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APPELLATE DIVISION.

MARCH 18TH, 1913.

*SNELL v. BRICKLES.

Vendor and Purchaser—Contract for Sale of Land—Time of Essence of Contract—Failure of Purchaser to Close in Time—Duty as to Preparation and Tender of Conveyance—Construction of Contract—Specific Performance—Refusal—Discretion.

Appeal by the defendant from the judgment of FALCONBRIDGE, C.J.K.B., ante 707, awarding specific performance of a contract.

The appeal was heard by MULOCK, C.J.Ex., CLUTE, RIDDELL, SUTHERLAND, and LEITCH, JJ.

J. E. Jones, for the defendant, the vendor.

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

The judgment of the Court was delivered by SUTHERLAND, J. (after setting out the facts):—With great respect, I am unable to agree with the opinion of the learned trial Judge. I cannot see that there is anything in the whole clause referred to, or anywhere in the agreement, which takes this case out of the rule stated that the purchaser should prepare the conveyance at his own expense.

The agreement does not say that the conveyance is to be drawn by the vendor or at his expense. Indeed, I think that the expression "upon the acceptance of title and delivery of deed

*To be reported in the Ontario Law Reports.

and give you back a first mortgage on the property for the remainder," contained in the offer of the plaintiff, indicates that the offer made contemplated that the purchaser was to follow the usual rule in that regard.

On the 15th March, the date of closing, the purchaser was, in my opinion, in default: (1) in not having prepared and tendered the deed to the vendor for execution; (2) in not having made a tender of the further cash payment of $2,000; (3) in not having obtained from the vendor a mortgage, in his solicitor's usual form, and prepared, executed, and tendered such a mortgage for the remaining $5,000 of the purchase-money.

He had proposed and agreed in his offer, accepted by the vendor and constituting the contract, that time should in all respects be strictly of its essence. The vendor was consequently quite within his rights on the 18th in declining to go on with the contract and declaring the transaction at an end.

This is not a case in which the plaintiff was let into possession and spent money on the property. It is a case in which the parties, on the face of their agreement, contemplated the completion of the transaction on a day certain, and in which the plaintiff, through his solicitor, had explicit notice that the defendant wanted it completed on that day, according to the terms of the agreement. The defendant was not in default in any way, and he did not in any way waive the express condition as to time. The plaintiff was in no way ready on the day named to complete the transaction; that was not the defendant's fault. He could stand upon his rights under the contract and consider and declare it to be at an end.

The defendant, it is true, prepared a draft deed. I am of opinion that, under the contract, he was not required to do so. Because voluntarily, and either to expedite the completion of the transaction on the day named, or through an erroneous conception on his part, he prepared the draft deed, which he was not required to do under the contract, is the plaintiff, on that account, to be put in a better position as to time than though the defendant had not so prepared the draft deed? I cannot think that he should be. But, in any event, the draft deed so prepared was not returned in time, though asked for and promised.

. . .

[Reference to *Labelle* v. *O'Connor* (1908), 15 O.L.R. 519.]

There is no pretext that there was any fraud, accident, or mistake in the preparation of the contract or the insertion therein of the explicit term as to time being of its essence.

With great respect, therefore, I am of opinion that no decree

for specific performance should be made, and that the appeal should be allowed.

The decision, as I have already mentioned, is based upon the construction of the contract, and not upon the ground of the exercise of the discretion of the Court. It was, however, argued that it is a case in which such discretion might well be exercised in favour of the plaintiff. . . .

[Reference to Lamare v. Dixon (1873), L.R. 6 H.L. 414, 423; Labelle v. O'Connor, 15 O.L.R. 519, per Anglin, J., at p. 546; Fry on Specific Performance, 5th (Canadian) ed. (1910), p. 19; Harris v. Robinson, 21 S.C.R. 390, 397.]

I am unable to see that this is a case in which judicial discretion should be exercised in favour of the plaintiff.

I would allow the appeal with costs here and below.

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*HILL v. RICE LEWIS & SON LIMITED.

Sale of Goods—Implied Warranty or Condition—Onus—Intention—Surrounding Circumstances—Absence of Evidence to Shew Reliance on Vendors—Breach—Damages—Remoteness.

Appeal by the plaintiff from the judgment of DENTON, Jun. Co.C.J., dismissing an action, brought in the County Court of the County of York, to recover damages for breach of an implied warranty or condition upon the sale of a box of cartridges to the plaintiff.

The appeal was heard by MULOCK, C.J.Ex., CLUTE, RIDDELL, SUTHERLAND, and LEITCH, JJ.

J. W. McCullough, for the plaintiff.

J. D. Montgomery, for the defendants.

MULOCK, C.J.:—This case was tried with a jury, and the learned trial Judge, after taking the opinion of the jury on certain questions, dismissed the action; and from that judgment the plaintiff appeals.

The facts are as follows. The plaintiff went to Parry Sound to hunt deer, using for such purpose a 38-40 Winchester rifle. Before going, he purchased, from the defendant company, a box of cartridges intended for his rifle. One of them proved unsuitable, being too small, and, not discovering its unfitness, the

*To be reported in the Ontario Law Reports.

plaintiff put it in his rifle, and, when aiming at a deer, snapped the rifle, but the cartridge, because of its unsuitable character, failed to explode. Thereupon he opened the breech, looked into the barrel, and, not seeing the shell, endeavoured to put in another cartridge; but, in doing so, the latter exploded and caused him injury, and for the damage thus sustained this action is brought.

For the plaintiff it was contended that the defendants were liable for breach of an implied warranty that each cartridge was suitable for the plaintiff's rifle; also that it was a sale of goods by description, and that there was an implied condition that each cartridge corresponded with the description.

