The
Ontario Weekly Notes

Vol. III. TORONTO, OCTOBER 11, 1911. No. 4.

COURT OF APPEAL.

SEPTEMBER 28TH, 1911.

NELLES v. HESSELTINE.

Damages—Breach of Contract for Delivery of Shares and Bonds —Ascertainment of Value at Fixed Date—Evidence—Report—Variation on Appeal—Further Appeal.

Appeal by the defendants the Windsor Essex and Lake Shore Rapid Railway Company from the order of MEREDITH, C.J.C.P., 2 O.W.N. 643, varying the report of the Local Master at Sandwich by reducing the amount of damages found by the Master; and from the judgment of BOYD, C., upon further directions (8th March, 1911). The appellants sought a further reduction of the damages.

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

M. Wilson, K.C., and J. M. Pike, K.C., for the appellants.

C. J. Holman, K.C., for the plaintiffs.

THE COURT dismissed the appeal with costs.

SEPTEMBER 29TH, 1911.

*RE HENDERSON AND TOWNSHIP OF WEST NISSOURI.

Schools—Continuation School—County By-law—High School District — Township By-law — Continuation Schools Act, 1909, *sec.* 9—*High Schools Act*, 1909, *sec.* 4—"*Existed in Fact.*"

Appeal by James Henderson from the order of a Divisional Court (FALCONBRIDGE, C.J.K.B., BRITTON and RIDDELL, JJ.),

*To be reported in the Ontario Law Reports.

affirming (RIDDELL, J., dissenting) the order of MIDDLETON, J., dismissing the appellant's motion to quash by-law No. 208 of the Township of West Nissouri, purporting to be a by-law to levy a rate for the erection of of a school-house for a continuation school: 23 O.L.R. 21, 651, 2 O.W.N. 152, 529, 1131.

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

J. M. McEvoy, for the appellant.

G. S. Gibbons, for the township corporation.

T. G. Meredith, K.C., and W. R. Meredith, for the West Nissouri Continuation School Board.

MEREDITH, J.A.:—The notion that there may be a high school district in law, which is not one in fact, seems to me to be entirely opposed to the intention of the Legislature, as plainly shewn in the public school laws of this Province.

The purpose of the Legislature, regarding "high" and "continuation" schools, is to provide higher education in connection with the public schools of the Province; but to give effect to the appellant's contention would be to hold that it enabled county councils to prevent effectually the establishment of either a high or a continuation school, and so to thwart all efforts to obtain such higher education.

I cannot think that the acts of the county council in question constituted the electoral district of East Middlesex a separate district for high school purposes under sec. 6 of ch. 226 of R.S.O. 1887, if for no other reason, because there was, and still is, no high school therein: there is no power conferred upon county councils to constitute an electoral district a separate district for high school purposes in order that it may contribute to the support of a high school, or high schools, in another electoral district.

But, if that were not so, if there were such power, the appellant's case would not be established; it would yet have to be determined whether such a district was one within the meaning of the provisions of sec. 9 of ch. 90, 9 Edw. VII. (O.), aimed against the establishment or maintenance of a continuation school in a high school district.

The purpose of that legislation is obvious; where a high school existed, giving better means of higher education, a continuation school would be needless; and, in my opinion, the fair and reasonable interpretation of the words "in a high school district" is in a district in which there is a high school; a high school district in fact.

I would dismiss the appeal.

GARROW, J.A., gave reasons in writing for the same conclusion.

MOSS, C.J.O., MACLAREN and MAGEE, JJ.A., concurred.

Appeal dismissed with costs.

SEPTEMBER 29TH, 1911.

HARLEY v. CANADA LIFE ASSURANCE CO.

Life Insurance—Change in Terms of Insurance—Alteration in Written Policy—Figures Left Unaltered—Mistake—Claim for Larger Sum than Promised by Insurers—Rectification of Policy.

An appeal by the plaintiff from the judgment of TEETZEL, J., at the trial (24th January, 1911), finding that the plaintiff was not entitled to the sum of $3,000 and profits claimed by him under a policy issued to him by the defendants, and dismissing the action, and adjudging rectification of the policy as counterclaimed for by the defendants.

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

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

W. Nesbitt, K.C., and Britton Osler, for the defendants.

The judgment of the Court was delivered by MEREDITH, J.A.:—I can have no manner of doubt that the judgment appealed against is right: indeed, it seems to me that it is needful only to state the simple incontrovertible facts of the case to shew that the plaintiff has no sort of right to the greater sum which he seeks to recover; that, if he could so recover, it would be, not by virtue of any contract, but solely by reason of a pure clerical error, which arose through the slovenliness of him whose duty it was to make the necessary changes in the policy, or to issue a new one, when the change was made in the "tontine period" of the assurance, from 27 to 17 years.

The contract, in the first place, was for a period of 27 years;

under which the plaintiff, in the events which have so far happened, was to pay an annual premium of $96.47 for 27 years, for which he was to be insured for $3,000, payable upon his death if it happened within that period, whilst, if he survived, he was to be entitled to withdraw in cash the full value of the policy, which was the "full reserve;" a certain amount, namely, the said sum of $3,000; and, in addition thereto, the profits apportioned to the policy; and the policy was correctly issued accordingly.

