THE

ONTARIO WEEKLY REPORTER

VOL. X. TORONTO, SEPTEMBER 12, 1907. NO. 16

JULY 12TH, 1907.

DIVISIONAL COURT.

CHICAGO LIFE INSURANCE CO. v. DUNCOMBE.

Principal and Surety—Bond for Fidelity of Agent of Insurance Company—Advances to Agent and Premiums not Paid over—Construction of Bond—Application to Existing Agreement between Agent and Company—Withholding from Surety Information as to Material Facts—Release.

Appeal by plaintiffs from judgment of BRITTON, J., 8 O. W. R. 898, dismissing the action.

C. St. Clair Leitch, Dutton, for plaintiffs, appellants.

J. M. Glenn, K.C., for defendant T. H. Duncombe, the respondent.

The judgment of the Court (MEREDITH, C.J., MACMAHON, J., MAGEE, J.), was delivered by

MEREDITH, C.J.:—The action is upon a bond entered into by the respondent and R. L. Duncombe, an agent of the appellants, with the appellants, bearing date 8th May, 1906, by which the obligors became bound to the appellants that, amongst other things, R. L. Duncombe would well and faithfully perform his duties as agent of the appellants, and would also well and truly pay over "all moneys which he now owes or hereafter may owe said company, or for which he may be liable to said company on account of loans or advances made to said R. L. Duncombe during the continuance

of the present agency of said R. L. Duncombe, or under any future agency agreement, either joint or several, for the purpose of enlarging his business or otherwise, and whether the same shall have been advanced under the terms of the agency agreement between said R. L. Duncombe and said company or any future agreement, or otherwise, or to any third person at his request, and whether said R. L. Duncombe shall have made any express promise to repay the same or otherwise."

R. L. Duncombe had been appointed agent of the appellants on 11th September, 1905, and an agency agreement of that date had been entered into between him and the appellants; that agreement was modified by an agreement bearing the same date, and another agreement similar in terms was entered into on 8th November, 1905, and still another on 29th January, 1906, and the last of these agreements was the one in force when the bond sued on was entered into.

The claim of the appellants is made up of $75.72, premiums alleged to have been received by R. L. Duncombe, the agent, between 14th March, 1906, and 11th May, 1906, and $900, advances alleged to have been made to him between 8th November, 1905, and 7th May, 1906 (statement A.)

This statement shews that at the date of the agreement of 29th January, 1906, Duncombe, the agent, was indebted to the appellants in $650 for advances, that $75 was advanced to him on that day, and $175 in three sums of $50, $50, and $75, subsequently.

Two grounds of defence are set up by the respondent, and have been given effect to by my brother Britton:—

(1) That the terms of the bond do not cover the advances made prior to 29th January, 1906.

(2) That the failure of the appellants to disclose to the respondent the fact that the person whose fidelity he was undertaking to be answerable for, was then indebted to the appellants in the sum of $650, was a concealment of material facts which should have been disclosed, and that the respondent is therefore entitled to repudiate the obligation entered into by him.

Dealing with the first ground of defence, I am of opinion that the terms of the bond cover the amount of the claim of the appellants for the premiums and the advances made on and after 29th January, 1906.

I agree with my brother Britton that no liability was undertaken by the respondent in respect of any transaction between R. L. Duncombe and the appellants prior to 29th January, 1906, but, if I understand my learned brother's judgment correctly, I differ from him in thinking, as I do, that there is evidence that the advances made were advances within the terms of the bond. The evidence taken under the commission shews that the advances were those which are usually made by life insurance companies to their agents, and were intended, in part, at least, to keep the agent in funds during the period of the credit which he might give to persons insuring or insured for payment of their premiums. I do not see that any of these advances may not properly be considered advances to the agent for "the purpose of enlarging" his "business or otherwise." They may be described not improperly, I think, as made for the purpose of enlarging the agent's business, for it is manifest that the more or longer credit he was in a position to give to his patrons, the larger the business he reasonably might expect to do; but if they do not fall within that part of the description, they certainly are covered, I think, by the words "or otherwise." If made in connection with the agency, as undoubtedly they were, it would be, I think, an unwarranted application of the ejusdem generis rule to apply it so as to exclude them.

The first ground of defence failing, is the respondent entitled to succeed on the second ground?

I am unable to agree with the conclusion of my brother Britton that there was anything in the conduct of the appellants or their dealing with the respondent that should have the effect of relieving him from the obligation entered into by him.