The first question to determine is, what was the contract between the parties? Did the plaintiff buy a number of cartridges contained in a sealed box, relying on an implied warranty on the part of the defendant company that they were each of a certain kind, or did he buy a specific article, viz., a sealed box, supposed to contain cartridges all of a certain kind, on his own judgment, not relying upon the defendants as to the contents of the box?

The onus is on the plaintiff to establish the implied warranty or condition, and such implication must rest on the presumed intention of the parties: The Moorcock (1889), 14 P.D. 68; or, as put in another way by Meredith, J.A., in Barbeau v. Piggott (1907), 10 O.W.R. 715: "Contracts are to be implied according to, not counter to, the intention of the parties."

Where it is a question of implied warranty, surrounding circumstances may be shewn in evidence in order to aid the Court in discovering the intention of the parties: Behn v. Burness (1863), 3 B. & S. 751; and those circumstances, together with the plaintiff's evidence, make it, in my opinion, abundantly clear that what the plaintiff wished to buy, and did buy, was a sealed box of a certain design and description, and bearing on it a printed guarantee of the manufacturers (who are not the defendant company), and supposed to contain cartridges of the kind desired by the plaintiff. . . .

[References to and quotations from the evidence.]

The plaintiff did not rely upon the defendants as to the quality of the contents of the box; he was aware that, when in their possession, it was sealed; and he, doubtless, assumed, as the fact probably is, that it came into their hands from the manufacturer in a sealed condition, and that they had no more knowledge than he as to its actual contents. That he was buying on his own judgment, based on his experience of the goods in

question, and not relying on any implied warranty on the defendants' part, is also made clear by the circumstance that he manifested no desire to have the box opened in order that he might inspect the contents. Doubtless, if he had so wished, he might have been afforded such an opportunity; and, if not, then he could have declined to purchase. The natural inference is, that the outside appearance of the box identified it to his satisfaction as being the goods of the Union Metallic Company, which had, theretofore, proved entirely satisfactory to him; and thus he was content to rely on his own judgment as to the merits of the cartridges contained in the box in question.

That he was relying on the manufacturers, not the defendants, also appears from his evidence where he explained that the purchase of the box of cartridges differed from the purchase of a can of peas, in that the box of cartridges bore on it the guarantee of the manufacturers; and it is significant that, in his examination, this reference to the manufacturers' guarantee originated with himself, and not with the examining counsel, shewing that when making the purchase the manufacturers' guarantee was present to his mind: thus he got the specific article which he bought. . . .

[Reference to Benjamin on Sale, 5th ed., p. 21; Mitchell v. Newhall, 15 M. & W. 308; Lamont v. Heath, 15 M. & W. 486; Brown v. Edgington (1841), 2 M. & G. 290.]

The defendant company had no knowledge of the defective cartridge, and the plaintiff chose to buy the sealed box of cartridges, relying on his own judgment. This was the case in Chanter v. Hopkins (1838), 4 M. & W. 405. . . .

[Reference also to Prideaux v. Burnett, 1 C.B.N.S. 613; Benjamin on Sale, 5th ed., p. 625; Jones v. Just, L.R. 3 Q.B. 197; Robertson v. Amazon Tug and Lighterage Co. (1881), 7 Q.B.D. 598.]

For the foregoing reasons, I am of opinion that the plaintiff, relying on his own judgment as to the quality of the cartridges put on the market by the Union Metallic Company, in sealed boxes like the one purchased, went to the defendant company's store for the purpose of purchasing one of such sealed boxes, and obtained the specific article that he desired, and that in making such purchase he did not rely on the sellers' judgment; and that, therefore, there was no implied warranty on the part of the defendants; and that this appeal should be dismissed with costs.

CLUTE and SUTHERLAND, JJ., agreed with MULOCK, C.J.; CLUTE, J., giving brief reasons in writing.

RIDDELL, J., dissented, for reasons stated in writing. He said, inter alia, that the complaint was not that the rifle cartridges sold were defective, but that one was not a rifle cartridge at all. In every sale there is a condition precedent that the article sold shall answer the description, and this condition becomes a warranty when the goods have been dealt with as the purchaser's own: Behn v. Burness, 3 B. & S. 751; New Hamburg Manufacturing Co. v. Webb (1911), 23 O.L.R. 44. In the present case, a revolver cartridge was sold for a rifle cartridge; and it made no difference whether the vendors knew the fact or not—they were liable as for an implied warranty that it was a rifle cartridge. He was also of opinion that the damages were not too remote; and that the appeal should be allowed with costs and judgment entered for the plaintiff for $500 and costs.

LEITCH, J., agreed with RIDDELL, J.

Appeal dismissed; RIDDELL *and* LEITCH, JJ., *dissenting.*

MARCH 18TH, 1913.

MILLER v. HAND.

Principal and Agent—Sale of Land by Agent to Nominal Purchaser—Resale at Profit—Secret Profit Derived by Agent—Measure of Damages—Partnership—Claim of Partner.

Appeal by the defendant from the judgment of BRITTON, J., ante 245.

The appeal was heard by MULOCK, C.J.Ex., CLUTE, RIDDELL, SUTHERLAND, and LEITCH, JJ.

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

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

The judgment of the Court was delivered by MULOCK, C.J.:—We are of opinion that this judgment cannot be disturbed. The learned trial Judge has found that the defendant was an agent of the plaintiff merely for the sale of lot 35, and continued as his agent throughout, until the sale was completed; and he was paid for his agency a certain stipulated sum of money.

During the whole of the period, from the time of Hand's appointment until the completion of the sale, the finding of the

learned trial Judge as to the question of fact is, and we concur in it, that the plaintiff was not aware that Hand was interested in the sale which he had credited to his principal. It is true that in the examination of the plaintiff in another action he used loose expressions, which, if uncontroverted, would seem to lead to the conclusion that he was willing to sell to Hand; but, immediately after those expressions, he states that he had no knowledge of Hand being interested. Some months afterwards, McDougall sold the property at a substantial advance; and, later on, the plaintiff learned of the fraud, and brought this action.

