THE

ONTARIO WEEKLY REPORTER

AND

INDEX-DIGEST

JANUARY-MAY, 1905

EDITOR :
E. B. BROWN, ESQUIRE
BARRISTER, ETC.

VOLUME V.

TORONTO :
THE CARSWELL COMPANY, LIMITED
1905

TABLE OF THE NAMES OF CASES

REPORTED IN

VOLUME V. OF THE ONTARIO WEEKLY REPORTER

THE

ONTARIO WEEKLY REPORTER

(To and Including January 7th, 1905.)

VOL. V. TORONTO, JANUARY 12, 1905. No. 1

FALCONBRIDGE, C.J. DECEMBER 22ND, 1904.

WEEKLY COURT.

RE LEVINSKY AND HALLETT.

Vendor and Purchaser—Sale of Land of Religious Society—Religious Institutions Act—Meetings of Congregation—Election of Trustees—Notice—Time—Advertisement—Public Auction.

Application by Louis Levinsky and others, trustees of the Jewish Synagogue in Toronto, known as the "Goel Tzedec," vendors, under the Vendors and Purchasers Act, for an order declaring that they were the properly appointed trustees of the said Jewish Synagogue, and as such were entitled to convey the lands in question, being lot 60 in Park Lane, in the city of Toronto, plan D 14, to the purchaser in fee simple.

By deed dated 9th July, 1886, the property in question was conveyed to Wolff Simons and four others, trustees of the Jewish Synagogue in Toronto known as "Goel Tzedec." No steps were taken to elect trustees in the place of Wolff Simons and others until 1904, when a notice calling a meeting of the congregation for 21st February, 1904, purporting to be given in pursuance of the Act respecting the Property of Religious Institutions, was affixed to the door of the Synagogue on 13th February, 1904. At this meeting five trustees were elected in the place of Wolff Simons and the others. At a subsequent meeting, called by letter addressed to members of the congregation, the offer of the purchaser was accepted by the congregation, but three of the trustees elected at the meeting of 21st February refused to execute the contract. A notice was given under the Act and affixed to the door of the Synagogue on 16th April, calling a meeting

for 24th April, 1904, at which meeting the dissenting trustees were removed from office, and three new trustees substituted for them.

The vendors were the two non-dissenting trustees elected at the meeting on 21st February, 1904, and the three substituted trustees elected at the meeting of 24th April, 1904. The property in question was not offered for sale by public auction, and no advertisement as to the sale was given: see R. S. O. 1897 ch. 307, sec. 14.

E. G. Long, for vendors.

M. H. Ludwig, for purchaser.

FALCONBRIDGE, C.J.—Section 16 of the Act respecting the Property of Religious Institutions requires that notice of a meeting at which trustees are to be elected be given at least eight days previous to the day appointed for holding such meeting. This is well settled to be eight clear days. The notice calling the meeting held on 21st February was insufficient, as eight clear days' notice had not been given. The meeting was, therefore, improperly called, and the election of trustees thereat was invalid. The same reason and result applies to the meeting held on 24th April, 1904.

The vendors are, therefore, not the trustees of the Synagogue, and cannot convey to the purchaser. In addition to this fatal objection, the provisions of sec. 14 of the Act, requiring an advertisement and an offering of the property for sale by public auction before a private sale can be made, were not complied with. The title cannot, therefore, be forced upon an unwilling purchaser, that is, a purchaser who is unwilling to take anything but a proper title.

ANGLIN, J. DECEMBER 22ND, 1904.

TRIAL.

HILL v. HILL.

Gift—Moneys Deposited in Bank—Terms of Deposit Receipt—Testamentary Disposition—Costs.

Action by John R. Hill against the personal representative of his deceased father, William Hill, for a declaration that a certain deposit receipt and the moneys represented by it were the property of plaintiff and not part of the estate of his deceased father.

R. G. Code, Ottawa, Robert Patterson, Carleton Place, and G. H. Findlay, Carleton Place, for plaintiff.

J. A. Allan, Perth, and C. McIntosh, Carleton Place, for defendant.

ANGLIN, J.—William Hill, deceased, owned $400 on deposit in the Bank of Ottawa to his credit. He procured from the bank a deposit receipt for this amount "payable to William Hill and John R. Hill, his son, or either, or the survivor." The understanding between William Hill and his son was that it should remain subject to the father's control and disposition while living, and that whatever should be left at his death should then belong to the son. The father's request to the bank manager, upon which the deposit receipt issued, was "to fix the money so that his son John would get it when he was done with." He told John himself that he wanted him to get the money when he (the father) was gone. He retained the deposit receipt intact in his own possession, and it was found amongst his papers at the time of his death. These facts are deposed to by the son John, the plaintiff. . . .

If the deposit receipt stood unexplained, so that I might treat its form as truly evidencing the substance of the transaction to which it owes its existence, plaintiff's contention might be sustained upon the authority of such cases as Payne v. Marshall, 18 O. R. 448, and Re Ryan, 32 O. R. 224, though in both these cases the circumstantial evidence that the survivor prior to the decease of his co-depositor was in fact a joint owner, was much stronger than the deposit receipt taken by itself would here afford.

But, upon plaintiff's own evidence, I find myself driven to the conclusion that the purpose of William Hill, deceased, was by this means to make a gift to his son, plaintiff, in its nature testamentary. As such it could only be made effectually by an instrument duly executed as a will. The father retaining exclusive control and disposing power over the $400 during his lifetime, the rights of the son were intended to arise only upon and after his father's death. This is, in substance and in fact, a testamentary disposition of the money, and, as such, ineffectual.

Neither can I regard the receipt as equivalent to a voluntary settlement, reserving to the settlor a life interest with a power of revocation: see Thompson v. Brown, 3 My. & K. 32.

I am therefore obliged to dismiss this action.

But, inasmuch as deceased William Hill, by what I find to be his ineffectual attempt to make a testamentary gift, created the difficulties which the present litigation removes, it will not be unfair to deal with the costs of this action as if incurred in an unsuccessful attempt to establish a testamentary document as such under similar circumstances. The costs of both parties will, therefore, be paid out of the fund in question, those of defendant to be taxed between solicitor and client.

ANGLIN, J. DECEMBER 22ND, 1904.

TRIAL.

GIBSON v. LE TEMPS PUBLICATION CO.

Partnership — Judgment against — Execution against Partners—Issue as to Fact of Partnership—Registered Declaration — Husband and Wife as Partners — Declaration of Dissolution by One Partner—Married Woman's Separate Estate.

Plaintiff was a judgment creditor of Le Temps Publication Company, a registered partnership. An issue was directed to determine whether Flavien Moffet and Sara Moffet, his wife, were members of that partnership, and, as such, liable to have execution issued against them personally upon the judgment held by plaintiff against Le Temps Publication Co., and was tried without a jury at Ottawa.

J. Lorn McDougall, Ottawa, for plaintiff.

W. H. Barry, Ottawa, for Sara Moffet.

G. McLaurin, Ottawa, for Flavien Moffet.

ANGLIN, J.—By declaration dated 28th July, 1898, signed by Flavien and Sara Moffet, they declare themselves partners carrying on business as "La Compagnie Publication Le Temps," under an agreement made a few months earlier. The allegations made in this declaration, registered 3rd August, 1898, under the provisions of R. S. O. 1897 ch. 152, are, by sec. 5 of that statute, rendered incontrovertible as against "any party not being a member of the partnership by any person who has signed the same." Mr. Barry argued, upon the authority of numerous American decisions, that a married woman is incapable of becoming a partner of her husband. If, in view of the statutory provisions to which I

have referred, this ground were open (and I think it is not), I should have no hesitation in holding that since the passing of the legislation now contained in the Married Woman's Property Act, R. S. O. 1897 ch. 163, sec. 3, sub.-sec. 2, a married woman can in all respects and for all purposes contract with her husband, as if she were a feme sole, every contract made by her being deemed to be made with respect to and to bind her separate property, whether she is or is not in fact possessed of separate estate at the date of the contract (sec. 4.)

Upon the evidence of Flavien Moffet, his wife was, in and prior to July, 1898, possessed of separate property. Mrs. Moffet was capable of entering into a contract of partnership with her husband. By virtue of sec. 5 of R. S. O. 1897 ch. 152, her registered declaration conclusively establishes that she did acts by which, having the capacity to enter into such a contract, she became a partner with her husband in the business in question.

There is no evidence that Mrs. Moffet ever withdrew from such partnership. Flavien Moffet purported to execute and caused to be registered on 19th May, 1903, a declaration that the partnership formerly carrying on business as "La Compagnie de Publication de Temps" had been dissolved. Mrs. Moffet did not sign this document. As against Flavien Moffet the statute makes this declaration conclusive evidence; in his favour it is no evidence whatever. His flippant demeanour, his manifest disregard of the seriousness of his oath, and his quibbling evasions in the witness box, in my opinion render his evidence entirely untrustworthy except in regard to matters upon which he testifies adversely to his own interest. There is no other evidence of any dissolution of the partnership between himself and his wife, except that afforded by the declaration last mentioned and the oral testimony of Flavien Moffet. I, therefore, find that Flavien Moffet and Sara Moffet were partners in the above named Le Temps Publication Company, at the time of the formation of the said company, and have ever since continued to be and are still partners in the said Le Temps Publication, and, as such, are liable to have execution issued against the goods and lands of them and each of them, such execution in the case of Sara Moffet being limited to her separate estate.

Plaintiff has, if so advised, leave to amend the issue by striking out the words "against them personally," and substituting therefor the words "against the goods and lands of

them and each of them, such execution in the case of Sara Moffet being limited to her separate estate."

Flavien Moffet and Sara Moffet must pay the costs of plaintiff of this issue and all his costs which I have power to dispose of. Le Temps Publication Company, identified as the partnership consisting of Flavien Moffet and Sara Moffet, had no interest in this issue, and no status to entitle it to costs of appearing by independent counsel.

ANGLIN, J. JANUARY 3RD, 1905.

TRIAL.

GOLD LEAF MINING CO. v. CLARK.

Company—Contract to Sell Shares—Consideration—Breach—Proposal—Acceptance — Seal — Mining Company — Discount on Shares—By-law—Release—Damages.

Action for damages for breach of an agreement.

Glyn Osler, Ottawa, for plaintiffs.