The respondent knew, as the letter from R. L. Duncombe to him of 8th May, 1906, shews, that R. L. Duncombe had been for some time, at all events, an agent of the appellants, and that he had just made a new contract with the appellants. The new contract referred to was a modification of the contract of 29th January, 1906, and was entered into on 7th May, 1906. The terms of the bond which the respondent executed shewed him that he was becoming bound for a then existing indebtedness of the agent, if he was then indebted to the appellants. It was not the appellants but R. L. Duncombe who requested the respondent to become a

party to the bond, and there was no communication in reference to it between the appellants and the respondent. It may be suspected, though I do not think it is proved, that Herbert S. Duncombe suggested to R. L. Duncombe that he should procure the respondent to take Herbert S. Duncombe's place as surety to the appellants. That the latter was desirous of being relieved of his obligation on the bond is shewn, but it is not shewn that it was because of any apprehension on his part as to the condition of R. L. Duncombe's account with the appellants, but, even if it were, I fail to see how the appellants can be affected by anything done by Herbert S. Duncombe to serve his own purposes, and when not acting for the appellants or in their interest; nor do I understand on what principle the fact that he was a vice-president of the company, and its solicitor, would warrant the Court in imputing notice to the appellants of the motives actuating him in endeavouring to get himself replaced as surety by the respondent.

The circumstance that when the payment was being made to the agent for the stock of the company owned by him, his indebtedness to the company was not deducted, is relied on by my brother Britton as indicative of some fraudulent intention in regard to the respondent. Again, it seems to me the answer to that is that the stock transaction was not one between the appellants and R. L. Duncombe, but between the latter and Herbert S. Duncombe, and there is no evidence—whatever one might be inclined to suspect—that the appellants, or, for that matter, that Herbert S. Duncombe, had any idea that the account of R. L. Duncombe was not in a satisfactory condition or that the advances made to him would not be repaid in due course, or that, knowing this, the respondent was substituted as surety for Herbert S. Duncombe in order that he might escape from the liability he had incurred as surety.

In my opinion, there was no duty resting on the appellants to communicate to the respondent the fact that Herbert S. Duncombe had been the surety for R. L. Duncombe, and that the respondent was taking his place and Herbert S. Duncombe was being relieved from his liability, or that the appointment of R. L. Duncombe as agent had originally been made before the appointment of 29th January, 1906, or that there was a current account between the agent and the appellants in which he was a debtor to the appellants for advances

made to him for the purpose of his business. As I have already pointed out, the respondent knew that there had been a previous agency to that in respect of which his bond was entered into, and I cannot think that the non-communication of the fact that advances had been made to the agent under previous agreements, which had not been repaid to the extent of $450, there being nothing to shew that the agent was in default in respect of these advances, has the effect of entitling the respondent to repudiate liability on his bond.

The appellants are, in my opinion, entitled to judgment for the amount of the premiums received by R. L. Duncombe after 29th January, 1906, and not accounted for, and paid to the appellants, and for so much of the advances made on or after that date, as have not been repaid. According to the statement A., the premiums amount to $75.72, and the advances to $250.

The appeal will therefore be allowed with costs, and, instead of the judgment entered by the trial Judge, judgment will be entered for the appellants for $325.72 with full costs.

In form the judgment will be for the penalty named in the bond and costs, and the damages for the breaches assigned assessed at the sum I have named.

ANGLIN, J. JULY 18TH, 1907.

TRIAL.

LAIRD v. NEELIN.

Assessment and Taxes—Tax Sale—Valid Assessment—Irregularities — Collector's Returns not Verified by Oath—Late Return—Non-compliance with Provisions of Assessment Act—Sale of Lands not Included in List Furnished by Treasurer to Clerk — Failure to Redeem within One Year after Sale—Curative Provision of Statute—Special Acts—Setting aside Sale.

Action to set aside a tax sale and treasurer's deed of lot number 9 on the north side of Bay street in the town of Port Arthur to the defendant Neelin. The sale took place

on 4th November, 1896. The deed was dated 18th November, 1897. This action was begun on 29th June, 1899.

G. H. Watson, K.C., and W. McBrady, Port Arthur, for plaintiff.

F. H. Keefer, Port Arthur, for defendants.

ANGLIN, J.:—The sale was had for alleged arrears of local improvement rates for the year 1890, amounting to $3.10, and of general taxes for the year 1890, amounting to $2.45.