For the appellant the question was raised as to what principle should be applied in fixing the damages. So long as the land remained in McDougall, so long as it had not passed into the hands of a *bona fide* purchaser for value without notice, it was recoverable by the true owner; and Miller was entitled to set aside the fraudulent deed.

Therefore, until the actual conveyance to Stubbs, the purchaser, the property in reality was the property of the plaintiff, and was thus sold to Stubbs to realise a certain sum of money; and the plaintiff is content to have the damages fixed by regard to the amount of money realised from that sale. His right thereto appears to us to be unassailable. If he chooses to adopt a sale, he is entitled to the fruits of it. He chooses to adopt it; and, therefore, we hold that he is entitled to judgment for his share in the profits. He had a co-partner in the enterprise, who is not a party to this action; and, therefore, Miller, the plaintiff, is to recover only to the extent of his damage.

Therefore, we dispose of the case, dismissing the appeal with costs, without, in any way, prejudicing the co-partner, Hearst, in bringing any action such as he may be advised in respect of his claim.

MARCH 19TH, 1913.

GRAHAM CO. LIMITED v. CANADA BROKERAGE CO. LIMITED.

Sale of Goods—Sale by Sample—Refusal of Inspection—Contract—Breach—Evidence—Damages.

Appeal by the defendants from the judgment of the Senior Judge of the County Court of the County of Hastings, in an

action in that Court, in favour of the plaintiff for the recovery of $300 damages in an action for breach of contract.

The appeal was heard by MULOCK, C.J.Ex., CLUTE, RIDDELL, SUTHERLAND, and LEITCH, JJ.

Shirley Denison, K.C., for the defendants.

M. Wright and W. D. M. Shorey, for the plaintiffs.

The judgment of the Court was delivered by CLUTE, J.:— The plaintiffs, through their commission agents, Messrs. Anderson, Powis & Co., on the 31st August, 1911, sold to the defendants "600 50 lb. boxes of good primes, at 10c. per lb., f.o.b. Ontario shipping point; subject to approval of 5 boxes when ready for shipment; Belleville freight to apply; shipment first half of October; terms sight draft, documents attached."

On the 5th October, 1911, the plaintiffs wrote the defendants as follows: "Referring to the order which we have on our books for 600 cases evaporated apples for you, sold through Wallace Anderson, Toronto, we are sending you by express to-day sample case of evaporated apples, which we think will be a fair representation of the 600 cases we can ship you. Please advise immediately by return mail if these goods are satisfactory."

The defendants replied on the 7th October, 1911, in part, as follows: "We are in receipt of your favour of the 15th inst., also invoice for sample box of evaporated apples, representing 600 boxes, which we were to take subject to our approval of sample. We have opened this box, and must say that out of seven samples that we have here it is the worst of the lot. I immediately called up Mr. Williams of Wallace Anderson, and he is writing you to-day and will confirm what I say. We cannot accept the car."

In reply to this letter, on the 9th October, the plaintiffs wrote: "We have telephoned our Frankford branch to send you five cases by express to-day. Please wire us report on them to-morrow without fail; as, if not satisfactory, we will try and submit some goods from some other branch. We want to deliver exactly what we have sold."

To this the defendants replied on the 10th October as follows: "We are in receipt of your favour of the 9th inst., and are rather surprised that you are sending forward another lot of samples of evaporated apples, as samples had already been submitted and refused, which closes the transaction as far as we are concerned. We, therefore, have no interest in any further samples."

On the 13th October, the plaintiffs again wrote: "We are sending you by express to-day another five cases evaporated apples from Belleville, representing 600 cases, which we can load here to-morrow, subject to immediate reply by wire at our expense. We consider these choice goods, away above the grade which we sold you, and so sure are we that the quality is right that we are quite willing to ship them on any 'good prime' contract you may have anywhere in Canada and stand behind the goods at their destination. Please reply by wire your decision early to-morrow morning regarding this order, and oblige."

The defendants replied on the 18th October: "We acknowledge receipt of your favour of the 13th inst., but we did not wire reply, as we have already advised you that we are not interested in further samples. Should we, however, be in the market late for evaporated apples, we would be glad to give you every opportunity, in fact would give you the preference. We return herein debit note for 10 boxes shipped, which are lying here to your order."

The defendants refused to examine either of the lots of five boxes each, sent by the plaintiffs, standing by the rejection of the first box, and insisting, as the correspondence shews, that the contract was off. The plaintiffs thereupon sold the lot, realising $300 less than contract-price.

It was not argued before us that the damages in the claim were unreasonable if the defendants were wrong in refusing to inspect either of the samples of the five boxes.

The first question is, whether the contract was varied between the parties, submitting one case for five. During the argument, I was rather impressed with the view that this was the effect of the correspondence between the parties; but, upon a closer examination of the letters of the 5th and 7th October, between the parties, I do not think they have this effect. The plaintiffs merely said: "We are sending by express to-day sample case of evaporated apples which we think will be a fair representation of the 600 cases we can ship you."

No doubt, if inspection had proved satisfactory, this sample might have taken the place of the five boxes, but the plaintiffs do not expressly ask that this should be done; nor do the defendants, in their reply, accept it as such; for all that is contained in this letter, they clearly had the right to ask for the five boxes.

