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HIGH COURT DIVISION.

MIDDLETON, J. JUNE 30TH, 1914.

McPHERSON v. UNITED STATES FIDELITY AND GUARANTY CO.

Execution — Judgment — Satisfaction — Interpleader Issue — Fraudulent Claim—Judgment for Instalments of Purchase-price of Land—Resale of Mill on Land by Vendor—Sale of Land—Effect upon Judgment—Judgment for Costs—Damages—Independent Cause of Action—Action on Interpleader Bond—Limitation of Amount Recoverable.

Action upon an interpleader bond; also an issue directed to be tried for the purpose of determining whether the judgment in the action of McPherson v. McGuire had been satisfied in whole or in part. See McPherson v. Temiskaming Lumber Co. (1911), 2 O.W.N. 553, 3 O.W.N. 36, [1913] A.C. 145.

The action and issue were tried together, without a jury, at Toronto.

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

G. H. Kilmer, K.C., for the defendants.

MIDDLETON, J.:—On the 3rd August, 1907, an agreement was made between McPherson and McGuire dealing with many matters. Clause 10 is the only one now of importance. McGuire agreed "to buy the Maclean saw-mill and machinery, as it stands to-day, at the sum of $7,500, to be delivered in as good state and condition as at the present, at the end of the present season of sawing."

In April, 1908, a further agreement was arrived at, by which the price of the mill was agreed to be paid in three annual in-

stalments, of $2,500 each, with interest, the first instalment to be paid in one year.

In December, 1908, an accounting took place, and an agreement was drawn embodying the result of the accounting.

An action was brought to recover the first instalment of the price of the saw-mill and other moneys alleged to be due to McPherson. In this action judgment in the first instance went by default, and, upon an application being made, the action was allowed to proceed to try the amount due, the judgment in the meantime standing as security to the plaintiff. The result of the litigation was to reduce the amount for which judgment had been signed from $3,961 to $3,232.42; but the execution issued upon the judgment has not been correspondingly amended. It was agreed by all parties that this should now be done. As the result of this litigation, further costs were awarded, and executions have been issued for these, $504.17 and $78.98.

When the second instalment came due, another action was brought. Judgment was recovered in it for $2,590.62 and $135 for costs.

In addition to these executions, two other executions were issued by Booth for $1,007.50, but it is admitted that there is only one debt. This makes a total upon the execution in the Sheriff's hands, exclusive of Sheriff's fees, of something in the neighbourhood of $9,500, under these executions, when interest is added.

The Sheriff seized certain logs. These were claimed by the Temiskaming Lumber Company Limited. An interpleader issue was directed, and it was provided that, upon the lumber company giving to the execution creditors, McPherson and Booth, security for the amount of the appraised value of the goods seized, after deducting the sum of $6,381, the Crown dues, the Sheriff would withdraw from possession.

Although all these different writs of execution were in the hands of the Sheriff, the interpleader issue referred to McPherson's writ under the first judgment and Booth's writ, by an erroneous date; but the issue was, whether, at the time of the seizure, the goods were the property of the claimant as against the execution creditors.

An interpleader bond was given by the defendant company in the penal sum of $10,000. It recites the recovery of McPherson's first judgment, $3,961, Booth's judgment for $1,007.50, giving the correct date of the execution, the interpleader order,

and the terms under which the Sheriff was to withdraw from possession; and the condition is, then, that if, upon the trial or determination of the said issue, the finding is in favour of McPherson and Booth, the company shall pay to them $10,000 or a less amount according to the direction of any order to be made in the matter of the interpleader.

The interpleader issue was finally determined in favour of the execution creditor, upon an appeal to the Privy Council, on the 19th November, 1912: McPherson v. Temiskaming Lumber Co., [1913] A.C. 145.

The first contention now made arises from the fact that, after the recovery of the judgments for the two instalments of the purchase-price of the mill, McPherson sold not only the land upon which the mill was, but the mill itself. McPherson asserts that he did this with the knowedge and approval of McGuire. I do not think that he has established any agreement with McGuire authorising the sale. The mill stood upon the land, unused and deteriorating. Insurance and taxes had accumulated against it, amounting to $1,200. It was sold for $1,780. McPherson is ready to allow this sale to wipe out any balance due to him by McGuire, without prejudice to his claim against the defendant company. What is contended is, that this resale by the vendor operates, as a matter of law, to wipe out the judgments obtained for the past due instalments.

Some difficulty exists in determining whether or not any land should pass to McGuire under the purchase of the mill. I think that it is clear that the mill was purchased with the idea of removing it from the property and taking it to the timber limits which were sold contemporaneously, and that it was not the intention of the parties that any land should pass.

The contention of Mr. Kilmer is that, notwithstanding this, the contract is a contract for the sale of land, and that the resale by the plaintiff prevents the further enforcement of the judgment.

In Lavery v. Pursell (1888), 39 Ch.D. 508, it was held by Mr. Justice Chitty that the sale of the building materials of a house, with the condition that such building should be taken down and the building materials removed from the land, was a contract for sale of an interest in land. I think I should follow this case. It purports to distinguish the sale of materials in an existing building from a case of the sale of growing timber. The distinction is by no means easy to follow. I do not think that Mr. Justice Chitty is to be taken as dissenting from the view ex-

pressed in Marshall v. Green, but rather as distinguishing the case of a building from the case of a tree growing upon the land. Marshall v. Green (1875), 1 C.P.D. 35, to which he refers, is cited with unqualified approval in Kauri Timber Co. v. Commissioner of Taxes, [1913] A.C. 771.

If this building is to be regarded as land, then, according to the decision in Cameron v. Bradbury (1862), 9 Gr. 67, and Gibbons v. Cozens (1898), 29 O.R. 356, by reselling the vendor has precluded himself from afterwards proceeding upon his judgment for the balance of the claim.

I do not think that this precludes the enforcing of the judgment for the costs thereby awarded. These costs are not, like interest, accessory to the demand, but are damages awarded to compensate for the trouble and expense to which the plaintiff is put by the litigation. They are a new and independent cause of action.

If I am right in these findings, it follows that the execution in respect of the instalments should be directed to be withdrawn, owing to the resale of the mill by the plaintiff, and that the executions with respect to costs should be declared to remain in force.

The defendants make a further contention which requires to be carefully examined. At the time the claimant acquired title, there were only the earlier executions in the Sheriff's hands, and the issue was confined to these executions. I quite agree with Mr. Laidlaw's contention that the interpleader order was intended to be, and is, wide enough to allow these creditors to come in and participate with their executions; but the point is, that the judgment of the Judicial Committee ([1913] A.C. 145) merely determines the invalidity of the claimant's title as to the executions in the hands of the Sheriff at the time that title was acquired. The head-note states accurately the ground of decision: "Where execution is levied upon timber cut by an assignee of the license under an assignment made subsequently to the issue of the writ, the levy is valid unless it is shewn that the assignee acquired his title in good faith and for valuable consideration without notice of the execution and has paid his purchase-money."

The concluding paragraph of the reasons for judgment (p. 159) is: "In the result, their Lordships are of opinion that the rights of both of the appellants under the three executions referred to fall to be satisfied out of the $10,000 secured by the bond." From this it is argued that the effect of the judgment

is, to confine the liability of the defendants to the amount remaining due on these three executions.

I cannot assent to this, because it is clear that it is held that the Temiskaming Lumber Company never became in fact a bonâ fide purchaser—that its whole claim was fraudulent—and, therefore, I think it should be held that it was invalid as to all the executions which became entitled to share under the interpleader order.

The bond provides for payment of the full $10,000 or a less amount thereof, according to the directions of any order of the Court or Judge to be made in the matter of the interpleader. I drew the attention of counsel to this, and they consented to my dealing with the matter upon the theory that such an application had been made. I think that the amount should be reduced so as to cover the costs due to McPherson and any further balance outside of the instalments of the purchase-money of the mill. As I understand the case, the first judgment covers more than the first instalment.

In the result, I think that the Booth execution and the other executions placed in the Sheriff's hands, so far as they are not wiped out by the declaration I have made, are entitled to share. If the parties cannot agree upon the amount, I may be spoken to.

As the defendants did not pay into Court anything upon the bond, I think that they should pay the costs of the action, and that McPherson should pay the costs of the issue.

MEREDITH, C.J.C.P. JULY 2ND, 1914.

*RE TOWNSHIP OF HARWICH AND COUNTY OF KENT AND CITY OF CHATHAM.