A. B. Aylesworth, K.C., and M. J. Gorman, K.C., for defendants.

ANGLIN, J.—Plaintiffs are a company incorporated under the Ontario Mining Companies Incorporation Act. On 31st October, 1899, through the instrumentality of A. T. Mohr, the general manager of plaintiffs, the defendants, Clark, Ryan, and Darby, entered into an arrangement whereby they undertook with the company "to sell or cause to be sold," within three months, 100,000 shares of its stock, having a par value of $1 per share, at a price netting the company not less than 5 cents per share, no charge to be made for commission or expenses. The consideration for this undertaking was a donation by Mohr to defendants of 30,000 shares of paid-up stock held by him, their immediate appointment to the directorate of the company, and the arrangement of all existing preferential claims against it, "so that the same shall stand only as an unpreferred debt of the company for which the directors shall not be personally liable by virtue of their position as directors." A memorandum of this "agreement" signed by the three defendants was submitted to a meeting of the directors held on 3rd November, and it is in evidence that it was then "accepted" on behalf of the company. The three

defendants were at the same meeting elected to the directorate, the 30,000 shares, 10,000 apiece, having been transferred to them on the company's books, and provision was made for the discount of a note of $5,000, from the proceeds of which the preferential liabilities of the company, some $2,000, were to be paid, the balance being intended for the future prosecution of the company's work. Upon this note, made by the company, the defendants, with other directors, became indorsers. I find as a fact, upon the evidence, that the giving of this note, and the application of its proceeds, as above stated, was acquiesced in and accepted by defendants as a fulfilment of the condition of their agreement providing for the conversion of outstanding preferential liabilities into an unpreferred debt of the company. It was understood that at or before the maturity of this note, which was made at three months from 1st November, 1899, there would be at least $5,000 available to the company as fruits of the underwriting agreement of defendants, and that these moneys would be employed to retire the note when it should fall due. Defendants, therefore, in reality assumed no further liability than their agreement with the company imposed. The minutes of the directors' meeting of 3rd November are unsigned, and there never was any formal acceptance under the seal of the company, or in writing over the signatures of its officers, of what though called the "agreement," was, in reality, the proposal or offer of defendants contained in the document signed by them and dated 31st October, 1899.

It is conceded that defendants made no sales of and procured no subscriptions for any part of the 100,000 shares of stock. But by way of defence to this action, in which the company seeks from them damages for breach of the agreement above outlined, defendants say:—

1. There was no formal acceptance under the seal of the company of the proposal of defendants, and, therefore, there never was a binding contract.

2. The principal consideration not having moved from the company, it cannot enforce this agreement.

3. That the agreement is in contravention of secs. 5 and 7 of the Ontario Mining Companies Act, inasmuch as the company did not pass a by-law under sec. 5 fixing and declaring the rate of discount at which such 100,000 shares should be issued.

4. That by permitting stock to be offered for sale at 5 cents per share and less during the period in which defend-

ants were to sell, plaintiffs prevented defendants from carrying out their agreement.

5. That, if ever bound by its terms, defendants were subsequently released by the company from their obligation.

6. That the breach of the agreement, if binding, caused no damage to the plaintiffs.

1. The agreement on the part of the company was substantially executed. Defendants had the 30,000 shares from Mohr; they were promptly appointed to the directorate; and the preferential debts of the company were converted into an unpreferred liability. In such circumstances, I have no hesitation in holding that the want of a formal acceptance under the seal of the company, could not avail as a defence to any action it might bring to enforce its rights under any intra vires agreement, whatever its nature. . . .

2. Nor is it material that a portion of the consideration passed, not from the company, but from Mohr. Defendants received the 30,000 shares under this agreement; the agreement is with the company and is enforceable by it.

These propositions, I venture to think, do not require to be supported by citation of authorities.

3. If the contract of defendants is to be construed as requiring them actually "to sell or cause to be sold" the 100,000 shares, the objection that there was no by-law under sec. 5 of the Mining Companies Act, sanctioning the discount at which such shares were to be disposed of, is formidable. Section 7 expressly prohibits, under severe penalties, the issue or disposal of any stock in a mining company at a rate less than par, unless a by-law has been passed.

Having regard to these statutory provisions, of which it must be assumed defendants as well as the directors of plaintiff company were aware, and having regard to the knowledge of all parties that the 100,000 shares in question consisted of unissued treasury stock, and that the requisite discount by-law had not been passed (surrounding circumstances such as always may be considered for purposes of construing an agreement), and applying the presumptions in favour of validity and legality and against intent to do that which is forbidden by law, I agree with the contention of Mr. Osler that defendants must be deemed to have undertaken merely to procure offers from solvent persons to take or subscribe for the company's shares to the number of 100,000, at not less than 5 cents per share, within the time limited. This they could legally do. I fully appreciate the

wide difference between the position of a person able to make an actual present sale, and that of one who may only solicit offers. Yet, for the reasons above stated, I think defendants' agreement "to sell or cause to be sold" must be held to have required them to procure offers or subscriptions for stock, and nothing more.

4. There is no evidence that the company sold or offered for sale any of its stock between 31st October, 1899, and 31st January, 1900; nor do I find anything in the agreement which would have made its having done so a defence to this action.

5. . . . . Basing my conclusion upon the comparative credibility of the respective witnesses, I find that there never was any release of defendants from any obligation imposed upon them by the original agreement; if the witness Mohr pretended to make any such new arrangement as he swears was made with defendants, through Darby, I find, not only that he did so without authority, but that he went through this form, acting, not for and in the interests of the company, but in collusion with Darby and for the purpose of helping defendants to trump up a fictitious defence to any claim which the company might make upon them under its original agreement. The contradictions between the stories told by Mohr and Darby, the inherent improbabilities of both, the unsatisfactory demeanour of Mohr in the witness box (I had not the advantage of seeing Darby, whose evidence was taken on commission), and, finally, the fact that both are contradicted by such reliable witneses as Messrs. Simpson and O'Brian, and, as admitted by Mr. Aylesworth, would have been in like manner contradicted by Sir Frederick Borden, if present, render it impossible that I should do otherwise than reject the evidence of these defence witnesses.

6. Although there is evidence of a sale to one Ault, in April, 1900, of 2,000 shares, at 10 cents per share, I must find, upon the great weight of evidence and in the light of all the circumstances, not only that the stock of this company was not marketable, but that it had no value whatever at the end of January, 1900. I do not overlook Mohr's evidence that he thought it, in January and February, 1900, worth 25 cents per share, nor the statement in his letter to the like effect. His motive for so writing to Mr. Simpson I do not fully apprehend or appreciate. But, esteeming Mohr as I do, I must decline to permit any statement by him, his object and purpose in making which I cannot clearly

grasp, to influence my judgment. Even if I should think that Mohr was so optimistic that he really believed the statement which he made, upon the whole evidence I would have no hesitation in finding this stock to have been actually valueless on 31st January, 1900. It follows that, as defendants were bound to sell a quantity of that stock so as to realize for the company at least $5,000, plaintiffs have by their failure to do so been damnified to that extent.

There will be judgment for the plaintiffs for $5,000 with costs. This is not a case for interest.

JANUARY 3RD, 1905.

DIVISIONAL COURT.

O'CONNOR v. O'CONNOR.

Gift—Donatio Mortis Causa—Evidence—Corroboration.

Appeal by plaintiff from judgment of MEREDITH, J., dismissing without costs an action brought by the administratrix of the estate of Mary Kinnelly, deceased, to set aside a conveyance dated 22nd February, 1902, from deceased to defendant of certain lands in the township of Pickering, and also to recover certain moneys of deceased alleged to be in possession of defendant. The claim to have the conveyance set aside was abandoned at the trial. Defendant claimed the money as a gift from deceased.

The appeal was heard by FALCONBRIDGE, C.J., STREET, J., BRITTON, J.

W. Proudfoot, K.C., for plaintiff.

J. J. Foy, K.C., for defendant.

STREET, J.—My brother Meredith believed the evidence of Mr. Richardson, the notary public who was sent for by deceased on 17th September, the day before her death, as well as that of Ellen O'Connor, the defendant, and came to the conclusion that an intention to give the money in question to defendant and an effectual carrying out of that intention had been satisfactorily established. Plaintiff contends that the evidence does not shew that such an intention, if it existed, was ever carried into effect.

Deceased was a widow, 73 years of age; she had one child, who had been in an insane asylum for many years; plaintiff was her brother, but he lived a long way from her, and she

had seen him once or twice only in the 25 years before her death, and had kept up no communication with him; she had some nephews and nieces living in the United States, with whom she had never had any communication. Defendant was her cousin, and had lived with deceased, sometimes in the house of deceased and sometimes in that of defendant, for a large part of the two years before the death of deceased. On 22nd February, 1902, she had conveyed her house and lot to defendant upon an agreement to support her for her life. Deceased was in very bad health, and on 11th September, 1902, seems to have begun the winding-up of her affairs by directing a girl called Loretta to draw up an order on the savings bank where she kept some $1,350, for the payment of the whole amount to defendant. She kept this order in her possession unsigned until 17th September, 1902, when she sent for Mr. Richardson, a notary public, and in his presence put her mark to three papers: one being the order on the bank which Loretta had drawn; the second being an order to one George O'Connor to pay any money that should come to his hands for her to defendant for the support of the daughter who was in the asylum, as it was her wish that defendant should have the oversight and care of her daughter as long as she lived and remained of unsound mind. The third paper was not produced at the trial. Richardson stated that it had been left in his possession after being signed by the deceased, and that he had lost it. He said that it was to the effect that defendant was to go to Toronto and get the money of deceased from the bank and give her what she wanted and keep the rest. This was said in the hearing of defendant. He said further that, when he said something about funeral expenses to deceased, she answered that Ellen (defendant) would attend to that. Deceased then handed to defendant the order on the savings bank in Toronto with her bank book, and defendant went there and brought back the whole sum, $1,358 in cash, and handed it to deceased. Defendant says that then deceased handed it back to her and gave it to her and told her to put it away, and that she took it and put it away with her own money, and told deceased she had done so, and that deceased said that was right. Deceased then told her that out of it she was to pay $300 to the Sisters of Charity, and $100 for masses and her debts and funeral expenses. Defendant said that this distribution of deceased's money, and this method of disposing of it, instead of leaving it by will, had often been mentioned by deceased as her intention.

I think the evidence of defendant receives from that of Richardson sufficient corroboration to comply with the Evidence Act. Deceased told him what her object was in sending defendant to Toronto for her money, viz., to give it to defendant, with the exception of what she needed for herself; the transaction appears to have been in contemplation of the approach of death, for she makes provision for her funeral expenses and masses for her soul. The intention with which she handed the money to defendant would have been ambiguous had it not been for the previous clearly expressed intention to give it to defendant.

On the whole, it appears to me that the gift was a good donatio mortis causa; the fact that the gift was coupled with a trust does not interfere with its taking effect in that way: see Hills v. Hills, 8 M. & W. 401.

Appeal dismissed with costs.

BRITTON, J., gave reasons in writing for the same conclusion.

FALCONBRIDGE, C.J., concurred.

TEETZEL, J. JANUARY 5TH, 1905.

CHAMBERS.

RE CRAWFORD.

Will — Construction — Annuities — Shrinkage in Rate of Interest—Encroachment on Corpus—Remaindermen—Vested Estates—Right to Devise.

Motion by executor under Rule 938 for an order determining certain questions arising under the will of the late Honourable George Crawford, Senator, who died in 1870.

Testator, after a devise of land to one son and a bequest of bank shares to another, made an elaborate provision for 4 annuities of $800 each to his widow and 3 daughters.

Two of the daughters were still alive, and the fund retained by the trustees to provide their annuities having failed, on account of a reduction in the rates of interest, to provide sufficient revenue to pay the annuities in full, the chief question was, whether the annuitants must suffer a reduction or whether the shortage should be made good out of the corpus of the estate.

