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APPELLATE DIVISION.

MAY 5TH, 1913.

*HUNT v. WEBB.

Master and Servant—Injury to Servant—Building Trades Protection Act, sec. 6—Breach of Employer's Duty—"Scaffolding"—Findings of Jury—Liability.

Appeal by the defendant from the judgment of LATCHFORD, J., on the findings of a jury, in favour of the plaintiff, in an action for the recovery of damages sustained by the plaintiff, who was a workman in the employment of the defendant, and was injured owing, as the plaintiff alleged, to the scaffolding upon which he was working having been unsafe, unsuitable, and improper, and not so constructed, protected, placed, and operated as to afford reasonable safety from accident to persons employed or engaged upon the building in and for the purpose of the erection of which the scaffolding was used: Building Trades Protection Act, sec. 6.

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

Strachan Johnston, K.C., for the defendant.

J. M. Godfrey, for the plaintiff.

The judgment of the Court was delivered by MEREDITH, C.J.O. (after setting out the facts):—It was contended by counsel for the appellant that the structure upon which the respondent was standing was not a scaffold, and was not intended to be used as a scaffold, and that the respondent, instead of using ladders

*To be reported in the Ontario Law Reports.

and a trestle with which he was provided for doing his work, had improperly used loose planks that were lying on the cross-pieces, but were not intended to be used as a scaffold.

There was, in my opinion, ample evidence to warrant a finding that this structure was a scaffold and was intended to be used as such by the respondent in doing the work upon which he was engaged. . . .

There was evidence to support the answers of the jury to the questions submitted to them; and there is, in my opinion, no ground for disturbing their findings.

It was, however, contended that there is no absolute duty imposed on an employer by the statute on which the respondent relies; and that the respondent's action, therefore, fails; and, in support of that contention, counsel relied on Britannic Merthyr Coal Co. v. David, [1910] A.C. 74, and Buller v. Fife Coal Co., [1912] A.C. 149.

The later case of Watkins v. Naval Colliery Co., [1912] A.C. 699, removes out of the way of the respondent any difficulty that might otherwise have existed—I do not say did exist—owing to expressions used by some of the Law Lords in the earlier cases.

The principle of the Watkins case is, in my opinion, clearly applicable to the case at bar. Section 6 creates an absolute duty on persons employed in the erection, alteration, repair, improvement, or demolition of a building, not to use scaffolding . . . or other mechanical and temporary contrivances which are unsafe, unsuitable, or improper, or which are not so constructed, protected, placed, and operated as to afford reasonable safety from accident to persons employed or engaged upon the building.

That this is a provision for the benefit of the workman is clear, and entitles him, if he suffers special damage from the contravention of it, to recover the damages which he has sustained: p. 702.

The appeal fails, and must be dismissed with costs.

MAY 5TH, 1913.

HUDSON v. SMITH'S FALLS ELECTRIC POWER CO.

Negligence—Injury to Person from Contact with Broken Live Wire upon Highway—Evidence—Judge's Charge—Findings of Jury—Insufficiency—New Trial.

Appeal by the defendants from the judgment of SUTHERLAND, J., upon the findings of a jury, in favour of the plaintiffs, in an action for damages arising from injuries sustained by the plaintiff Elizabeth Hudson by coming in contact with a broken live wire of the defendants upon a street in the town of Smith's Falls. The plaintiff Elizabeth Hudson was awarded $800 damages, and the plaintiff Henry Hudson, her husband, $500 damages.

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

C. A. Moss and H. A. Lavell, for the defendants.

D. L. McCarthy, K.C., for the plaintiffs.

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

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

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

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

In his charge to the jury, the learned Judge went very fully into the facts in evidence; and, had the jury followed his directions, the case would be much clearer than it is put in the answer which they gave. After finding that the appellants were guilty of negligence causing the accident, the jury defined the negligence as "insufficient inspection of service wire." There are several possible explanations of this answer if the charge of the learned Judge is examined. The following matters were pointed out by him:—

At p. 232, the learned trial Judge said: "If the plaintiffs shew that the defendant company allowed their wire to get out of repair, or by lack of proper inspection were negligent, then the defendant company would be liable. If, on the other hand, it is shewn by the evidence that it was the cable of the Bell Telephone Company which caused the accident, and the defendants could not, by reasonable inspection and oversight which they should have exercised, have discovered it in time, then, it may be, you will come to the conclusion that the defendant company are not liable, that the cause of the accident was the misconduct of the Bell Telephone Company. But, even if it were caused by the cable of the Bell Telephone Company, or in some way that you cannot see a primary blame to be placed upon the defendant company, and it appears in a satisfactory way to you from the evidence, or you can reasonably deduce it from the evidence, that, after the defendant company's wire was broken, the matter was brought to their attention, or such a time elapsed that they should have discovered it, and that in the meantime they did not repair it promptly, and the injury occurred, then, even though the Bell Telephone Company's cable

did cause the break, it might be that you would come to the conclusion that, owing to the dilatoriness—if there was such—of the defendant company in failing to repair the trouble after they were told of it, or after they should have discovered it, they would be liable."

And at p. 240 he said: "The plaintiffs also say that, in any event, if the defendants had been watching and inspecting as they should, the possibility or probability of the break would have been apparent, and could have been avoided, and should have been. And then they say that, in any event, the defendants had opportunities to learn of the defect in time to have prevented the accident."

At p. 245 he said: "If it occurred through a defect in the wire, through age or otherwise, through lack of proper insulation or anything of that sort, and you find that that is the cause of the breaking; if it occurred because the Bell Telephone Company's cable had got in such a position that it might break it, and the defendant company, by the exercise of proper precautions and reasonable inspection, could have discovered that and rectified it before the break occurred; if, in any of these ways, you think the wire broke—these are ways which may appear to you to be properly developed in or deducible from the evidence—the defendant company may, in your opinion, be properly made liable for the breaking of the wire, and that is negligence which you would hold them liable for."

At p. 248, he said: "In that connection you will have to determine whether the defendant company's wire was properly insulated at the point where it came in contact with the wire of the Citizens Company. And, in considering all this, you will have to determine where these wires were situated, the wires of the respective companies, and how close they were to each other."

In discussing question 2, the learned trial Judge thus instructed the jury: "If so, what was the negligence? Was it lack of inspection of the wire, was it through leaving a wire up that was not strong enough, was it through lack of inspection of the situation and the nearness of the Bell Telephone Company's cable—if you think that is the case—or what was the negligence of the defendant company? If there is one act of negligence, set it out there; if there is more than one act of negligence, set them out."

It is, therefore, clear that there were six points that the jury were asked to consider, involving lack of or careless inspection as an element of negligence. They were, in regard to the wire,

its age, its strength, its insulation, its proximity to the Bell Telephone Company's heavy cable, its nearness to the Citizens Company's wire—which is said not to have been properly insulated—and the prompt discovery and removal of it after it fell.

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

The jury may have known what they meant; but this is not sufficient. Their answer must be such that, having regard to the evidence adduced, the Court can say that there is evidence to support their finding, and that that evidence discloses a ground of legal liability. In this respect the appellants have a right to complain, especially in view of the sharp conflict among the witnesses as to the night of the occurrence and to the fact that throughout the trial the appellants, so far as the respondents were concerned, had their attention fixed on the one issue raised by the pleadings, and dealt only with the other points so far as they afforded an answer to the defence of the third parties.

Upon one of the charges of negligence—and the one perhaps most forcibly presented—a learned Judge has, in Roberts v. Bell Telephone Co., ante 1099, expressed the opinion that there is no duty to inspect wires periodically for the purpose of seeing that other wires have not been improperly placed in undue proximity. This, if correct, is an additional reason for ascertaining the exact meaning of the answer to question 2.

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

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

Judgment accordingly.

MAY 5TH, 1913.

*NORFOLK v. ROBERTS.

Municipal Corporations—Waterworks—Action by Ratepayer to Compel Corporation to Collect Rates from Persons Supplied with Water — Corporation Acting within its Powers—Absence of Fraud—Refusal of Court to Interfere—Discretion—Declaratory Judgment.

Appeal by the defendants the trustees of the Dale estate from the judgment of LATCHFORD, J., ante 419.

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

E. D. Armour, K.C., for the appellants.

W. N. Tilley and H. S. White, for the plaintiff.

T. J. Blain, for the defendant the Corporation of the Town of Brampton.

The judgment of the Court was delivered by MEREDITH, C.J.O.:—The respondent sues as a ratepayer of the town of Brampton, on behalf of himself and other ratepayers of the town; and, so far as the matters complained of by him remained to be dealt with at the trial, seeks a mandatory order requiring the defendant the Corporation of the Town of Brampton to collect from the appellants a sum of money alleged to be due by them to the corporation for arrears of water-rates.

Although in his reasons for judgment the learned trial Judge says, "There will be judgment requiring the defendant municipality to collect from the defendants the executors of the Dale estate, and requiring the last-mentioned defendants to pay to the municipality, the sum of $1,591.72," he endorsed on the record a direction that judgment should be entered "against the defendants the executors of the Dale estate and the Municipal Corporation of the Town of Brampton declaring that the said municipality wrongly abstained from collecting arrears of water-rates and water-rates from the said executors, amounting together to $1,591.72, and that the said municipality is entitled to collect and the said executors to pay such sum;" and the formal judgment has been drawn up in accordance with that direction.