Municipal Corporations—Land in Township Acquired by City Corporation for Cemetery—Municipal Institutions Act, 29 & 30 *Vict. ch.* 51, *sec.* 269, *sub-sec.* 3—*Road Bordering on Cemetery—"Boundary-line between County and City"—Municipal Act, R.S.O.* 1914 *ch.* 192, *sec.* 452—*Municipal Institutions Act*, 36 *Vict. ch.* 48, *sec.* 379, *sub-sec.* 7—*Obligation to Erect and Maintain Bridges over Streams Crossing Highway.*

Motion by the Corporation of the Township of Harwich, upon originating notice, under sec. 465 of the Municipal Act, for

*To be reported in the Ontario Law Reports.

an order determining a question as to the boundary-line between the city and the county.

Matthew Wilson, K.C., for the applicants.
J. A. Walker, K.C., for the county corporation.
O. L. Lewis, K.C., for the city corporation.

MEREDITH, C.J.C.P.:—The single question raised upon this motion is, whether the road in question is a boundary-line between the city of Chatham and the county of Kent. . . .

If it be such a boundary, then it is admitted that the burden of erecting and maintaining the bridge in question falls upon the city and county; but, if not, then the whole burden falls upon the applicants alone. It was not contended that it should, and I do not see how it could, fall upon the city and township.

In the year 1869, the town council of Chatham passed a by-law providing for the purchase of certain land in the township of Harwich for the purposes of a public cemetery; and, in the year 1871, another by-law establishing a public cemetery upon this land "near to but without the limits" of the town.

Under an Act respecting the Municipal Institutions of Upper Canada, 29 & 30 Vict. ch. 51, sec. 269, sub-sec. 3, the council of the town had power to pass by-laws "for accepting or purchasing land for public cemeteries, as well within as without the municipality;" and, in the sub-section giving this power, it was provided that "thereupon such land, although without the municipality, shall become part thereof, and shall cease to be part of the municipality to which it formerly belonged."

The land purchased was and still is wholly without the then town, now city, of Chatham; and, though quite near to it, there is no physical connection between them at any point; it is wholly within the township of Harwich. On one side it extends to the original road allowance between the 2nd and 3rd concessions of the township of Harwich; and, in so far as this road forms any part of its boundary, the applicants contend that it is "a boundary-line between a county and a city;" so that, under the legislation I have mentioned, the county and city are in duty bound to erect and maintain any bridge over the stream crossing it: see R.S.O. 1914 ch. 192, sec. 452.

If this be their duty now, it was equally so their duty in and ever since the year 1871: see 34 Vict. ch. 30, sec. 13 (O.); and yet, if so, it has been wholly neglected by these greater municipalities, and uncomplainingly performed by the lesser—the applicants. . . .

In the Municipal Institutions Act of 1873, 36 Vict. ch. 48, sec. 379, sub-sec. 7, an exception to the general power to acquire or purchase for a public cemetery, and "as well within as without the municipality," conferred by the early enactment, was made in these words, "but not within any city, town, or incorporated village;" and for many years thereafter the law remained against cemeteries being established in cities, towns, or incorporated villages. So that there existed that which was substantially a prohibition against the establishment of municipal cemeteries in towns, cities, and incorporated villages, with also a provision that a cemetery so established, although without the municipality, should become part of it and should cease to be part of the municipality to which it formerly belonged, both contained in the one sub-section of an enactment. Having regard, however, to the obvious purposes of the legislation, these things are not substantially inconsistent the one with the other. The object of the legislation was to bring the municipal cemetery, when without the territorial limits of the municipality owning it, completely under its control as if it were within such limits.

The fact that the cemetery in question is near to the city of Chatham makes no difference; the question involved would be precisely the same no matter how far it might be from the city. There is nothing to indicate any intention that the cemetery is to be treated as if tacked on to the outskirts of the city so as to extend the city's territorial limits. Nor is there anything in any part of the legislation affecting the question which requires that it should be held that the cemetery is a city without the city; or that there are to be two separate and distinct parts of the one city. Full effect is fairly given to all the purposes and words of the Legislature if the cemetery be treated, in all things affected by the legislation respecting cemeteries, as if it were within the city. So that the legislation respecting municipal cemeteries does not necessarily sustain the applicants' contention.

Nor does the legislation more directly affecting the question of liability. It is, as I have said, only regarding boundary-lines between a county and a city that the liability contended for in this case exists. No one would, I am sure, think of calling the boundaries of the cemetery boundary-lines of the city. The city has its well-defined and well-understood limits or boundaries; and in this case they happen to have been fixed by statute: see 33 Vict. ch. 66 (O.); though that in itself does not seem to me to control, in any way, the question. It is not, of course, necessary that a municipality shall be all within a "ring fence" as it

were; it may be that two or more parts of it may be quite, in locality, separated and apart from one another; but that is quite a different thing; the cemetery is a thing of itself; it could not, for many years at all events, have been established within the city; and was, as the by-laws governing it plainly shew, intended by the municipality to be without its borders. The by-law of 1871 begins with these words: "Whereas it has become necessary to the health of the town of Chatham that a public cemetery should be established near to but without the limits thereof." Though again what the council of the municipality may have thought or desired does not govern; the sole question is, what is the effect of the legislation?

But all these things go to shew that the legislation in question was not deemed by any one directly concerned at the time of its enactment, or for many years after, to mean that which the applicants at this late day contend for. It is a thing of itself without the city walls, but, for its proper government by the municipality whose it is, it is made part of the city as if within its walls.

If it were ever intended to make the public roads, bordering on a city's cemetery, boundary-lines between city and county, the Legislature would hardly have made provisions so easily defeated as those under consideration would be, for instance, by choosing land upon roads which no stream crossed or by leaving a strip of land unacquired, except for the purposes of a way in and out, along the public road; and, in any case, why should the public ownership of a few acres of land in any other municipality create any greater obligation than private ownership of it should? And in this case could the proportion of cost of maintenance of bridge or road be anything but very small?

The application is made for the purpose of relieving the township from all obligation to erect and maintain bridges over streams crossing the path of the road in question, in placing that obligation upon the county and city: the application fails; its dismissal will leave the obligation on the township, which assumed and performed it many years ago and has performed it to the present time; no other order is necessary.

I make no order awarding costs; the question is an important one; and there is said to have been no consideration of it hitherto; the city and county will doubtless consider themselves well out of the difficulty at the expense of their own costs, which cannot be great upon a motion of this kind.

The application is dismissed without costs.

MEREDITH, C.J.C.P. JULY 2ND, 1914.

*COUNTY OF WENTWORTH v. HAMILTON RADIAL ELECTRIC R.W. CO. AND CITY OF HAMILTON.

Highway—Toll Road Acquired by County—Expropriating By-law—Toll Roads Expropriation Act—County Road—Act for Improvement of Public Highways—County Road—Transfer of Portion to City—Powers of Ontario Railway and Municipal Board—Ultra Vires Order—Annexation of Part of Township to City—Proclamation of Annexation—Effect of—6 Edw. VII. ch. 34, sec. 1(2)—Agreement between County and Railway Company—Estoppel—Payments for Running Rights over Road—Payments Made under Mistake of Law—Costs.

Action to recover $597.95 alleged to be a balance of money due for tolls upon two and three-tenths miles of road

G. Lynch-Staunton, K.C., and J. L. Counsell, for the plaintiffs.

A. Hope Gibson, for the defendant railway company.

F. R. Waddell, K.C., for the defendant city corporation.

MEREDITH, C.J.C.P.:— . . . A toll road company were the owners of a toll road in the county of Wentworth. The county, in the year 1902, committed itself to a comprehensive scheme for the betterment of a number of highways within its limits. This is purported to do under the provisions of an Act for the Improvement of Public Highways, 1 Edw. VII. ch. 32 (O.), though out of the eighteen roads comprised in the scheme six of them were to be improved only to the extent of freeing them from tolls, at a cost of over $50,000; the other twelve were to be improved, in the ordinary sense, at the cost of another $500,000 or so.

Section 5 of the enactment mentioned provided that any municipality might apply the whole or part of the moneys to which it might be entitled, under the Act, towards paying any expenses that might be incurred for the purchase of toll roads, within such municipality, or for freeing the same from tolls; and that such toll roads as were purchased should be included in the roads to be designated and assumed or improved in accordance with the provisions of the Act.

*To be reported in the Ontario Law Reports.