J. E. Jones, for the executor and the two annuitants, and for certain residuary legatees.

C. A. Moss, for a residuary legatee.

M. A. Secord, Galt, for other residuary legatees.

TEETZEL, J.—. . . Does the language of the testator import that $800 at all events is annually to be paid out of his estate to each annuitant, or only the interest to that amount of a capital sum which is to be set apart or retained?

I am convinced that with reference to these 4 annuitants the controlling intention of the testator was that the annuitants should each receive $800 per annum in any circumstances.

This is strongly evidenced, I think, by the following facts and circumstances to be gathered from the will:

(a) Clause 3, directing the annuities to be paid, contains no limitation or condition.

(b) Testator had an estate more than sufficient to provide for these annuities out of income, and, after directing his executors out of the residue to pay his debts, etc., directs them to divide the residue among his sons and the children of one daughter, "after retaining in their hands . . . a sufficient portion of my estate to produce annually by way of dividends, interest, or otherwise howsoever, a sufficient sum to pay the said annuities," etc.

(c) He directs the annuities to be paid quarterly . . . no regard being had to whether the executors would have sufficient in hand in the shape of interest to pay the annuities at the quarterly periods.

(d) He makes no express disposition of any surplus revenue which might be earned upon the moneys retained after paying the annuities.

(e) An absence of any clear intention to constitute the annuitants life tenants only of the estate retained by the trustees or of an intention that such estate should pass in its entirety to remaindermen.

It seems to me that the provisions made for paying the annuities out of income were intended chiefly as a means to secure the payment of the annuities, but not the only means. . . .

A perusal of all the cases cited leads me to the conclusion that this particular will resembles more the wills in question in May v. Bennett, 1 Russ. 370, Wright v. Calendar, 2 DeG. M. & G. 652, Carmichael v. Gee, 5 App. Cas. 588, and Kimball v. Cooney, 27 A. R. 453, than the wills in the cases of Baker v. Baker, 6 H. L. Cas. 616, and Wilson v. Dalton, 22 Gr. 160.

I think, therefore, the shortage in the annuities still current, after crediting the income derived from the securities

held by the trustee, less the costs of collection, must be made good by sale of such part of such securities as may be necessary for that purpose.

Another question involved upon the motion was as to the interest of George Easton and James L. Whiteford in the principal money after the death of the annuitants.

It was not seriously argued that George Easton, who was the husband of a daughter of the deceased, has any interest. In my opinion he has no interest whatever.

As to James L. Whiteford, he is a grandson of Isabella Easton, a daughter of the testator. I think he is entitled under the will of his mother, Margaret C. Whiteford, who is a daughter of Isabella Easton, to the share which would come to the said Margaret C. Whiteford if she should be living when the said principal money is distributed.

I think the effect of the will is that as to the principal estate to be retained by the trustees and to be divided at the death of the annuitants, it is vested at the date of the testator's death in the persons named, among whom it should be divided.

The will provides that one-fifth part of the principal money so retained to secure the annuities is upon the death of the annuitants respectively to be given to the children of the deceased daughter, Isabella Easton. One of those children was Margaret C. Whiteford, who was living at time of testator's death, but died in 1895, and by her will gave all her estate to the said James L. Whiteford, and in my opinion he is entitled.

In support of this construction, I refer to Latta v. Lowry, 11 O. R. 517; Woodhill v. Thomas, 18 O. R. 277; Macdonell v. Macdonell, 24 O. R. 468; and cases cited in Jarman on Wills, 5th ed., p. 789.

Costs of all parties out of the principal estate.

JANUARY 5TH, 1905.

DIVISIONAL COURT.

CITY OF TORONTO v. TORONTO R. W. CO.

Trial — Postponement — Determination of Questions Arising in another Action Pending—Causes of Action—Identity.

Appeal by defendants from order of ANGLIN, J., 4 O. W. R. 345, allowing plaintiffs' appeal from order of Master in

Chambers, 4 O. W. R. 221, staying proceedings in two actions (Nos. 188, 189) until the disposition of a certain other action between the same parties, called the "omnibus action." A special case in the omnibus action was heard and disposed of by ANGLIN, J. (4 O. W. R. 330), and proceedings were being taken for an appeal to the Court of Appeal.

The appeal was heard by FALCONBRIDGE, C.J., STREET, J., BRITTON, J.

W. Cassels, K.C., for defendants.

W. E. Middleton, for plaintiffs.

STREET, J.—An examination of the pleadings in these actions has satisfied me that there is no such identity in the subject matter of actions Nos. 188 and 189 with that of the "omnibus action" as would justify us in exercising the discretionary power of staying proceedings in the former until the determination of the latter.

Nor am I able to come to the conclusion that the application of the defendants for a stay in the actions 188 and 189 comes within the provision of the Judicature Act requiring all matters in controversy between the parties to be determined so far as possible in one action.

In the action brought in April, 1903, the omnibus action, the city of Toronto alleges breaches of the agreement by the defendants, asks for an interpretation of the agreement, for specific performance of it, and for damages, those damages being only recoverable, in respect of past breaches, and being recoverable, if at all, under the 46th clause, to the extent of $10,000 as liquidated damages for the breach of any of the numerous conditions in the agreement. In April, 1904, a new term is added to the agreement by the Legislature, under which an entirely new scale of damages is provided, recoverable, however, only in case of the neglect or refusal of defendants to provide a service "reasonably complying with the provisions of the agreement."

It is clear that the decision of the matters raised by the pleadings in the "omnibus action," no matter whether in favour of plaintiffs or defendants, while it may decide all the matters alleged to be in controversy between the parties at the time it was brought, and according to the law then in force, must be limited to those matters, and cannot determine the right of plaintiffs to recover damages in respect of matters arising a year afterwards and governed by an entirely new state of the law. It is true that the meaning of the

agreement into which the parties have entered is, to a certain extent, an element in the determination of the questions raised in both actions: but the interpretation placed upon it by the ultimate court of appeal in the "omnibus action," whatever that interpretation may be, will merely throw light upon, without determining, the question, raised in the other actions, whether defendants have given a service of cars reasonably complying with the terms of their agreement.

The questions in the "omnibus action" have already been subdivided into two classes which are to be prosecuted not simultaneously but successively. There is a possibility, if not a probability, of protracted litigation in that action, looking at the nature of the questions involved; and its ultimate result will not dispose of the questions involved in the later actions.

In my opinion, the appeal of defendants from the order of my brother Anglin setting aside the order of the Master in Chambers, should be dismissed with costs.

FALCONBRIDGE, C.J., gave reasons in writing for the same conclusion.

BRITTON, J., concurred.

MEREDITH, J. JANUARY 6TH, 1905.

TRIAL.

WALLER v. INDEPENDENT ORDER OF FORESTERS.

Life Insurance—Benefit Certificate—Friendly Society—Rules—Impairment of Contract—Insurance Act—Non-observance of Requirements—Setting out Rules—Incorporation by Reference—Action by Administratrix—Suicide—Insanity.

Action to recover $3,000 upon a benefit certificate issued by defendants insuring the life of plaintiff's intestate.

J. C. Makins, Stratford, for plaintiff.

W. H. Hunter, for defendants.

MEREDITH, J.—There can be no doubt of defendants' power to alter their rules; their by-laws have always provided for that. Deceased became a member of the society whilst such laws were in force. It was within his right, as well as

within the right of every other member, to seek alterations, in the prescribed way, affecting the rights of other members, just as it was within the rights of the other members who sought the alterations in question, affecting the deceased's and all other members' rights, and procured it in the prescribed way, to do so. That aspect of the case presents no difficulty: the difficulty arises from the provisions of the Ontario Insurance Act, which so largely interferes with such rights and other the rights of contract between insurer and insured.

The Act requires that every written contract of insurance shall have set out in full on its face or back all its terms and conditions, and provides that, if not so set out, they shall be invalid in so far as they impair the effect of the contract; but that registered friendly societies, instead of so setting out the complete contract, may indicate therein the terms by reference to their rules containing them. That was not done in this case. Indorsed upon the contract is a form of agreement referring to the rule, then existing, upon which defendants now rely, but that form has never become a completed contract or writing; it required the signature of the person insured, and, upon its face, appears also to have required the seal of the "court" of which he was a member, and to be signed by two of the officers of that court as witnesses; it lacks all these things, and is on its face an incomplete and ineffectual thing, whatever might have been its effect if complete. It is nowhere in itself, or in the body of the contract, referred to as having any effect unexecuted. And, this indorsement having no effect, recourse must be had to the face of the contract for a compliance with the provisions of the Act; but there I am unable to find any term, set out as the Act requires, limiting the insured's or the assured's rights to anything contained in the then existing rules, or any their future rules. It is true that the then existing rules are "made a part of the contract," but their terms are neither set out "in full," nor are they "indicated therein by particular reference to the rules containing them." All amendments to the rules, adopted from time to time, are stated as part of the consideration for the contract—whatever that may mean—but they are not even expressed to be made part of the contract. Under the Act, the application for the insurance may be considered with the contract, but apparently only in respect of material misrepresentations in it.

The contract is within the Act, and nothing impairing its effect is set out in the only manner in which it could be

effected; and so, if there is nothing apart from contract preventing recovery, plaintiff, as the legal personal representative of deceased, is entitled to recover the sum assured, $3,000. Plaintiff does not sue in her own right as beneficiary—there seems to be no ground disclosed in the evidence upon which she could so recover—her action is brought and her claim made solely as administratrix of the deceased's estate. It therefore follows that, if the deceased committed suicide whilst sane, she is precluded, at common law, from recovering: see Amicable Ins. Co. v. Bolland, 4 Bligh N. R. 194, and Borrodaile v. Hunter, 4 M. & G. 639. It is admitted that he committed suicide, but the parties are at issue on the question of insanity—at issue really though the pleadings may not sufficiently indicate it—and that question was not tried owing to the absence of plaintiff's witnesses. The case must, therefore, go down to trial upon that issue, unless the parties can agree as to the fact, or, being unable to so agree, desire that it be found upon a reference instead of a trial.

All questions of costs can better be determined when the rights of the parties are finally determined.

MEREDITH, J. . JANUARY 6TH, 1905.

TRIAL.

MIDDLETON v. COFFEY.

Liquor License Act—Delivery of Intoxicating Liquor to Person after Notice—Licensed Seller—Service of Notice on Barman—Sufficiency—Damages—Costs.

Action against a licensee under the Liquor License Act, R. S. O. 1897 ch. 245, to recover damages under sec. 125 of that Act for delivering intoxicating liquor to a certain person after notice under that section.

J. A. Robinson, St. Thomas, for plaintiff.

J. M. Glenn, K.C., for defendant.

MEREDITH, J.—. . . The main question is, whether notice was given to defendant as provided for in sec. 125, which is in these words:—

"The husband, wife, parent, child of 21 years or upwards, brother, sister, master, guardian, or employer, of any person who has the habit of drinking intoxicating liquor to excess . . . may give notice in writing, signed by him or her,

or may require the inspector to give notice, to any person licensed to sell, or who sells or is reputed to sell, intoxicating liquor of any kind, not to deliver intoxicating liquor to the person having such habit; and if the person so notified, at any time within 12 months after such notice, either himself, or by his clerk, servant, or agent, otherwise than in terms of a special requisition for medicinal purposes, signed by a licensed medical practitioner, delivers, or in or from any building, booth, or place occupied by him, and wherein or wherefrom any such liquor is sold, suffers to be delivered, any such liquor to the person having such habit, he shall incur upon conviction a penalty not exceeding $50, and the person giving or requiring the notice to be given may, in an action as for personal wrong (if brought within six months thereafter, but not otherwise) recover from the person notified such sum, not less than $20 nor more than $500, as may be assessed by the Court or jury as damages; and any married woman may bring such action in her own name, without authorization by her husband. . . ."