It is to me a somewhat startling proposition that a ratepayer is entitled to bring into Court a municipal corporation and a person who is alleged to be indebted to it, for the purpose of

*To be reported in the Ontario Law Reports.

having it declared that the corporation has wrongfully refrained from collecting the alleged debt, and that it is owing by the alleged debtor; and the case at bar is the first, as far as I am aware, in which the attempt has been made—and certainly the first in which it has succeeded.

Even in the case of a trust fund, a cestui que trust cannot maintain an action against a debtor to the estate. It was so held in Sharp v. San Paolo R.W. Co. (1873), L.R. 8 Ch. 597. . . .

[Quotation from the opinion of James, L.J., in that case, at pp. 609, 610.]

In the case of a corporation, "the broad rule is, that, with the exception of ultra vires transactions, whatever concerns a corporation as such can be dealt with by the majority of the corporators or the governing body, if they have vested in them the capacity to exercise the powers of the corporation:" Brice on Ultra Vires, 3rd ed., p. 731. To this rule there are exceptions, but none of them applies to such a case as is put forward by the respondent in the case at bar.

The trend of modern judicial decisions is to depart from the practice of former times of applying to bodies of a public representative character, intrusted by Parliament with delegated authority, the rules which were applied in the case of trading corporations, and to recognise the right of such bodies, while acting bona fide and within the limit of the powers conferred upon them by the Legislature, to transact their business without interference by the Courts: Slattery v. Naylor (1888), 13 App. Cas. 446; Kruse v. Johnson, [1898] 2 Q.B. 91; Thomas v. Sutters, [1910] 1 Ch. 10.

It is, in my judgment, erroneous to treat either the corporation or its council as trustees for the ratepayers. They are, no doubt, in the sense in which the Sovereign is spoken of as a trustee for the people, trustees for the inhabitants of the municipality; but they are, in my opinion, in no other sense trustees, but a branch of the civil government of the Province; and, within the limits of the powers committed to them by the Legislature, at all events in the absence of fraud, should be free from interference by the Courts.

I entirely agree with what was said by Middleton, J., in Parsons v. City of London (1911), 25 O.L.R. 172, and by the learned Chief Justice of the King's Bench in delivering the judgment of the Divisional Court, ib. 442, as to the poweres of municipal councils.

It would be an intolerable state of things if, whenever a council acting in good faith has determined that it ought not to enforce a claim which technically it may have against some one

alleged to be indebted to it, a ratepayer may bring the corporation and the alleged debtor into Court in order that it may be declared that the indebtedness exists, and that the corporation wrongfully refrains from collecting it; and what good would result from such a declaration being made? If the corporation still thinks that, for reasons which appear to it sufficient, it ought not to enforce payment of the debt, is another action to be brought to obtain the relief which the respondent claimed by his pleading, a mandatory order to the corporation to enforce payment or an order that the person who has been adjudged to be a debtor pay to the corporation the amount of the debt, and if the latter order were made, how could the corporation be compelled to issue execution or other process on the judgment if it were minded not to do so?

The possession of such a power by the Courts would mean practically that the body which has been intrusted by the Legislature with the management of the affairs of the municipality is to be subject, at the instance of a single ratepayer, to be brought into Court to answer as to why this debt or that debt due to the corporation is not collected, and to have its discretion as to the justice of enforcing payment of money technically due to it overruled by the Court.

The case at bar, in my judgment, is one in which, even if such a power were possessed by the Court, it should not be exercised. Although it may be that technically the appellants are indebted to the corporation in the sum for which they have been adjudged to be indebted, the circumstances are such as would require an honest man, and ought to permit a council, not to require payment of it to be made.

According to the findings of the learned trial Judge, the appellants expended of their own money nearly $1,000 in putting down mains for supplying to their greenhouses the water for which the rates in question have been charged, and these mains have been used by the corporation for supplying water to others whose houses are on the line of the mains.

There can be no manner of doubt, I think, that it was intended by the council, as well as by the appellants, that an allowance for this expenditure should be made to the appellants by a reduction of the water-rates for which they would be liable. . . .

This reduction in the water-rates was in no sense a bonus. It was made for valuable consideration; and, whatever technical difficulties there might have been in compelling the corporation to implement its agreement, because it was not authorised by by-law passed with the assent of the electors, I should be sorry

indeed if the Court were bound to prevent the corporation from doing justice by refraining from collecting the full rates which would have been payable by the appellants according to the tariff.

In my view, the Court is not bound to compel the corporation to exact "the pound of flesh."

The Court has a large discretion as to granting merely declaratory judgments; and, apart from the other serious objections to granting such a judgment in the circumstances of this case, in the exercise of that discretion, the relief which by the judgment appealed from the respondent has obtained should not have been granted.

I would allow the appeal with costs, reverse the judgment of the trial Judge, and substitute for it a judgment dismissing the action with costs.

MAY 5TH, 1913.

*KERLEY v. LONDON AND LAKE ERIE TRANSPORTATION CO.

Constitutional Law—Ontario Railway Act, 1906, *secs.* 3, 5, 193 *—Proclamation of Governor-General Confirming—4 Edw. VII. ch.* 10, *sec.* 79(O.)—4 *Edw. VII. ch.* 32, *sec.* 21(*D.*)— *Railway Act, R.S.C.* 1906 *ch.* 37, *sec.* 9—*Effect of—Railway Company Incorporated by Dominion Statute—Electric Railway—Work Declared to be for General Advantage of Canada—Unnecessary Declaration—Running Electric Cars on Sunday—Penalties under Ontario Statute.*

Appeal by the defendants from the judgment of BOYD, C., 26 O.L.R. 588, 3 O.W.N. 1498.

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

M. K. Cowan, K.C., for the defendants.

J. A. Paterson, K.C., for the plaintiff.

The judgment of the Court was delivered by MEREDITH, C.J.O., who, after quoting sec. 193 of the Ontario Railway Act, 1906, said:—

*To be reported in the Ontario Law Reports.

The language of the section is wide enough to enbrace all street railways, tramways, and electric railways situate within the Province, but it must be read in connection with the earlier sections which deal with the application of the Act; and, when so read, it is abundantly clear that it was not intended by the Legislature that any of the provisions of the Act should apply to any railway, tramway, or street railway that was not incorporated under its authority and subject to its exclusive legislature authority.

The earlier sections to which I refer are secs. 3 and 5. . .

[The learned Chief Justice quoted sub-sec. 1 of sec. 3 and the latter part of sec. 5.]

The earlier legislation on the subject dealt with by sec. 193, was 4 Edw. VII. ch. 10, sec. 79, and it was in terms made applicable to street railways, tramways, and electric railways *subject as such to the jurisdiction of this Province.*

The Act of 1906 was mainly a consolidation of the existing law; and the draftsman, instead of limiting the application of the provisions of sec. 193 as they were limited in sec. 79 of the Act of 1904, accomplished the same purpose by the general provisions of secs. 3 and 5 to which I have referred.

Section 193 does not, in my opinion, apply to the appellant company or its undertaking; the company was incorporated by an Act of the Parliament of Canada, 9 & 10 Edw. VII. ch. 120, and it is empowered, in addition to constructing and operating lines of railway within the Province, for the purpose of its undertaking to construct, acquire, and navigate steam and other vessels for the conveyance of passengers, goods and merchandise to and from the city of Cleveland, in the State of Ohio, and other places, and to construct, acquire, lease, and dispose of wharfs, docks, elevators, warehouses, offices, and other structures to be used to facilitate the carrying on of business in connection therewith (sec. 12); and, by sec. 2, its undertaking is declared to be a work for the general advantage of Canada.

Such being the objects for which the company was incorporated, it is clear, I think, that its undertaking was one falling within the exclusive legislative authority of the Parliament of Canada, conferred by clause 23 of sec. 91 of the British North America Act—the question as to the legislative body which has jurisdiction having to be determined, as was decided . . . in City of Toronto v. Bell Telephone Co., [1904] A.C. 52, not by a consideration of the powers which it has exercised, but of those which it is empowered by its Act of incorporation to exercise.

That a Provincial Legislature is not competent to interfere

with the operations of a company whose undertaking is subject to the exclusive legislative authority of the Parliament of Canada appeared so clear to their Lordships of the Judicial Committee that Lord Macnaghten, in delivering their judgment in City of Toronto v. Bell Telephone Co., treated the proposition as axiomatic . . . [1904] A.C. at p. 57.

It follows from this that the declaration that the appellant's undertaking was a work for the general advantage of Canada was unnecessary . . . and . . . unmeaning: [1904] A.C. at p. 60.

For these reasons, I am of opinion that the . . . action must fail unless the legislation of the Parliament of Canada and the Proclamation of the Governor in Council . . . have had the effect of subjecting the appellant company's railway and the appellant company in respect of it to the same restrictions as to the operation of the railway on Sunday as are applicable to railways subject to the legislative authority of the Province. . . .

[The learned Chief Justice then quoted sec. 6*a* of the Railway Act of Canada, added by 4 Edw. VII. ch. 32, sec. 2.]