The enactment, however, provided no means for acquiring or freeing from toll any toll road; and therefore the county, having to expropriate, were obliged to resort to other legislation: and accordingly, in March, 1902, by by-law No. 468, in which they declared it to be desirable that the tolls be abolished on the road in question, and set out that they had "failed to agree with the owners of such road as to the amount to be paid in order that the tolls thereon might be abolished," they provided "that the necessary proceedings be taken by arbitration to determine such amount under the provisions of the Toll Roads Expropriation Act, 1901; and made provision for an arbitration to determine such amount. The Toll Roads Expropriation Act, 1901, is 1 Edw. VII. ch. 33 (O.); and, under this enactment, sec. 15, the responsibility of maintaining and keeping in repair any road after the removal of the tolls under it was put upon "the local or minor municipalities through which the same pass, as in the case of ordinary highways;" but by an amendment to the Act passed in the following year, 1902, and before this road scheme was adopted by the county, the 15th section of the Act of 1901 was repealed, and, instead of its provision on the subject, it was provided that, "upon the removal by the county of the tolls from any road under this Act, such road, so far as it lies within the county, shall thenceforth be a county road, within the meaning and provisions of the Municipal Act."

So that, whatever may be the real meaning of sec. 5 of 1 Edw. VII. ch. 32 (O.), an Act for the Improvement of Public Highways, regarding roads not purchased—as they might be under the provisions of the toll roads enactments—but merely freed from tolls, the road in question became a county road upon the removal by the county of the tolls, the provisions of the enactments respecting expropriation governing in this respect; and further, it may be pointed out, that, by an amendment to the Act for the Improvement of Public Highways, made in the year 1905, it was provided that all roads constructed or repaired under this enactment and for the construction or repair of which aid might thereafter be granted out of the fund set apart under the Act, should thereafter be deemed county roads and be maintained and kept in repair by the county in which they are: 5 Edw. VII. ch. 27, sec. 4, (O.); see also R.S.O. 1914 ch. 270, sec. 92.

So that we begin with the dominant fact that the road in question became and was a county road, well proven.

Then, had the Ontario Railway and Municipal Board power to transfer any part of it to the City of Hamilton?

The order of the Board purporting to do so was made in September, 1909; and at that time the Board had power, speaking generally, to annex to a city, or town, part of an adjacent township; there could be, and is, no dispute as to that; the one question is: What was the effect of such an annexation? By the order of the Board, part of the township of Barton was annexed to the city of Hamilton; and a part of the road in question lies within that part of the township so annexed to the city; so that it is now within the territorial limits of the city. Unless, by virtue of that annexation, the county lost and the city acquired control over that part of the road, it yet remains a county road throughout, because the Board in no other way had any power over the road; it is not even suggested that they had.

There are but three parties to an application for such an annexation, the city or town, the township, and the municipal electors of the part of the township to be annexed; and it is important to observe that the annexation may be ordered upon such terms as may be agreed upon, or shall be determined by the Board. The county had no right to be and in fact were not, in any sense, parties to the annexation proceedings.

These things being so, I cannot consider that the Board had any power to deprive the county of any rights it had to or upon the road in question. It could hardly be contended that, were the road still the property of the road company, the Board had power to take it from them and hand it over to the city, though of course the county is not quite in the same position as the road company would be if still owners of the road. It is true that the road company made a conveyance of the road to the county, but I cannot think that that conveyance added anything to the county's rights or duties in regard to the road. They did not purchase it under the provisions of the toll roads enactments; but freed it from tolls under the toll roads expropriation enactments, under which it became a county road.

The Legislature has power to deprive any person or corporation of any civil rights without being heard, and power also to authorise the Ontario Railway and Municipal Board to do so, but it is hardly imaginable that they would; and it would need to be in very plain language—if it were ever done—before effect should be given to it; and, even were that not so, I should be unable to find any warrant in any legislation for an order of the Board vesting in the city a county road, or any part of it.

That the county had substantial interests in the road in question is obvious. They paid $24,000 to free it from tolls, and to

acquire such an interest in it, and such control over it, as the legislation I have referred to conferred upon them; that amount became and still is to a very considerable extent a charge upon the whole county. . . .

I can come to no other conclusion than that the city have quite failed to shew that the order of the Board vesting part of the county road in the city was at all within the power of the Board; I hold it to have been ultra vires.

It was urged that the order must be valid, because under an enactment passed in the year 1906, 6 Edw. VII. ch. 34, sec. 1, sub-sec. (2), it was provided that the terms and conditions contained in a proclamation of annexation should have the same force and effect and be as binding as if embodied in legislation; but legislation may be ultra vires, and it is for the Courts to determine whether it is or is not, when the question is duly raised in litigation. In respect of all terms and conditions within the powers conferred upon the Board by legislation, the Board's proclamation has the force and effect ascribed to it; but in all things without its jurisdiction neither proclamation, order, nor other act has any force or effect; and it is for this Court now to determine whether the order vesting the county road in the city had any force or effect; and, in my opinion, and as I have said, it had not. . . .

Nearly all the other points involved in the case hang upon the one just dealt with and fall with it . . . It will probably be found that, whether they ought to or not, the parties (the county and the railway company) had the power to enter into the agreement, and having had the power and made the bargain, no change from a railway under provincial jurisdiction to one under federal jurisdiction, if there were any such, would annul that bargain: see R.S.O. 1914 ch. 185, sec. 231 (i), and Hamilton Street R.W. Co. v. City of Hamilton, 38 S.C.R. 106.

Estoppel too was much relied upon for the city; and it is quite true that the county went a long way in acquiescing in the order of the Board; but municipalities cannot transfer their rights or obligations, generally speaking, in regard to public ways at their will, and so it is plain that they cannot get rid of them by estoppel as if they were private rights; so, without considering whether all that took place would or would not create an estoppel between private owners, this point also fails.

That which is immediately in question in this action is the annual sum which the railway company agreed to pay to the

county for that which may roughly be described as running rights over a part of the road in question. Acquiescing, as I have said, in the order of the Board, the county for several years consented to the payment to the city of so much of the annual sum as was paid in respect of that part of the road in that part of the township of Barton which was annexed to the city; but now, having got new light upon the subject, they seek to recover, from the railway company, the whole of the annual sum for this year and also all those portions of it which were paid to the city. As to the former, they are entitled to succeed, but as to the latter, having consented to the payments made, obviously they cannot. Whether or not they have any right to recover the latter from the city is not a question raised in this action; and it is not proper that I should consider it; though it may be said that at first sight it seems to be a case of payments consented to under a mistake of law, not of fact; and that such cases as Beauchamp v. Winn, L.R. 6 H.L. 223, are not applicable. After payment of all the money the city have spent in improving that part of the road which it was thought was vested in them, it would be hard if they should lose too these payments. . . .

There will, accordingly, be judgment for the plaintiffs for the amount of the current year's rent, and the action will be dismissed in so far as the amount of the payments made to the city are claimed from the defendants the railway company. The amount of the current year's rent was paid into Court by the defendants the railway company, and so the judgment should contain an order for payment of it out of Court to the plaintiffs.

The defendants the railway company should be paid their costs of the action subsequent to the payment into Court by the plaintiffs; the plaintiffs, having failed in their claim against these defendants for any more than the amount paid into Court, should pay such costs; there should be no order as to costs of the action, up to the time of payment into Court, that is, no costs between these parties; the defendants the railway company are not blamable for the litigation; the vacillating course of the plaintiffs is, to some extent at all events. The defendants the city should pay to the plaintiffs all the plaintiffs' costs of the action referable to these defendants' contention that they are entitled to a share of the annual sum payable by the defendants the railway company under their agreement with the plaintiffs. . . .

This opinion has been withheld until now in order that I might

learn whether any, and if any what, views were entertained by the Board upon the question of their jurisdiction; and from what I have now learned it is probable that no question of that character arose, that the order made by the Board was made entirely upon the consent of the parties represented upon the application for the annexation proclamation and order, that is, the city and the township only.

BRITTON, J. JULY 2ND, 1914.

JUNOR v. INTERNATIONAL HOTEL CO. LIMITED.

Master and Servant—Injury to and Death of Servant—Action under Fatal Accidents—Explosion of Hot Water Range in Hotel Kitchen—Common Law Liability—Employment of Competent Persons by Hotel Company—Independent Contractor—Findings of Jury—Negligence of Fellow-servants—Common Employment—Evidence.

Action under the Fatal Accidents Act to recover damages for the death of the plaintiffs' daughter by reason of the negligence of the defendants, as the plaintiffs alleged.

The action was tried before BRITTON, J., and a jury, at Sault Ste. Marie.

J. E. Irving, for the plaintiffs.

Gideon Grant, for the defendants.