The notice which is the basis of the right of action must be in writing and must be given to the licensee, but personal service is not necessary; the Act does not expressly or impliedly require it; it is enough if the notice be served upon any agent of the licensee, expressly or impliedly authorized to receive it for him. In some cases personal service might at times be practically impossible, and might be of less benefit to the licensee than service upon his agent would be, as, for instance, in the case of an absent licensee whose business is during such absence entirely managed by an agent.

In this case the licensee is a rather elderly man, and one who seems to depend upon others, to a considerable extent, in the management of his licensed business. The notice was served upon his bar-man . . . the person in charge of the very part of defendant's business directly affected by the notice; the very person to whom notice was most essential, whether it came from his master to him or otherwise, for it would, in all probability, he his act in supplying the liquor which would create the liability. The bar-man occupied such a position under defendant and in his licensed business that it cannot but be that he was an agent for defendant authorized to receive the notice, and, if that be so, it seems to be immaterial whether or not defendant had knowledge of it, or perhaps it would be better to say it is not essential; service upon the agent for service, was service upon the principal: see Tanham v. Nicholson, L. R. 5 H. L. 561.

But I am far from being able to find as a fact that defendant really never had any knowledge of the notice until, as he says, this action was brought or threatened. . . . The whole evidence would lead one to the conclusion that defendant had knowledge of the service of the notice, but had forgotten it.

At the trial I was inclined to the view that, as the enactment expressly makes the licensee answerable for the delivery of the liquor "by his clerk, servant, or agent," as well as by himself, and as it, immediately before such provision, provides for the notice being given to the licensee, without adding any such other words as "his clerk, servant, or agent," there might be an indication that actual notice to the licensee himself is required, and that only after such personal notice does he become liable for the act of his "clerk, servant, or agent." But it is clear that, unless an enactment requires personal service, personal service is not, generally speaking, necessary: see The Queen v. Lancaster, 15 Q. B. 671, and Ex p. Porlingee, [1892] 1 Q. B. 15: and any one aware of such general rule might well think it mere surplusage, indicating a want of knowledge of the law, expressly to provide for service upon an agent when personal service was not plainly indicated. The purpose of the legislation seems to me to have been rather to leave as few loop-holes as possible by which, under any manner of cunning devices, the legislation might be made practically a dead letter. There is nothing extraordinary in making a master answerable for the negligence of his servant.

The opinion expressed by Osler, J., in Austin v. Davis, 7 A. R. 478, at p. 484, that "clearly, the person to be notified is the master or owner of the business, and not the mere clerk or servant employed, it may be for a day, or a longer or shorter period," has caused me to pause long and to search carefully for reasons and authorities in support of that opinion. But it was purely an obiter dictum of the learned Judge, no question as to service of the notice having arisen in that case, and so, like every other dictum—no matter how able and experienced the Judge—has no binding effect upon any other Judge, and affords no excuse for his failing to give the question consideration, and the parties the benefit of an exercise of his judgment upon it.

I have been unable to find any authority for requiring personal service. . . . The general rule seems to me to be settled to the contrary; and I can find nothing in the enactment itself to warrant the taking of it out of the general rule. . . . The person served in this case was, as I

find, an agent upon whom service might rightly be made for the master.

There was no contest upon any other question; the notice was really given upon the requirement and on behalf of plaintiff, and intoxicating liquor was delivered, notwithstanding it, so as to create a liability from defendant to plaintiff under the provisions of the enactment.

There will be judgment for plaintiff and $100 damages, but without costs, which is tantamount to with costs on the County Court scale and set-off of defendant's additional costs, and saves the delay and expense of a contested taxation.

JANUARY 4TH, 1905.

DIVISIONAL COURT.

NELSON v. LENZ.

Division Courts — Garnishing Plaint — Garnishee Resident out of Province—"Carrying on Business" in Province—Person Transacting Business as Agent for Another Garnishee Submitting to Jurisdiction—Assignee of Fund Garnished Intervening—Status of Intervener.

Appeal by the primary creditors in a garnishee matter in the 7th Division Court, Essex, from the order and judgment of the Judge presiding in that Court determining that the garnishee, R. A. Newman, who resided in the city of Detroit, Michigan, but was alleged to carry on business at Windsor, Ontario, was not subject to be made a party to garnishee proceedings.

The garnishee's wife owned in her own right property in the county of Essex, some of which was rented. The garnishee acted as agent for his wife in managing her property, and he employed a solicitor practising in Windsor to collect rents and superintend repairs, make leases, etc., for which services a fixed sum was paid him. The garnishee entered into a contract, in his own name, with the primary debtor, for the building by the latter of a house on the property of the garnishee's wife, upon which $667.09 remained due to the primary debtor. The latter was indebted to a number of persons to the amount of between $800 and $900. The solicitor before mentioned, as solicitor for all these creditors, except one McKee, took garnishee proceedings under sec. 190 of the Division Courts Act, and accepted service for Newman,

the garnishee. McKee (a creditor having an equitable assignment of the debt from the primary debtor) intervened and contested the right to take these proceedings, on the ground that Newman neither resided nor carried on business within the jurisdiction of the 7th Division Court, and that, therefore, the proceedings taken could not be sustained.

By sec. 190 of the Division Courts Act there is jurisdiction in garnishee proceedings in the Division Court of the division in which the garnishee "lives or carries on business."

The appeal was heard by FALCONBRIDGE, C.J., STREET, J., BRITTON, J.

C. A. Moss, for primary creditors.

W. H. Blake, K.C., for McKee.

BRITTON, J.—If the objection in this case was taken by the garnishee himself that he did not carry on business within the limits of the 7th Division Court in the county of Essex, within the meaning of sec. 190 of the Division Courts Act, I would, upon the evidence, sustain that objection. The question of carrying on business or transacting business in any particular place is one of fact, and one of degree. A business may be carried on by a person in one place, which is but a small part of a business carried on by the same person in another place, or a small business may be carried on in one place by a professional man having a large practice in another place.

Here the garnishee by his attorney admits that he does carry on business in the county of Essex, and he voluntarily submits to the jurisdiction of this Court. I see no reason why he has not the right to do this. He admits that he is indebted to the primary debtor, in reference to work done by the primary debtor in that county, in a certain sum, and he is willing to abide by the decision of the Judge of the Court in which the action is brought as to the person to whom that money shall be paid.

I am unable to come to the conclusion that McKee, a creditor of the primary debtor, who intervenes, has shewn "any just cause why the debt sought to be garnished should not be paid over or applied in or towards the satisfaction of the claim of the primary creditor."

The facts are not in dispute. . . . The garnishee raised no objection to the jurisdiction of the Court, but regularly appeared by his attorney, and admitted an indebtedness of $667.09.

Can McKee, as one intervening, do, as against the primary creditors, what the garnishee has not done, and what, in my opinion, he had a right to refrain from doing?

Assuming that McKee is a party interested in these garnishee proceedings, he is entitled, under sec. 193, to set up any defence as between the primary creditor and primary debtor which the latter would be entitled to set up in an ordinary action, and also any such defence as between the garnishee and primary debtor, and "may also shew any other just cause why the debt sought to be garnished should not be paid over or applied in or towards the claim of the primary debtor." The mere fact that McKee is a creditor of Lenz, and has an accepted order for the amount of his claim upon the garnishee, is not, in my opinion, a just cause. If it is in the power of the garnishee to submit to the jurisdiction of the Court, then an intervener ought not to be allowed, in his own interest, but to the prejudice of the primary creditor and against the wish of the garnishee, to say that the Court shall not entertain such jurisdiction.

If McKee, by his assignment, of which it appears the garnishee had notice, has acquired any rights against the garnishee, he can enforce these.

If the garnishee proceedings are void for want of jurisdiction, it may be that they will not protect the garnishee in paying over this money. That is a matter between the garnishee and the primary debtor, or between the garnishee and McKee, but it ought not to be raised as between the primary creditors and garnishee, unless by the garnishee himself. "Just cause" is said to be "substantial reason in law, and it means a good and substantial reason as against these primary creditors, who are entitled to their money and to the fruits of proceedings regularly taken, and without objection by either the primary debtor or garnishee.

If any question arises as to priority of McKee over any primary creditor, or as to his being entitled to the money under his assignment, it may be that he can apply under sec. 200.

This is a case of jurisdiction of the person, and it is a jurisdiction which may be acquired by "voluntary appearance either in person or by attorney:" see Am. & Eng. Encyc. of Law, vol. 17, p. 1064; Preston v. Lamont, 24 W. R. 928.

I think appeal should be allowed with costs.

FALCONBRIDGE, C.J.—I agree with my brother Britton's reasoning and conclusions in this case. The appeal is, therefore, allowed with costs.

STREET, J., dissented, giving reasons in writing. He was of opinion that the garnishee did not "carry on business" in the limits of the 7th Division Court, Essex, within the meaning of sec. 190 of the Division Courts Act, citing Smith v. Anderson, 15 Ch. D. 258; Singleton v. Roberts 70 L. T. 687; Baillie v. Goodwin, 33 Ch. D. 604; Re Wallis, 14 Q. B. D. 950; Graham v. Lewis, 22 Q. B. D. 1. He was also of opinion that the intervener had, under sec. 193 (1), the same right as the garnishee to set up the facts as an answer to the claim of the primary creditors.

MEREDITH, C.J. JANUARY 7TH, 1905.

WEEKLY COURT.

RE ATLAS LOAN CO.

ELGIN LOAN CO.'S CLAIM.

Company—Loan Company—Loan on Debenture of another Loan Company—Special Contract—Purchase of Shares of Speculative Stock—Share of Profits—Powers of Company—Validity of Debenture—Actual Advance—Repayment—Interest.

Appeal by the Elgin Loan Co. from the disallowance by the Master in Ordinary of their claim, in the proceedings to wind up the Atlas Loan Co., to rank upon the estate of the latter in respect of a debenture of that company for $55,000, dated 31st May, 1902, payable to the Elgin Loan Co. or order on 2nd January, 1907, with interest at 5 per cent. per annum, payable half-yearly, the whole being collaterally secured by 375 shares of the capital stock of the Dominion Loan Co.

W. K. Cameron, St. Thomas, and Shirley Denison, for appellants.

W. H. Hunter, for the liquidator of the Atlas Loan Co.

MEREDITH, C.J.—The Master came to the conclusion that, as he states, "the issue of this debenture by the Atlas Co. and its acceptance by the Elgin Co. was a device to enable the latter company to invest its trust funds in unauthorized and therefore forbidden securities." . . . What I understand to be the meaning of the finding is, that the Elgin Co. were the real purchasers and owners of the 375 shares,

and that the debenture of the Atlas Co. was issued in order to give the transaction the form of a loan to the latter company of the money which was used to pay for the shares, in order that the investment might appear to be one that it was within the powers of the Elgin Co. to make.