In the consolidation of 1906 (R.S.C. ch. 37) this section, rearranged and with some changes in its phraseology, appears as sec. 9.

Acting under the authority conferred by sec. 6*a*, the Governor in Council, by Proclamation dated the 24th November, 1906, confirmed, for the purposes of the section, sec. 193 of the Ontario Railway Act, 1906. . . .

Before the Act of 1904 was passed, it had been decided by the Judicial Committee that the legislation of this Province embodied in the Lord's Day Act, treated as a whole, was beyond the competency of the Ontario Legislature to enact, because it was criminal law within the meaning of clause 27 of sec. 91 of the British North America Act. . . .

The legislation by Parliament in 1904 was intended, I have no doubt, to meet the demands of those who asserted that purely local railways ought to be subject to such laws as the Legislatures of the Provinces in which they were situate might see fit to enact with regard to their operation on Sunday.

How far, then, has Parliament gone in meeting these demands? Only, I think, to the extent of making subject to provincial legislation as to Sunday labour such railways as, but for the declaration that they were works for the general advantage of Canada, would have been subject to that legislation. . . .

What, in my opinion, was meant was to make it clear that the section was not to apply to railways which, apart from the declaration that they were works for the general advantage of Canada, would not be subject to the legislative authority of a Provincial Legislature. . . .

If . . . the appellant company, having regard to the objects for which it was incorporated, could not have been incorporated by the Legislature of this Province, it follows—if I am right in the view I have expressed as to the effect of the legislation of the Parliament of Canada, and the Proclamation of the Governor in Council—that neither that legislation nor the Proclamation has an application to or affects the appellant company or its railway.

If, however, my view as to the effect of the legislation and Proclamation is not well-founded, there would remain the difficulty that neither the Provincial Act of 1904 nor sec. 193 applies to any railway that is not "subject to the jurisdiction of the Province," or, as expressed in the Act of 1906, is not "within the legislative authority of the Legislature of Ontario;" and the confirming Acts of the Parliament of Canada can have no greater effect than if they were enacted in ipsissimis verbis of the Provincial Acts which they confirm. In other words, the legislation does not apply to undertakings within the exclusive legislative authority of the Parliament of Canada, and its confirmation by Parliament does not extend its operation to them.

I have mentioned that in the consolidation of 1906, sec. 6*a* is rearranged and its phrasealogy is somewhat changed. The changes in phraseology probably do not alter the meaning of the section, but they bring out more clearly what I have said was, in my opinion, the purpose of the legislation.

It is satisfactory to know that the construction I have placed upon the legislation of the Parliament of Canada is in accord with the intention of the framer of sec. 6*a*, the then Minister of Justice: see Hansard, 1904, vol. 66, p. 5684, vol. 67, pp. 7566 to 7571.

Several important constitutional questions were considered and dealt with by the learned Chancellor; but, in the view I have taken, it is unnecessary to determine them, and I refrain from expressing any opinion upon them. See Citizens Insurance Co. v. Parsons (1881), 7 App. Cas. 96, 113.

I would allow the appeal with costs, reverse the judgment of the Chancellor, and substitute for it a judgment dismissing the action with costs.

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VALCI v. SMALL.

Master and Servant—Injury to Servant from Kick of Horse—Negligence—Evidence to Submit to Jury—Voluntary Incurring of Risk—Knowledge of Danger—Imperfect Information as to Nature and Extent—Nonsuit Set aside and New Trial Ordered—Pleading—Amendment—Addition of Alternative Claim under Workmen's Compensation for Injuries Act.

Appeal by the plaintiff from the judgment of LATCHFORD, J., at the trial, withdrawing the case from the jury and dismissing the action, which was brought by the driver of a waggon against his employer to recover damages for injuries sustained by the plaintiff from the kick of the defendant's horse driven by the plaintiff, upon the allegation that the defendant was negligent in requiring the plaintiff to drive a kicking horse.

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

John MacGregor, for the plaintiff.

James Haverson, K.C., for the defendant.

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

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

struck the appellant as he sat in the waggon-seat, and injured him severely.

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

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

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

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

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

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

MAY 5TH, 1913.

*PEACOCK v. CRANE.

Principal and Agent—Sale of Mining Property—Secret Commission—Enhanced Price — Fraud — Right of Purchasers as against Agents to Recover Sum Paid, in Addition to Actual Price.

Appeal by the defendants Crane and Cotton from the judgment of BRITTON, J., 3 O.W.N. 1184.

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

I. F. Hellmuth, K.C., and G. B. Balfour, for the appellants.

M. K. Cowan, K.C., for the plaintiffs, respondents.

The judgment of the Court was delivered by HODGINS, J.A.:— In Grant v. Gold Exploration and Development Co., [1900] 1 Q.B. 233, it is said by A. L. Smith, L.J., that, when a vendor sells property subject to a commission, the commission is added to the price asked by the vendor, i.e., the purchase-money is loaded with the amount of the commission to be paid. In this case the $50,000 in question was added to the purchase-price of $500,000, which itself included $25,000 stipulated to be paid as commission. The $50,000 was, by arrangement, to be paid by the vendors to Eames, so that he, or both he and Jeffrey and Moore, should get it as "commission." In the case cited it is laid down very clearly that, when the purchase-money is increased by a sum which, without the knoweldge of the purchaser, is to be paid to the purchaser's agent, it is a bribe; and, as such, can be, if quantified, recovered back by the purchasers, either from their agent who was bribed or from the vendors and agent jointly and severally.

The vendors have paid this particular $50,000 into Court; and the respondents, who are the purchasers, have been held entitled to it, and rightly so, in my opinion, unless the appellants can claim it free from the disability which attaches to any right or title of the agents, Eames, Jeffrey and Moore. The latter two admit that they have no title to it; but the appellants contend that, if this money is paid to the respondents, Moore in some way will benefit by it; probably, as it is asserted, by arrangement before or pending this proceeding. In fact, a conspiracy is

*To be reported in the Ontario Law Reports.

alleged between Moore and Eames to defeat the appellants' claim.

. . .

I do not think that the signing of the agreement for sale by the purchasers, in Pittsburg, on the 10th June, 1909, nor the making of a cheque on the 11th June, 1909, to pay part of the purchase-money, affects the question as to when the commission was earned. The commission is payable only out of the "proceeds of the sale," and is for negotiating the sale, afterwards consummated, for $550,000.

This agreement of the 12th June, 1909, was one which, under the circumstances disclosed in evidence, might have been rescinded by the purchasers, or under which they could have recovered back the $50,000. The procuring of this agreement by Moore is the consideration for the letter, addressed, at Moore's request, to Eames, and is the only consideration as between the vendors, Eames, Jeffrey, and himself.

It is, in itself, by reason of the bribe it contains—which is included in the purchase-price—a "corrupt bargain," to use the words of A. L. Smith, L.J., in the case already cited, and one which entitles the purchaser to rescind or to recover from the agent or vendor, or both, the bribe which formed an ostensible part of the purchase-money.

It is, therefore, difficult to understand the argument on behalf of the appellants, that Moore could not prejudice their rights, as the commission was already earned when the transfer to Eames of the right to the commission was made. The appellants' right cannot be put higher than as principals or assignees of Moore; and, granting that the latter could not defeat the appellants' claim by an assignment or transfer of the right to commission, the fundamental fact remains that the commission itself is money that, notwithstanding the form of the contract, belongs to the purchasers and could be recovered by them either in the hands of Moore or from the vendors.

No claims based on the contract or dependent on its validity can defeat the purchasers' right, which arises from the infirmity of the contract itself. See the remarks of Bacon, V.-C., in Bagnall v. Carlton (1877), 6 Ch. D. at p. 385, based upon Imperial Mercantile Credit Association v. Coleman, L.R. 6 H.L. 189.

Nor does the fact that the vendors' agent, Fraser, may have said that he would protect the appellants, carry the matter any further. The vendors agreed to the price being increased, so that Moore and Eames would get the increase as commission. They, therefore, did all that they could do to enable Moore and Eames to collect the $50,000, and to that extent "protected" the appellants.

It is this very arrangement, however, which gives rise to the purchasers' rights and enables them to rescind the agreement, or, as an alternative, to claim back the amount by which the purchase-money was increased.

If, as is well settled, an agent ceases to be entitled to any remuneration when he put himself in a position where his interest necessarily conflicts with his duty to his principal, then neither Moore nor Jeffrey nor Eames would be entitled to this $50,000. See per Bowen, L.J., in Boston Deep Sea Fishing and Ice Co. v. Ansell, 39 Ch. D. 364 The right of the purchaser to recover it is but the natural outcome of the application of this principle, because it treats the commission as an improper increase of the purchase-price, induced by the fraudulent act of both vendor and agent: Salford Corporation v. Lever, [1891] 1 Q.B. 168; Grant v. Gold Exploration and Development Co., [1900] 1 Q.B. 233.

The extent to which the Court will go in protecting a purchaser is well shewn in Beck v. Kantorowicz (1857), 3 K. & J. 230, where the ultimate purchaser or transferee of the mine was held entitled to the shares set apart by way of secret commission by the vendors to one of a group of co-adventurers who bought and then sold to the company.