The letters, in short, are not sufficiently definite to introduce a new term in place of the old, and substitute one box in lieu of the five. The fact that the defendants inspected the sample box sent does not necessarily imply that they thereby

intended to treat that in lieu of the five boxes. They did, in fact, subsequently do so; but I mean that their mere act of inspection would not necessarily imply that that was their intention. They might very well say that the meaning of the plaintiffs' letter is, that, if they feel satisfied with this single box sample, they will fill the contract with goods of that class. But in the letters neither of the parties distinctly takes this ground, and the fair construction of the letters and what was done by way of inspection is, that the plaintiffs intended to reserve to themselves the right of formally sending the five boxes, in case the one box did not prove satisfactory.

If this be so, as I think it is, then the defendants have wrongfully refused inspection under the contract; and, upon the plaintiffs proving, as they did to the satisfaction of the trial Judge, the loss incurred by them for such wrongful refusal, they are entitled to recover in damages. This view is sufficient for the disposition of this case.

But I also think that the view of the trial Judge on the authorities is correct, even assuming that the five first boxes sent must be treated as a second sample sent for inspection under the contract. Benjamin on Sale, 5th ed., p. 358, says: "But an appropriation and tender of goods, not in accordance with the contract, and in consequence rejected by the purchaser, is revocable, and the seller may afterwards, within the contract-time, appropriate and tender other goods which are in accordance with the contract." . . .

[Reference to Borrowman v. Free, 4 Q.B.D. 500, and quotations from the judgments in that case.]

In the present case there was no selection, within the time of the contract, of any particular lot. The contract was satisfied if, within the time, the plaintiffs tendered required sample which the defendants approved. I do not think the question of election arises in this case. The plaintiffs were ready to comply with the terms of their contract, and the defendants refused inspection.

The plaintiffs were, therefore, entitled to recover damages for such refusal; and the appeal should be dismissed with costs.

MARCH 19th, 1913.

*PIPER v. STEVENSON.

Limitation of Actions—Possession of Land—Enclosure—Cultivating and Cropping—Acts of Possession—Abandonment—Person Acquiring Title by Possession not Living on Land during Winter Months—Entry of Owner—Insufficiency—Establishment of Title by Possession.

Appeal by the defendant from the judgment of MEREDITH, C.J.C.P., in favour of the plaintiff in an action for trespass to land.

The appeal was heard by MULOCK, C.J.Ex., CLUTE, RIDDELL, SUTHERLAND, and LEITCH, JJ.

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

Edward Gillis, for the plaintiff.

The judgment of the Court was delivered by CLUTE, J.:—The plaintiff claims as owner and occupier of lots 28 and 29, block A, Marmot street, North Toronto, registered plan No. 722, and asks an injunction restraining the defendant from trespass and for damages for former trespass and forcible entry. The defendant denies that the plaintiff is the owner of the lots in question, and says that he purchased the same from the registered owner thereof, and thereupon entered into possession of the same and built a fence thereon and planted a crop, which are the trespasses complained of.

In March, 1901, the plaintiff bargained for the adjoining lots with one Whaley; and, in May or June, delivered to Whaley a buggy in part payment. In September, the plaintiff enclosed the Whaley lots and the lots in question by a fence; but did not receive the deeds of the Whaley lots until the 4th February, 1902, when three of them were conveyed to the plaintiff, and the 4th July, when the remaining three were conveyed to the plaintiff. In the autumn—probably in October—after the fencing was done, the plaintiff had manure drawn upon the lands in question; and the evidence shews that they have been cultivated and cropped by the plaintiff ever since.

The plaintiff did not reside upon the land in question, nor upon the lots purchased from Whaley, until 1905 or 1906, but lived at a short distance upon a rented farm, from which she could walk to the lots in about fifteen or drive in five minutes. The Whaley lots and the lots in question formed a block, and

*To be reported in the Ontario Law Reports.

were wholly enclosed from September, 1901, until this action was brought on the 21st June, 1912.

The learned trial Judge finds that the lands in question "were fenced in with her own as one lot" in September, "and all the lots thus enclosed were together ploughed as one lot, and during the following winter manure was drawn out and placed upon the land. Everything was done to it that an owner intending to possess and cultivate it would have done. In the following spring it was cropped; and from that on it was cultivated until the crop was taken off, when fall ploughing and manuring were again done. And this has gone on continuously ever since. In the years 1905 and 1906 buildings were erected, and in the latter year the plaintiff went to live and has ever since lived there. Her possession has been all along open, obvious, exclusive, and continuous. Until 1906, everything was done upon the land that an owner not residing upon it would do in reaping the full benefit of it; and since the spring of that year everything that an owner in actual, constant occupation would do. All this is well proved by the witnesses Doughty, Whaley, and Newman, as well as by the plaintiff and her husband."

I think this is a fair statement of the result of the evidence.

The learned trial Judge then proceeds: "I cannot think that the logical result of the reasoning in any of the decided cases can be, that there can be no possession which would ripen into a right to the land unless the possessor also lives upon it; and, if it were, I should be quite unable to follow it to that extent in this case. Here there was the plainest evidence of wrongful possession, in the fencing in of the land in question as part and parcel of the plaintiff's land, calling for action on the owner's part if he desired to save his rights—action in removing the fences or in the Courts of justice; and, in addition to that, there was the continuous user by the plaintiff for her own benefit for upwards of ten years before any action was taken; and so the rights of the owner became barred by the statute."

Mr. Armour strongly urged that what was done by or on behalf of the plaintiff in respect of fencing and occupation of the lots did not bring the case within the purview of the statute so as to give her a title, because the work was done by her servant, and she did not personally reside upon the land until some five or six years after the property was fenced. He further urged that, the deeds to the plaintiff of the adjoining lots not having been given until February, 1902, the possession of the adjoining lots was in the owner of them, and the lot in question could not be considered as enclosed with the plaintiff's until she received the deed; and that entry by the defendant, after he had received

his deed—he then having the paper title—vested the property in him; the statute not having run a sufficient length of time from the date of the deed of the adjoining lots to the plaintiff and the entry by the defendant.