Subsequently, for some reason or other which is not at all material, nor is it at all material at whose instance it was done, the parties agreed to change the contract from one of the 27-year period to one of a 17-year period, of the same class, so that the plaintiff would pay the premiums for 17 years only, and receive the benefits of a policy of that class, in which there were to be but 17 payments at the most; that is to say, in the events which have happened, he was to pay, as he has done, the 17 annual payments of $96.47, and when paid "to withdraw the full cash value" of the policy, "that is, the full reserve," and, in addition thereto, the profits apportioned to the policy; that is, in all things the policy was to be changed from a 27-year period one to one of a 17-year period; and the policy was returned to the defendants in order that the necessary changes might be made. Let me repeat that the full cash value of all policies of this class, no matter what the period might be, was a fixed, unalterable amount; the full cash value of all 27-year period policies was $3,000, and of all 17-year period policies $1,422, each amount being arrived at in the same way.

When the policy was returned to the defendants to be so changed, that occurred which cannot but be described as a purely clerical error, which I cannot attribute to anything but pure laziness, or indifference, on the part of those whose duty it was to make this important change in the writing which was to evidence the new contract.

No new policy was issued; indeed, all that the industrious gentlemen charged with the making of this important change in the writings evidencing the contract between the parties, seem to have done, was to change one figure in one of the head-lines of the policy—changing the words and figures "Tontine Profits Period 1919" to "Tontine Profits Period 1909," and procuring a change of the same character only in the written application for insurance. Not a word was altered in the body of the policy, indicating that it had not even been read when the change was made, so that by its terms the plaintiff is yet to pay the 27 annual payments to entitle him to $3,000 and profits.

How can there be any doubt, then, that the learned trial Judge was right, and that this appeal must fail?

I am glad to observe that the plaintiff nowhere asserts that there was ever any agreement or promise—other than in writing—to pay that which he seeks in this action: his statement is only that, after the policy, as changed, came to him, some time after I think, he and a local agent of the defendants came to the conclusion that, under it, he would be entitled to all that he seeks in this action, an opinion which cannot, of course, create any sort of legal obligation or right; and one which no one can well be blamed for being surprised at, for it must be hard . . . to understand any one—even the proverbially incompetent mariner or even a member of the bar—expecting to get as many eggs for 17 cents as he had agreed to pay 27 cents for.

Again, if the plaintiff is to be met upon his own technical ground—the writing and nothing but the writing—he must, equally, fail. According to the letter of the contract, as it still is, he is to pay 27 annual payments before becoming entitled to the $3,000 and profits, and it is he who must seek, and obtain, a rectification of the writings before he can recover anything at the present time; and it can hardly be seriously contended that he has made out, by irrefragable evidence, that, under the real contract, he is entitled to $3,000 for the 17 payments; thereby acquiring rights which no one else in the same class has, or ever had, and so doing them, as well as the company, an injustice.

I would dismiss the appeal.

SEPTEMBER 29TH, 1911.

*MARSHALL v. GOWANS.

Negligence—Highway—Horses Frightened by Motor Vehicle—Motor Vehicles Act—Onus—Evidence—Contributory Negligence—Findings of Jury—Judge's Charge—New Trial.

Appeal by the defendants from the judgment of LATCHFORD, J., upon the findings of a jury, in favour of the plaintiff.

The action was brought under the Fatal Accidents Act to recover damages resulting from the death of the plaintiff's husband, John Marshall, under circumstances of alleged negligence.

On the 17th June, 1910, John Marshall was engaged with a team of horses in hauling gravel to be used upon a highway in the township of Melancthon, where he resided. At the time of

*To be reported in the Ontario Law Reports.

the injury he was unloading, and for that purpose was standing within the traces, with his back to the nigh horse. While he was in that position, the defendant approached from behind in an automobile, which, it was said, startled the horses, causing them to run away, with the result that John Marshall was killed.

Questions were left to the jury and were answered as follows:—

1. Was it reasonably necessary that the horn of the defendant's automobile should have been sounded as the automobile approached Marshall? A. Yes; when defendant first saw Marshall.

2. Did the defendant, when approaching Marshall's horses, manage his automobile in such a manner as to exercise every reasonable precaution to prevent the frightening of such horses? A. No; seeing Marshall's position, defendant should have sounded horn.

3. Did the accident to Marshall arise through the negligence of the defendant? A. Yes.

4. If you find that the accident arose through the negligence of the defendant, in what did that negligence consist? A. In not sounding horn or stopping automobile sooner.

5. Could Marshall, by the exercise of reasonable care and diligence, have avoided the accident? A. No; not under the custom of unloading gravel.

6. If you find that Marshall could have so avoided the accident, in what did his want of reasonable care and diligence consist? A. None.

7. What damages, if any, have been sustained by the plaintiff? A. $2,000, divided as follows: Mrs. Marshall, $1,000; second boy, $100; three other children, $900 each.

The trial Judge directed judgment to be entered for the defendant accordingly.

The defendant appealed, upon the grounds: (1) that there was no evidence that the unfortunate result complained of, namely, the startling of the horses and their running away, was caused or should be attributed to the presence on the highway of the defendant's motor-car; (2) that, in any event, there was no evidence of any negligent act or conduct on his part on the occasion in question; (3) that the deceased was guilty of contributory negligence.