I am unable to agree with this finding.

The documentary evidence—I mean that of the debenture, the agreement between the two companies of 10th June, 1902, and the resolution of the directors of the Elgin Co. authorizing the entering into of the transaction—as well as the correspondence and circumstances immediately connected with the completion of it, are, in my opinion, quite inconsistent with the transaction being of the character the Master has found it to have been.

The agreement is, that not less than 375 shares of the stock of the coal company shall be purchased by the Atlas Co.; that the shares, with the debenture on which the claim is based, shall be security to the Elgin Co. for "the amount so invested in the debenture, with interest at 5 per cent. per annum," and that the Elgin Co. are to have the option of demanding payment at any time of the amount of the debenture or so much of it as may be advanced, with interest to the date of the demand. . . .

The money which was used to pay for the 375 shares was the money of the Atlas Co., and the Elgin Co. did not pay anything until after the debenture had been issued and delivered to them, and the agreement had been signed. . . .

What appears to me, looking at all the circumstances disclosed in the documentary and oral testimony, or such of it as can be relied on, to have been likely to have been the real arrangement between the parties, and what was, in my opinion, the arrangement that was really come to, is this: That, in order to enable the Atlas Loan Co. to buy the shares, the Elgin Loan Co. should lend to it what was required to buy not less than 375 shares; that this should be advanced by the Elgin Co. to the Atlas Co. on the latter's debenture for $55,000, and that the shares when purchased should be held by the Elgin Co. as collateral security for the loan and be repaid out of the proceeds of the sale of them; that the Elgin Co. might call in the loan whenever they saw fit to do so, and that, as the consideration for making the loan, the Elgin Co. were to be paid 5 per cent. interest on the money advanced, or, at their option, might take the dividends on the shares in lieu of interest, and were, when the shares were sold, to

receive, if there was a gain on the transaction, one-half the difference between the purchase price and the selling price.

I see nothing inconsistent with that having been the real nature of the arrangement, in the circumstance of the telegram of 27th May, 1902, from Rowley, the manager of the Elgin Co., to Wallace, the president of the Atlas Co., "you have authority to use your own discretion in purchasing," or in the bought notes being made out by Ames & Co. (a firm of Toronto stock brokers, in which Wallace was a partner) in the name of the Elgin Co., or in the fact of the debenture being issued when, as it is said, there was no need for it, because money enough to buy the shares was lying at the credit of the Elgin Co. in the hands of the Atlas Co., or in the cheque which was issued by the Elgin Co. being for exactly the sum for which the shares had been bought, or in the fact that the debenture was for $55,000. On the contrary, every one of these circumstances is, in my opinion, quite consistent with the real transaction having been what, as I have said, I think it was, or, if apparently not so, is as readily explained. . . .

It may well be that the reason for the issue of the debenture was in some sense the fact that the Elgin Co. had not the power to buy the shares, but only, I think, in the sense that, because that was impracticable, it was found necessary not that in form but that in substance the transaction should be a purchase by the Atlas Co. of the shares on their own account, and at their own risk, and a loan to them by the Elgin Co. of the amount required to buy the shares on the security and the terms and conditions mentioned in the agreement.

I would, therefore, reverse the decision of the Master unless, as contended by the liquidator of the Atlas Co., the Elgin Co. are not entitled to prove by reason of the invalidity of the debenture as an obligation binding on the Atlas Co., . . . the ground being that the issue of the debenture was ultra vires the Atlas Co. because when issued their statutory power to borrow on debentures was exhausted, and because, if it was not exhausted, debentures had already been issued to the full amount authorized by the only by-law for the issue of debentures which had been passed by the directors.

. . .

It is unnecessary, I think, to consider these objections, for, assuming them to be well taken and the debenture void, the Elgin Co. would nevertheless, in my opinion, be entitled to prove for the amount of the loan and the interest upon it.

The Elgin Co. had at the credit of their savings bank account when the cheque of 11th August, 1902, was drawn, $81,070.65, and that was reduced by debiting them in the account with the amount of the cheque to $28,879.40.

If the debenture is void, it is surely not open to the Atlas Loan Co., while repudiating their liability upon it, to claim credit in the savings bank account for the very money which they, as the result of the transaction, merely transferred from one pocket to the other. I do not think that they can do this, and that the result of their repudiation of liability on the debenture is to render it impossible for them to charge against their indebtedness on the savings bank account the cheque of 11th August, 1902. It is not as if the money was borrowed to be used, to the knowledge of the lender, in making an investment which was ultra vires the borrower. The investment intended to be made and which was made was intra vires the Atlas Co.

For these reasons, the finding of the Master should be reversed, and there should be a reference back, with directions to allow the claim of the Elgin Co. to the extent of the amount of the loan and interest upon it, and with leave to the Elgin Co., if they so desire, to amend the proof by making an alternative claim in respect of the moneys on deposit with the Atlas Co., and the Elgin Co. must, of course, value their security and give credit accordingly.

The costs of the contestation and of the appeal must be paid by the liquidator of the Atlas Co.

MEREDITH, C.J. JANUARY 7TH, 1905.

TRIAL.

MERCHANTS FIRE INS. CO. v. EQUITY FIRE INS. CO.

Fire Insurance — Specific Goods — Substituted Goods — Construction of Policy—Termination of Insurance—Notice—Reinsurance—Breach of Warranty—Limitation of Actions —Statutory Condition—Unjust and Unreasonable Variation.

Action on a policy of insurance issued by defendants, dated 1st April, 1902, reinsuring plaintiffs for one year, on property covered by plaintiffs' policy No. 2958 issued at their

Brantford agency in favour of the Snow Drift Co. of Brantford, for $2,000.

R. C. Levesconte, for plaintiffs.

B. Morton Jones, for defendants.

MEREDITH, C.J.—Policy No. 2958 of plaintiffs bears date 24th February, 1899, and was for a term of one year. The property insured is described in it as "120 sacks of green coffee while stored in the 3-storey patent roofed building occupied by the assured situate 37 and 39 Dalhousie street, Brantford, Ontario." The policy was, in pursuance of one of its terms, renewed in each of the years 1900, 1901, and 1902. The loss was made payable to the Bank of British North America. The business of the Snow Drift Co. was that of dealers in coffees, spices, extracts, and other articles. They carried insurance on their general stock for a considerable amount, besides the policy on the green coffee.

The reason for effecting the insurance of 24th February, 1899, on the green coffee, was that the Snow Drift Co. had exceeded their line of credit with their bankers, the Bank of British North America, who required security, and the means adopted to give the security was the effecting of this insurance, and providing by the policy that the loss should be payable to the bank.

A fire occurred on 18th September, 1902, which resulted in the total destruction of the whole of the company's stock in trade, including the green coffee. . . . The loss on it was $1,321 at the lowest; . . . it is more likely that the loss exceeded $2,000.

There is no doubt that none of the green coffee which was in the Snow Drift Co.'s premises when the insurance with plaintiffs was effected, was there when the fire occurred. It had been sold in the course of the business, months and perhaps years before, and one of the questions in dispute is as to the proper construction of the policy—whether it is a policy on a specified 120 bags or on any 120 bags of green coffee which might, while the policy was current and at the time of the fire, be on the premises mentioned in the policy; and I am of opinion that it is the latter.

If the description had been "the stock of green coffee," it is quite clear that the policy would have covered the stock on hand at the time of the fire, though the whole of the particular coffee of which the stock consisted at the time the insurance was effected had been disposed of. Does, then,

the description "120 bags of green coffee" do more than confine the subject of insurance to green coffee in bags, and limit the right to recover in respect of such a stock to the value of 120 bags, however large the stock may have been? I think it does no more than this. . . . The nature of the business which the Snow Drift Co. was carrying on . . . was such that caused, if it did not require, the stock of green coffee to be turned over very frequently. . . .

It is true that it appears that 120 bags of green coffee were at one time separated from the rest of the stock and placed by themselves in the Snow Drift Co.'s premises, but that was done only for the purpose of enabling the local manager to shew to the inspector of the bank that the company had as large a stock of green coffee in bags as had been insured for the bank's benefit.

Altogether different considerations are applicable to . . . the case of a warehouse receipt . . . Llado v. Morgan, 23 C. P. 517.

Contrary to what I should have expected, I have not been able to find any reported case in which the precise question that has arisen in this case has been decided, unless it be British America Ins. Co. v. Joseph, 9 Lower Canada R. 448. . . . I am unable to distinguish that case from this. . .

Gorman v. Hand in Hand Ins. Co., 11 Ir. R. C. L. 224, is not, I think, opposed to the view I have expressed. . . . Palles, C.B., recognizes what I take to be clearly the rule for interpreting insurance contracts, that, even though prima facie the words used to describe the property insured point to a specific and then existing thing, the circumstances of the case may be such as to lead the Court which is called on to construe the contract to give to the words a broader and more comprehensive meaning. . . .

Assuming that the description in plaintiffs' policy is prima facie a specific description, the circumstances which I have already detailed, and which shew conclusively, I think, that the contracting parties did not intend to enter into a contract of so limited a character, rebut that presumption, and require me, if the words are susceptible of such a meaning, as I think they are, to construe the contract as covering any bags of green coffee to the number of 120, the property of the insured, which might be, during the currency of the policy and at the time of a loss by fire happening, in the premises described in the policy.

It was further argued that the insurance had been terminated by the assured, by written notice to that effect, before the fire occurred.

This contention was based upon the fact that the assured had, on 10th September, 1902, written to the agents at Brantford of plaintiffs in the following terms: "In reference to policy 2958, in amount $2,000, held by the Bank of British North America, on 120 bags of coffee, we wish to cancel this policy and have you give us a new one for $1,000, as there are now only 50 bags of coffee in stock."

This letter was not communicated by the Brantford agents to plaintiffs' head office until after the fire occurred, and no action was taken upon it, either by return of the unearned premium or otherwise.

It was argued for defendants that the writing of this letter operated as a written notice, within the meaning of condition 19a of the statutory conditions, and that the insurance was terminated immediately on the receipt of it by the Brantford agents; but I am not of that opinion.

The letter was not, I think, such a written notice as the condition relied on refers to. It was, I think, only an intimation of the intention of the assured to terminate the insurance if and when there was substituted for it a new policy for $1,000; to that plaintiffs never agreed, and it was never done. . . .

It was also urged as an answer to plaintiffs' claim that there had been a breach of the warranty, contained in the policy sued on, that plaintiffs would retain an amount at risk equal to that reinsured under that policy.

I do not understand the force of this objection. The amount reinsured by defendants' policy was $1,000, and, as I have found, plaintiffs had at risk up to the time of the fire not only a sum equal to that, but to double that sum.

It was contended lastly that, as the action was not begun until more than 6 months after the loss occurred, it was barred, and condition 22, as varied by the indorsement on defendants' policy, was relied on in support of that contention.