The plain answer to that, I think, is this. It is wholly immaterial whether the plaintiff had received a deed of the adjoining lots or not; she had bargained for them and fenced them in September, 1901; and her possession of them and of the land in question was continuous and exclusive from the date of fencing.

The entry, such as it was, under the law as it now stands, could have no effect. Since the Act, sec. 8, no person shall be deemed to have been in possession of any land, within the meaning of the Act, merely by reason of having made an entry thereon. . . .

[Reference to Co. Litt. 253b; 4 & 5 Anne ch. 16, sec. 16; 21 Jac. I. ch. 16; Doe v. Coombes, 9 C.B. 718; Solling v. Broughton, [1893] A.C. 556; Worssam v. Vandenbrande, 17 W.R. 53.]

The present case differs from the last-mentioned case in several particulars. The land has been continuously used and occupied down to the present time by the plaintiff. The plaintiff was in fact residing upon the land at the time the alleged entry was made, that is, upon the block of which the lands in question form a part, being one enclosure for the whole. Also, here, the ten years had elapsed after the enclosure and before the entry, and the entry was such as, I think, expressly falls within sec. 8 of the Act.

There remains, therefore, for consideration, only the question whether or not a piece of land, entirely enclosed with other lands by the plaintiff, used and occupied by her continuously for over ten years, her possession all along being "open, obvious, exclusive, and continuous," does not come within the statute, simply because in the earlier four or five years she did not live upon the land—that is, was personally absent during the winter, although the land remained still enclosed by the fence, and was used and occupied as an owner would use and occupy in such a case. . .

[Coffin v. North American Land Co., 21 O.R. 80, considered and distinguished. Trustees and Executors and Agency Co. v. Short, 13 App. Cas. 793, referred to.]

It is impossible, I think, to treat what took place in the present case as abandonment. . . .

[Reference to McIntyre v. Thompson, 1 O.L.R. 163, 167; Seddon v. Smith, 36 L.T.R. 168; Harris v. Mudie, 7 A.R. 414, 421; Jackson ex dem. Hardenburg v. Shoomaker, 2 Johns. (N.Y.) 230; Worssam v. Vandenbrande, 17 W.R. 53.]

In the present case, not only did the fence continue, but the land was cultivated each year.

I cannot assent to the general statement of Street, J., in the Coffin case, that the winter months must be separated from the summer months, and that we must look at the acts of possession during those months by themselves; nor to the view there expressed that the acts done in the winter months did not constitute an occupation of the property to the exclusion of the right of the true owner; nor that the property thus became vacant during the winter, and that the right of the true owner would attach, and that the operation of the Statute of Limitations would cease until actual possession was taken in the following spring. . . .

Aside from the authorities, it seems to me plain that in the present case the owner's right of action first accrued when the lands in question were enclosed, thus excluding him. . . .

[Reference to secs. 4 and 15 of the Real Property Limitation Act; Halsbury's Laws of England, vol. 19, p. 110; Sugden's Real Property Statutes, 2nd ed., p. 47; Grant v. Ellis, 9 M. & W. 113, 128.]

The judgment in the Coffin case . . . in so far as it purports to be applicable to a case like the present, and to declare that the winter months must be separated from the summer months, and that we must look at the acts of possession done during those months by them . . . is overruled.

The appeal is dismissed with costs.

MARCH 20TH, 1913.

*KINSELLA v. PASK.

Gift—Evidence—Onus—Failure to Establish—Improvidence—Lack of Independent Advice—Moneys Intrusted to Solicitor for Safekeeping—Transfer to Alleged Donee—Right of Donor to Follow.

Appeal by the defendant from the judgment of CLUTE, J., in favour of the plaintiff, in an action for the recovery of $6,800 obtained by the defendant from her mother, the plaintiff, in the circumstances mentioned below.

*To be reported in the Ontario Law Reports.

The appeal was heard by MULOCK, C.J.Ex., RIDDELL, SUTHERLAND, and LEITCH, JJ.

I. F. Hellmuth, K.C., and J. H. McCurry, for the defendant.

R. McKay, K.C., for the plaintiff.

MULOCK, C.J.:—The plaintiff, a widow, eighty years old, resided alone in her own house in North Bay, and became seriously ill with bronchitis, a neighbour . . . taking care of her. About the 28th March, 1912, the plaintiff's daughter, the defendant, very properly caused her to be removed to her own house in North Bay; and, a day or two afterwards, also transferred to her house the plaintiff's trunks and some other of her effects.

The plaintiff had living five children, two sons and three daughters: one daughter residing at Montreal, the sons living in North Bay.

Whilst at the defendant's house, the plaintiff continued seriously ill, was confined to bed, and required the attendance of a nurse.

On the 2nd April, 1912, the plaintiff signed three cheques, amounting in all to $6,600, in favour of Mr. T. E. McKee, a solicitor of North Bay. . . . Mr. McKee deposited these cheques in his bank to his own credit, and gave the defendant his cheque for the amount thereof, viz., $6,600, and advised her to deposit the amount to her credit in the Bank of Ottawa, which she did, depositing it in the savings bank branch.

On the 9th April, 1912, McKee was again at Mrs. Pask's, and obtained a written retainer, signed by the plaintiff, to collect a claim for dower; and obtained from the plaintiff on that occasion a cheque for $100 as a retainer fee. He says that, shortly thereafter, he collected $200 in respect of this claim; that he gave the plaintiff a cheque therefor; and that this cheque was returned, paid, through his bank, endorsed in favour of Mrs. Pask (the defendant). This cheque was not produced at the trial, and Mrs. Pask has offered no explanation as to how she came by it. On the 29th April, she made a deposit of $200 in the Bank of Ottawa—presumably this sum of $200; and this action is brought to recover the $6,600 and the $200.