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

E. F. B. Johnston, K.C., for the defendant.

I. B. Lucas, K.C., for the plaintiff.

GARROW, J.A. (after setting out the facts as above) :—But for the recent legislation . . . I should, upon the evidence, have been inclined to think it very doubtful if the plaintiff had made out a case which should have gone to the jury. . . . The Ontario statute 6 Edw. VII. ch. 46, amended by 8 Edw. VII. ch. 35, by sec. 5(1) requires every motor vehicle to be equipped with a horn, to be sounded whenever it shall be reasonably necessary to notify pedestrians or others of the approach of any such vehicle. Section 10 requires the person in charge of the motor vehicle, approaching any vehicle drawn by a horse or horses, to operate, manage, and control the motor vehicle in such manner as to exercise every reasonable precaution to prevent the frightening of any such horse or horses. . . . And sec. 18, as amended, provides that, where any loss or damage is incurred or sustained by reason of a motor vehicle on the highway, the onus of proof that such loss or damage did not arise through the negligence or improper conduct of the owner or driver of the motor vehicle shall be upon the owner or driver of such motor vehicle.

The shifting of the onus . . . , although not unknown in criminal and quasi-criminal matters, is, I think, unique in strictly civil procedure. Its effect seems to go far towards withdrawing such cases from the control of the Court as in ordinary jury cases, so far at least as seeing, before the defendant is called on for his defence, that the plaintiff has made out a case.

There is left, of course, the preliminary question, whether the accident, upon the evidence, was really caused by the presence on the highway of the motor—a very serious question in this case. Of this, there must, of course, be reasonable evidence, or the case should not be allowed to proceed. . . .

[The learned Judge then referred to the evidence and the findings of the jury, set out above.]

There seems to be some inconsistency, if not contradiction, between the answers to the first and second questions. . . .

It seems to me, with deference, that too much was made of the circumstance that the horn was not sounded. The fact was not disputed, and it might at least, I think, considering all the circumstances, have very well been left to be dealt with under the 4th question, where the answer would have been a little less obvious. . . .

Then the 5th answer is, I think, open to some remark. A man cannot be allowed to be negligent at another's expense because the first-named person complies with a custom. From the defendant, heavily handicapped, in his effort to defend himself,

by an unusual onus, the very utmost of care is apparently demanded. Is it too much, under the circumstances, when the facts tell, as they seem to do, so heavily against any corresponding care on the part of the unfortunate deceased, to demand that the jury shall at least answer the questions as to his contributory negligence plainly and without any attempt at or room for evasion? . . .

Upon the whole, considering the somewhat peculiar nature of the case, and the circumstances . . . , I have come to the conclusion that a new trial should be directed—the costs of the last trial to be costs in the cause to the successful party, and the costs of this appeal to be to the defendant in any event.

MEREDITH, J.A.:— . . . The defendant should have a new trial because of the ambiguity of the jury's finding on the question of contributory negligence. Their finding in that respect is, that there was not contributory negligence "under the custom of unloading gravel." But, if it were negligent, how could it make it less so that others did it? . . . The findings in this respect are, in my opinion, insufficient for the proper determination of the question of liability. . . . Whenever a jury fails to find all the facts needful for a determination of the rights of the parties, a new trial is necessary; and there can be no difference between a plaintiff's and a defendant's case in this respect.

MAGEE, J.A.:— . . . In instructing the jury as to the third question, the learned Judge said: "That is framed upon a section of the statute which puts a totally different face upon actions of this kind from the ordinary actions of negligence. If a plaintiff comes into Court, in an ordinary case, alleging negligence on the part of a defendant, the plaintiff is bound to prove the defendant negligent before he can recover. Now, the Legislature has changed that. Given the accident caused by a motor vehicle . . . the proof is then on the defendant to shew that he was not negligent. Has the defendant satisfied you that he was not negligent? That is what the question means. If he has, you will say so; and if he has not, say so." If the question meant only, Was the defendant guilty of negligence or not? then there is no finding that the death was caused by the negligence. If the question bears its ordinary meaning, then the jury were practically instructed that the whole onus was upon the defendant, and no distinction is presented to their minds between the issues raised. I do not find elsewhere in the learned Judge's charge, although he deals with the defendant's contention as to the cause, anything to remove from the jurors' minds the im-

pression that would necessarily be left with them, that the defendant must prove that the fatal result was not caused by reason of his motor. For that reason, I think there should be a new trial. . . .

MOSS, C.J.O., and MACLAREN, J.A., agreed that there should be a new trial.

HIGH COURT OF JUSTICE.

MIDDLETON, J., IN CHAMBERS. SEPTEMBER 28TH, 1911.

BANK OF HAMILTON v. KRAMER IRWIN CO.

Practice—Leave to Continue Action—Delivery of Statement of Claim after Time Expired—Judgment Recovered against some Defendants—Assignment by Plaintiffs to one Defendant after Payment—Action Continued in Name of Original Plaintiffs—Delay—Absence of Prejudice—Mercantile Law Amendment Act—Contribution from Co-sureties—Issue as to whether Defendant Taking Assignment was the Real Debtor.

Appeal by the defendants Holme and Barker from the order of the Master in Chambers, 2 O.W.N. 1432, allowing the defendant Dickenson, who desired to continue the action in the name of the plaintiffs against the appellants, to deliver a statement of claim after time expired.