BRITTON, J.:—The plaintiffs are the parents of Jean Junor, who when living was the head waitress in the defendants' hotel at Sault Ste. Marie, and who was killed at that hotel on the 18th May, 1913, by the explosion of the range, or hot water attachments thereto, in the kitchen of the hotel, where she was engaged in the performance of her ordinary work. This action is brought under the Fatal Accidents Act, the plaintiffs being father and mother respectively and being persons having a reasonable expectation of pecuniary interest in or benefit from the life of their daughter.

The negligence charged is, that the defendants so negligently and carelessly set up and installed the range and attachments as to cause the explosion. The plaintiffs further allege that it was

the absolute duty of the defendants to provide a safe place for the daughter Jean to work, and that the defendants failed in their duty in that regard.

The defendants' manager of the hotel was one Pollock. He was not an expert—in fact he did not know anything about putting up the range—so he employed Emanuel J. Gallagher to do the work.

After the close of the evidence and after some discussion with counsel and the jury, the following questions were put to and answered by the jury:—

(1) Were the defendants guilty of any negligence which caused the death of Jean Junor? A. Yes.

(2) If so, what is the negligence you find? A. By not having the hot water system properly installed and inspected. The manager of the hotel neglected his duty, inasmuch as he neglected to examine the work, or cause to have it examined, immediately when he found it was not satisfactory.

(3) Would danger to persons in the kitchen of the International Hotel be reasonably expected to arise from an appliance formed by connecting the water front with the steam coils, unless measures were adopted to prevent such danger? A. Yes.

(4) Did the defendants take reasonable care to prevent such danger? A. No.

(5) Did the defendants exercise reasonable care in employing a manager? A. Yes.

(6) Was the manager in the employ of the defendants, at the time of the installation of the plant which caused the damage and at the time of the accident, a competent manager? A. Yes.

(7) Did the defendants' manager exercise reasonable care in the employment of Mr. Gallagher to install the work mentioned? A. No.

(8) Damages? A. Father, $1,200, mother, $1,200.

Additional:—

(1a) Whose negligence was it that led to the explosion? A. On the part of the manager, also of Gallagher.

(2a) Who in the construction of the appliance left anything undone, the leaving of which undone led to the explosion? A. Gallagher.

(3a) Who, if any one, did anything in the construction of the appliance that led to the explosion? A. Gallagher.

Upon these answers each party claims to be entitled to judgment.

The case is by no means free from difficulty. I have looked

at all of the many cases cited by counsel, and at other cases. My conclusion is, that the defendants can successfully invoke for their defence the doctrine of common employment.

This is a common law action. The plaintiffs have no claim under the Workmen's Compensation for Injuries Act; so, unless there is liability at common law, the plaintiffs cannot succeed.

The plaintiffs rely upon Ainslie Mining and R.W. Co. v. McDougall, 42 S.C.R. 420, as correctly stating the law: "An employer is bound to provide a safe and proper place in which his employees can do their work, and an employer cannot relieve himself from this obligation by delegating the duty to another; and, if the employee is injured by the failure of the employer to fulfil this obligation, the employer cannot, in an action against him for damages, invoke the doctrine of common employment." I do not understand that case to mean that, whenever an accident happens to an employee in the course of his employment, in the room or upon the premises provided by the employer, the place is to be considered an unsafe and improper place in which to work. There is no warranty, on the part of the employer, that the employee will not meet with an accident while at work. The right of action is founded upon negligence; and, if there is no negligence in providing and maintaining the place where work is being done, if it is safe and proper for the work to be done, and if there is no negligence in respect to the particular act or thing which causes the injury to the workman, there is no liability. The building must be structurally safe—it must be free from pitfalls, from dangerous openings insufficiently guarded, and from dangerous machinery unprotected. The contention of counsel for the plaintiffs, in his very able conduct of this case, is, that the kitchen of the hotel, from the time of the attachment of the steam heating to the range, was not a safe place for the hotel employees to work in. If it was not safe, it was for the time made unsafe by the negligence of Gallagher. The contention is, that, if Gallagher was an ordinary servant of the employer, the employer is liable, and, even if an independent contractor, the defendants are liable, and many cases were cited in supposed support of this contention.

Jones v. Canadian Pacific R.W. Co. (1913), 30 O.L.R. 331, has no bearing, as in that case there was breach by the defendants of a statutory duty.

The most recent case on the point of independent contractor is Vancouver Power Co. v. Hounsome (1914), 49 S.C.R. 430.

Upon what may be considered as undisputed evidence, the

negligence which caused the accident was that of Gallagher. His work was repair work. He was called in as a known man, supposed to be competent, and as one engaged in and doing a large business. The defendants knew nothing about it, but their manager did. The manager was competent, as the jury found, and the defendants exercised reasonable care in selecting and employing him. Both the manager, Pollock, and the workman, Gallagher, were fellow-servants with the deceased of the defendants. If there is anything left of the doctrine of common employment, as I think there is, it must be applied in this case.

In my opinion, if there is any liability, it is because of the answers of the jury to the 3rd and 4th questions. These questions were put at the request of counsel for the plaintiffs.

I am of opinion that there was no evidence that should be submitted to the jury that danger to persons in the kitchen of the hotel would reasonably be expected to arise from an appliance formed by connecting the waterfront with the steam coils. It was not shewn that any such accident had ever happened in that hotel, or anywhere, to the knowledge of the defendants. Steam heating and hot water heating are in general use. The hotel kitchen was free from all such sources of danger when the manager and the deceased accepted employment. The manager as an employee sought to have changes made and repair-work done; and, by the negligence of the person employed, the accident happened. The defendants were not notified of the work, or of any danger as likely to arise in connection with the heating, as it had been or was to be.

I am also of opinion that there was no evidence to go to the jury which would enable them to answer the 4th question as they did, by saying that the defendants did not take reasonable care to prevent such danger. My reasons are partly stated above, but I repeat. The company appointed a competent manager, who, in turn, knowing of no possible danger, selected a man in the business of steam and hot water heating to do what seemed to the manager, and reasonably so, an ordinary job.

There was no evidence that want of inspection, under the circumstances, was negligence. The man employed to do the work was such a person as would be employed to inspect, if any inspection was required, in the case of work done by another. The servant assumes all ordinary and usual risks in accepting employment. If the risk was an obvious one, it was so to the employee as well as to the employer. The doctrine of assumption of risk applies as well to those arising during service as to those existing at the time of hiring.

Upon the general question of limiting liability where the employer has secured competent workmen, see Woods v. Toronto Bolt and Forging Co., 11 O.L.R. 216.

In dismissing the action, I do so with some hesitation, because of what I regard as conflicting opinions upon the question, and I shall not be sorry if this important case receives the attention of an Appellate Division.

The action will be dismissed without costs.

SUTHERLAND, J. JULY 4TH, 1914.

BRITISH WHIG PUBLISHING CO. v. HARPELL.

Limitation of Actions—Claim on Promissory Notes—Acknowledgment in Writing within Six Years before Action Brought—Other Defences—Notes Made in Representative Capacity—Accommodation Maker—Evidence.

This was an action to recover $1,000 and interest on four promissory notes made by the defendant, the last of which was dated the 22nd March, 1904, and was payable at one year from the date. None of the other notes matured later than the 16th January, 1905.

The action was begun on the 23rd March, 1911.

The defendant pleaded that he was the manager of the Queen's Quarterly Magazine, to the knowledge of the plaintiffs; that the notes were not in fact, as the plaintiffs knew, the notes of the defendant, but were signed by him as representing the committee of publication, and were accepted by the plaintiffs in that way; that he received no consideration for the notes; that the proceeds of the notes were applied on behalf of and for the purposes of the committee; and that the committee, and not he, was liable therefor. He also pleaded the Statute of Limitations and the Statute of Frauds.

A letter written by the defendant to Mr. E. J. B. Pense, the agent of the plaintiff company, on the 13th December, 1905, was relied upon by the plaintiffs as an acknowledgment in writing taking their claim out of the operation of the Limitations Act. The letter began: "I am exceedingly sorry that this account has not been paid before and personally feel very grateful to you for your indulgence in the matter."

A. B. Cunningham, for the plaintiffs.
Alexander MacGregor, for the defendant.

SUTHERLAND, J. (after setting out the facts) :—I am of opinion that the notes, when given, were the notes of the defendant, and not given in any representative capacity for the committee. Neither were the notes given, I think, for the accommodation of the plaintiff company or of Mr. Pense, but because the plaintiff company, through Pense, was pressing for payment of an account which at that time was the defendant's account and incurred in substantial part by him. Neither in the letter of the 13th December, 1905, written to Mr. Pense, the admitted agent of the plaintiffs, nor in the letter to the plaintiffs' solicitor on the 3rd March, 1911, did the defendant specifically put forward the claim that the note had been given for the accommodation of the plaintiffs or Mr. Pense, even if, under our Bills of Exchange Act, R.S.O. 1906 ch. 119, that would have availed him, under the circumstances disclosed in evidence.