The plaintiff alleges that the moneys were deposited with McKee for safekeeping for herself. The defendant says that they were a gift, through him, to her. The onus is on the defendant to establish the gift. The evidence on this issue was conflicting. The plaintiff at the trial swore that she intrusted the money to McKee for safekeeping for herself, and gave reasons for having done so. The defendant and certain other witnesses

gave evidence to shew that the moneys were handed to McKee for her. The learned trial Judge has, in effect, discredited the evidence of the defendant and her witnesses, and has accepted that of the plaintiff—finding as a fact that the plaintiff deposited the moneys with McKee for safekeeping, not intending to part with the control thereof. That finding of fact, as between the parties, is conclusive, and cannot be disturbed by an appellate Court. I have carefully read and considered the evidence at the trial; and, if it were open to me to review the learned trial Judge's finding of fact, I should feel bound to arrive at the same conclusion that he has reached.

With such a finding, in an action against McKee, he would be obliged to account to the plaintiff for the moneys intrusted to him. Nevertheless, the plaintiff may follow the trust fund in the defendant's hands, if capable of identification there; and, the evidence shewing that the moneys intrusted to McKee were, to the defendant's knowledge, wrongfully transferred to her, she is also accountable therefor to the plaintiff. . . .

Apart from the defendant's conduct, in the face of the plaintiff's evidence that she gave the money to McKee for safekeeping, for herself and for no one else, and in the absence of any satisfactory authority to McKee to pay it to the defendant, the defendant has failed to discharge the onus which rested upon her of shewing any authority in McKee to hand over the money to her as an absolute, irrevocable gift.

In this view of the case, alone, therefore, I agree with the learned trial Judge that the plaintiff is entitled to succeed.

But, even admitting that the money was intended as a gift to the defendant, it cannot, I think, in the circumstances, be upheld. The plaintiff was old and sick and much in need of care. She had no legal claim for support upon her daughter; and if obliged, or if she desired, to leave her house, she would, if deprived of the $6,800, find herself almost without means of support, having but the sum of $1,327.61 in cash and her house in North Bay. . . . In such circumstances, the giving away of such a large proportion of the plaintiff's estate, thereby leaving her, a feeble old woman, without sufficient means for her proper support, was an improvident act, and can be upheld only on strict proof by the donee that the transaction was carried out under such conditions as will justify the Court, having regard to the well-established principles applicable in such cases, in permitting it to stand.

In every case where a person, to his own advantage, but to the prejudice of the giver, obtains by donation some substantial benefit, he is bound to prove clearly, not only that the gift was

made, but that it was the voluntary, deliberate, well-understood act of the donor, and that the donor was capable of fully appreciating and did fully appreciate its effect, nature, and consequences. . . .

[Reference to Huguenin v. Baseley, 14 Ves. 293; Anderson v. Elsworth, 3 Giff. 164; Cook v. Lamotte, 15 Beav. 234; Phillips v. Kerry, 32 Beav. 628; Donaldson v. Donaldson, 12 Gr. 431; Lavin v. Lavin, 27 Gr. 567, 7 A.R. 197; Irwin v. Young, 28 Gr. 511; Widdifield v. Simons, 1 O.R. 483; Shanagan v. Shanagan, 7 O.R. 209; Mason v. Seney, 11 Gr. 447; Hume v. Cook, 16 Gr. 84; Watson v. Watson, 23 Gr. 70; Dawson v. Dawson, 12 Gr. 278.]

Testing the present transaction by the principles enunciated in the foregoing cases, and assuming that the plaintiff informed McKee that she was giving the money to him for Mrs. Pask, the defendant has failed to prove that it was a voluntary, deliberate act on the plaintiff's part, and that the plaintiff appreciated its nature. . . .

The transaction impresses me as a cruel overreaching of a feeble old woman, who was not given by McKee the protection to which she was entitled. . . .

It is clear, I think, from the evidence, that the plaintiff did not give the money to Mrs. Pask. Even if she told McKee to give it to the defendant, she had no independent advice, and was in a state of mind that prevented her appreciating the consequences to herself of such an improvident gift.

Whatever she did in connection with the transaction was not her voluntary, deliberate, and well-understood act, but the result of a condition of fear and mental excitement and bodily sickness.

I, therefore, think that the defendant has failed to discharge the onus upon her of shewing that the gift was made under such conditions as are necessary in order to its validity.

The defendant says that she has expended moneys in the plaintiff's behalf to the extent of $800, and the plaintiff's counsel consents to that sum being deducted from the amount of the judgment against the defendant.

The judgment may be reduced by that amount; and, subject to that term, this appeal should be dismissed with costs.

SUTHERLAND and LEITCH, JJ., concurred.

RIDDELL, J., agreed in the result.

Appeal dismissed.

HIGH COURT DIVISION.

BRITTON, J. MARCH 15TH, 1913.

SHAVER v. SPROULE.

Indemnity—Covenant for Indemnity against Mortgage-debt—Enforcement, notwithstanding that Debt not Paid—Payment into Court.

Motion by the plaintiff for judgment upon the statement of claim, in default of defence.

The plaintiff claimed a declaration that the defendant was bound, under a covenant of indemnity contained in a conveyance from the plaintiff to the defendant, to procure the plaintiff's release or discharge from his liability to the mortgagor from whom the plaintiff bought the lands in question, and to whom the plaintiff had given a similar covenant of indemnity, for principal, interest, and costs under the said mortgage, and a judgment directing the defendant to procure such release or discharge by payment of the said liability or otherwise and to indemnify the plaintiff against the said liability.