G. H. Kilmer, K.C., for the appellants.
H. E. Rose, K.C., for the defendant Dickenson.

MIDDLETON, J.:—An appeal from an order of the Master in Chambers allowing a statement of claim to be now delivered—the time limited by the Rules and extended by an order made in 1905 having long since expired.

The action was brought on the 30th December, 1904, to recover $10,838.49, the amount claimed to be due upon the account of the defendant company guaranteed by the individual defendants.

Judgment was in 1905 obtained against the defendants other than Holme and Barker. These defendants, who were sued as executors of one Van Vlack, denied liability, contending that

the advances made and sued for were not within the instrument executed by Van Vlack; and as to them the motion for judgment was on the 10th February, 1905, dismissed.

No statement of claim was delivered, and a motion to dismiss resulted in an order of the 29th April, 1905, extending the time till the 17th June; and by arrangement this was again extended till the 1st December. From this time on nothing was done till this present application.

On the 22nd April, 1911, Dickenson, one of the defendants, paid the judgment, and the bank assigned the guarantees in question to him, by an instrument which gives him full power to use the bank's name. Dickenson, using the bank's name, now seeks to proceed with this action.

Upon the argument before me it was admitted that the defendants were not prejudiced by the delay, if Dickenson is entitled to sue in the name of the bank. No statute of limitations has intervened, and there is no real difference between a continuation of the old suit and a new suit now brought in the name of the bank.

The material filed on the motion for judgment shews that, quite apart from the position the bank may occupy, there is a real and substantial question between Dickenson and those representing Van Vlack's estate. The latter assert that the debt is really Dickenson's, and that Dickenson has no right to recover anything over.

What is said, in substance, is: so mould this litigation that this, the real question, may be adjudicated, and do not permit the action to go on for the purpose of determining the academic question of the right of the bank against Van Vlack.

The real question can, of course, be raised by Dickenson, if he chooses, in an action for contribution; but, if he has the right he now asserts, I cannot compel him to forgo it. On consideration of the difficulty, delay, and expense which will, I fear, arise from this course, he may change his mind.

At common law, when a creditor asserted a claim upon a bond against two obligors, and one paid, the debt was satisfied, and an assignment of the claim to the debtor paying or a trustee for him was inoperative. The debt was gone, there was nothing to assign. See cases collected in De Colyar, 3rd ed., pp. 326-7.

The Mercantile Amendment Act provides that, upon a surety paying, he may obtain an assignment, and his payment shall not be deemed to have satisfied the claim, and he may assert the creditor's right, and his payment shall not be pleaded in any action in which he asserts the creditor's right in the creditor's

name. The statute, it is true, provides that the surety shall not by this means recover more than his just proportion against his co-surety, but "recover" in this statute does not mean "recover a judgment for" but "recover" in the sense of actually receive.

The Mercantile Amendment Act, 1856, it has been held, is controlled by the bankruptcy case of Ex p. Stokes, 1 De G. 618, determined eight years earlier.

In In re Parker, Morgan v. Hill, [1894] 3 Ch. 400, Kekewich, J., says, speaking of the Act: "A surety is, in such a case, to stand in the place of the creditor and to use all the remedies, and, if need be, and upon a proper indemnity, to use the name of the creditor, in any action, in order to obtain indemnification. What is the creditor's right? To sue for the whole debt—why must the surety be restricted to suing for something less than that? I can see no reason in principle, and the statute certainly does not point to any. But Mr. N. argues that the proviso in the statute that 'no co-surety . . . shall be entitled to recover from any other co-surety . . . by the means aforesaid, more than the just proportion to which, as between those parties themselves, such last-mentioned person shall be justly liable,' means that the surety shall not bring an action for more than that proportion. That is a warping of the language. The proviso is introduced as something to explain and detract from the full right of action for the whole debt, and says that, notwithstanding the right of the surety to stand in the place of the creditor, and therefore to sue for what is due to the creditor, he shall not recover, that is, in ordinary language, bring into his pocket, by means of the judgment, more than a just proportion. That would be an idle proviso if the former part of the section does not mean that he may sue for the whole of the debt. It says, in tolerably plain language—'Sue for the whole debt; but when you have got your judgment, that shall only avail you to bring into your pocket what is due to you, having regard to your relation to your co-surety.' I think, therefore, that the co-sureties are entitled to prove for the whole amount of the debt assigned to them, subject only to the qualification I have mentioned." This was affirmed in appeal by the Court of Appeal, upon the authority of Ex p. Stokes, supra.

So suing, the claim that is to be adjudicated upon at the hearing is the bank's claim, and the plaintiff's statement of claim must assert the bank's rights.

The defendants can, by a proper defence, say that Van Vlack was not a co-surety at all, and that, therefore, when Dickenson paid the debt it was discharged, and his assignment

is inoperative, as the Mercantile Amendment Act only applies to prevent this result when the relation of co-sureties exists.

The amount which Dickenson is entitled to recover against Van Vlack can only be determined upon an application (or in an action) to restrain any further levy upon any judgment that may be recovered by Dickenson in the bank's name. Such an application may be made as soon as Van Vlack's executors think they have paid all that he was justly liable to pay so far as Dickenson is concerned.

Possibly upon such an application the other question, i.e., whether he ever was liable (as between himself and Dickenson) to pay anything, may be then open—possibly the only way this can be raised is by defence—I express no opinion.

Manifestly, if no question exists as to the solvency of Van Vlack's estate, all the questions can be more neatly raised and determined in an action by Dickenson against Van Vlack's executors; but I cannot compel this.

