaser.

LANGWORTHY v. MCVICAR—LENNOX, J., IN CHAMBERS—JAN. 13.

Appeal—Leave to Appeal to Appellate Division from Order of Judge in Chambers—Rule 507*—Pleading—Validity of Marriage.*]—Motion by the defendant McVicar for an order for leave to appeal from an order of MIDDLETON, J., in Chambers, affirming an order of the Senior Registrar in Chambers, refusing to strike out of the defences of each of the other defendants a clause whereby it was alleged that the applicant was not the wife of the testator whose estate was in question. LENNOX, J., said that no good purpose would be served by giving leave to appeal. It was true that the Supreme Court of Ontario had no power to annul a marriage, but equally true that it was within the power and was the duty of the Court to inquire into and determine the intrinsic validity of alleged marriages when it incidentally or collaterally became necessary to do so in determining rights of inheritance, rights of property, and the like: A. v. B., L.R. 1 P. & D. 559; Prowd v. Spence, 10 Dom. L.R. 215. The applicants were not injured by having timely notice of the issues to be raised. They had not brought themselves within Rule 507. There were no conflicting decisions, and it did not appear that there was "good reason to doubt the correctness" of the order from which the applicants sought leave to appeal. Application dismissed; no costs. J. Haverson, K.C., for the defendant McVicar. J. W. McCullough, for the defendant Kains. Featherston Aylesworth, for the other defendants.

RE WILSON AND HOLLAND—LENNOX, J.—JAN. 13.

Vendor and Purchaser—Contract for Sale of Land—Requisitions as to Title—Application under Vendors and Purchasers Act—Costs.]—Application by a vendor, under the Vendors and Purchasers Act, for a declaration that he had shewn a good title as against the requisitions made by the purchaser. The learned Judge said that upon the argument the only requisitions to which the purchaser's counsel appeared to attach importance were numbers 2 and 8. As to 8, nothing was said beyond the fact that it was not abandoned. As to mortgages 2589 and 3085, there mentioned, it would appear to be proper that discharges of these should be obtained. The same was to be said as to number 3959, unless the title to the mortgage vested in Claude McLaughlin and merged in the fee under No. 18962. No explanation was given, so that this was a mere surmise suggested by the abstract. As to numbers 4002 and 18124, the vendor's answer (to 3 and 8) seemed to be sufficient. Requisition number 9 was not spoken of at all, but, if it had not been disposed of, the vendor's answer to it should be verified. Counsel for the purchaser said that he had not seen the evidence as to number 5; and as to it no declaration could be made. All questions as to the other requisitions, except as to the possible title of Alexander Christie, had been satisfactorily met. Having regard to the length of time which had elapsed, the character of the property, and the nature of the occupation, requisition No. 2 was sufficiently answered, and the title should be accepted as to this. There was nothing vague or indefinite in Lamb's affidavit. The 4th paragraph of the vendor's affidavit should be read as saying that he purchased "on the 30th day of December, A.D. 1813," with Shaver. This did not shew what this date should be. This affidavit should be amended; and, when the title is accepted and the transaction about to be closed, the purchaser should be at liberty to take the affidavits off the files—giving a receipt therefor—as vouchers for his title. The vendor to pay the costs of this application. H. D. McCormick, for the vendor. A. W. Greene, for the purchaser.