In the earlier letter he expressed his thanks for leniency extended, and asked Mr. Pense to be good enough to bear with him for a few days longer. In the letter to the solicitors, while he says that he told Pense that he did not consider himself liable for the balance of the Quarterly indebtedness, he also states that Pense threatened to sue him for the accounts and notes at that time, apparently considering him liable. He also says in this letter that in equity Chown should pay the balance of the account. It may be that, as between the defendant and the committee, the contract between them having been put an end to, and the committee having taken over the assets in whole or great part, and assumed the debts, or at all events some of them, the defendant is entitled to look to them for payment of the notes if held liable therefor in this action. I am not trying that question, and have not the facts before me on which to determine it.

I am of opinion that he is liable upon the notes sued on unless the plaintiffs' remedy is barred by the Statute of Limitations.

The plaintiffs rely on the letter of the 13th December, 1905, as an acknowledgment made within six years of the date of the issuing of the writ on which a presumption to pay can be implied so as to rebut the statutory presumption of payment at the end of that period.

A leading case is Tanner v. Smart, 6 B. & C. 603: "In assumpsit brought to recover a sum of money, the defendant

pleaded the Statute of Limitations, and upon that issue was joined. At the trial the plaintiff proved the following acknowledgment by the defendant within six years: 'I cannot pay the debt at present, but I will pay it as soon as I can.' Held, that this was not sufficient to entitle the plaintiff to a verdict, no proof being given of the defendant's ability to pay."

This case is commented upon in Darby and Bosanquet's work on the Statute of Limitations, ed. of 1899, p. 67, where, referring to it, it is said: "It was held, after fully going into all the cases, that proof of ability was required to turn the conditional promise into an absolute one; and there was, therefore, no sufficient acknowledgment to take the case out of the statute; for, upon a general acknowledgment, where nothing is said to prevent it, a general promise to pay may and ought to be implied; but where a party guards his acknowledgment and accompanies it with an express declaration to prevent any such implication, the rule expressum facit cessare tacitum must apply. Ever since the decision in Tanner v. Smart, it has been settled law that nothing can take a debt out of the statute unless it amounts to an express promise to pay or an unconditional acknowledgment of the debt from which such an express promise may be implied." And at p. 69: "Though the rule laid down in Tanner v. Smart is perfectly clear, it is often difficult, owing to the variety of expressions employed by different persons, to apply the rule to each particular case."

The letter of the 13th December, 1905, contains in its first sentence, I think, a clear admission of liability, and the last clause . . . namely, "I therefore hope you will be good enough to bear with me for a few days longer until the Judge gives the Quarterly matter a hearing," is clearly a request for a few days longer time for payment and an intimation that he was hoping and expecting that the decision of the Judge on the hearing of the Quarterly matter might assist him in that direction.

There are no words "accompanying the acknowledgment" contained in the letter such as in any manner qualify the presumption of an express promise which can properly be implied from such acknowledgment: Dickinson v. Hatfield, 5 C. & P. 46; Bird v. Gammon, 3 Bing. N.C. 883; Comforth v. Smithard, 5 H. & N. 13.

There will, therefore, be judgment for the plaintiffs for the amount of the four notes, namely, $1,000, together with appropriate interest and costs.

LENNOX, J. JULY 6TH, 1914.

SOPER v. CITY OF WINDSOR.

Limitation of Actions—Possession of Land—Evidence—Character of Possession—Claim under—Purchaser at Tax Sale—Title—Declaration of—Trespass—Injunction—Damages.

Action for a declaration of the plaintiffs' title to land in the city of Windsor and for an injunction and damages in respect of the defendants' entries and trespasses thereon, the defendants setting up title under a tax sale.

D. L. McCarthy, K.C., and A. H. Foster, for the plaintiffs.
J. H. Rodd, for the defendants.

LENNOX, J.:—The action was brought by Abram S. Soper. I added his wife as a party-plaintiff. I do not know that this was necessary, as, upon the terms upon which the plaintiffs were living, I think the possession might well be attributed to the husband.

The plaintiffs have established "open, obvious, exclusive, and continuous" possession of the land in question, of the character required to defeat the defendants' claim, under the Limitations Act, R.S.O. 1914 ch. 75, for a period of twenty-five years or more; and, subject to the trespasses of the defendants in this action complained of, this has been continued down to the time of the issue of the writ. It is true that like the rear part of the land which they acquired by deed, and as is true of the back portion of nearly every city lot, the plaintiffs were not able to make any actual use of the land in winter time, but it was fenced in and was resting, mellowing, and renewing its life for the plaintiffs from winter to winter; it was never abandoned by the plaintiffs; it was ploughed and cultivated and cropped or pastured from year to year; the fences were renewed, repaired, and kept up from time to time in the ordinary way of ownership; "everything was done upon the land that an owner not residing upon it would do in reaping the full benefit of it;" and but for the opinion expressed in Coffin v. North American Land Co. (1891), 21 O.R. 80, now overruled, I should not have thought that it was reasonably open to argument that a distinction could be drawn between the winter and the summer months. The point is set at rest at all events in favour of the plaintiffs

by the Court of Appeal in Piper v. Stevenson (1913), 28 O.L.R. 379.

This point being settled, it is not disputed that the possession of the plaintiffs from the time they enclosed the land, about 1888, until Mrs. Brown intervened, was visible, notorious, adverse, continuous, and unchallenged; and, with the land constantly fenced in and cropped or pastured, and used and enjoyed by the plaintiffs as ostensible owners, there was to the registered owner, as there was, upon the evidence, to everybody living in the neighbourhood, "the plainest evidence of wrongful possession . . . calling for action on the owner's part if he desired to save his rights," as was pointed out by Meredith, C.J.C.P., in the Piper case.

The defendants set up ownership of the property by registered title; but, in considering what inferences should be drawn or presumptions raised in their favour, it is worth while to keep in mind that they are not registered owners by a chain of title from the Crown; there is no link uniting them with "the true owner" whom the defendants dispossessed, and they have never been in possession, nor has any person under whom they claim been in possession at any time, except in so far as the defendants may be said to derive title through the plaintiffs.

And the defendants have the plaintiffs' title or they have nothing. It was the plaintiffs' title, not the title traceable back to the Crown, that the defendants' grantor bought at the tax sale on the 21st December, 1900; for whatever the contention may be as to the character of the occupation after 1906, it is not denied that from about 1888 down to the time of the tax sale in December, 1900, the true owner was absolutely shut out, and the plaintiffs were in undisputed enjoyment and possession of the land in question. Whether they paid the taxes or not is immaterial.

In Iredale v. Loudon (1908), 40 S.C.R. 313, the occupant of a room for the statutory period acquired title to it, although he not only failed to pay the taxes, but from time to time, as they were delivered, sent on the tax bills to the true owners, thus, as might be said, recognising the ownership of the persons claiming by deed.

The legal result is, that, at the end of the first ten years of this possessory period, and probably two years before the date of the tax sale, the title of the true owner was extinguished by sec. 16 of the Limitations Act, and under sec. 5, sub-sec. 3 of sec. 6, and sec. 16 of this Act, the plaintiffs became, if not to all

intents and purposes, at all events for all practical purposes, the owners; and, upon the authority of many cases, and, as I think, according to the correct interpretation of the statute, although there are cases to the contrary, they obtained a statutory conveyance of the land in question. This latter point is not perhaps very material, except in view of the plaintiffs' claim for a declaration of title; but some authorities will be found collected in Halsbury's Laws of England, vol. 19, p. 155, notes to para. 316.

The plaintiffs would be entitled to redeem: R.S.O. 1914 ch. 195, sec. 170. They could maintain an action for trespass: Bentley v. Peppard (1903), 33 S.C.R. 444. They could, even while the time was running, dispose of the land by will or deed, and it was inheritable by their heirs—that is, their right I presume: Halsbury's Laws of England, vol. 19, p. 158, para. 320. Their title, when the tax sale was made, was good at law and in equity, and could be forced upon a reluctant purchaser: Scott v. Nixon (1843), 3 Dr. & War. 388; Lethbridge v. Kirkman (1855), 25 L.J.Q.B. 89. Of course, like any other owners, their land was liable to be wrested from them by non-payment of taxes, followed by dispossession before they became reinstated by the purchaser's delay.