The appeal will be dismissed, but costs will be in the cause. The time for pleading may, if desired, be extended.

BOYD, C. SEPTEMBER 29TH, 1911.

*KENNEDY v. SPENCE.

Vendor and Purchaser—Contract for Sale of Land—Vendor Able to Convey only Half—Ignorance of Purchaser at Time of Contract — Specific Performance with Abatement of Moiety of Purchase-money—Husband and Wife.

Action by the purchaser for specific performance of a contract for the sale and purchase of land. The defence was, that the defendant (vendor) could convey only half the land, his wife owning the other half.

R. H. Greer, for the plaintiff.
C. A. Moss, for the defendant.

BOYD, C.:— . . . The wife will not agree to the sale, and both husband and wife are unwilling that a stranger should be brought in as co-owner. The contract was made by the husband for the sale of the whole, and he assumed that his wife would

*To be reported in the Ontario Law Reports.

agree as a matter of course. Of this state of title the purchaser was not aware till late in the proceedings, and he is willing to accept all that the vendor can give with a corresponding abatement in price. To this he is entitled, upon the authorities, and the alleged inconvenience cannot change the result. . . .

[Reference to Hooper v. Smart (1874), L.R. 18 Eq. 683; Horrocks v. Rigby (1878), 9 Ch. D. 180; Burrow v. Scammell (1881), 19 Ch. D. 175; Hexter v. Pearce, [1900] 1 Ch. 341, 345; Lumley v. Ravenscroft, [1895] 1 Q.B. 683; Barnes v. Wood (1869), L.R. 8 Eq. 424; Castle v. Wilkinson, L.R. 5 Ch. 534; Rudd v. Lascelles, [1900] 1 Ch. 815.]

The present case is one for specific performance against the husband for his moiety with an abatement of one moiety of the price. The sale is to be carried out on the footing that the purchaser agrees to deal with the claim of Maud Spence (as mentioned at the hearing).

Costs to the plaintiff.

BOYD, C. SEPTEMBER 29TH, 1911.

*TORONTO AND NIAGARA POWER CO. v. TOWN OF NORTH TORONTO.

Municipal Corporations—Electric Power Company—Authority to Erect Poles and Wires in Streets of Town without Permission — Construction of Statutes — "Enter" — "Incommode"—Application to Dominion Railway Board—Necessity for Depositing Plan and Book of Reference—Condition Precedent.

Action to restrain the defendants from interfering with the plaintiffs' operations in erecting poles and transmission wires in the town of North Toronto, and for damages.

D. L. McCarthy, K.C., for the plaintiffs.
T. A. Gibson, for the defendants.

BOYD, C.:—The plaintiffs claim to have a free hand to erect a line for the transmission of high electric power along the streets of North Toronto, without the sanction or supervision of any municipal or other body. The defendants contend: (1) that

*To be reported in the Ontario Law Reports.

there is no power whatever conferred by the plaintiffs' charter to enter and break ground in the street; (2) that, if there is such power, it cannot be exercised without the permission of the municipality; and (3) that the exercise of such power of construction should be supervised by some competent authority outside of the company, in the interests of public safety, and in order to avert probable injury to life and property. . . .

[As to the corporate power under the Act the Chancellor referred to other legislation: the Dominion Telegraph Company's Act of 1871, 34 Vict. ch. 52, sec. 4; the Bell Telephone Company's Act of 1880, 43 Vict. ch. 67, sec. 3; the Montreal Telegraph Company's Act of 1882, 45 Vict. ch. 93, sec. 3.]

In the Act incorporating the plaintiffs, 2 Edw. VII. ch. 107, the collocation of words as to the powers of the company is different, but not less comprehensive: thus (sec. 12), the company may construct, maintain, and operate works for the . . . distribution of electricity and power . . . and may construct, maintain, and operate lines of wire, poles, tunnels, and other works, in the manner and to the extent required for the corporate purposes, and may with such lines of wire, poles, etc., conduct, convey . . . such electricity . . . through, over, along or across any public highway . . . and may enter upon any lands on either side of such lines and fell and remove any trees . . . or other obstructions. . . . And the company may enter upon private property and survey and set off such parts as are necessary (making compensation therefor) under the provisions of the Railway Act of 1888, thereinafter referred to. And by sec. 13, the company may erect poles, construct trenches, and do all other work for the transmission of power, provided the same are so constructed as not to incommode the public use of the streets or to impede access to houses in the vicinity.

Under the words of the Bell Telephone Act it was held by the highest Court that the power existed and was exercisable without the sanction of the municipal bodies in whom the highways were vested: City of Toronto v. Bell Telephone Co., [1905] A.C. 52. The words of the Bell Telephone Company's Act, "construct, erect, and maintain" are equipollent with these of the present Act, which are: "Construct, maintain, and operate" lines of wire and poles and and therewith convey power through, over, along, or across any public highway.

The words "enter" is used in these empowering Acts uniformly, so far as I can see, with reference to an entry on private lands, whereas "construct" is used as to the operation on public

places. In the absence of words of restriction, the meaning is to give absolute power to go upon the highway for the purposes of their undertaking without permission from the municipality. The words used as to the powers of the company are to be read giving them their fair and ordinary meaning; and my conclusion is that the only condition imposed by this charter is, that the work of construction shall be so conducted as not to incommode the public use of the streets or to impede access to buildings close-by the streets.