In their statement of defence the defendants allege a transfer of the property in question from defendant Campbell, himself a transferee from Neelin, to one Graham, as a bona fide purchaser for value without notice of plaintiff's claim. Graham is not a party to this action. The evidence failed to sustain this plea.

The plaintiff made no attempt to shew that the local improvement rates for 1890 were not properly imposed. He made an effort to shew that there was some irregularity in the specification of the items of general taxation for the year 1895, which seems to me not very material.

It was shewn that the collector's returns for the years 1890 and 1895 were not verified by oath, as required by sec. 132 of 55 Vict. ch. 48, and that the return in the latter year was over 7 months late. The provisions of secs. 140, 141, 142, 143, 150, and 162, of the same statute, were shewn to have been entirely ignored by the officials of the municipality, and other minor irregularities were also proven.

Section 163 forbids the sale of any lands which have not been included in the list furnished by the treasurer to the clerk of the municipality, pursuant to sec. 140 of the statute. That the impeached sale was had in direct violation of this prohibition is not controverted. But it is contended for the defendants that the provisions of sec. 188 of the Consolidated Assessment Act of 1892 (sec. 208 of ch. 224, R. S. O. 1897), bar the plaintiff's action, because he failed to redeem the lands within one year after the sale. That section reads as follows: "If any tax in respect of any lands sold by the treasurer, in pursuance of and under the authority of . . . this Act, has been due for the third year or more years preceding the sale thereof, and the same is not redeemed within one year after the said sale, such sale and the official deed to the purchaser of any such lands (provided the sale be

openly and fairly conducted) shall be final and binding upon the former owners of said lands, and upon all persons claiming through or under them—it being intended by this Act that all owners of land shall be required to pay the arrears of taxes due thereon within the period of 3 years, or redeem the same within one year after the treasurer's sale thereof."

. . .

[Reference to Donovan v. Hogan, 15 A. R. 432, 445.]

The defendant did not plead this section; neither did he offer any evidence to shew that the sale was openly and fairly conducted.

If untrammelled by authority, I should incline to hold that where a valid assessment has been admitted or proven, and taxes so imposed have been unpaid for over 3 years since they became due, a sale had for such taxes would fall within the curative operation of sec. 188, notwithstanding non-compliance with the requirements of secs. 140 et seq. This view appears to have commended itself to Osler, J.A., in Kennan v. Turner, 5 O. L. R. 560, 563, 2 O. W. R. 239, but is not tenable since the later decision of a Divisional Court in Ruttan v. Burk, 7 O. L. R. 56, 61, 3 O. W. R. 167. Though certainly open to the observation made upon them by Osler, J.A., in many earlier authorities the opinion is expressed that sec. 188 applies only to sales made in conformity with the requirements of the statute, and does not validate sales made in contravention of sec. 163 (sec. 176 of ch. 224, R. S. O. 1897): Wildman v. Tait, 32 O. R. 274, 283, 2 O. L. R. 307; Love v. Webster, 26 O. R. 453; Deverill v. Coe, 11 O. R. 222, 241; Haisley v. Somers, 13 O. R. 600. See also Carter v. Hunter, 13 O. L. R. 310, 319, 9 O. W. R. 58.

The defendant also relies upon the special Acts 63 Vict. ch. 86, sec. 4, and 1 Edw. VII. ch. 65, sec. 2. The former statute was in Ruttan v. Burk held insufficient to cure such defects as have been shewn in this case The action was begun before the latter statute was enacted, and it expressly excepts from its operation sales questioned in pending litigation.

No claim is made on behalf of the defendants Neelin and Campbell for a declaration of lien under sec. 198 of 55 Vict. ch. 48.

The impugned sale and deed must, therefore, be set aside as prayed, with costs to be paid to the plaintiff by the defendants Neelin and Campbell.

ANGLIN, J. JULY 18TH, 1907.

TRIAL.

STEVENSON v. CAMERON.

Deed—Rectification—Conveyance of More Land than Vendor Intended — Unilateral Mistake no Ground for Relief—Fraud—Knowledge of Purchaser of Intention of Vendor—Importunity—Absence of Independent Advice.