Statutory condition 22 allows a year after the loss has occurred in which to bring the action, and I am not only unable to hold the variation which defendants have attempted to impose upon the assured, by reducing the time allowed for bringing an action to 6 months, to be just and reasonable, but I am clearly of opinion that, on the contrary, it is both unjust and unreasonable.

The result is, that plaintiffs should have judgment against defendants for one-half the amount paid the Snow Drift Co. in settlement of the loss under their policy, which was $1,000.

Judgment for plaintiffs for $500 with interest and costs.

MEREDITH, C.J. JANUARY 7TH, 1905.

TRIAL.

ATLAS LOAN CO. v. DAVIS.

Promissory Note—Purchase Price of Shares—Misrepresentations as to Value—Confidential Adviser — Agency — Evidence.

Action to recover the amount of a promissory note for $5,000 made by defendant, dated 17th April, 1902, and payable, with interest at 6 per cent. per annum, 12 months after date, to A. E. Wallace in trust.

The defence was, that the note was given in part payment of the price of 100 shares of the common stock of W. A. Rogers Limited, of the par value of $100, purchased by defendant from plaintiffs for $7,000, $2,000 of which was paid in cash; that plaintiffs, through Wallace (their president), agreed with defendant in the month of May (sic), 1902, that, as soon as a good opportunity should arise, the company would purchase stock in some good company on behalf of defendant, and would give him the full benefit of the purchase, and transfer the stock to him at cost price; that Wallace, acting as defendant's confidential adviser, soon afterwards notified defendant that he could obtain stock of the Rogers Co. of the par value of $10,000, for the actual price of $7,000, and that defendant thereupon agreed to purchase the stock, and paid $2,000 on account, and gave the promissory note sued on for the residue of the price; that defendant was induced to enter into the transaction, pay the $2,000, and give the note, by the false and fraudulent representations of Wallace as to his knowledge and means of knowledge of the stock; that Wallace falsely represented to defendant that the stock was worth par, and that the actual price paid for it was $7,000, and that plaintiffs were giving defendant the full benefit of the transaction and were not making a profit thereon; that these representations were false to the knowledge of plaintiffs, because they had in fact purchased the stock at 35 cents in the dollar, and that plaintiffs, instead of acting in

the interest of defendant as his agents, had acted for their own advantage, and were themselves the vendors, and concealed that fact from defendant.

H. L. Drayton, for plaintiff.

J. A. Robinson, St. Thomas, and J. M. Ferguson, for defendant.

MEREDITH, C.J.—The defence was not, in my opinion, proved. According to the testimony of A. E. Wallace . . . his company (plaintiffs) purchased from the firm of A. E. Ames & Co., of which he was a member, 600 shares of the common stock of the Rogers Co. at 50 cents in the dollar. He thought the stock at that price a great bargain; that it was worth at least 70 cents in the dollar, and was likely in the near future to go to par; that he himself bought from his company 100 of the shares at 70 cents in the dollar; that he did not personally make the sale to defendant, or a sale which was made to Honsinger, who acted for defendant in the purchase of the 100 shares bought by him, of another 100 shares at the same price; that these sales were made through a man named Smith, who was sometimes employed by plaintiffs in such transactions; that he (Wallace) made no representations of any kind as to the stock either to Smith or to Honsinger. He further testified that the stock was a desirable investment at 70 cents in the dollar; that it had always paid a dividend of 4 per cent. per annum, and earned enough to pay a much larger dividend.

Smith . . . was not called.

I see no reason for disbelieving the testimony of Wallace, and I give credit to it. The testimony of Honsinger, upon which alone defendant rested his case, fell far short, even if it were accepted in its entirety, of proving the fraud set up or any fraud in the transaction. At most it shewed that, owing to the nature of the relations between him and Wallace, and the previous transactions which they had had, he believed that he was not buying from Wallace or plaintiffs, but that Wallace was acting as his friend or agent in procuring the stock for him, and that he and defendant were getting what they bought at the price which was being paid for it. His testimony, assuming it to be entirely accurate, shewed no reasonable ground for any such belief, nor is there anything in it inconsistent with what Wallace deposed to, unless it be the statement that he had had a conversation with Wallace, 4 or 5 days before the purchase was made, when Wallace, he says, told him that he (Wallace) could get 500

shares of the stock; that it was "a snap;" that he was taking 100 shares, and named others who were to take some also; and that the price was 70. Wallace did not recollect any such conversation; but, assuming it to have taken place, it affords no support for the allegations of fraud upon which defendant relies.

If Wallace did say that the price of the stock was 70 cents in the dollar of the par value, what was meant was, I think, plainly that that was the price which the purchasers, including himself, would have to pay for it. If the stock had been bought by plaintiffs from Ames & Co., as I have found it was, and plaintiffs were offering it for sale at 70 cents, I know of no duty which rested upon them to inform intending buyers of the price at which the stock had been bought or the profit it was making in the transaction.

In my opinion, there is nothing to justify a finding that either plaintiffs or Wallace acted in the transaction as agent for defendant, or that they or either of them led him or his agent Honsinger to believe that they would do so.

Defendant having failed to make out his defence of fraud, it is unnecessary to consider whether, if it had been made out, his dealings with the stock after the discovery of the fraud would not have disentitled him to the relief which he seeks, which is practically rescission of the contract by which he acquired the stock, or to deal with the other matters urged by plaintiffs' counsel. . . .

Judgment for plaintiffs for the amount of the note with interest and costs.

JANUARY 7TH, 1905.

DIVISIONAL COURT.

REX v. SPEGELMAN.

Gaming—Municipal By-law—Ultra Vires—Municipal Act—Gambling in Private House—Conviction Quashed.

Motion by defendant to quash his conviction by the police magistrate for the city of Toronto for allowing a game of chance to be played for money upon his premises, contrary to a by-law of the city.

The motion was heard by BOYD, C., MEREDITH, J., MAGEE, J.

J. M. Godfrey, for defendant.

J. R. Cartwright, K.C., and J. S. Fullerton, K.C., for the Crown.

BOYD, C.—The information is for that Spegelman did "permit or allow a game of chance or hazard with dice, cards, or other device, to be played for money, liquor, or other thing, within 139 Adelaide street west, in the city of Toronto," contrary to the by-law in that behalf.

The evidence shews that the place in question is the private house of defendant; that his friends come to visit him on Sundays, and sometimes play poker for money, and the occasion under investigation was one of these Sundays, when this game of chance was played for money.

The by-law relied on provides that no person shall keep or permit to be used in any house, room, or other place, for the purpose of gambling, any faro bank, rouge et noir, roulette table, or other device for gambling, or permit or allow any game of chance or hazard with dice, cards, or other device, to be played for money, liquor, or other thing, within such house, room, or place.

The conviction literally follows this language, with all its alternatives changed as to conjunctives, and if the by-law is valid, the conviction would be deemed sufficient.

The by-law purports to be founded on a clause in the Municipal Act empowering the municipality to pass by-laws "for suppressing gambling houses and for seizing and destroying faro banks, rouge et noir, roulette tables, and other devices for gambling found therein:" R. S. O. 1897 ch. 223, sec. 549 (4.)

The legislation is pointed at houses where gaming or gambling is practised, and the house is kept for such purpose. The inquiry in this case was not as to whether the place in question was a "gambling house," and there was no evidence to induce that conclusion. One instance is proved, or perhaps two, in which cards for gain had been played at the house, but that falls far short of what would be required to attach to it the character of a "gambling house."

It is grouped in the Municipal Act with "disorderly houses," under the general heading of "Public Morals," and contemplates places which are to be regarded as nuisances to the community. For it is old law that all common gaming houses are nuisances in the eye of the law, not only because they are great temptations to idleness, but also because they are apt to draw together great numbers of disorderly persons, which cannot but be inconvenient to the neighbourhood: Hawkins's P.C., book 1, ch. 75, sec. 6.

The element of frequency at least is essential to make out that any place is a gambling house, and isolated instances on Sundays, when Jews or others come together in private

houses to play cards, are not within the scope of this statute. It is not needful to consider whether it is in conflict with the criminal law of Canada—although the ultra vires question was broached on the argument—and thereupon to consider whether there is a distinction between the gambling house of the Provincial law and the common gaming house of Dominion Code, so that both may stand together because referring to different infractions of the law in its police and its criminal aspects.

For present purposes, it is enough to say that the by-law far transcends the terms of the enabling statute, and assumes to make illegal that which was not in contemplation of the Legislature as expressed in the statute.

Much that Mr. Justice Kennedy says in Scott v. Phillimer, [1904] 2 K. B. 895, may be applicable to the moral aspect of this case, but that should not lead us to penalize a man who has not violated public morals, in the use of his house, according to the charge made or the evidence adduced in support of it.

The conviction should be quashed because resting on an invalid by-law.

MEREDITH, J., gave reasons in writing for the same conclusion.

MAGEE, J., concurred.

JANUARY 7TH, 1905.

DIVISIONAL COURT.

CAMERON v. DOUGLASS.

Master and Servant—Injury to Servant—Death—Negligence —Contributory Negligence—Proximate Cause—Voluntary Incurring of Risk—Workmen's Compensation Act—New Trial—Questions for Jury.

Appeal by plaintiff from judgment of BRITTON, J., 3 O. W. R. 817, dismissing the action, which was brought to recover damages for the death of a man in the employment of defendant, owing to defendant's negligence as alleged.

The action was tried with a jury, who answered questions in favour of plaintiff. On motion for judgment, BRITTON, J., decided that, upon the undisputed evidence, assuming that defendant had been guilty of negligence in not having cased the shaft in which the deceased was when he received the injuries which caused his death, it was shewn that the

injuries were not due to that negligence, but to the neglect of the deceased himself to obey the directions of defendant to trim the shaft, and that deceased voluntarily took the risk which he incurred in going down the shaft.

G. Lynch-Staunton, K.C., for plaintiff.

H. Carscallen, K.C., for defendant.

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

MEREDITH, C.J.—. . . We think that there was evidence for the jury to support the contention of plaintiff that defendant was guilty of negligence in not casing the shaft, but that it was not made clear to the jury that an affirmative answer to the first question involved two propositions, one that there was negligence, and the other that that negligence was the cause of the accident.

We think also that the jury should have been asked to find whether, had the deceased obeyed the direction given him to trim the shaft, the accident would have been avoided. Although there was much to lead to the conclusion that, had that been done, the accident would not have happened, we are unable to say that the jury might not have reached a different conclusion. . . .

That the deceased continued in the employment of defendant with knowledge of the omission to case the shaft, would not, according to the express provisions of the Workmen's Compensation Act, of itself justify a finding that deceased had voluntarily incurred the risk of the injury which happened to him, and that should, we think, be pointed out to the jury.

New trial. Costs of last trial and of appeal to be costs in the cause, unless the Judge before whom the action is ultimately tried otherwise directs.

JANUARY 7TH, 1905.

DIVISIONAL COURT.

LEMON v. LEMON.

Mortgage—Payment — Evidence — Admissibility — Contract —Specific Performance—Credit for Sum Paid—Burden of Proof—Scope of Reference.

Appeal by defendant from order of ANGLIN, J., 3 O. W. R. 734, setting aside report of Master in Ordinary finding that there was nothing due upon the mortgage in question.