"Incommode" is a limited word and does not appear to have reference to the dangers arising from the subsequent transmission of the power, but to inconveniences in the actual placing of the plant on the public sites. That is a matter to be adjusted pending construction, and is fully met in this case by the undertaking given that the line shall be put up under the supervision and with the approbation of the Dominion Railway Board (a body not in existence when the charter was obtained from Parliament). That Board will also, doubtless, have careful regard to the element of danger to life and property liable to arise from the stringing overhead of high voltage transmission wires.

In the next place, the company also claim the right to proceed without filing plans and surveys of the proposed route. Of this I have more doubt. The Act, sec. 18, provides that the company may take and make surveys and levels of the lands through which the works are to pass or to be operated, and of the course and direction of the works and of the lands intended to be passed through "as far as then ascertained," and also the book of reference for the works, and deposit the same as required by the Railway Act (1888) with respect to plans and surveys of a section of the works . . . and upon such deposit of the map or plan and book of reference of any such portion, all the sections of the said Railway Act applicable thereto shall apply.

Though this reads that the company "may" do this, it means that they shall do so in order to bring their corporate powers into proper activity and efficiency. And when one needs the interpretation to be given to the word "lands" as meaning or including "privilege or easement" (sec. 21 of the charter, sub-sec. (*c*)), it appears to me to extend the provision as to maps and book of reference to this passage of the line along the highway in question. The statute itself concedes or grants the easement or privilege of passing "through, over, along, or across any highway:" this work is intended to pass "through" the highway (on its surface, that is), and the propriety of plans, surveys, and the like seems as great for this method of construction as if private lands were alone in question.

The special Act (sec. 21) incorporates sec. 90 of the general Railway Act, 51 Vict. ch. 19. That section provides (*a*) that the company may enter into or upon any lands of Her Majesty without any previous license therefor . . . and make surveys and examinations and ascertain such parts as are necessary and proper for the line. It may be that this can be read as applicable to highways which are vested in the Crown as to the freehold; and, if so, the language is pertinent to both aspects of the case in hand, i.e., the company can enter without getting leave, but it is not absolved from preparing proper plans for public notification of what is being proposed to be done.

Section 145 of the general Act (also incorporated) enacts that the deposit of map, plan, and book of reference shall be deemed a general notice to all parties of the lands (i.e., privilege or easement) which will be required for the line.

The sections of the Railway Act of 1888 applicable to maps and plans are also in general terms incorporated with the special Act (sec. 18). These sections are from 123 to 131, as now important. By sec. 124, the map, plan, and book of reference are to be deposited at the Department of Railways and are to be examined and certified by the Minister and transmitted to the different localities interested; any person may resort to and take copies of these documents (sec. 126); and, by sec. 134, till such original documents have been so deposited, the construction of the line shall not be proceeded with.

Had this public notice been given, it would have been open for the authorities of the defendants to have intervened before the Minister or otherwise, and have pointed out the obvious dangers likely to arise from the proposed method of construction over the local electric lines of the defendants. At present, without some safeguard of preliminary character, the company assert the right to go off-hand on the ground, place the poles over the line of the defendants without notification or supervision of any kind, public or private. The Bell Telephone Act provides for the sanction of the municipal authorities in cities, towns, and villages as to the height of the poles and the affixing of the wires, as to the number of lines of poles along the streets of a town, and as to not duplicating poles along the same side of a street, and the like safeguards, which are conspicuously omitted from the Act of 1902. It cannot be because the danger of electrical transmission is being lessened by the efflux of time, but perhaps because there was not sufficient vigilance exercised during the passage of this Act in the interests of public safety.

According to the best opinion I can form, the law requires

the deposit of plan and book of reference as a condition precedent to the beginning of construction: that this being done, there is no permission required for the occupation of the public streets. It may be that the municipality will waive the deposit of plans, on the undertaking of the company to have the method of construction approved of by the Railway Board; and in that case the deposit may be made *nunc pro tunc* and the prosecution of the work not unduly delayed. For this reason, also, I have perhaps expedited overmuch the giving of judgment, but it is best for both parties to know where they are as soon as possible.

Success being divided, I would give no costs to either side.

BRITTON, J. OCTOBER 2ND, 1911.

BURROWS v. BURROWS.

Husband and Wife—Land Acquired in Name of Wife—Contract —Evidence—Statute of Frauds—Resulting Trust—Work and Labour—Counterclaim—Injunction.

This action was brought for the recovery of an undivided half of two certain parcels of land, parts of lot 5 in the 3rd concession of the township of Kitley, or, in the alternative, to recover a certain sum of money for work and labour and money expended in divers way in the occupancy and working of this land for many years. Counterclaim for an injunction to restrain the plaintiff from interfering with the defendant's working of the land.

G. F. Henderson, K.C., and W. McCue, for the plaintiff.
H. A. Lavell, for the defendant.

BRITTON, J.:—The facts of the case are as follows. The plaintiff and defendant are husband and wife, he 59 years of age—she about 61. They were married in 1871.

It must be assumed for the purpose of this action that the defendant's mother became and was the owner of a portion of this lot, out of which she conveyed to the defendant a part, particularly described, containing 5 acres and 12 poles.