Action for the rectification of two conveyances made by plaintiff to defendants on 18th July, 1906. The property conveyed consisted of two lots known as numbers 9 and 10, which, according to the registered plan, had a frontage on Gore street of 133 feet by a depth of 165 feet, to the right of way of the Canadian Pacific Railway. The plaintiff had been the owner of these lots for something over 20 years. The defendants were desirous of acquiring them for the purpose, amongst others, of erecting an hotel upon lot number 9, fronting on Gore street. The plaintiff sought rectification in respect of a strip of land crossing the rear of both lots, and varying in width from 26 feet at the west to 36 feet at the east. This strip of land, according to plaintiff's contention, she expressly excepted from the lots when selling them to defendants. She based her claim for relief upon the grounds of mistake and fraud.

F. H. Keefer, Port Arthur, for plaintiff.

G. H. Watson, K.C., and W. A. Matheson, Fort William, for defendants.

ANGLIN, J.:—The strip of land in the rear has for many years been used as a means of access for the public to the station of the Canadian Pacific Railway Company, at West Fore William. This strip, the plaintiff alleges, her husband, since dead, some 20 years ago, agreed on her behalf to transfer to the railway company, who then erected and have since maintained the fence separating it from the remaining parts of lots 9 and 10.

It was perfectly clear upon the evidence that any mistake which may have existed as to the description of the lands in the conveyances was entirely on the part of the plaintiff herself. So far as the defendants were concerned, they in-

tended that the deeds in question should be drawn to cover the entire lots. The mistake, therefore, being unilateral, the plaintiff cannot obtain rectification on that ground. This renders it necessary to consider whether or not the evidence supports the plaintiff's claim that the execution of the deeds in their present form was procured by fraud on the part of the defendants.

Although the defendants intended to acquire the property jointly, for reasons of their own they approached the plaintiff as if the defendant Cameron alone were to be the purchaser, and the interest of the defendant Flannigan was merely that of an agent to acquire the property for him.

The opening of the negotiations was some few days prior to 24th April, 1906. There is some uncertainty upon the evidence whether defendant Flannigan, who conducted the negotiations with plaintiff, saw her twice or oftener before an agreement of sale was actually signed. According to the evidence of plaintiff, he probably paid her at least 3 visits before the execution of the agreement. According to his own statement he saw her twice. He says that on the first occasion nothing was discussed except the question of price—nothing at all said as to the dimensions of the property; that, on the second occasion, he was accompanied by one Black, who was to take the management of the hotel to be built upon the property, and that then there was nothing said as to the dimensions of the property to be conveyed, or as to any interest of the Canadian Pacific Railway Company in the strip in question. Upon the occasion on which the agreement was executed, 14th April, Flannigan says that there was no discussion as to the frontage or depth of the property, and that nothing was said as to any rights in the Canadian Pacific Railway Company in respect of the rear strip. He states, however, that, on the occasion when Black was with him, Mrs. Stevenson told them that there was a lane at the rear, and that some agreement respecting this lane had been entered into by herself or her husband with the municipal council, under which this lane was to be kept open for the use of the public. He says that she could not give him any definite information about this agreement, nor could she state its precise terms or effect. On the occasion of the execution of the agreement, he says, she again spoke of this lane being left open for the public use, and in that connection referred to a piece of Edward street which she had fenced in. Mr. Cameron's evidence as to what took

place on the occasion of the execution of the agreement—the only time when he saw the plaintiff—was that the frontage and depth of the property were then referred to, and that there was some discussion between plaintiff and defendant Flannigan about some part of the lots which they spoke of as reserved for street purposes. He says that there was no reference in this connection to any interest of the Canadian Pacific Railway Company.

Mrs. Stevenson, on the other hand, swears that from the first interview with the defendant Flannigan, who was admittedly acting on behalf of himself and his co-defendant Cameron, she made it clear to him that she intended to convey only so much of the lots numbered 9 and 10 as lay to the north of the strip of land in question, informing him that she could not convey the southerly strip because of an agreement between her husband and the Canadian Pacific Railway Company, made many years ago, whereby that company was to acquire that strip in exchange for a portion of Edward street to which the company had acquired title under a by-law of the municipal corporation of Neebing, and a subsequent conveyance from the corporation executed to carry out such by-law. She does not profess to have explained fully to Flannigan the precise nature of the arrangement with the Canadian Pacific Railway Company, or the mode in which that company acquired their interest in the strip of land in question. But she is emphatic in her statement that on every occasion—and she says there were several—on which the matter was discussed before the agreement for sale was signed, she made it perfectly clear to Flannigan that she did not consider herself able to give title to this rear strip, and intended to sell and convey only the front portion of the lot, having an approximate depth of 125 feet. She says that on the occasion on which the agreement was executed Flannigan referred to the fact that the frontage of the lots was about 133 feet, and that she then told him that the depth would be about 125 feet, but that she was not sure of it and would have her son measure it. She further says that, in discussing the boundaries of the land to be sold, the fence, which appears to have been erected something over 20 years ago by the Canadian Pacific Railway Company, separating the strip in question from the land which she alleges she intended to sell to defendants, was referred to; that this fence stood in this position for some

20 odd years, and was a landmark which the defendant Flannigan could not have overlooked, seems beyond question.