I think the judgment of the trial Judge should be affirmed, and that the appeal should be dismissed.

Appeal dismissed.

MAY 5TH, 1913.

RICE v. PROCTOR.

Principal and Agent—Agent's Commission on Sale of Land—Commission Claimed by two Agents—Interpleader Order—Scope of Issue Directed—Right to Commission—Evidence.

Appeal by the defendants in an interpleader issue from the judgment of the County Court of the County of York determining the issue in favour of the plaintiff.

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

J. Bicknell, K.C., and M. L. Gordon, for the appellants.

W. H. Irving, for the plaintiff in the issue, the respondent.

The judgment of the Court was delivered by HODGINS, J.A.:—An interpleader order was made on the 14th November, 1912, by His Honour Judge Denton, in an action in the County Court of the County of York, between the appellants, as plaintiffs therein, and one R. A. Baldwin, directing an issue to be tried between Morley B. Rice, the respondent . . . and the appellants.

In that action the appellants were suing Baldwin for a commission on the sale of No. 33 Whitney avenue, Toronto.

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

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

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

The purpose of an issue is to inform the conscience of the Court; and in this case its trial disclosed to the County Court that there was or might be a claim for commission, quite apart from that properly dealt with in the interpleader order. But

the judgment in appeal does not deal with anything beyond the money in Court; and, if the respondent is entitled to that money, the appeal should be dismissed.

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

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

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

MAY 6TH, 1913.

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

Writ of Summons—Service out of the Jurisdiction—Con. Rule 162(e), (h)—Contract—Place of Payment or Performance—Assets in Ontario—Debts Owing to Defendant—Discretion—Forum.

Appeal by the plaintiff company from the order of MIDDLETON, J., 27 O.L.R. 402, ante 381.

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

J. F. Boland, for the plaintiff company.

R. C. H. Cassels, for the defendant company.

At the conclusion of the hearing, the judgment of the Court was delivered by MEREDITH, C.J.O., allowing the appeal and restoring the order made by the Senior Registrar of the High Court, dismissing an application to set aside an order permitting

*To be reported in the Ontario Law Reports.

the issue of a writ of summons for service out of Ontario and the service thereof upon the defendant company in Quebec; with costs to the plaintiff company in any event.

The Court was of opinion that the original order was properly made under Con. Rule 162(h), the defendant company having exigible assets within Ontario at the time the action was brought. The defendant company did business in Ontario, and it would be a great hardship if their creditors were obliged to sue in another Province.

MACLAREN, J.A., IN CHAMBERS. MAY 7TH, 1913.

TOWNSEND v. NORTHERN CROWN BANK.

Appeal to Privy Council—Right of Appeal—Privy Council Appeals Act, sec. 2—Matter in Controversy—Sum Involved.

Motion by the plaintiff for the approval of a security bond and the allowance of his appeal to His Majesty in His Privy Council from a judgment of this Court (ante 1165) which affirmed the judgment dismissing his action.

H. S. White, for the plaintiff.

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

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

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

Before the trial, the parties agreed that the assignee should go on and sell the assets of the estate, the proceeds to stand in substitution for the property so sold, according to the respective rights of the parties. The plaintiff's evidence shewed that the assets realised $3,900. This included $1,000 received for the mill, to which the defendants made no claim. It also included goods, chattels, and accounts to which the defendants were held

not to be entitled; their claim being limited to the lumber alone and its proceeds.

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

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

HIGH COURT DIVISION.

MIDDLETON, J., IN CHAMBERS. MAY 5TH, 1913.

RE LLOYD AND ANCIENT ORDER OF UNITED WORKMEN.

Life Insurance—Death of one of two Designated Preferred Beneficiaries in Lifetime of Assured—Absence of Fresh Designation—Right of Survivor—"Wife"—Ontario Insurance Act, 2 Geo. V. ch. 33, sec. 178, sub-secs. 3, 4, 7—R.S.O. 1897 ch. 203, sec 159, and Amendments.

Motion by Alice Lloyd, the widow of James L. Lloyd, deceased, for payment out of insurance moneys paid into Court by the insurance society.

J. M. Ferguson, for Alice Lloyd.

G. G. Mills, for Mary Eliza Birtch, daughter of the deceased.

MIDDLETON, J.:—James L. Lloyd was insured in the Ancient Order of United Workmen, on the 5th July, 1884, for $2,000, payable "to his wife Sarah Anne Lloyd one-half and the other half to his daughter Mary Eliza Lloyd"—now Mrs. Birtch.

Lloyd died on the 24th February, 1913. His first wife, Sarah Anne Lloyd, predeceased him, dying on the 13th November, 1909. He married Alice Barton on the 11th January, 1911, and she survives him. There is no question as to the title to

Mrs. Birtch to one-half of the money, and this has been paid to her. The remaining $1,000 has been paid into Court, and is the amount in question here.

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

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

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

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

The alternative contention presented by the daughter is as follows. Under sec. 159 of the Ontario Insurance Act, R.S.O. 1897 ch. 203, and its amendments, upon the death of one of two or more designated beneficiaries, the right to receive the whole fund, in the absence of a new apportionment, became vested in the survivors. This right became vested upon the death of the first wife, Sarah, on the 13th November, 1909; and the subsequent legislation, even if sufficient to confer the right upon the second wife, would not operate to divest this vested interest.

In the result I have arrived at, it is not necessary for me to discuss this point. I content myself with referring to my recent decision in Re Jennison, ante 1084.

It is not a case for costs.

MIDDLETON, J. MAY 5TH, 1913.

RE DORWARD.

Will—Construction—Residuary Devise—Space in Printed Form Intended for Name of Devisee not Filled up—Intention Gathered from Will.

Motion by the executrix for an order declaring the construction of the will of Walter Dorward, who died on the 22nd February, 1911.

Shirley Denison, K.C., for the executrix and for William and David Dorward.

H. M. Ferguson, for the other next of kin.

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

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

Costs may come out of the estate.

MIDDLETON, J. MAY 5TH, 1913.

RE MYERSCOUGH AND LAKE ERIE AND NORTHERN R.W. CO.

Railway—Expropriation of Land—Dominion Railway Act—Compensation—Arbitration and Award—Evidence—Quantum of Allowance—Damages for Severance—Sale of Portion Severed—Deprivation of Access to Highway—Subdivision—Registration of Plan—Consent of Municipality—Increased Value of Land from Construction of Railway—Appreciation of—Omission of Arbitrators to Fix Date for Making Award—View of Locus by Arbitrators—Failure to State Weight to be Attached to View—Ontario Arbitration Act, 9 Edw. VII. ch. 35, sec. 17(3)—Application to Arbitrators under Dominion Act—Reference back for Certificate—Husband and Wife—Arbitration with Wife—Release by Husband.

Appeal by the railway company from an award of two out of a board of three arbitrators allowing a land-owner $623 for a part of his land taken for the railway and $677 for injurious affection of the land not taken.

The appeal was heard by MIDDLETON, J., in the Weekly Court at Toronto, on the 1st May, 1913.

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

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

MIDDLETON, J.:—The material dates are as follows. The railway company registered their plan and book of reference on the 20th February, 1912. Notice of expropriation, dated the 12th October, 1912, was served on the 17th October, 1912. Thomas Myerscough (who owned the land at the date of the filing of the plan), on the 8th July, 1912, conveyed to his wife, Rebecca Myerscough. On the 27th June, Thomas Myerscough agreed to sell part of the land to Smith et al. for $28,000. On the 5th August, 1912, a by-law was passed by the Council of the City of Brantford, by which permission was given to Rebecca Myerscough, the owner of the portion of lands mentioned in the agreement with Smith et al., to lay out upon these lands certain highways of a uniform width of fifty feet. These highways connect with Mount Pleasant street, the main thoroughfare, and provide a highway bordering upon the lands taken by

the railway company. They cover all the lands on the one side of the railway allowance.

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

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

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

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

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

Quite apart from this, I do not think that there was, in this case, a sale without ample provision being made for access. It

was the intention of the parties that the land should be laid out as shewn in the plan. The agreement for sale was made, too, before the property was conveyed; and, while Mrs. Myerscough was still the owner, she obtained the necessary municipal consent, and registered the plan. This was apparently done with the full approval of the purchasers and in pursuance of the real understanding between the vendor and purchasers.

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

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

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

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

In Re Horeshoe Quarry Co. and St. Mary's and Western Ontario R.W. Co., 22 O.L.R. 429, 2 O.W.N. 373, a Divisional Court held that the omission does not invalidate the award, and that the objection is waived by proceeding with the arbitration.

Then it is said that the arbitrators took a view of the property, and that the award is not in conformity with sec. 17(3) of the Arbitration Act, 9 Edw. VII. ch. 35. The section relied upon provides that where the arbitrators proceed wholly or partly on a view or on any knowledge or skill possessed by them-

selves or any of them, they shall also put in writing a statement thereof sufficiently full to enable a judgment to be formed of the weight which should be attached thereto.

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

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

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

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

LENNOX, J. MAY 5TH, 1913.

UNION BANK OF CANADA v. A. McKILLOP & SONS LIMITED.

Company—Trading Company—Powers Given by Charter—Declared and Incidental Purposes of Company—Guaranty—Ultra Vires—Ratification—Costs.