The defendant's father and mother had unhappy differences between them, and separated. After the separation, the mother and the plaintiff entered into an agreement by which the mother

was to be maintained for her life by the plaintiff, and the mother conveyed to the plaintiff the remaining portion of the land owned by her. The plaintiff and his mother-in-law did not agree. The father of the defendant and her brother took the part of the mother of the defendant, with the result that the plaintiff reconveyed the part he had to his mother-in-law.

The plaintiff contends that part of the arrangement was, that the father-in-law should execute a new conveyance of the parcel 5 acres and 12 poles to the defendant. This was done, so that the defendant's title was fully confirmed by deed dated the 17th December, 1878. The plaintiff, by his labour, he furnishing most, if not all, of the materials, erected a house upon the 5 acres, in which both resided. The plaintiff was a carpenter and worked at his trade, earning a little money that way—which he says he contributed towards the expense of maintaining his wife and family. The defendant denies this in the main. She admits that he did buy a few things and brought them to the home. All of the rear half of lot 5, 3rd concession of Kitley, except the 5 acres and 12 poles, became the property of one James L. Davis and was for sale. The plaintiff and defendant talked together about buying it. The plaintiff alleges that they mutually agreed to purchase this land from Davis, and that the property so purchased should be conveyed to the defendant, and so remain until the mortgage given for the amount of the whole purchase-money should be fully paid, and that, then, the defendant should convey to the plaintiff an undivided half interest in not only the part purchased from Davis, but also in the 5 acres and 12 poles which the defendant then owned. The defendant denies that there ever was any such agreement.

It was ascertained that the property could be purchased for $1,100, and that $1,100 could be borrowed by giving a mortgage upon the Davis land being purchased, and upon the 5 acres and 12 poles, together. The defendant says that she would not buy and would not mortgage her parcel, unless the conveyance from Davis was made to her—made in her name. She admits that the purchase was for their home, and that the plaintiff was to use all his efforts to assist in paying for it. The purchase was carried out, and on the 14th November, 1899, a conveyance was made by Davis, to the defendant alone, of the rear half of lot No. 5 in the 3rd concession of Kitley, save and except the 5 acres and 12 poles already owned by the defendant. It was paid for in cash; the money for the purpose was procured by way of loan from the estate of Alexander Wood, upon a mortgage of the whole land, viz., the 5 acres and 12 poles of the defendant, and

the land purchased from Davis. The plaintiff joined in the mortgage, and, with the defendant, covenanted to pay; but, as a matter of fact, did not pay any money. One solicitor acted in procuring the money upon mortgage and in taking the conveyance from Davis. That solicitor was not called, and it does not appear that the plaintiff took any part with Davis in negotiating for the purchase. He did, as I have stated, have the conversations with his wife. The defendant denies that the plaintiff did contribute, as he promised to do, to the payment of the mortgage, and she denies that the plaintiff furnished or contributed any substantial amount to the maintenance of the family on the farm. It was contended that the plaintiff furnished or paid any money specifically for payment of the mortgage, or that he paid any money to the mortgagees.

The defendant and two sons of the plaintiff and defendant worked, and, by their labour, and mainly from milk produced by an increasing number of cows, paid off the mortgage.

The agreement set up by the plaintiff was not proved. The onus was upon the plaintiff. The defendant denies that there was such an agreement, so it cannot be considered as established. Even if such an oral agreement had been clearly proved, the Statute of Frauds would completely bar the plaintiff's recovery upon it, upon the facts and circumstances in evidence here.

The plaintiff did not strongly contend that there could be any recovery as to the 5 acres and 12 poles; but he strenuously argued that there was a resulting trust in his favour to the extent of an undivided half interest in the land purchased from Davis. I am of opinion that there is no resulting trust here. The plaintiff did not advance the purchase-money either himself or jointly with his wife. There was no arrangement by which the wife's labour or that of the sons should be considered as the plaintiff's or as payment by the plaintiff. The milk money was the principal source from which the money came. Some came in cash, earned elsewhere than upon the premises, by the younger son.

The defendant is not obliged to depend upon the equitable presumption of advancement to resist the plaintiff's claim; but, if she did, the presumption has not been rebutted. The recent case of Commissioner of Stamp Duties v. Byrnes, [1911] A.C. 386, is of interest in deciding what is necessary to rebut a presumption and establish a trust. See Snell's Principles of Equity, 15th ed., pp. 86, 87.

As to the claim for work and labour, particulars of which were furnished by the plaintiff, he is not entitled to recover. The relation of debtor and creditor did not exist.

The defendant has not objected to the plaintiff taking possession of any of the chattels that belonged to him. She has not objected, so far as appears, until the commencement of this action, to the plaintiff residing with her in the house upon the premises; only she asks that he do not interfere with her and her sons, or her hired help, in their work. The plaintiff left voluntarily. Upon the evidence, I must find that the plaintiff has not at all times conducted himself properly towards his wife and family. It may be, and I think it is so, that, considering the temperament and disposition of the plaintiff, he has not at all times been treated as he should be by a wife and children. They say that, if they shewed resentment, it was under great provocation; and that is partly true. I decline to grant any injunction at the present stage of the case. From the plaintiff's evidence and his emotion on the witness-stand, I think he will not, in the event of no reconciliation being effected, force himself upon his family, but will, as he is able to do, earn his own living apart from his very capable wife and family.