Mrs. Stevenson's daughter Jennie was present at one interview between the plaintiff and the defendant Flannigan prior to the execution of the agreement, and also during some part of the interview on the day on which the agreement was actually executed. She swears that on the former occasion her mother told Flannigan distinctly that she would only sell what land was inside the fence, as she had given the rest to the Canadian Pacific Railway Company, and that on the second occasion, when Flannigan referred to the frontage being 133 feet, her mother told him that she thought the depth was 1,125 feet, but was not sure, and that she would get her son to measure it before the deed was made out. Flannigan, upon being confronted with these statements in cross-examination, contradicts them flatly. He says that on no occasion did Mrs. Stevenson state that the strip back of the fence had been given to the Canadian Pacific Railway Company; in fact, that no reference was made at any time to any interest of the Canadian Pacific Railway Company in these lands.

Referring to what took place at the time of the execution of the agreement, he swears positively that there was no reference whatever to the dimensions of the property, either in frontage or depth. In regard to this latter occasion the evidence of Mr. Cameron contradicts that of Flannigan, and, in a measure, at least, corroborates the testimony of Mrs. Stevenson and her daughter, because he says that both frontage and depth were mentioned, though he does not agree that the depth was spoken of as being approximately 125 feet.

It should be noted also that upon his examination for discovery, Flannigan had sworn that Cameron was not with him when the agreement was executed, and that in the witness box he made a contrary statement upon cross-examination, giving as an explanation of this contradiction, the fact that Cameron had since satisfied him that he was present.

Mrs. Stevenson and her daughter both say (though they will not swear positively) that to the best of their recollection no part of the agreement signed on 24th April was read over to them by Flannigan at that time. Flannigan at first said that he had read over the typewritten portions of this document, but upon being shewn the document, he went further and swore that he had read over practically the whole

of it. Cameron, who, according to Flannigan's present evidence and his own testimony, was present at the execution of the agreement, cannot remember that any part of that document was read by Flannigan to Mrs. Stevenson.

An independent witness, Harry Harkness, who, according to Flannigan's evidence, always has been and still is a personal friend of his, swore that about the time when Flannigan was contemplating buying this land and building an hotel, he approached Harkness desiring information about the position of the Stevenson estate. Harkness says that he told Flannigan that there had been a deal between Stevenson and the Canadian Pacific Railway Company, as to part of the land; that Flannigan must be careful to buy only the land between the two fences; that the Canadian Pacific Railway Company had got the rest. Later in the course of his evidence he said: "I told Flannigan that the rear part of the lots had been given to the Canadian Pacific Railway in exchange for a lot on the corner of Edward street." On being confronted with these statements, Flannigan flatly denied them and said that no such interview took place; that the only time he saw Harkness was during the progress of the building of the hotel, and that Harkness on that occasion referred to the fence enclosing Edward street, which he said should be taken down, as Mrs. Stevenson did not own that property. He also said that he had never spoken to Harkness about his intention to build the hotel.

When the agreement was executed on 24th April, $1,000 was paid on account of the purchase money. Matters remained in this position, the defendants meantime having commenced building, until 11th July, when, finding it necessary to secure a loan from a mortgage company, they sought to obtain the deed. Flannigan again went to Mrs. Stevenson to inform her of their wish. According to the evidence of Mrs. Stevenson and her daughter, they sought to put the matter off until Mrs. Stevenson, who at the time was ill, should feel able to go to Port Arthur to consult her solicitor, Mr. Keefer, and have him prepare the deed; but, Flannigan pressing the matter, and suggesting that they should allow him to get his solicitor, Mr. Morris, to prepare the deed, Mrs. Stevenson yielded and consented that Mr. Morris should be instructed to draw the instrument. Mr. Flannigan, on the other hand, says that he suggested that Mrs. Stevenson should instruct Mr. Keefer to prepare the conveyance, but that, notwithstanding this suggestion, she told

him that she wished to have it prepared by Mr. Morris, and asked him to instruct Mr. Morris to draw it up. Upon cross-examination Mrs. Stevenson and her daughter adhered firmly to their statement, as did Mr. Flannigan to his.