Action to recover $15,500 upon a guaranty.

Hamilton Cassels, K.C., and D. C. Ross, for the plaintiffs.
C. A. Moss and J. B. McKillop, for the defendants.

LENNOX, J.:—Archibald McKillop, John Alexander McKillop, Daniel McKillop, Hugh Cummings McKillop, and Isabella Fuller were incorporated as a company "to buy, sell, and deal in timber and lumber, and for the said purposes to operate and carry on saw-mills, bending-factories, and other wood-working machinery and mills for the manufacture of woodwork, and implements, and carpenters and builders' supplies, and to carry on the business of a farmer and dealer in live stock and farm produce," on the 28th September, 1904, under the provisions of the Ontario Companies Act.

On the 17th February, 1905, and before they had organised as a company, these same incorporators executed an instrument by which they jointly and severally bound themselves to be responsible to the Merchants Bank for the indebtedness of the West Lorne Waggon Company Limited, to the amount of $20,000. These incorporators appear to have regarded this as an obligation of the defendant company; and the reason assigned for not executing as a company is the non-organisation of the company. I understood the president of the defendant company to say on examination that "when the money was obtained from the Merchants Bank on our guaranty we were the West Lorne Waggon Company." It is a fact that the waggon company was launched by this witness, his brothers, and their friends. The charter members of the waggon company are still the only members of the defendant company. It is a family affair—arising out of property and business which the shareholders inherited from their father. At the time the defendant company executed the guaranty in question, they held one share in the West Lorne Waggon Company, and some of the members had shares. These shares were held in the same way

when the waggon company assigned. In March or April, 1905, the West Lorne Waggon Company was taken over by the Wilkinson Plough Company, and the shareholders, or many of them, were paid by shares in the plough company. This latter company also assigned, and at the time of the assignment members of the defendant company held shares in the plough company to the amount of $25,000. These shares were held and treated as the property of the defendant company. In March, 1907, the waggon company owed the Merchants Bank about $40,000, and for $20,000 of this the members of the defendant company were responsible upon their guaranty. At this time it was arranged to transfer the West Lorne Waggon Company account to the United Empire Bank—this bank advancing the waggon company the money to enable them to pay off the Merchants Bank. It is admitted that the plaintiffs have succeeded to all the rights of the United Empire Bank. Of this $40,000 credit, $25,000 was advanced upon a promissory note of the West Lorne Waggon Company, secured by an assignment of the company's manufactures and raw material, under the provisions of sec. 88 of the Bank Act; and the balance was secured, or supposed to be secured, by a general guaranty of the defendant company for a sum not exceeding $15,000, and interest thereon at six per cent. per annum after demand. This is the situation in outline; but, so far as the facts or the inferences from facts are concerned, there is nothing to assist me which will not be equally available to an appellate Court in the event of an appeal, as there is no conflict of testimony and nothing turning upon the demeanour of witnesses.

The defence is two-fold, namely: that the guaranty never bound the company; and, if it did, that there is now no indebtedness within its terms. The first objection goes to the root of the action. Although not without doubt, I have come to the conclusion that the guaranty sued on did not and does not bind the defendant company. The money lent by the United Empire Bank upon the faith of this undertaking went in discharge of this amount of the liability of the members of the defendant company to the Merchants Bank. I don't think this matters. The Merchants Bank could not have recovered upon their security in an action against the defendant company; and, with all equities counted, the plaintiffs cannot be subrogated with higher rights. This is a family concern, a private company, it is said; but it appears to me that, to be binding at all, it must be binding to all intents, and so postpone the rights of creditors of the defendant company and its members if insolvency had sup-

ervened. The members of a company and the company are separate entities: Soloman v. Soloman, [1897] A.C. 22. The president and other members of the defendant company were keenly alive to the importance of retaining the operations of the waggon company in West Lorne, and looked forward to profitable sales, but their charter did not authorise the defendant company to engage in the business which the waggon company was incorporated to carry on. How then could it be said that the defendant company had power to finance a business which it could not engage in? Whether imprudent, or probably profitable, is not the question; and I cannot think that the transaction now repudiated was so clearly incidental to the purposes for which the defendant company was incorporated that there could be said to be "a potential necessity" for executing the guaranty sued on: A. R. Wiliams Machinery Co. v. Crawford Tug Co., 16 O.L.R. 245; Small v. Smith, 10 App. Cas. 119; Attorney-General v. Great Eastern R.W. Co., 5 App. Cas. 473, at pp. 478, 481. What is not expressly authorised or incidental is prohibited: Ashbury R.W. Co. v. Riche, L.R. 7 H.L. 653. Nor do I think that the reference to this guaranty contained in the minute-book of the defendant company, and made subsequent to the new Act, constitutes an effective ratification This may happen if the thing done, though irregularly done, was within the authorised object of the company, was intra vires; otherwise, however, if it was impliedly prohibited by being clearly outside the declared and incidental purposes or objects of the company. Cases clearly marking this distinction are collected in the appendix to Pollock on Contracts, 7th ed., pp. 694-6.

Entertaining the opinion I have expressed, it becomes unnecessary to deal with the other objection to the plaintiffs' claim. The merits are with the plaintiffs; and it is, therefore, not a case for costs to the defendants. I shall not be sorry if my judgment shall be shewn to be wrong.

The action will be dismissed without costs.

LENNOX, J. MAY 5TH, 1913.

NORMAN v. McMURRAY.

Vendor and Purchaser—Contract for Exchange of Lands—Time of Essence—Waiver of Provision—Negotiations after Time Expired—Absence of Tender—Reciprocal Obligations—Specific Performance—Damages.

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

Joseph Montgomery, for the plaintiffs.
G. R. Roach, for the defendant.

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

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

There is no evidence that either party actually tendered an executed deed of the land he was conveying to the other, and there was no priority of obligation—their obligations were reciprocal in this respect. Until one acted, the other was not in default. In Halsbury's Laws of England, vol. 7, p. 434, it is said: "Where a contract consists of mutual promises . . . they may be dependent upon one another so that the due performance by one party of his promise is a condition precedent to the liability of the other." There either party could preserve the vitality of the time-clause by doing everything to be done upon his part within the time limited, and refusing negotiations

of any kind after that day. But the defendant did not complete his part of the contract; and, as held in Foster v. Anderson, 15 O.L.R. 362, 16 O.L.R. 565, a person who has not, himself, within the time, fully performed his part of the contract, cannot make this condition a ground of defence against the other party; and, as shewn in Upperton v. Nicholson, L.R. 6 Ch. 436, once the time has thus gone by, the subsequent rights of the parties are governed by the general principles of the Court. See also Snell v. Brickles, ante 707, 951.

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

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

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

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

REYNOLDS, LOCAL MASTER AT BROCKVILLE. MAY 7TH, 1913.

SOPER v. PULOS.

Assignments and Preferences—Assignment for Benefit of Creditors—Claim by Assignee to Goods Seized by Sheriff under Execution and Subject of Interpleader Issue Delivered but not Tried when Assignment Made—Sheriff's Sale under Order of Court—Preference—Priorities—Assignments Act, sec. 14—Creditors' Relief Act, sec. 6, sub-secs. 4, 5.

The plaintiff, having a judgment against the defendants for the recovery of money, issued execution, under which the Sheriff seized certain goods in the possession of the defendants, which were claimed by a chattel mortgagee. The Sheriff interpleaded; and the usual order was made, directing a sale of the goods if security should not be given by the claimant, and the trial of an issue as to the claim, with a provision for other creditors coming in and taking part. No security being given, the Sheriff advertised the goods for sale, and the issue was delivered, but had not been tried when, on the 3rd May, 1913, the execution debtors made a general assignment for the benefit of creditors, and the assignee claimed the goods from the Sheriff.

The Sheriff applied for directions.

H. A. Stewart, K.C., for the Sheriff.

J. A. Hutcheson, for the execution creditors.

M. M. Brown, for the assignee.

C. C. Fulford, for the claimant.

THE LOCAL MASTER was of opinion that the assignee was not entitled to receive the goods on paying or securing the preferential costs; and that the Sheriff's sale should proceed.

As soon as the interpleader order was made and the contesting execution creditors took upon themeselves the burden of the issue, they obtained a right of preference, of which the assignment did not take precedence under sec. 14 of the Assignments Act. The sale, when held, would be under the order of the Court: Reid v. Murphy, 12 P.R. 334. The interpleader clauses of the Creditors' Relief Act, sec. 6, sub-secs. 4 and 5 governed.

The principle of Re Henderson Roller Bearings Limited, 22 O.L.R. 306, 24 O.L.R. 356, affirmed in the Supreme Court of Canada, Martin v. Fowler, 46 S.C.R. 119, was applicable, although the issue had not been tried. The execution debtors, by making an assignment at this stage, could not overrule the order of the Court and change the rights of the parties.

KELLY, J. MAY 9TH, 1913.

MARCH v. STIMPSON COMPUTING SCALE CO.

Malicious Prosecution—Conversion of Goods of Trading Company by Employee—Liability of Agent of Company for Prosecution—Finding of Jury—Facts not Properly Disclosed to Crown Attorney—Liability of Company for Prosecution Instituted by Agent—Authority of Agent—Absence of Express Authority—Non-existence of Emergency Giving Rise to Implication—General Scope of Agency—Evidence—Burden of Proof—Nonsuit.