The appeal was heard by MEREDITH, C.J., MACMAHON, J., IDINGTON, J.

R. C. Clute, K.C., and A. R. Clute, for defendant.

G. F. Shepley, K.C., and W. E. Middleton, for plaintiff.

MEREDITH, C.J.—This action was begun on 17th April, 1903, to enforce the payment of a mortgage made by plaintiff and Joel Lemon to Joseph Bennett, dated 1st December, 1886, which by various assignments had become vested in plaintiff, the assignment to him having been made by Hartman Jones, who was then the assignee of the mortgage, on 11th December, 1901.

The only defence set up by the appellant was that the mortgage had been paid off by Jonathan Lemon, who was the father of both plaintiff and defendant, with the father's own money, and that plaintiff, who had been intrusted with the money for the purpose of paying off the mortgage, procuring a discharge of it, and handing the mortgage and discharge to defendant, had, in fraud of defendant and in breach of his trust, procured the assignment under which he claims, to be made to himself. . . .

According to the testimony on the part of plaintiff, his case was that he had with his own money purchased the mortgage from Hartman Jones, and that he was the beneficial owner of it and entitled to enforce it against defendant. . . .

On 11th December, 1901, when the money to which Hartman Jones was entitled was paid to him, plaintiff had at his credit in the Standard Bank at Stouffville exactly $1,500, which he drew from the bank on that day and paid to Jones. The $1,500 at his credit was made up by adding to $655 then at his credit two sums of $825.32 and $19.68 respectively, which were on the same 11th December deposited to plaintiff's credit. The $825.32 was made up of $225 which was borrowed by plaintiff on his own promissory note from one Underhill, and $600.32, the amount of a cheque drawn by the father on the Standard Bank, and which represented the balance at his credit there on 11th December, 1901.

It was proved and not disputed by plaintiff that the sums deposited to the credit of the father's account formed part of the proceeds of the crop grown on the father's farm in 1900, which the father intended to apply for the benefit of defendant, and, though that is not in terms admitted by plaintiff, there is no doubt, I think, that the purpose to which it was intended to be devoted was the paying off, as far as it would go, of the mortgage in question. . . .

Save as to the $600.32, it is impossible, I think, on the evidence, to find that the money paid to Hartman Jones was the money of the father. . . .

Leaving out the evidence of statements made by the father—and these were inadmissible on the issue as to the ownership of the money which was paid to Hartman Jones—it is impossible, I think, except as to the $600.32, to find that defendant has satisfied the onus which rested upon him of shewing that the money paid to Jones was the money of the father.

The $600.32 was undoubtedly on 11th December, 1901, the money of the father, and the onus was on plaintiff to shew that it had become his; that he, in my opinion, failed to do. . . .

I entirely agree with the view of my brother Anglin that it was not competent for the Master, upon such a reference as was made to him, to enter into any inquiry as to, and still less to adjudge, the specific performance of a contract by the father with defendant to pay off the mortgage. No such case was, moreover, made upon the pleadings . . . and, if it had been, it should have been dealt with at the trial or referred to the Master for trial, and neither was done, and, in my opinion, had the inquiry been open, the evidence fell far short of proving a contract by the father to pay off the mortgage for the benefit of defendant—at most all that was shewn was an expression of intention, which the father was at liberty to change, if he were so minded. . . .

I am of opinion that it has not been shewn that the mortgage was paid off, but that defendant is entitled to credit upon the mortgage for $600.32 as paid on account of principal on 11th December, 1901, and that the order of my brother Anglin should be varied by substituting for the declaration made by it a declaration that defendant is liable for $889.68 for principal money remaining due on 11th December, 1901, with interest from 1st December, 1902, at 5 per cent. per annum, and by substituting for the provision as to costs an order that there be no costs to either party of the former reference or of the appeal to my brother Anglin or of this appeal. . . .

MacMahon, J., gave reasons in writing for the same conclusion.

Idington, J., dissented, giving reasons in writing for supporting the finding of the Master that the mortgage was paid with the father's money.

JANUARY 7TH, 1905.

DIVISIONAL COURT.

BOYS' HOME v. LEWIS.

UFFNER v. LEWIS.

Judgment — Construction — Order to Refund Money Retained by Executors—Residuary Legatees—Joint or Several Liability—Interest.

Appeal by defendant Lewis from order of ANGLIN, J., 4 O. W. R. 243, on appeal from a supplemental report of the local Master at Hamilton, affirming the report in so far as it dealt with the liability of appellant and his co-defendant Morgan, which was found by the Master to be a joint and several liability. The history of the two cases appears in the various reported decisions: 4 O. R. 18; 27 A. R. 242; 5 O. L. R. 684; 3 O. W. R. 625, 779.

The appeal was heard by MEREDITH, C.J., MACMAHON, J., IDINGTON, J.

W. E. Middleton and A. M. Lewis, Hamilton, for appellant.

D'Arcy Tate, Hamilton, for plaintiffs and defendants the Elighs.

MEREDITH, C.J.—The appellant and Morgan were executors of the will of Daniel Evans, deceased, and were entitled under the will to one undivided one-fifth of his residuary estate. . . .

The question which the appellant presents for decision is, whether he and his co-executor Morgan are jointly and severally liable to pay the sum by which $5,510.57 exceeded their proper share of the residue, and the interest upon it, or each of them is liable to pay one-half only of that sum and interest. . . .

By the judgment of the Court of Appeal . . . the executors, as well as the Boys' Home, were treated and dealt with as legatees who had received out of the estate, in satisfaction of their respective shares of the residue, more than they were entitled to, and who were liable to refund the excess. . . . The declaration and adjudication is, not that defendants John Lewis and Robert R. Morgan are liable to pay, but that they are liable to "make good and repay"—thus putting the declaration of liability on the footing that the money to which it relates was no longer in the hands of the appellant and Morgan in their capacity of executors, but that

it had been "retained" by them as residuary legatees. . . . The purpose of the Court of Appeal, as I understand it, was to require the beneficiaries who had been overpaid to restore to the estate for the benefit of the petitioners (the Uffners) and Maria Evans, if she should be found to be entitled, what they had received in excess of the sum which they would have received had the division of the residue been made into the proper number of shares. . . .

Upon the whole, I am of opinion that the Master was wrong in holding, as he appears to have done, that the appellant and Morgan were jointly and severally liable to make good and repay the excess which they were declared to be liable to make good, and the interest upon it, and that he ought to have found that each was liable for what he had received for himself of what was treated as the share of the residue belonging to the executors, in excess of what he was actually entitled to, and the interest upon what he had so received, and to have taken the accounts upon that footing.

. . .

I would, therefore, allow the appeal and vary the report in accordance with the opinion I have expressed, and would give no costs of this appeal or of the appeal to my brother Anglin to either party.

MACMAHON, J.—I agree in this.

IDINGTON, J., also concurred, giving reasons in writing.

JANUARY 7TH, 1905.

DIVISIONAL COURT.

DOYLE FISH CO. OF TORONTO v. LONDON COLD STORAGE AND WAREHOUSING CO.

Warehousemen—Cold Storage of Fish—Liability for Spoiling—Duty of Warehousemen — Condition of Fish — Examination—Negligence.

Appeal by defendants from judgment of BRITTON, J., in favour of plaintiffs in action to recover damages for the loss of 193 boxes of smelts which were delivered by plaintiffs to defendants to be kept in cold storage, and which, as plaintiffs alleged, were spoiled owing to the negligence of defendants; and dismissing defendants' counterclaim for the storage charges on the fish.

The main contest on the facts at the trial was as to (1) whether the fish were in good order and condition when they

were received by defendants, and (2) whether the temperature at which defendants' warehouse was kept while the fish were in cold storage there had caused or would account for the fish, if they were in good order and condition when received, having become spoiled.

BRITTON, J., found in favour of plaintiffs on the first question, but made no finding as to the second.

C. J. Holman, K.C., for defendants.

G. Grant, for plaintiffs.

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

MEREDITH, C.J.—My learned brother in finding for plaintiffs appears to have been influenced by the fact, as he found it to be, that defendants, in breach of what he held to be their duty, had neglected, as he expressed it, to look after the fish while in the warehouse, and to examine them, to some extent at all events, to see whether they were keeping or not, and, if they were not keeping, to do what was necessary to make them "safe."

The attempt to shew that the fish were spoiled owing to the temperature at which the rooms in which they were stored were kept or to the fluctuations of temperature which had taken place, in my opinion, entirely failed. . . .

Defendants were bound to take reasonable care of the fish while they remained in the warehouse, and, in determining whether that care was taken, regard must, of course, be had to the object with which the fish were delivered to defendants, which was that they should not be allowed to thaw out, but be kept in a frozen condition.

I will assume in favour of plaintiffs that if it was proved that fish placed in a cold storage warehouse and remaining there for the period during which the fish in question remained in defendants' warehouse, if they were in good condition when placed in the warehouse, would ordinarily be found at the end of that period to be in the like good condition, the onus resting upon defendants, if it was also established that the fish were when delivered to them in good condition, to shew that their condition on 12th August was not due to any want of care on their part.

Was any such case made out by plaintiffs? I think not.

. . .

It is, I think, impossible to come to the conclusion that it was proved that the fish, when they reached defendants'

warehouse, were in good order and condition, in the sense in which that expression must be understood, having regard to the purpose for which they were intrusted to defendants, that is to say, in such order and condition that, had they been properly cared for by defendants, they would have kept sound and fit for consumption, at all events for some time beyond 12th August. In addition to the inconclusiveness, as I view it, of the evidence adduced by plaintiffs to establish this, there was against that evidence the failure of plaintiffs to make out the only specific act of negligence charged, and the evidence on the part of defendants and of their manager called by plaintiffs . . . which tended to shew, if it did not establish, that due care had been used by defendants, and therefore to shew that the fish could not have been in good order and condition when received, which might well, I think, have been the case, even though the usual objective symptoms of it were not apparent to the eye.

Having regard to what was conceded on all hands, I am unable to see how defendants can be made liable because of their omission to examine the fish to see how they were keeping. For an examination of the fish and the discovery that they were not keeping would have been of no service to plaintiffs, because, ex concessis, having commenced to spoil nothing could be done to save them. . . .

Appeal allowed with costs, action dismissed with costs, and judgment for defendants on their counterclaim with costs.

JANUARY 7TH, 1905.

DIVISIONAL COURT.

MOTT v. GRAND TRUNK R. W. CO.

Railway—Injury to Person Crossing Tracks—Workman in Grain Elevator—Tracks in Elevator—Shunting Engine—Negligence—Warning—Findings of Jury—New Trial.

Appeal by defendants from judgment of MAGEE, J., upon the findings of a jury, in favour of plaintiff for $1,200 damages, and motion by defendants, in the alternative, upon affidavits, for a new trial.

Action brought under R. S. O. 1897 ch. 166, by widow of Charles Mott, to recover damages for his death, which, as she alleged, was caused by the negligence of defendants. The action was brought for the benefit of the widow herself and four named children of deceased.