The deeds were prepared by Messrs. Morris & Babe, who had never previously acted for Mrs. Stevenson, but were the solicitors of Mr. Flannigan; and, according to the evidence of Mrs. Stevenson and her daughter, Mrs. Stevenson was asked, by telephone message from Mr. Babe on the morning of the 12th July, to attend at his office on that morning to execute them, her reply being that she did not then feel able to go, but would endeavour to go down at 4 o'clock in the afternoon. Shortly afterwards, and between 11 and 12 o'clock in the forenoon, Mr. Babe and Mr. Flannigan attended at Mrs. Stevenson's house to secure the execution of the deed. The mother and daughter were both present, and both say, though again they will not swear positively, that no part of the instruments were read over in their presence, and that they were signed by Mrs. Stevenson without her reading them. Mr. Babe's evidence is to the effect that it is always his custom to read over deeds executed in his presence, or, at all events, the material portions of them, and he says that on this occasion he has a recollection of telling Mrs. Stevenson that the deeds she was about to execute were from herself to Messrs. Cameron and Flannigan, and that they conveyed, for a sum of $2,750, the property described in the deed. The description he says he read in full. Believing that Mr. Babe intended to tell the truth to the best of his recollection, I am, nevertheless, not satisfied that he did on this occasion read over in full the descriptions of the property contained in these deeds. He seemed very anxious to impress upon me the fact that it was his custom invariably to do so. My experience is that a witness who is anxious to swear to his custom, has usually convinced himself that, upon some particular occasion, as to which his recollection has not been very distinct, he did in fact adhere to his custom. In the present instance, I incline to the view that Mr. Babe did, as he states, tell Mrs. Stevenson that the deeds were deeds from herself to Messrs. Cameron and Flannigan; that he probably also mentioned the consideration, and in a general way,—for instance, as her property at the corner of Gore and Edward streets, or, in some such indefinite manner, referred to the lands which were to be conveyed. Mr. Flannigan declined to pledge his oath that the deeds

or any part of them were read over to Mrs. Stevenson, saying that, although he accompanied Mr. Babe, presumably for the purpose of seeing that the instruments were executed, and thereupon paying over the money, he did not pay any attention to this portion of the transaction.

Nothing further of any importance occurred until some time late in August, or in the month of September, or October; the date was not at all definitely fixed. The plaintiff says that at some time during this period she was waited upon by her banker, Mr. Jarvis, who had the custody of her papers, accompanited by Mr. Taylor, an official of the Canadian Pacific Railway Company, who came to inform her that she had conveyed to Messrs. Flannigan and Cameron the rear strip in which the Canadian Pacific Railway Company were interested. This fact had apparently been brought to the knowledge of Mr. Taylor, and he came to Mrs. Stevenson for an explanation about it. Mrs. Stevenson swears that she was then for the first time aware that in the deeds the lands conveyed were described otherwise than as she had intended they should be.

During the interval between this date and the time at which the present action was brought, plaintiff was endeavouring to secure a reconveyance of the southerly strip from Messrs. Cameron and Flannigan. Their attitude almost from the first appears to have been that there had been no mistake made by Mrs. Stevenson in conveying this strip to them, but that they held it subject to a condition that it should be available for the purposes of a public highway. Indeed Mr. Flannigan is very positive in his evidence that throughout the negotiations it was stated by Mrs. Stevenson that her husband had made some sort of an agreement with the municipality of the township of Neebing whereby this strip of land should be given for use as a public highway, and that it was a term of the bargain between himself (Flannigan) and Mrs. Stevenson, that, although the southerly strip should be included in the conveyance from Mrs. Stevenson, the grantee should keep the strip open as a public lane or highway and should hold it subject to that condition. Mr. Cameron in his evidence said that in the month of October, when Mrs. Stevenson saw him, complaining that the deeds were not as she had intended they should be, she referred to some other arrangement with the town for an exchange of the rear part of her lots for some other land. From the time this action was brought the defendants' position had

been, and still is, that they are willing to allow the land in question to be used as a public highway. . . .

It becomes largely a question of credibility as between Mrs. Stevenson and her daughter on the one hand, and Mr. Flannigan on the other.