George Halliday mortgaged certain lands in the township of Gloucester to J. P. Band, to secure $8,000 and interest. Subsequently, Halliday conveyed the equity of redemption to the plaintiff, and the plaintiff covenanted to pay the mortgage and to indemnify the mortgagor against all actions, claims, and demands on account thereof. The plaintiff, in turn, conveyed the same equity of redemption to the defendant, and the defendant gave the plaintiff a covenant of indemnity in the same terms. The mortgage fell in arrear, and the mortgagee recovered a personal judgment against the mortgagor Halliday on his covenant to pay the mortgage-moneys, and the usual order nisi for foreclosure was made. The mortgagor threatened to sue the plaintiff upon his covenant of indemnity, but the plaintiff, instead of first paying the amount due upon the mortgage to the mortgagor or the mortgagee, commenced this action, in the Supreme Court of Ontario, against the defendant upon the covenant of indemnity entered into by the defendant.

The motion for judgment was heard by BRITTON, J., at the Ottawa Weekly Court.

F. A. Magee, for the plaintiff.

No one appeared for the defendant.

BRITTON, J., following In re Richardson, Ex p. Governors of St. Thomas's Hospital, [1911] 2 K.B. 705 (C.A.), and other cases cited in Halsbury's Laws of England, vol. 22, p. 390, foot-note (k), held that the covenant of indemnity could be enforced, notwithstanding that the plaintiff had not paid the debt.

The judgment as entered contained a declaration in the terms asked for, an order that the defendant should pay into Court to the credit of the cause on or before the 1st April, 1913, the amount due to the mortgagee for principal, interest, and costs, the same to be applied in payment of what was due to the mortgagee; or, if the mortgagor had paid the mortgagee, then in payment of what was due to the mortgagor. The judgment further directed that, in default of such payment into Court, the plaintiff should recover from the defendant the sum due for principal, interest, and costs.

[See Boyd v. Robinson, 20 O.R. 404.]

BOYD, C. MARCH 17TH, 1913.

JOHNSON v. FARNEY.

Will—Construction — Gift of Estate to Wife—Expression of "Wish" as to her Disposition of Estate Construed as Suggestion, rather than as Precatory Trust—Attack on Will of Wife—Issue as to Mental Competence—Costs.

Action for a declaration that the document propounded as the last will and testament of Anna Maria Johnson, deceased, was not such in fact, upon the ground that she was, when she executed it, incompetent to make a will; and, in the alternative, for construction of her husband's will, and a declaration as to the estate taken by her under her husband's will.

J. H. Rodd, for the plaintiffs.
F. A. Hough, for the defendants.

BOYD, C.:—At the close of the evidence, I held that the will of the testatrix was well made, and that the probate of it granted could not be disturbed.

Failing the direct attack, the plaintiff next contended that, as to the property coming from her husband, the testatrix had no more than a life estate, or a life estate coupled with a trust

for the ultimate benefit of the plaintiff and others. This involves the proper construction af the husband's will, upon which I withheld judgment till I had examined the cases cited.

The material clauses of the will are these:—

At the introduction it is said: "I leave all my real and personal property to my dear wife." Then, towards the end, it is said: "I also wish if you die soon after me that you will leave all you are possessed of to my people and your people equally divided—that is to say, your mother and my mother's families." Then, in a codicil, he refers to real estate purchased after the date of the will, and says: "Property known as the William McGuire property to go to my wife to do as she sees fit with it. . . . If she my wife die intestate divide what is left of it equally among my brother and sisters and her brothers and sisters. . . ."

The husband died in 1907, leaving about $10,000 worth of property; the wife died in 1912, and her property is about $17,000. They had no children. A year or so after her husband's death, the widow spoke of the provisions in his will being just and fair to both families, and she wanted it carried out.

But, five years after his death, she apparently changed her mind, and thought fit to give all her property among the members of her own family. I think she had the power and the right to do this, and that no trust is imposed upon the property devised to her by the husband. The codicil implies that she had testamentary power over what came from her husband, and his direction was to have force only if she died intestate; and what would have happened had she died intestate need not be discussed. But in the will the expression used is that of a wish, not a direction; and, according to the present lines of decision, the language is sufficient to create an obligation, i.e., a legal obligation enforceable in the Courts.

As said in one of the later cases, the husband may have thought that the influence of an express wish would be sufficient to induce the wife to apply the property in the way suggested, but it was not put upon her as a duty, a mandate, or a legal obligation. He did not mean the second stage of the transfer to be under his will, but to be bestowed under the influence of his expressed wish and by the testamentary act of the wife. His words, taken literally, would cover all the possessions of the wife, however acquired, and this shews that he did not seek to control her free action, but only to give evidence, as he does in so many other parts of the will and codicil, which need not be quoted.

The earlier cases on precatory trusts have been departed from, and a stricter rule now obtains, which may be thus expressed: an absolute gift is not to be cut down to a life interest merely by an expression of the testator's wish that the donee shall, by will or otherwise, dispose of the property in favour of individuals or families indicated by the testator.

A wish or desire so expressed is no more than a suggestion, to be accepted or not by the donee, but not amounting to a mandate or an obligatory trust. This is the result of In re Hamilton, [1895] 1 Ch. 375, affirmed, [1895] 2 Ch. 370. The modern view as thus expounded is recognised and acted on by Joyce, J., in a recent case, In re Conelly, [1910] 1 Ch. 220.

The parting of the ways is marked in our Courts by the case decided by the Chancery Division in 1889, Bank of Montreal v. Bower, 18 O.R. 226, 230. The whole situation is fully discussed and the cases collected in In re Andrews (1911), 80 L.J. Ch. 370.

I, therefore, declare that there is no trust attaching to the provisions of the husband's will, and that the wife held the property absolutely as her own.