Deceased died on 22nd October, 1903, as the result of an injury which he received two days earlier. He was employed by the Midland Elevator Co. at their elevator in Midland,

and his duty was to assist in loading cars belonging to defendants with grain when they were brought to the elevator to be laden.

Two tracks of defendants, spoken of as the east and west tracks, were used for the purpose of bringing the cars to the elevator to be loaded and taking them away after that had been done. The tracks passed through the elevator, that is to say, there was an open space for them between the east and west parts of it, and the elevator was built over this space, which was high enough to permit of a car with a man standing upon it passing through. The cars were loaded by means of spouts, two on each side of the open space, distant 22 feet apart, and the cars on the tracks were loaded from bins by means of these spouts, and when the grain in the bins became so low that the spouts could not be used, the remnant of the grain remaining in the bins was removed by shovelling. The cars on the east track were loaded from bins on the west side of the elevator, and those on the west track from bins on the east side. The cars were brought from the south and left on the tracks by the employees of defendants who had charge of the shunting operations; they were left in such a position that they might be brought in turn by the elevator company's employees opposite to the spouts by means of which they were to be filled; they were moved into the desired position by what was called a car-puller, which was in charge of and operated by an employee of the elevator company, and after they were loaded were taken south by the shunting engine with its tender attached. After the cars were brought to the elevator the engine with its tender was detached and returned to defendants' yard, some distance south of the elevator, the grade from the south to the elevator being down. A line of posts placed at short intervals from one another ran through the open space parallel with the tracks and about midway between them; these posts stood vertically and were about 12 inches square, and were put there apparently to carry the weight of the building above the tracks. The distance between this line of posts and the near rail of each track was 3 feet 8 inches, and the space between the side of a car standing on the track and the line of post nearest to it was nearly two feet, and the length of a car was 35 feet. A highway called Bridge street was crossed by defendants' siding on which the shunting was done, about 400 feet south of the elevator.

On the day of the accident a train of 19 cars had been brought to the elevator to be loaded; 10 of them were placed on the east track and the remainder on the west track, and the engine which had brought them had gone back to the

yard. Of the cars on the east track 9 were then loaded, but the train had been drawn by the car-puller too far to permit of the 10th car, which was the most southerly one, being loaded; the power of the car-puller was not sufficient, owing, it was said, to the grade, to pull the whole train back so as to have the 10th car in position; in order to put it in position it was uncoupled from the rest and pulled about 3 or 4 feet, and that space was left between it and the rest of the train. Owing to the necessity arising for the elevator men to shovel what was left in one of the bins, the deceased was directed to go from the west track, where at this time the other part of the train was being loaded, to the bins on the east side to assist in the work of shovelling; in order to get there it was necessary for him to cross both tracks; he had crossed the west track, and was proceeding through the space which had been left between the 9th and 10th cars, and, as he was passing through, the 10th car was pushed against the 9th by the engine, which with its tender had been backed up to take away the loaded cars, with the result that he was caught between the draw-heads of the two cars and fatally injured.

The negligence charged was: (1) omission to ring the engine bell or sound the whistle or give any other warning that the engine was returning to take away the loaded cars; (2) failure to bring the engine, after it had come near to the train of cars and before attempting to couple them together, to a standstill, and to ascertain before making that attempt whether the train was in a condition to be pulled out with safety; (3) that the engine-driver was not in charge of the engine, but had allowed the conductor to act for him, and that the brakesmen, who usually gave signals to the engine-driver, were not in their usual position.

W. R. Riddell, K.C., for defendants.

W. H. Blake, K.C., for plaintiff.

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

MEREDITH, C.J. (after stating the facts as above):—If, upon a charge eliminating and withdrawing from the jury all the matters complained of, upon which there was, as I think, no evidence for the jury, a general verdict had been found for plaintiff, I should not have felt disposed to interfere with the finding.

There was, I think, evidence for the jury that the employees of defendants in charge of the shunting operations were guilty of negligence in backing the engine and tender

up to the southerly car without taking care to see that in doing so they were not endangering the safety of those who were employed about the elevator in loading the cars and without any warning or other indication of their approach.

The case is not, I think, like that of a person crossing the line of a railway upon which trains might be expected at any time to pass. The siding upon which in this case the cars were standing was, as I understand, used only in connection with the business of the elevator, and when it was necessary to take cars there to be loaded, or to take them away after they had been loaded, there was evidence from which the jury might have been led to the conclusion that those in charge of the shunting operations knew that it was, if not probable, at least possible, that some of the cars which they intended to take away were not coupled, and that there would probably be a space between them, through which those working about the elevator, or some of them, might be passing in going, in discharge of their duties, from one side of the opening to the other. . . .

There was also evidence to go to the jury that defendants themselves recognized the necessity of employing means to prevent injury from happening to those working about the cars, as indicated by the ringing of the bell as the engine approached the cars as a warning that it was coming; by the bringing the engine to a stop a short distance from the cars before backing it up to the train and making the coupling, and also possibly by having brakesmen to see that the coupling was properly effected and to signal to the engine-driver as to how and when he should back up and when he should go ahead with the train when it was made up ready to be pulled out. . . .

My learned brother was, I think, right in refusing to withdraw the case from the jury on the ground that, upon plaintiff's own shewing, deceased's injury was caused or contributed to by his own negligence so as to disentitle plaintiff to recover.

I am not prepared to assent to the proposition that, regardless of the circumstances of the particular case, if it appears that the person injured has not before crossing a railway track looked and listened for an approaching train, and that, if he had done so, he would have seen that one was approaching, and that it was dangerous for him to cross, it is the duty of the trial Judge to withdraw the case from the jury. . . . Proof of what I have referred to as to looking and listening may in some cases afford such cogent evidence of a failure to discharge the duty of taking reasonable care, that it may be the duty of the Judge to withdraw the case

from the jury, upon the ground that only one inference, and that unfavourable to the person charged with the negligence, could be drawn from the evidence. The cases in which such a course ought to be taken are few; and, in my opinion, this is not one of them. . . .

In the circumstances of this case, as I have said, there was, in my opinion, evidence to go to the jury. . . The omission of the employees of defendants to take steps, which not always, it is true, but, if some of the witnesses were believed by the jury, generally, were taken when the engine approached, to take out the train after it had been loaded, may have been thought by the jury to have led the deceased to believe that he incurred no danger in passing through the space that had been left between the 9th and 10th cars. There was also some evidence that, owing to the narrow space between the line of posts and the cars, the deceased's opportunity for seeing the engine and tender as they approached was a very limited one.

There must, however, I think, be a new trial. If, as it may well be, the jury meant by their answer to the 3rd question that one of the acts of negligence of which defendants were guilty, which they designate "improper positions of officials," was that the conductor of the train, and not the engine-driver, was in charge of the engine and tender when they were being backed up, there was no evidence whatever to warrant that finding—for, assuming the fact proved, there was nothing to shew that the conductor was not competent to manage the engine, and such evidence was essential to justify a finding against defendants of negligence.

What other act of negligence was intended to be specified in the answer to the 3rd question by the words "not blowing whistle at crossing," is also open to doubt. If the answer is taken literally, there was, I think, no evidence to support it, for there was, in my opinion, none given to shew that the statutory crossing signal was not given at the proper place before crossing Bridge street. There was, no doubt, evidence that no warning was given of the approach of the engine either by bell or whistle, but that evidence was not directed to the statutory warning required to be given when approaching a highway crossing, but to such a warning as it was said the employees of defendants were accustomed to give that the engine was approaching for the purpose of pulling out the loaded cars, and, for all that was said by any of the witnesses, the statutory signals may have been properly given.

. . .

Although it may be urged that the jury have impliedly negatived the other acts of negligence complained of, and

that the logical result of my view as to these findings is that the action should be dismissed, I am inclined to think that that is not so, necessarily. The jury, having found the acts of negligence specified in their answers, may have thought it unnecessary to go further; and in any case the ends of justice will, I think, be best served by sending the case back to be tried again.

I would, therefore, set aside the findings of the jury, and the judgment pronounced upon them, and direct that a new trial be had between the parties, and that there should be no costs of the last trial or of the appeal to either party.

JANUARY 7TH, 1905.

DIVISIONAL COURT.

RE ELLIS AND TOWNSHIP OF WIDDIFIELD.

Public Schools—Division of Township into Sections—Mandamus—Demand—Particular By-law—Duty of Council—Discretion—Newly Organized Township—Public Schools Act, sec. 12—Construction—Costs.

Appeal by applicants from order of BRITTON, J., 3 O. W. R. 802, dismissing their motion for an order of mandamus commanding the township corporation, under the Public Schools Act, 1 Edw. VII. ch. 39 (O.), to subdivide the township into school sections.

The appeal was heard by MEREDITH, C.J., MACMAHON, J., IDINGTON, J.

E. E. A. DuVernet, for appellants.

A. G. Browning, North Bay, for township corporation.

MEREDITH, C.J.—The township of Widdifield is an organized township in the district of Nipissing. It has been organized but a few years, and school sections have since been formed from time to time as, in the opinion of the council of the township, the requirements of the inhabitants demanded. Small parts of the township are not now embraced within any school section, and the parts not within a school section do not all lie contiguous to one another. These parts are but sparsely settled, and the township as a whole is a rough and somewhat poor one, with swamps and rocky land in many parts of it. Part of the township for public school purposes forms part of the incorporated town of North Bay. . . .

The application made to the council the denial of which was the ground upon which the mandamus is asked for, was not a demand that the council should perform the duty which

it is claimed rests upon it to divide the whole township into school sections, as provided by sec. 12 of the Act, but a demand that the council should pass a particular by-law. . . .

It was clearly not the duty of the council to pass any such by-law; it was for the council and not the applicants to determine how the division should be made.

There was, therefore, in my opinion, no such demand and refusal as was necessary to be shewn to entitle the appellants to the mandamus they seek to obtain.

It may be open to grave question whether, assuming that sec. 12 is mandatory in its character, as I am inclined to think it is, it does not leave to the discretion of the township council the time when the division of the township into school sections shall be completed. . . . I have found and express no opinion upon the question.

There are other difficulties in the way of the construction contended for by defendants.

It is difficult to see how the directions of the section are to be worked out in a new township. . . .

There is the further difficulty . . . that it is impossible for the council to divide the whole township into school sections, because of the fact . . . that part of it is now by law not under its jurisdiction for school purposes. . . .

The difficulties of construction which sec. 12 presents, and the consequences of the adoption of the construction for which appellants contend, demand that there should be legislation making clear what was intended by sec. 12, and that, if that intention is declared to be what appellants contend the section now means, that may not be done without full consideration of the difficulties in applying such a provision to the conditions existing in such townships. . . .

In all the circumstances, having regard especially to the undoubted hardship upon some at all events of the ratepayers of having no school facilities provided for their children, and the difficulty of construing the legislation I have been considering, the appeal should be dismissed without costs. . . The dismissal of the action which was brought by appellants for the purpose of obtaining the relief which they sought to obtain by their motion, should also be without costs. It was dismissed with costs at the trial, subject to any direction as to the costs of it which might be made on this appeal, and we have therefore, I think, jurisdiction to deal with these costs.

MACMAHON, J., concurred.

IDINGTON, J., also concurred, giving reasons in writing.