While Mrs. Stevenson's demeanour on cross-examination was not always entirely satisfactory—yielding apparently to a spirit of obstinacy, she sometimes declined to answer counsel for the defendants explicitly, and once or twice said she did not remember matters upon which she answered quite promptly when questioned by Mr. Keefer,—on the whole I was favourably impressed with her testimony, and found nothing which would justify a conclusion against her veracity. Her daughter appeared to be a modest young girl, very nervous, but desirous of telling the truth to the best of her ability.

While it might be difficult to specify anything marked in Mr. Flannigan's manner of giving evidence, or his demeanour in the witness box, that would raise serious doubt as to his credibility, he is, as has been pointed out, in direct conflict with both Mrs. Stevenson and her daughter on almost every material point. Their testimony, as against his, is, in one important particular, materially corroborated by the defendant Cameron. Flannigan's evidence also directly contradicts that of Harkness. Against the reliability of this witness nothing whatever has been suggested, and he is entirely independent.

It is also noteworthy that at least on one occasion, where Flannigan is in conflict with both Mrs. Stevenson and her daughter, a witness, Black, who was present and might have given important testimony, was not called. Black was in the court room during the trial. He was excluded at the request of plaintiff's counsel while the evidence for defendants was given. He was interested with the defendants in their hotel scheme, being the person who was to manage it for them. It is a significant circumstance that his testimony is not before the Court.

There should also be noted the fact that there is a material difference between Mr. Flannigan's evidence on discovery and his evidence at the trial, and his explanation of his change in story is rather calculated to lead me to place less reliance on his testimony.

It is likewise a significant circumstance that, although upon their own admission there was some special condition

or term arranged between the defendants and Mrs. Stevenson with regard to the strip of land in question, no allusion to it is to be found either in the agreement or in the deeds which they procured her to sign. Although they admit that it was agreed that this strip of land should be held by them subject to some trust for its use as a public highway, the conveyances which they took vest this property in them absolutely and free from any condition whatever. On the whole, I am driven to the conclusion that in all respects in which the testimony of either Flannigan or Cameron is in conflict with that of Mrs. Stevenson and her daughter, I must reject the former and accept the latter.

It only remains to consider whether, upon the story as told by Mrs. Stevenson and her daughter, a sufficient case is made out for rectification upon the ground of fraud. It is not necessary to find that Messrs. Flannigan and Cameron designed to do Mrs. Stevenson any real harm or wrong in this matter, and I acquit them of any such intent. She held the legal title to the strip of land, as she told Flannigan, as trustee for the Canadian Pacific Railway Company. She had no apparent beneficial interest in it. I think it quite probable that the defendants, appreciating this, thought it would put them in a better position to deal with the Canadian Pacific Railway Company in respect of this strip of land, if the legal title were vested in themselves, and that it would do plaintiff no real injury if they included this land in the conveyances which they obtained from her, even though she did not intend that it should be so included.

At all events, I find as a fact upon the evidence, that the plaintiff never did intend to convey the strip of land in question, and that the defendant Flannigan was aware from the outset that she intended to reserve it, and that she was of opinion that she had no right to convey it. The defendant Cameron is bound by the knowledge of the defendant Flannigan, whether it was communicated to him or not.

The taking of the agreement and conveyances including this strip of land was, in these circumstances, in my opinion, fraudulent. Mrs. Stevenson was admittedly a sick woman at the time that the execution of the conveyances was procured. She had been very unwell for some time before, and, according to her own story, was not quite fit to do business when the sale agreement was signed. Throughout the whole transaction she had no independent advice. Instead of allowing her to have the deeds prepared by her own solici-

tor, as she desired, the defendants induced her to allow their solicitors to prepare them, and Mr. Flannigan admits that he concealed from them what he now asserts to have been the fact, viz., that there was some special bargain affecting the rear strip in question, by which it was to be held subject to a trust for public use.

I think, therefore, the plaintiff is entitled to the relief which she claims, and that judgment must be pronounced for the rectification of the conveyances in question by limiting the lands included in them, so as to exclude the strip of land which lies to the south of the fence, marked "right of way of fence" upon the plan filed as exhibit number 2.

The plaintiff will have her costs of this action.

JULY 19TH, 1907.

DIVISIONAL COURT.

DUNSTAN v. NIAGARA FALLS CONCENTRATING CO.