The plaintiffs did not cease to be the owners by reason merely of the tax sale. The municipality did not profess to transfer the possession to the tax purchaser. And the deed, while conferring a fee simple estate, left it for the grantee to complete his title by obtaining possession. Has anything happened since to complete the defendants' title?

The plaintiffs remained in possession after the sale as before. The evidence of the plaintiffs and their witnesses is, to my mind, clear and satisfactory as to this, and is, I think, much more definite and reliable than the statements made by Mrs. Brown and members of her family. I am satisfied that the cattle were not pastured on the property until after Mrs. Brown had ceased to make payments, after she had, as Pulling swears, relinquished the property, and after Pulling, acting on this, had sold and conveyed to the defendants. The defendants cannot claim under Mrs. Brown, nor can she be regarded as in possession for them. What she did was adverse to the defendants. If she was not using the land, as Mrs. Soper swears, with the consent of the plaintiffs, she was a mere casual trespasser, and the plaintiffs are entitled to count Mrs. Brown's occupation, of whatever character it was, with their own to complete the statutory

period: Doe d. Goody v. Carter (1847), 9 Q.B. 863; Myers v. Ruport (1904), 8 O.L.R. 668; Kipp v. Synod of Toronto (1873), 33 U.C.R. 220.

But, before the sale of the property to the defendants, and, as I presume, while the agreement between her and Pulling was current, Mrs. Brown did something, and at this time her acts, if sufficient in themselves, would enure to the benefit of Pulling, and so of the defendants. A mere entry upon the land, however, in assertion of title, or even repeated entries, is not enough. There must be something done that "amounts to a resumption of possession by the true owner:" Doe d. Baker v. Coombes (1850), 9 C.B. 714; Randall v. Stevens (1853), 2 E. & B. 641; Allen v. England (1862), 3 F. & F. 49; Thorp v. Facey (1866), 35 L.J.C.P. 349; Worssam v. Vandenbrande (1868), 17 W.R. 53; Solling v. Broughton, [1893] A.C. 556 (P.C.)

Mrs. Brown put up two or three notices of some kind somewhere upon or near the land in question, they were promptly removed by the plaintiffs, and she then relapsed into quiescence. This is clearly not enough to arrest the operation of the statute. The statute is specific in stating that no mere "entry or continual claim" will preserve the right of action. And there is nothing else. Pulling, the tax purchaser, says that he did nothing whatever, and he could not controvert the statements of the plaintiffs and their witnesses.

Breaks in the possession are not fatal, so long as the true owner does not in consequence resume possession: McLaren v. Morphy (1860), 19 U.C.R. 609.

Mr. Rodd refers to McMahon v. Grand Trunk R.W. Co. (1908), 12 O.W.R. 324, and contends that, as the plaintiffs' rights must still depend upon the fiction of a lost grant, they could not acquire title, as the defendants have only power to convey for specific purposes which can have no application here.

Leaving out of the question the obvious circumstance that our statute aims at the "extinguishment" rather than the creation of a title, the answer is plain enough, namely, that there is no question of a grant here from the defendants; they would not, in any event, be the grantors, for they did not acquire title until 1910—it is not a question of what they are presumed to have conveyed away, but what title they obtained, and what they have done to preserve and perfect it.

I have no doubt at all that the plaintiffs have acquired a title to possession and enjoyment as against the original owners

and the defendants, but they ask for a declaration of title, an injunction, and damages. The state of the title at the time the adverse possession began has been shewn. The parties ousted were owners in fee. The conveyance at the tax sale was of a fee. There are, therefore, no outstanding estates in remainder to vest at a later date. In Halsbury's Laws of England, vol. 19, p. 155, par. 316, it is said: "The operation of the statute is merely negative, it extinguishes the right of the dispossessed owner, and leaves the occupant with a title gained by the fact of possession resting on the infirmity of the right of others to eject him." But he is clearly entitled to be protected against the aggression of others who seek to disturb him, including a former owner who has lost his title by laches. I have come to the conclusion, though not without some hesitation, that the plaintiffs are entitled to all the relief claimed.

There will be judgment declaring that the plaintiffs are owners in fee of the land in question, for an injunction restraining the defendants from entering upon or interfering with this land, a reference to the Local Master at Sandwich to ascertain and assess the damages sustained by the plaintiffs, and judgment thereon.

The plaintiffs will have the costs of the action and reference.

References: Lloyd v. Henderson (1875), 25 U.C.C.P. 253; Brooke v. Gibson (1896), 27 O.R. 218; McConaghy v. Denmark (1880), 4 S.C.R. 609; Sherren v. Pearson (1887), 14 S.C.R. 581; Nixon v. Walsh (1911), 2 O.W.N. 1218; Griffith v. Brown (1880), 5 A.R. 303; Rooney v. Petry (1910), 22 O.L.R. 101; and Donovan v. Herbert (1884), 4 O.R. 635.

KELLY, J. JULY 8TH, 1914.

RE NEAL AND TOWN OF PORT HOPE.

Highway — Closing by Municipality — Injury to Neighbouring Lands—Compensation—Award—Street Closed to Facilitate Railway Construction—Benefit to Property from Railway—Refusal of Arbitrators to Consider—Affirmance on Appeal —Municipal Act, 1913, *sec.* 325 — *Nonretroactivity — Evidence—Depreciation of Property in Value.*

Appeal by the Corporation of the Town of Port Hope from an award of two of three arbitrators appointed to fix the amount

of money to be paid by the appellants as compensation for injury to the lands of E. B. Neal and Eliza Jane Neal by the closing of Hope street, in the town of Port Hope. The two arbitrators awarded the respondents $900.

Grayson Smith and D. H. Chisholm, for the appellants.
W. F. Kerr, for the respondents.

KELLY, J.:—Part of the respondents' property fronts on Hope street, part on Alfred street, which runs into Hope street, and part on Walnut street, which runs into Alfred street. These are the properties in respect of which the two arbitrators awarded damages. Lots 8, 9, and 10 fronting on the west side of Ontario street, also owned by the respondents, these arbitrators find, were not damaged by the closing of Hope street. The other arbitrator disagreed with the conclusions of his co-arbiters, and made a separate finding that no compensation should be made and no damages paid by the corporation to the owners.

By-law number 1038, passed by the municipal council on the 26th June, 1911, provided for the closing of that portion of Hope street lying fifty feet on each side of the centre line of the Canadian Northern Ontario Railway, as located across that street. Hope street runs in a northerly and southerly direction, the part of it so provided to be closed being south of the respondents' property, and the main or central part of the town being still further to the south. Another means of access from the respondents' property to the centre of the town was provided by the opening of Helen street from Hope street to Ontario street, a short distance to the north of the part of Hope street so closed. The corporation on the 10th May, 1910, entered into an agreement with the Canadian Northern Ontario Railway Company, by which they agreed, amongst other things, to close Hope street permanently at the point and to the extent above indicated.

The present proceedings were instituted on the 24th June, 1912, by the appointment by the owners of His Honour Judge Huycke as their arbitrator, under the provision of the Municipal Act of 1903. I have no evidence of the date of the appointment of the town's arbitrator; but the third arbitrator, His Honour Judge Harding, was appointed by order of the Senior County Court Judge of the United Counties of Northumberland and Durham on the 8th October, 1913. The award of these two arbitrators was made on the 24th January, 1914, and the finding of the other arbitrator on the 12th February, 1914.

Substantially, the grounds of appeal are, that the two arbitrators did not take into consideration in making their award any advantage which the owners derived from the building and construction of the Canadian Northern Ontario Railway "and the other work for the purpose and in connection with which the land in question was alleged to be injuriously affected;" that these arbitrators refused to take into consideration the provisions of sec. 325 of the Municipal Act of 1913 (3 & 4 Geo. V. ch. 43); that, upon the evidence, it was manifest that the owners suffered no damage by the closing of Hope street; and that the evidence shewed that the owners were not injured to any greater extent or in any different manner than the general public in the vicinity of their property.

The Municipal Act of 1913 came into force on the 1st July, 1913. The by-law which provided for the closing of Hope street was passed and these arbitration proceedings were instituted not only before that Act came into force, but before it was passed. The appellants contend that they are entitled to invoke the Act of 1913, and to rely on sec. 325 thereof.