The action will be dismissed, without costs. The counterclaim will also be dismissed without costs.

DIVISIONAL COURT. OCTOBER 2ND, 1911.

BROWN v. CITY OF TORONTO.

Highway — Nonrepair — Injury to Pedestrian — Negligence of Municipal Corporation—Action—Three Months' Limitation —Notice of Accident—Omisison to Give—Damages.

Appeal by the plaintiff from the judgment of BRITTON, J., 2 O.W.N. 982, dismissing the action.

The appeal was heard by BOYD, C., LATCHFORD and MIDDLETON, JJ.

S. H. Bradford, K.C., for the plaintiff.

H. L. Drayton, K.C., and H. Howitt, for the defendants.

THE COURT dismissed the appeal without costs.

RE MCLAREN—MIDDLETON, J.—OCT. 2.

Will—Construction—Gift to Class—Period of Distribution.] —Motion by the executors and trustees under the will of James William McLaren for an order declaring the true construction

of the will. The learned Judge said that the only gift was found in the clause directing division at the death or upon the remarriage of the wife. The class to take was then determined, and consisted of the children then surviving and the issue of any who might predecease the wife. As the class could not be now ascertained, the executors could not, even with the consent of the children and the wife, make a division at the present time. The issue of any child who might predecease the wife would not be bound by the action of the parent. There is no room, on this will, to find a vested gift to the parents; the only gift is to the class; and the issue of any children who may then be dead will take as members of the class, and not through their parent. Costs of all parties out of the estate. J. Macpherson, for the London and Western Trusts Company, the executors and trustees. M. D. Fraser, K.C., for the beneficiaries.

BROWN v. SECURITY LIFE INSURANCE CO. OF CANADA—SUTHERLAND, J.—OCT. 3.

Contract—Company—Payment for Services—Contract Made by Manager—Absence of Authority to Bind Company.]—The plaintiff alleged that he was employed to solicit subscriptions for stock under an agreement in writing, dated the 15th September, 1908, purporting to be made between the Security Life Assurance Company of Canada, represented by one of its provisional directors, and himself, and which was sealed with a seal bearing the name of the said company and signed, "The Security Life Assurance Company of Canada, T. M. Ostrom, Gen'l Manager." It was not shewn in evidence that Ostrom had authority from the other persons or provisional directors to make this contract or that it was ratified by them. The company was not then incorporated, and no company with that name ever became incorporated. Under the terms of the document so signed, the plaintiff was to solicit subscriptions to the capital stock of the company, and was to be entitled to a commission of $5 for each share subscribed, and, in addition to his commission, $125 per month during his employment, to cover his expenses. The plaintiff also relied as to a small portion of his claim on an agreement in writing, dated the 25th June, 1909, and purporting to be made between the Security Life Insurance Company of Canada (the name under which the defendants were incorporated) and himself. It purported to be signed in the

name of the company by Ostrom as general manager, and was sealed with the seal of the "Security Life *Assurance* Company of Canada." Under this the plaintiff was to be agent of the company for the purpose of procuring subscriptions for stock, and was to have a commission of $4 per share and $150 per month for expenses, etc. Under the alleged contract of the 15th September, 1908, the plaintiff claimed for salary to the 1st May, 1909, $999.55, and for commissions, $3,190, in all, $4,189.55, on which he credited $1,204.55, leaving a balance of $2,985. Under the alleged contract of the 25th June, 1909, he claimed salary to the 1st October, 1909, $450, and commissions, $48: in all, $498, on which he credited as received on account, $150, leaving a balance of $348. He claimed, therefore, $3,333 and interest from the 4th December, 1909. SUTHERLAND, J., reviewed the evidence, and said that he was of opinion that the plaintiff had not established any liability as against the defendant company under either agreement. Any agreement that the plaintiff made for remuneration was made with Ostrom alone, and he was to be paid by Ostrom only. Ostrom was not authorised to make either of the agreements relied on by the plaintiff. Action dismissed with costs. G. F. Henderson, K.C., for the plaintiff. J. U. Vincent, for the defendants.

LECKIE v. MARSHALL—DIVISIONAL COURT—OCT. 5.

Contract—Sale of Mining Properties—Purchase-price Payable by Instalments—Judgment—Payment into Court.]—An appeal by the defendants Marshall and Gray's Siding Development Limited from the order of SUTHERLAND, J., 2 O.W.N. 1441; and a motion by those defendants for an order relieving them from the order directing them to perform the contract in question, and to pay the purchase-money into Court. The appeal was heard by a Divisional Court composed of BOYD, C., LATCHFORD and MIDDLETON, JJ. The Court varied the order of Sutherland, J., by permitting the appellants to pay instalments in arrear, under the contract, into Court, instead of directing them so to do, and fixing the dates for such payments. In default of payment upon the dates appointed, the relief under the contract will be given to the parties so entitled in the form therein set out. The motion in other respects was allowed to drop without costs, but without prejudice to any further application the appellants may be advised to make. Time for payment of instalments was

extended ten days for the first instalment, and thirty days for each subsequent instalment. G. Bell, K.C., for the appellants. J. Bicknell, K.C., and Glyn Osler, for the plaintiffs.

CORRECTION.

In Pattison v. Canada Pacific R.W. Co., ante 45, F. R. Morris was counsel for the defendants the Canadian Northern Railway Company; not O. H. Clark, K.C., as stated.