An action for malicious prosecution, tried with a jury.

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

G. F. Shepley, K,C., and G W. Mason, for the defendant company.

No one appeared for the defendant Dent.

KELLY, J.:—The plaintiff, in 1910 and the early part of 1911, was in the employment of the defendant company as an agent for the sale of scales. The defendant company's chief place of business is in the city of Detroit. The defendant Dent was also at that time in the employment of defendant company as a salesman.

About the end of April, 1912, the plaintiff, on the information of Dent (who therein professed to act as agent and representative of the defendant company) was arrested at Ottawa on a charge of having converted to his own use a scales which he had taken in exchange and as part payment for a scales of the defendant company which he had sold to Stone & Fisher, of Iroquois.

The arrest took place about 9 o'clock in the forenoon, and he remained in custody until about 4 o'clock in the afternoon of the next day. He was taken to Iroquois, where, on an investigation before magistrates, he was acquitted. Dent was then, at his own request, bound over to prosecute the plaintiff at the Sessions, and such prosecution took place later on at Cornwall. There also the plaintiff was acquitted.

The sale of the scales by the plaintiff—for conversion of which the charge was laid—was made a year or thereabouts prior to the arrest.

The written contract of employment between the plaintiff and the defendant company bears date the 12th January, 1910. In October and November of that year, dissatisfaction having arisen about the mode of dealing by the plaintiff and other

agents, owing to scales taken in exchange not having been satisfactorily accounted for or returned, the company, in correspondence with the plaintiff, made it a condition that all scales taken in exchange for scales sold by the plaintiff should be immediately returned to them, and in the same correspondence a new scale of payment to the plaintiff was fixed. The plaintiff evidently adopted this as a term of his agreement with the company, and lived up to it, and returned all scales taken in exchange by him till the sale to Stone & Fisher about April, 1911, when he retained the scales taken in exchange from them; and though, in reporting to the company the making of this sale, he informed them that he was forwarding the old scales taken in exchange, he failed to do so; and, later on, he sold it and retained the money received therefor. He left the company's employment in or about September, 1911.

Some question or accounts between the plaintiff and the company arose, and interviews took place between the plaintiff and Dent, following which Dent consulted Mr. Honeywell, a solicitor in Ottawa, who had previously had some knowledge of the matter. Though he (Honeywell) says that he had general information as to the effect of the agreements between the plaintiff and the company and the correspondence which took place in relation to the terms of employment, these documents were not submitted to him at the time he was consulted by Dent. He also says that, being of the opinion from what was laid before him that the plaintiff was guilty of a criminal offence, he referred Dent to Mr. Ritchie, the Crown Attorney, whom Dent then consulted. No papers or documents were laid before Mr. Ritchie; but, on Dent's statement that the old scales was the property of the company, and that the plaintiff had sold it and pocketed the money, he advised that he was subject to prosecution. The arrest then followed.

At the close of the plaintiff's case, counsel for the company asked for a nonsuit. I was of opinion that there was sufficient evidence to go to the jury as to the action taken by Dent, but I reserved the question of the liability of the company for the acts of their co-defendant, if the jury should find in favour of the plaintiff. The verdict as returned by the jury (which of their own motion they put in writing) was as follows: "We as jury consider that Mr. Dent did not disclose the facts properly to Mr. Ritchie. A. No. We as jury agree that the plaintiff is entitled to $1,200."

On this finding, I think that the plaintiff is entitled to judgment as against Dent.

Dealing with the question of the liabiilty of the defendant

company, I am unable to see that there was any evidence that Dent had authority, express or implied, from the company to prosecute or arrest. His powers and duties as agent for the company are set forth in the printed agreement of employment between them dated the 15th January, 1910, and which is in the same form as the original agreement between the plaintiff and the company, except that the agreement with Dent contains a provision that he should employ a reasonable number of salesmen, whose contracts would be made with the company; that he (Dent) was to instruct these salesmen and give them assistance in doing their work, and be held responsible by the company for their acts and for any charge-backs or advances which might be made in their accounts, or which the company would be unable to collect from the salesmen, as well as for scales and other goods which might be in their hands. The company were also to keep the accounts with the salesmen, and payments to them were to be made direct by the company. . . .

[Reference to Bank of New South Wales v. Owston, 4 App. Cas. 270.]

Authority may be implied in cases of emergency, when the exigency of the occasion requires it; but authority in such a case is a limited one; and, before it can arise, a state of facts must exist shewing that such exigency is present, or from which it may reasonably be supposed to be present.

In the present case there is no evidence whatever of the existence of any such emergency or exigency. Many months had elapsed between the commission of the act for which the plaintiff was prosecuted and the time of the arrest; and, for nearly all that period, Dent had knowledge of what had taken place. For a considerable time prior to the arrest, the plaintiff was employed in and around Ottawa, and there were no circumstances or conditions to necessitate immediate action in order to preserve or protect the company's property or interests, or from which it might be inferred that the opportunity to arrest the accused might be lost if the necessary time were taken to refer the matter to the company. There is nothing from which an inference of special authority could be drawn.

We are then to consider whether Dent had authority, either expressly or within the general scope of his employment. There is an absence of evidence of any express authority from the company to prosecute the plaintiff, or to prosecute any other person, in respect of any dealings or transactions with the company, or indicating that the company had knowledge that a prosecution was about to take place or was being carried on, or that Dent contemplated a prosecution; nor is there any evidence that the company approved, ratified, or condoned Dent's action.

This part of the case is, therefore, narrowed down to a consideration of the question whether, in the scope of his duties, Dent had general authority from the company to arrest and prosecute, where no emergency or exigency, such as above-mentioned, existed.

It is of some importance to bear in mind that the course of dealing, as set forth in the written agreements, required the plaintiff to make returns of money and of scales taken in exchange, not to Dent, but to the company; and that payments of moneys coming to the plaintiff were to be made direct by the company to the plaintiff, and not through Dent; and, according to the plaintiff's own uncontradicted evidence, the company shipped scales to him direct, and not through Dent. These circumstances indicate the limited character of Dent's authority.

I fail to see any evidence of a general authority to cause the plaintiff's arrest or to prosecute, or that Dent's duties involved in their performance the putting of the criminal law in motion. This is not a case of the agent doing an authorised act in an unauthorised manner, but of doing an act not authorised, either expressly or impliedly, by his employers.

The master's liability for the unauthorised torts of his servant is limited to unauthorised modes of doing authorised acts: Clerk & Lindsell's Law of Torts, Can. ed. (1908), p. 75.

The question of such authority has been dealt with over and over again in such cases as Bank of New South Wales v. Owston, cited above: Abrahams v. Deakin, [1891] 1 Q.B. 516; Hanson v. Waller, [1901] 1 K.B. 390; Stedman v. Baker, 12 Times L.R. 451; and also in two cases—comparatively recent—in our own Courts: Thomas v. Canadian Pacific R.W. Co. and Bush v. Canadian Pacific R.W. Co., 14 O.L.R. 55, in which a number of the English cases are reviewed

The onus was on the plaintiff to give some evidence which would justify the jury in finding that, from the nature of his duties or the terms of his employment, Dent had authority to institute these criminal proceedings.

In my view, he has not satisfied the obligation to give such evidence; and, following the reasoning and the conclusions arrived at in Thomas v. Canadian Pacific R.W. Co. and Bush v. Canadian Pacific R.W. Co., and the authorities on which the judgment in these cases is based, I can only conclude that as against the defendant company the plaintiff has no right to succeed.

Judgment will, therefore, be in favour of the plaintiff as against the defendant Dent for $1,200 and costs, and dismissing the action as against the defendant company with costs.

BOYD, C. MAY 9TH, 1913.

UNITED INJECTOR CO. v. JAMES MORRISON BRASS MANUFACTURING CO.

Patent for Invention—Combination of Parts—Novelty—Utility—New and Useful Result—Infringement—Trade Name—Injunction—Damages.

Action for infringement of the plaintiffs' patent for improved inspirators and their trade mark and trade name.

D. L. McCarthy, K.C., for the plaintiffs.

G. H. Watson, K.C., and S. C. Smoke, K.C., for the defendants.

BOYD, C.:—This patent is for a combination of parts, and it is not anticipated by another patent granted to the same patentee for another combination of parts, the constituents of which are not the same as in the impeached patent.

I had no doubt at the hearing as to the ultility of the patent. It was strongly urged that what the plaintiff had put in his last patent was substantially described to the world in the drawings and parts of the earlier patent. The lack of novelty in the gauge bolster was said to be because it represented what was called in the former patent the correcting ring or collar, and that the ring or collar was the equivalent of the gauge bolster if the adjustment of parts by increase or decrease of thickness on the under part of the leg of the fulcrum bracket was substituted.

It was sought to support this position by the familiar doctrine in patent law that, if the prior inventor shews one way of carrying out his invention, he is entitled to claim it for all other ways. This rule applies when the invention is in respect of a principle, and not the case of a combination of old parts producing a new and useful result.