Without going into what would be the effect of the application of that section to these proceedings and to the award of these two arbitrators, I think the proceedings are properly under the former Act. To hold otherwise would be opposed to the fundamental rule of English law that no statute shall be construed so as to have a retrospective operation, unless such a construction appears very clearly in the terms of the Act, or arises by necessary and distinct implication. A statute is not to be construed so as to have greater retrospective operation than its language renders necessary. The advantage which, the appellants contend, enured to the owners' property, is not anything arising from the mere closing of the street, but from the advent of the railway and the changes incident thereto. But the "contemplated work," the advantage of which is to be considered by the arbitrators, is the work of the corporation alone: Re Brown and Town of Owen Sound (1907), 14 O.L.R. 627; and not other advantages to accrue to the property by reason of whatever changes or improvements the railway company did or made, or which result from the advent of the railway to that locality.

I have read all of the lengthy evidence taken before the arbitrators, and on it the two arbitrators whose award is now appealed against were, in my opinion, quite correct in coming to the conclusion they reached. From a perusal of the evidence a fair conclusion is that the respondents' property was injuriously

affected. The arbitrators had the added advantage of having the witnesses before them.

The gist of the objection to the award on the part of the other arbitrator is, that the two arbitrators refused to take into consideration any advantage which the owners might have derived from the construction of the railway, which, he stated his opinion to be, "was the work for the purpose of or in connection with which the land was injuriously affected." That, as I have said, does not, in my opinion, enter into the merits of the case.

In Re Brown and Town of Owen Sound, supra, the closing of the road which injuriously affected the property of the owner was part of a scheme for granting facilities to a lumber company, and the owner was held entitled to compensation without any diminution because the erection of the company's mill enhanced the value of his lands. It is seldom that any two cases, in their facts and circumstances, so nearly resemble each other as the Owen Sound case and the present case.

The question which the arbitrators had to consider was, whether there was a diminution in the value of the respondents' lands consequent upon the closing of Hope street. Evidence was practically directed to that very fact—evidence which established that the owners suffered in their property, not as part of the public, but in a special way because of their ownership of these lands. Mr. McGill, who for several years held the position of assessor for the appellants, and was engaged by them to prepare their case in these proceedings, and gave evidence on their behalf, puts it this way:—

"Q. You do consider the closing of Hope street was a distinct disadvantage to the people on it? A. No—if no benefit.

"Q. The closing of Hope street itself, distinct? A. Without any countervailing elements.

"Q. I am eliminating countervailing elements. A. I can't separate them. I have to associate them together. If that street was closed, there was no railway and the canning factory down here; certainly it would be a damage."

As touching upon the loss to the particular owner, as distinguished from the injury to the public, the statement of Lord Penzance in Metropolitan Board of Works v. McCarthy (1874), L.R. 7 H.L. 243, is in point: "The question then is, whether, when a highway is obstructed, the owners of those lands which are situated in a sufficient degree of proximity to it to be depreciated in value by the loss of that access along the highway which they previously enjoyed suffered especial damage 'more than'

and 'beyond' the rest of the public. It surely cannot be doubted but that they do."

The same question was considered in Re Taylor and Village of Belle River (1910), 1 O.W.N. 608, 15 O.W.R. 733, where Sir William Mulock, C.J., held that the owner suffered damage by the closing of a highway which, owing to the proximity of her property to it, enhanced the value of that property, and the closing of the highway depreciated the value.* This case was cited with approval in the judgment of the Appellate Division in O'Neil v. Harper (1913), 28 O.L.R. 635.

My conclusion is that the two arbitrators were justified by the evidence in making their award, and in that view the appeal should be dismissed with costs.

*Affirmed (1910), 2 O.W.N. 387.

PETCH v. NEWMAN—KELLY, J.—JUNE 30.

Principal and Agent—Agent for Purchase of Goods—Claim for Moneys Advanced and Commission—Findings of Jury—Interest—Amendment—Counterclaim—Costs.]—The plaintiff, as he alleged, was the agent of the defendants, in the season of 1912-13, for the purchase of beans, and he brought this action to recover moneys advanced to make the purchases and commission for his services. The defendants alleged that they were purchasers of beans from the plaintiff. The action was tried before KELLY, J., and a jury. In answer to questions, the jury found that the plaintiff was employed by the defendants to buy beans for the season of 1912-13; that in his employment he exercised reasonable skill or such skill as he actually possessed; and that he was not guilty of disobedience to instructions nor negligent in the discharge of his duties. They also found that the accounts between the parties for the season of 1911-12 were settled by the payment of $500 by the defendants to the plaintiff. A further finding was in reference to the price to be paid for beans bought from one McLarty. In his capacity of agent, the plaintiff agreed to purchase a quantity of beans from McLarty; and, when some of these were being delivered, the plaintiff refused to pay the price agreed upon because of inferior quality. The plaintiff's evidence was that the matter was referred to one of his principals, the defendant William C. Newman, to fix the price, and that Newman did fix it at $1.50 per bushel. This New-

man denied; but the jury found that Newman did fix the price and communicated it to the plaintiff. Upon the findings of the jury, the learned Judge holds that the plaintiff is entitled to recover a balance of $4,297.26, with interest from the 1st January, 1913, on the sums from time to time remaining unpaid, a claim for interest being added by amendment. The defendants counterclaimed for $180 for 1,500 empty printed bags, which were said to have been sent to the plaintiff. The plaintiff admitted that some bags did reach him, but said that he did not use them. The evidence did not disclose what number came into his possession. The learned Judge said that the plaintiff must either return the number he received or pay the defendants therefor at the price of 12 cents each. If the parties could not agree upon the number, either might submit the matter to the Judge for determination. In other respects counterclaim dismissed. No costs of the counterclaim. The plaintiff to have the costs of the action against the defendants. Sir George Gibbons, K.C., and J. B. Davidson, for the plaintiff. H. D. Smith, for the defendants.

ARBRICK v. RYAN—LENNOX, J.—JULY 3.

Partnership — Action to Establish—Evidence—Costs.]—Action for a declaration that the plaintiff was entitled to an equal share with the defendant in all properties and mining rights secured by the defendant in and about the village of St. Barnabe, in the Province of Quebec, for an account of profits, and for payment of the amount found due to the plaintiff. The learned Judge said that he had read the defendant's examination for discovery, as he was requested to do. There was nothing in it to cause him to alter the view he expressed at the trial—it was substantially the same as the defendant's viva voce evidence in Court. In short, there was nothing anywhere, except the very strenuous argument of counsel, to support the plaintiff's claim. The defendant's counsel did not press for costs. Judgment dismissing the action without costs. Auguste Lemieux, K.C., for the plaintiff. E. P. Gleeson, for the defendant.

PARENT v. CHARLEBOIS—LENNOX, J.—JULY 3.

Vendor and Purchaser—Agreement for Sale of Land—Written Memorandum—Omission of Material Terms—Consensus ad Idem not Arrived at—Duress—Claim for Reformation of Agree-

ment—Conflict of Evidence—Findings of Fact of Trial Judge.] —Action for specific performance of an agreement for the sale of lands by the defendant to the plaintiffs or for damages for breach of contract. The learned Judge gave written reasons for a judgment in favour of the defendant, in the course of which he examined the evidence closely and said that he was satisfied that the defendant never understood that she was making a contract of the character alleged by the plaintiffs, and that the plaintiffs must have realised this at the time. The contract set up by the plaintiffs was an unconscionable one. The plaintiffs were shrewd, keen, educated men. The defendant was an aged, hysterical woman, living alone. It was shewn that she did not understand the language of the agreement; that material provisions were omitted from the written document which she signed; and that she was nervous and frightened and was intimidated and threatened. Upon the facts alone, without reference to the Statute of Frauds, the parties never agreed to the same thing, and there was no contract. The evidence, also, warranted the conclusion that the defendant was not fairly dealt with; she never had a chance to understand, deliberate, or protect herself; the so-called agreement was practically wrung from her; and the plaintiffs, as medical men, were peculiarly fitted to appreciate the unfitness of a nervous, excited, worried, and hysterical woman. There had been no ratification or adoption of the agreement. The learned Judge also finds that important terms of the agreement were omitted from the writing, and holds that it does not satisfy the Statute of Frauds. The result is, that the writing as it stands cannot be enforced, because it does not contain the actual agreement between the parties. It cannot be reformed and enforced, because of the conflict of evidence; and, upon the weight of evidence, it cannot be reformed so as to support the plaintiffs' claim. Action dismissed with costs. G. F. Henderson, K.C., for the plaintiffs. M. J. Gorman, K.C., for the defendant.

HELFAND v. SLATKIN—BRITTON, J.—JULY 6.