Contract—Goods to be Manufactured by Plaintiff—Refusal of Defendants to Accept—Statute of Frauds—Work and Labour.

Appeal by plaintiff from judgment of MAGEE, J., 9 O. W. R. 11.

J. A. Macintosh, for plaintiff.

A. B. Morine, for defendants.

The judgment of the Court (MEREDITH, C.J., TEETZEL, J., ANGLIN, J.), was delivered by

MEREDITH, C.J.:—The action is brought for the price of labels manufactured by plaintiff for defendants. Among other defences set up, defendants pleaded the Statute of Frauds, and effect was given to that defence and the action was dismissed.

Plaintiff's contention upon the argument of the appeal was that the claim of the plaintiff was not for goods sold but for work and labour performed and materials supplied, and that the Statute of Frauds had therefore no application.

We do not find it necessary to consider the cases cited by the learned counsel for the plaintiff, for, as far as we are concerned, the question has been conclusively determined by a decision of the Court of Appeal, Canada Bank Note Engraving and Printing Co. v. Toronto R. W. Co., 22 A. R. 462, and determined adversely to plaintiff's contention. In that case the plaintiffs were engravers and lithographers, and the contract was with them for supplying the defendants with certain bonds and coupons to be printed by the plaintiffs, in a special form, with special wording, prepared by the defendants, upon paper purchased by the plaintiffs, and one of the questions was as to the application of the Statute of Frauds to a contract of that kind.

I am unable to distinguish that case from the case at bar. I can see no difference between the supplying of the bonds and coupons in that case and of the labels in this. The bonds and coupons when completed were not in the hands of the plaintiffs saleable to any one but the defendants except as waste paper, any more than are the labels in this case in the hands of the plaintiff.

Nor do I think the case comes within the rule suggested by Mr. Justice Stephen and Sir Frederick Pollock: "A contract by which one person promises to make something which when made will not be his absolute property, and by which the other person promises to pay for the work done, is a contract for work, although the payment may be called a price for the thing, and although the materials of which the thing is made may be supplied by the maker:" Law Quarterly, vol. 1, p. 10.

The appeal must be dismissed with costs.

BRITTON, J. JULY 31ST, 1907.

CHAMBERS.

REX v. CAPELLI.

Criminal Law—Murder—Death Sentence—Reprieve—Criminal Code, sec. 1063.

Motion by the prisoner under sec. 1063 of the Criminal Code to reprieve the accused for such period beyond the time fixed for the execution of the sentence as should be necessary for the consideration of the case by the Crown. The prisoner, with one Marino, was tried at Parry Sound before TEETZEL, J., on 28th and 29th May, 1907, for the murder of William Dow. Marino was acquitted. Capelli was convicted and sentenced to be hanged on 1st August, 1907. An application was made on behalf of Capelli for the mercy of the Crown. This application was disposed of on 24th July, the Governor-General ordering that the law be allowed to take its course. This decision was not communicated to the solicitor for the prisoner until after the 27th July, but he became aware on the evening of that day from the Toronto newspapers of the decision. It was alleged that there has not been such full consideration of the facts, as counsel for the accused could present them, as would enable the Minister of Justice to determine, pursuant to sec. 1022 of the Code, that Capelli should have a new trial.

C. A. Moss and H. L. Hoyles, for the prisoner.

E. Bayly, for the Attorney-General.

BRITTON, J.:—I have read the evidence, and, while I express no opinion as to whether the accused should get a new trial or not, I think substantial justice requires that a short reprieve should be granted. The law is that a reprieve is grantable by the Court whenever substantial justice requires it. If the Minister of Justice has already fully considered all the facts mentioned in the affidavit of Mr. Keeter filed on this application, it may be that nothing will be gained by the short respite given to the prisoner, but if these facts have not been properly presented for due consideration, it is due to the prisoner that the opportunity

be now given. It is important that the question of the Crown not calling the witness Robertson, and the fact, if it be so, of the evidence of a person who was sick being now procurable on behalf of the accused, should be considered. I am not unmindful of the fact that after the verdict all presumptions are against the innocence of the prisoner, and I do not deal with the question of either guilt or innocence, but my decision is simply that the prisoner surely gets the fullest opportunity for the presentation of, and argument upon, all the facts which would go to shew that he may be entitled to a new trial, and for this purpose I grant a reprieve for 2 weeks, and order the execution to take place on 15th August, 1907, instead of the 1st, as sentenced by the trial Judge.