The application of this doctrine is to be found discussed in Chamberlain v. Broadfield, 20 R.P.C. 584, and Consolidated Car Heating Co. v. Came, [1903] A.C. 509.

Under the prior patent, when the parts of the machine are assembled for the purpose of being sent out of the shop ready to be operated, a collar or correcting ring of the right thickness is put in between the leg of the fulcrum bracket and the top of the casing. When the machine thus set up is tested, it always

happens that there are cumulative errors which require to be corrected, and this is done by adjusting the thickness of the correcting ring (filing it down, for example), so as to get it of exactly the right size for the particular machine. That collar so adjusted cannot be used in any other machine without making the like appropriate adjustment.

In the later patent, the preliminary adjustment of a new machine is attained by making the correction upon the lower face of a collar forming part of the leg of the fulcrum bracket. Apart from and in addition to this, in the later patent there is the standard gauge bolster placed between the leg of the fulcrum bracket and the casing of the machine. That is a distinct and separate factor, by changing which, according to the capacity required, different capacities of tubes can be used in the same machine without any need of going back to the machine-shop.

I think the addition of the gauge bolster to the former combination patented by the same inventor is not an obvious thing to the ordinary workman. There is inventive insight displayed, which appears to be accentuated in this case by contrasting the evidence of a witness given for the attack upon the patent at the first hearing and the evidence given by the same witness at the adjourned trial of the case.

I pointed out at the close of the evidence wherein I thought the two patents were distinguishable, and I see no reason to withhold making effective the terms of the judgment then indicated.

Judgment was accordingly pronounced restraining the defendants from using the words "Hancock" or "Hancocks" or "inspirators" in connection with locomotive injectors not manufactured by the plaintiffs; for $50 damages for the improper use by the defendants of the plaintiffs' trade name; restraining the defendants from infringing the plaintiffs' patent; for $300 damages for infringement, or, at the election of either party, a reference to ascertain the damages; and dismissing the defendants' counterclaim. The defendants to pay the costs of the action and counterclaim. In case of a reference, the defendants are to pay the damages found by the Master forthwith on confirmation of his report.

LATCHFORD, J. MAY 10TH, 1913.

RE WOODHOUSE.

Land Titles Act—Application for Registration—Objection—Bar—"Action"—Judicature Act, sec. 2(2)—Possession of Land.

An appeal by Christie Brown & Co. Limited, under sec. 140 of the Land Titles Act, from an order of the Master of Titles declaring the appellants precluded from bringing any action against John Woodhouse to recover possession of certain lands, and debarred from objecting to the registration of Woodhouse and his wife as the absolute owners of the lands.

W. B. Milliken, for the appellants.
Edward Meek, K.C., for Woodhouse and wife.

LATCHFORD, J.:—The appellants are, by the terms of the order, precluded from bringing any action against John Woodhouse for possession of the lands in question. They are also thereby debarred, in the opinion of the learned Master, from objecting to the registration of Woodhouse and his wife as the absolute owners of the lands.

It seems clear to me that, in filing the objection, the appellants were not "bringing an action." Unless a contrary intention appears, the word "action" shall be construed "to include suit, and shall mean a civil proceeding commenced by writ or in such other manner as may be prescribed by Rules of Court:" Judicature Act, sec. 2, sub-sec. 2. No contrary intention appears; and the objection filed is not a suit or a civil proceeding begun by writ, or as prescribed by any of the Rules. "Action," as the term is used in the order, has, in my opinion, the meaning attributed to the word by the Judicature Act, and not any other.

While the appellants cannot sue Woodhouse to recover possession of the property, they can, I think, be heard when they object that he and his wife should not be registered as owners of the land under the provisions of the Land Titles Act. With the shield provided by that Act the appellants can, in my opinion, defend their paper title against aggressors using the weapons forged by the same statute. It may well be that the applicants (Woodhouse and wife) can establish the right which they assert, but Christie Brown & Co. are not precluded from

questioning that right by the prohibition expressed in the order referred to. It is still open to the company to object that the Woodhouses are not entitled to the registration sought. The objection made should be considered on its merits.

The appeal is, therefore, allowed with costs, and the matter remitted to the Master of Titles.

MIDDLETON, J. MAY 10TH, 1913

MARTIN v. HOWARD.

Animal—Lien for Keep—Sale of Animal for Unpaid Board—Notice—Newspaper Advertisement—Statutory Condition—Innkeepers Act, 1 Geo. V. ch. 49, sec. 3, sub-sec. 6—Vendor Becoming Purchaser—Conversion—Damages—Costs.

Action for damages for the wrongful sale of a stallion.

The action was tried before MIDDLETON, J., and a jury, at Bracebridge, on the 8th May, 1913.

J. T. Mulcahy, for the plaintiff.

W. H. Kennedy, for the defendant.

MIDDLETON, J.:—The plaintiff had purchased a stallion from one Armstrong, but apparently had paid very little on account of the purchase. This, however, is not material; as, upon the evidence, the title had passed to him. The horse was boarded by the plaintiff at the defendant's stable, and it is admitted that the defendant was entitled to a lien for its keep. The question as to whether the lien was affected by the horse being from time to time taken way from the stable was not raised nor discussed.

Under the Innkeepers Act, 1 Geo. V. ch. 49, sec. 3, sub-sec. 6, the defendant would have the right, after the board was unpaid for two weeks, to sell the horse "on giving two weeks' notice by advertisement in a newspaper published in the municipality."

An advertisement was published in the issues of the Gravenhurst *Banner* of the 5th and 13th December, of a sale to be held on the 14th December. This was not two weeks' notice; and, as the notice is a statutory condition of the right to sell, there was no right to sell at that time.

At the sale the defendant himself bought the horse in, and thereafter claimed to own him.

The right given by the statute is a right to sell. Manifestly this must be a sale to some third person, and the vendor cannot himself be the purchaser.

At the trial I gave leave to amend by alleging conversion, and left to the jury only the questions of the value and of the amount due for board.

There will, therefore, be judgment for the net sum of $300 and costs.

There was no evidence whatever given in respect of the allegation in the statement of claim as to discouraging bidding at the sale; nor was any evidence tendered on the part of the defendant to support the allegation contained in the fourth paragraph of the defence.

I do not think it is a case in which I should interfere as to the scale of costs.

LAPORTE v. WILSON—LENNOX, J.—MAY 5.

Landlord and Tenant—Purchaser from Landlord — Acceptance of Rent—Tenancy from Year to Year—Termination—Notice —Proof of Title—Ejectment.]—Action to recover possession of land and for rent, damages, etc. The learned Judge said that the plaintiff claimed title in fee simple to the property in question under an alleged deed from Richard Stephens, but adduced no proper evidence of the title of Stephens or the execution of the deed. As the defendant alleged a tenancy, and that subsequently he purchased from the same person, Richard Stephens, and as the defendant actually proved a tenancy derived from Richard Stephens, the want of clear proof upon this point might not be an answer to the plaintiff's claim. The failure to prove the execution of the deed was a fatal objection; but this point was not necessary to the determination of the case. The defendant was in possession at the time of the plaintiff's alleged purchase, as the plaintiff knew. The evidence shewed that, on the 1st September, 1909, the defendant became a tenant of the premises in question for a year certain, and entered into possession under an agreement with the alleged owner, Richard Stephens. He had been in possession ever since. Remaining in possession with the consent of his landlord, and paying, and the landlord accepting, rent as before, he became a tenant from year to year, beginning on the 1st September, 1910. This tenancy could be determined

only by a notice of at least six months, terminating at the end of a year. The notice had not been given. Although not legally proven, there was no doubt that the plaintiff's alleged deed was a sufficient protection to the defendant for payment of rent to the plaintiff, since the time he ceased to pay to Stephens. Action dismissed with costs. If the plaintiff desired it, he might deduct from the defendant's costs, when taxed, the rent of the premises in question from the 1st July, 1912 (less such sum, if any, as the defendant in this period had paid for taxes), and in that event the defendant would be entitled to issue execution for the balance only. J. H. Clary, for the plaintiff. J. A. Milligan, for the defendant.

JOHN MACDONALD & CO. LIMITED v. TEASDALE—LENNOX, J.—MAY 5.

Trusts and Trustees—Land Conveyed by Husband to Wife—Resulting Trust for Husband—Declaration—Payment of Claim of Creditor—Amendment.]—Action to have it declared that a certain conveyance of land made by the defendant Henry E. Teasdale to his wife, the defendant Helena Augusta Kate Teasdale, was null and void as against the plaintiffs and all other creditors of the defendant Henry E. Teasdale, or that the lands conveyed were held in trust by the grantee for the grantor. The learned Judge said that the evidence satisfied him that the defendant Henry E. Teasdale had a financial interest in the land standing in the name of his wife, and that money which ought to have gone in payment of the plaintiffs' claim went in paying for this property. So far as this money was derived from a boarding account or from conversion of a horse, there never being any completed gift of these chattels to the wife, so far as there were profits from these investments or accumulations or surpluses from the husband's earnings, these were the husband's moneys, and must be accounted for. It all went into the common fund now in part invested in the land in question. Whether the business alleged to have been carried on by Mrs. Teasdale could be regarded as her business, the learned Judge had not stopped to determine, as, without this, there was, in his opinion, a resultant trust in favour of Henry E. Teasdale of more than suffiicent to satisfy the plaintiffs' claim. The evidence as to advances made by Mrs. Teasdale and a chattel mortgage transaction left a serious question whether the detailed

account of the money in question, including the separate handling of the initial $150, could be depended upon. Judgment declaring that the defendant Henry E. Teasdale is beneficially interested in the lands in question to an extent sufficient to satisfy the plaintiffs' claim, and for payment and sale upon default, and for the costs of this action. The plaintiffs to amend their statement of claim by striking out from paragraph 1 of the prayer for relief the words "and all other creditors of the defendant Henry E. Teasdale." T. H. Lennox, K.C., for the plaintiffs. R. D. Moorhead, for the defendants.