Building Contract—Breach—Termination of Contract—Damages—Removal of Material on Ground—Counterclaim—Costs.] —Action to compel the defendant to remove certain building materials from the plaintiffs' land fronting on St. Clair avenue, in the city of Toronto, and for damages for breach of the defendant's contract for the erection of buildings. The learned Judge

finds that the defendant has not fulfilled his contract, and that the work on the ground is of no practical use or value to the plaintiffs, as the cost of taking down and removing will be as much as can be realised for it. He also finds that the defendant has not proved the allegations made in his statement of defence and counterclaim. Judgment for the plaintiffs for $200 damages; for a mandatory order upon the defendant compelling him to remove all the material owned by him from the plaintiffs' premises within 20 days; for a declaration that the contract is at an end, and that the plaintiffs are under no liability to the defendant thereupon; and for payment by the defendant of the plaintiffs' costs of the action. Counterclaim dismissed with costs. If the costs of the action are taxed on the County Court scale, there will be no set-off of costs on the Supreme Court scale in favour of the defendant. A. Cohen, for the plaintiffs. McGregor Young, K.C., and C. M. Herzlich, for the defendant.

STEERS v. HOWARD—LENNOX, J.—JULY, 6.

Fraud and Misrepresentation—Option for Purchase of Land—Acceptance—Resale at Increased Price—Purchaser for Value without Notice—Remedy of Vendor against Original Purchasers—Payment of Difference in Price—Charge on Mortgage for Amount Due for Principal, Interest, and Costs.]—The plaintiff was the owner of a farm in the township of Sandwich West, and gave the defendants Howard and Bates an "option" in writing to purchase it for $20,000, to be good for two months from about the beginning of May, 1913. Subsequently the plaintiff made the option good until the 8th September, 1913, with the proviso that he should have the right, during the life of the option, to sell the property before the option should be accepted, but the price at which he could sell was to be not less than $22,000, and if he should sell at that price, Howard and Bates were to get back the sum of $750 which they had paid to the plaintiff. During the currency of the option, certain persons in Detroit, who ultimately became incorporated as the "Detroit Ojibway Land Company," a defendant in this action, got into communication with the plaintiff, and were ready to purchase at $28,000 as soon as they could make financial arrangements for the first payment, which was to be $6,000 or $5,000. On the 7th August, 1913, these persons in Detroit told the plaintiff that they were ready to make the first payment and enter into a

formal agreement, and the plaintiff told this to the defendants Howard and Bates, and they and the defendant Reid, who had become associated with them, knew of all the dealings with the Detroit people. On the 7th August, Howard and Bates "accepted" the option by a writing which they handed to the plaintiff, but did not make any further payment to the plaintiff. The defendants Howard and Bates, representing that they were now the owners, entered into an agreement with the Detroit people for the sale of the farm to them at $28,000; and the plaintiff, believing that the Detroit people had determined not to purchase, conveyed the property to the individual defendants on the terms of the option, i.e., at $20,000, and they conveyed to the defendant company upon the terms of their agreement, for the price of $28,000. The plaintiff brought this action to recover $8,000, less the $750 paid to him. The action was tried before LENNOX, J., without a jury, at Sandwich. Judgment was then reserved; and the learned Judge now gives judgment in favour of the plaintiff, and stating reasons in writing, in which he examines the evidence and finds the defendants Howard, Bates, and Reid guilty of fraud. He is of opinion that the defendant company is to be regarded as a purchaser for value without notice, and that it should not be prejudiced in its position. Judgment for the plaintiff against the defendants Howard, Bates, and Reid for $7,250, with interest from the 1st September, 1913, and the costs of the action. The plaintiff to have a first charge upon the mortgage given by the company, for his principal, interest, and costs. Judgment for the defendant company against the defendants Howard, Bates, and Reid for the company's costs of defence; and, subject to the prior claim of the plaintiff, the defendant company to have a lien for these costs upon any balance of mortgage-moneys in their hands and to have the right to retain and apply them in payment of these costs and interest. J. H. Rodd, for the plaintiff. D. L. McCarthy, K.C., for the defendants Howard and Bates. M. Sheppard, for the defendant Reid. G. A. Urquhart, for the defendant company.

BAND v. FRASER—KELLY, J.—JULY 8.

Account—Promissory Note—Payment into Court—Discharge of Mortgage—Reference.]—Motion by the plaintiff for judgment on the pleadings. Judgment was given as follows: On payment into Court by the plaintiff of $1,000 as security for whatever

amount shall be found to be overdue on a certain promissory note for $1,272, on the taking of an account between the parties, the defendant shall forthwith, at his own expense, procure and register a proper discharge of the plaintiff's land from the Soper mortgage referred to in the material; directing a reference to the Master at Ottawa to take the account; and providing that, on the discharge being registered, there shall be paid out of Court to the defendant (out of the $1,000) such sum as shall be found due by the plaintiff to him, and that the balance of the $1,000 shall be paid out to the plaintiff, and that further directions and costs shall be reserved till after the Master's report. S. R. Broadfoot, for the plaintiff. W. C. Greig, for the defendant.

SWARTZ v. BLACK—KELLY, J.—JULY 8.

Evidence — Conflict — Written Instrument — Registration against Land—Cloud on Title—Finding of Trial Judge—Removal of Instrument from Register.]—Action for a declaration that a certain instrument in writing by which the defendants agreed to exchange two houses belonging to the defendant Black in Claremont street, in the city of Toronto, for one house belonging to her co-defendant, in the same street, was a cloud upon the plaintiffs' title; to have the instrument delivered up for cancellation; and the registration thereof vacated. The action was tried without a jury. The evidence was conflicting. The learned Judge found in favour of the plaintiffs, saying that the object of the defendants was to tie up the property and thus prevent the plaintiffs from dealing with it, and granted the plaintiffs the relief claimed with costs. H. H. Shaver and G. N. Shaver, for the plaintiffs. M. Wilkins, for the defendants.

KIDD v. NATIONAL RAILWAY ASSOCIATION AND NATIONAL UNDERWRITERS LIMITED—HODGINS, J.A.—JULY 10.

Principal and Agent—Agent's Commission on Sale of Company-shares—Action against two Companies—Contract—Terms of Employment—Evidence—Right to Commission—Liability of Companies respectively—Costs.]—An action tried at the Toronto non-jury sittings. The plaintiff sued both companies for commission on the sale of stock in the National Railway Association. The learned Judge, after setting out the facts at length, stated his conclusions as follows:—I think the plaintiff must,

under the circumstances, be taken to have worked for and on account of the defendant the National Railway Association from the 24th December, 1912, when he was appointed its organiser, and that the defendant the National Railway Association is bound to account to him from that date. Prior to that he is entitled to an account against the defendant the National Underwriters Limited on the basis of twenty per cent. on the whole amount subscribed and when paid, or, if not, then twenty per cent. on the first payment and an interim commission of ten per cent. on the residue until payment in full, under a verbal agreement with Menzies (a director of the National Railway Association). After the 24th December, 1912, the plaintiff is entitled to commission at twelve per cent. or such rate as has been paid since then by the defendant the National Railway Association to other similar agents, if any were employed. I am unable to assent to the argument that the resolution of the respective companies to the effect that the agreement between them was to be as if it had never existed, entitles the plaintiff to claim against the National Railway Association from the 21st June, 1912, free and clear of any intervention by its co-defendant. What had actually occurred before those resolutions were adopted could not be effectually undone so far as the plaintiff was concerned, and his rights and the corresponding liability of the National Underwriters Limited were unaffected by the rescission. The dealings of the companies would estop them from an account from one to the other or from any liability except possibly for the commission paid on the first 208 shares, but are no bar to the plaintiff's claim, nor do they give him rights to which he was not then entitled. As the defendant the National Railway Association wholly denied the plaintiff's right, it should pay the costs of action against it up to the trial. If a reference is taken as to it, further directions and subsequent costs will be reserved. As to the defendant the National Underwriters Limited, the plaintiff succeeds in shewing that it is not entitled to entangle him in an account with it after the 24th December, 1912, nor to payment by him of any amount based upon an account after that date. The plaintiff's statement of claim correctly sets out the position, and I think that this defendant should also pay the costs of action as against it., i.e., the excess caused by joining it. If a reference is had against the National Underwriters Limited, further directions and subsequent costs will be reserved, as also the costs of its counterclaim. If no reference, there will be no costs of the counterclaim, which will be dismissed. I. F. Hellmuth, K.C., and J. H. Cooke, for the plaintiff. R. McKay, K.C., for the defendants.