SHERIFF v. AITCHESON—LENNOX, J.—MAY 5.

Contract—Formation—Evidence—Absence of Consensus.]—Action for specific performance of a contract or for damages for breach thereof. The learned Judge said that the transaction involved was nothing more or less than the plaintiff bargaining with the plaintiff for the tenancy and optional purchase of the defendant's farm, upon the plaintiff's own terms. The defendant signed some of the documents; but every proposal, every figure, every term, and every stipulation was conceived and set out by the plaintiff. "Their minds never met," and that the plaintiff was conscious of at the time. There was no bargain. Action dismissed with costs. A. C. Heighington, for the plaintiff. H. H. Dewart, K.C., for the defendant.

SMITH v. STANLEY MILLS CO.—MASTER IN CHAMBERS—MAY 7.

Discovery—Examination of Plaintiff—Action to Set aside Agreements—Allegation of Physical and Mental Incapacity of Plaintiff—Order for Attendance of Plaintiff at his own House—Presence of Medical Adviser—Examination of Plaintiff by Alienist on Behalf of Defendants—Con. Rules 3, 462—9 *Edw. VII. ch.* 37, *secs.* 8, 9(2)—1 *Geo. V. ch.* 20, *secs.* 1, 2—*Lunacy—Jurisdiction of Master in Chambers — Particulars — Counterclaim—Claim for Damages by Reason of Interim Injunction—Practice—Costs.*]—The plaintiff, a man of eighty-four years of age, brought this action to set aside two agreements made by him with the defendants, one in March, 1910, the other in January, 1913, by which he gave the defendants an option to buy cer-

tain valuable real property in the city of Hamilton, at the expiration of a lease, in 1918 or 1923, for $40,000. The plaintiff alleged that the property was worth far more than $40,000; and that, by reason of his advanced age and ill-health, he was incapacitated from doing business and was induced to enter into the agreements without independent advice or assistance. The defendants obtained and served an appointment for the examination of the plaintiff for discovery, at his own home; but the plaintiff did not appear, being too ill to do so, as was stated on affidavit. The defendants moved for an order requiring the plaintiff to attend for examination at his own expense and for a direction that a qualified physician might attend on the defendants' behalf at such examination; or for an order for the examination of the plaintiff by an alienist or other physician in regard to the plaintiff's alleged physical and mental incapacity. The Master said that there was no difficulty in making an order for the defendant to attend for examination; and at such examination it would be desirable that the plaintiff's medical adviser should be present: Lindsay v. Imperial Steel and Wire Co., 13 O.W.R. 872. It was not to be presumed that the plaintiff would not be able to submit to such examination at his own home; and it was difficult to see how he could hope to get judgment setting aside the later agreement unless he could himself appear at the trial—which would be a much more serious and trying ordeal, even if not a trial by jury. The defendants' solicitors should take out another appointment, after ascertaining the most convenient time for the plaintiff. No further payment of conduct money would be necessary. The costs of the motion should be costs in the cause.—The Master declined to make any order as to the presence of a medical man on behalf of the defendants at the plaintiff's examination or for an examination of the plaintiff by a medical man. The Master referred to Angevine v. Goold, ante 1041. He said that he could not see that Con. Rule 462 could be applied, either per se or by analogy under Con. Rule 3. Nor could any assistance be had from 9 Edw. VII. ch. 37, secs. 8 and 9(2), amended by 1 Geo. V. ch. 20. Sections 1 and 2 of the latter Act might give the Court power to aid the defendants; but lunacy matters were excluded from the Master's jurisdiction by Con. Rule 42(5), and what could not be done directly could not be done indirectly.—In the same case, the plaintiff moved for particulars under the counterclaim, chiefly as to the damages alleged to have been caused to the defendants by an interim injunction order obtained by the plaintiff. Counsel for the defendants pointed out that no claim was to be gone into at

present. It was only an intimation of what the defendants would ask if successful at the trial. He cited Kerr on Injunctions, 4th ed., pp. 591, 592, as shewing that it could not be determined until after the trial whether an inquiry as to damages would be granted. Even if the action was dismissed, the defendants would not necessarily recover damages. The Master agreed with this, and said that no particulars should be ordered, especially as the case was at issue and had been ordered to be tried on the 19th May. The motion was, therefore, dismissed; costs in the cause. The plaintiff was justified in finding out exactly what course the defendants intended to take, just as the defendants were justified in making every reasonable effort to have evidence as to the mental condition of the plaintiff in 1910 and at the present time. A. O'Heir and F. Morison, for the plaintiff. H. A. Burbidge, for the defendants.

PAGLIAI v. CANADIAN PACIFIC R.W. CO.—BRITTON, J.—MAY 7.

Damages—Carriage of Goods—Loss in Transit—Liability of Carriers—Assessment of Damages — Value of Goods.]—The plaintiff, on the 18th December, 1911, delivered to the agents of the defendants at Minneapolis a cask of moulds and a cask of models to be carried to Toronto. The moulds arrived safely, but the models did not, having been apparently lost in transit. The plaintiff sued for $2,000 damages for the loss of the models. BRITTON, J., found, upon the evidence, that the defendants were liable for the loss of the models; in fact, he said, liability was conceded at the trial; but the defendants contended that the amount claimed by the plaintiff was exorbitant. The learned Judge reviewed the evidence, in a written opinion, and stated his conclusion that the plaintiff's damages were not so large as the amount which he said was paid for the models. Damages assessed at $850, and judgment directed to be entered for the plaintiff for that amount with costs. W. A. Proudfoot, for the plaintiff. Angus MacMurchy, K.C., for the defendants.

FRITZ v. JELFS—MASTER IN CHAMBERS—MAY 8.

Security for Costs—Public Authorities Protection Act, 1 *Geo. V. ch.* 22, *sec.* 16—*Police Magistrate—Action against, for Tort —Unofficial Act—Cause of Action—Motion to Strike out Statement of Claim—Con. Rule* 261—*Forum.*]—Motion by the defendant Jelfs to set aside the statement of claim as disclosing no cause of action, or for an order for security for costs, under

the Public Authorities Protection Act, 1 Geo. V. ch. 22, on the ground that the action was brought against the moving defendant as a Justice of the Peace or Police Magistrate, and that the grounds of action were trivial and frivolous. By the statement of claim the plaintiff alleged that the defendant Jelfs maliciously advised and procured the landlady of the plaintiff to eject him from the premises held by him under a lease: that, in pursuance of this object, he wrote a letter to the plaintiff on the 20th June, 1912, advising him that, if he did not leave within two days, "I shall have to assist Mrs. Bell in forcibly ejecting you;" that six days thereafter this threat was repeated by a detective of the Hamilton police force; and the following day two constables in their uniforms, "pursuant to instructions received from the defendant Jelfs, forcibly ejected the plaintiff and put his goods and chattels on the street." For these alleged torts, the plaintiff claimed $3,000 damages from the defendant Jelfs. It was not denied that the defendant Jelfs was the Police Magistrate. But he made an affidavit on the motion, to which his letter of the 20th June was an exhibit. In this he said that what he did was not in any way as such magistrate; and that he was only acting as a friend to Mrs. Bell, as he does constantly when poor people come and ask his advice, which is given free. Even without this affidavit, the Master said, it was clear that all that the plaintiff charged against the defendant Jelfs was in no way connected with his office, so as to bring him within the protection of the Act 1 Geo. V. ch. 22, sec. 16. This point was dealt with in Parkes v. Baker, 17 P.R. 345, and very recently in Meredith v. Slemin, ante 885. Here there was no pretence that what the defendant Jelfs did was in any way within the scope of his official duties. The defendant himself expressly denied that it was; and this disposed of the motion for security. It was said by Boyd, C., in Kelly v. Barton, 26 O.R. at p. 621: "If the officer, in discharge of a public duty, acts irregularly or erroneously, he is entitled to the qualified protection of the statute; but, if he volunteers or assumes to do something which is not imposed upon him as an official duty, then he is outside" of the statute.—As to the other branch of the motion, the Master said that it could not be entertained except under Con. Rule 261. This was so decided by Street, J., in Knapp v. Carley, 7 O.L.R. 409. See too Harris v. Elliott, ante 939.—The motion failed on all grounds, and must be dismissed with costs to the plaintiff in the cause; without prejudice to any motion that the defendant Jelfs might be advised to make under Con. Rule 261 or otherwise. S. F. Washington, K.C., for the defendant Jelfs. L. E. Awrey, for the plaintiff.