The attack upon the will was ill-advised, in view of evidence so easily procurable; but, as some benefit accrues from the construction of the will, I am disposed to except this case from the general rule as to costs being payable by the one who fails in the attack, and to dismiss the action without costs. I am also influenced by the fact that the wish of the testator was, that his family should be equally benefited with the family of his wife—though he did not take effectual steps to secure that result.

BRITTON, J. MARCH 19TH, 1913.

HOWSE v. SHAW.

Solicitor—Negligence—Failure to Bring Action in Time—Conflict of Evidence—Onus—Finding of Fact—Injury from Nonrepair of Highway—Notice of Accident—Sufficiency—Dismissal of Action for Misfeasance—Appeal—Instructions for—Acquiescence—Mistaken Opinion of Solicitor on Question of Law.

Action against a solicitor for negligence.

The action was tried before BRITTON, J., without a jury, at St. Thomas.

Gordon Waldron and G. G. Martin, for the plaintiff.
C. St. Clair Leitch, for the defendant.

BRITTON, J.:—On the 27th June, 1911, the plaintiff, while driving upon a highway in the township of Southwold, was thrown from his "rig" and quite severely injured. The plaintiff attributed his accident to a defective roadway. He was well versed in municipal law, having, as he stated, been for seven years a member of a township council, and also for two other years a member of a county council. He knew that it was necessary, if he intended to hold the township corporation liable for his injury as occasioned by nonrepair of the highway, to give the township corporation notice within thirty days of the time of the happening of the accident, and to bring his action within three months.

On the 25th July, 1911, William Bole, of West Lorne, at the request and on behalf of the plaintiff, wrote out, signed, and delivered to the plaintiff to be mailed, a notice in the words and figures following:—

"West Lorne, Ontario, July 25th, 1911.

"To the Reeve of the Township of Southwold,

"Dear Sir:—Take notice that on June 27th I was severely injured by being thrown from my rig owing to defective highway just east of Shedden, and as a result of such injuries I claim damages to the amount of $500. If so I can, I will wait on your council, when next you meet, if you will let me know the date, as having been a member of the township council here seven terms, and of the county council two terms, I would like to talk matters over with you, before further procedure.

"Yours truly,

"Barnum Howse,

"per W. H. B."

. . . This notice was received by the Reeve of Southwold —but the exact date of such receipt or indeed of the mailing was not shewn. Nothing turns upon that, in view of what happened. The claim was rejected by the township council. The plaintiff apparently had hopes of getting a settlement even up to and after the 16th August, that being the day when he consulted the defendant—and the day when, as he contends, he retained the defendant to bring an action against the township corporation. The defendant's account of the interview and alleged retainer on the 16th August is, that the plaintiff spoke hopefully of a settlement and gave reasons for his hope, and he

wanted a strong letter—"a bluffing" letter—written to the Reeve, as he, the plaintiff, thought that such a letter would assist in bringing the settlement about.

There is a direct contradiction between the plaintiff and defendant as to what took place at that interview. The plaintiff says that he told the defendant to commence the action if no settlement followed the letter and to commence it in time. The plaintiff further says that, at other times and later on, he told the defendant to issue the writ, and that the time within which the writ must issue was discussed between him and the defendant. The defendant says that the negotiation was still on between the plaintiff and the council, and he, the defendant, was not instructed to issue the writ; but, on the contrary, he was to wait until further instructed, and he was not, within the three months from the time of the accident, instructed so to do. The defendant says he was not instructed to commence the action until October, 1911. A letter such as the defendant describes was written on the 16th August, 1911.

The plaintiff says that up to within three or four days of the expiry of the time for bringing his action, he knew that the writ had not issued, and he told the defendant's clerk of the delay and complained of it. The plaintiff is not corroborated in this, and the defendant denies it, so far as having the matter brought to his notice by either the plaintiff or by the stenographer or any one in his (the defendant's) office. As to what took place in October, the plaintiff says that he knew he was late; and, when the defendant suggested issuing a writ, the plaintiff said "no use;" that the defendant looked up the law, and came to the conclusion that the three months' limitation did not apply, and that then the plaintiff said: "If you go on, you do so at your own risk—I will not be responsible."

The defendant's account of it is, that, when the plaintiff wanted the writ issued, he (the defendant) raised the question of expiration of time, or that it might have been suggested by the plaintiff; that he (the defendant) did look up the law, and he came to the conclusion that it was a case of misfeasance, and so the action was not barred; that he told the plaintiff so, and the plaintiff then directed the issue of the writ, and it was done. A special case was agreed upon, which was heard by Mr. Justice Middleton, and the action was dismissed: see Howse v. Township of Southwold, 3 O.W.N. 1295. This was affirmed by a Divisional Court: see 3 O.W.N. 1592, 27 O.L.R. 29.

In May, 1912, the plaintiff determined to look for damages from the defendant by reason of the defendant's negligence in not commencing the action in time.

The writ issued herein on the 24th August, 1912. Since the issue of the writ, the costs of the action, including the appeal, in Howse v. Township of Southwold, were taxed against the plaintiff at $148.66, and on the 10th October, 1912, the plaintiff paid to the Sheriff, in full of the amount of execution for these costs and for the Sheriff's fees, in all, the sum of $170.

The plaintiff's alleged causes of action are: (1) that the defendant neglected to commence the action against the township corporation until the plaintiff's right of action had become barred by the provision of the Municipal Act; and (2) that the defendant, without consulting with the plaintiff and without any instructions from the plaintiff, entered an appeal to a Divisional Court from the decision of the trial Judge.

I am of opinion and so find that the plaintiff is mistaken in saying that the defendant was actually retained and instructed on the 16th August, 1911, to issue the writ without further instructions from the plaintiff.

I find that the plaintiff did not give further instructions to the defendant until after three months from the time of the accident. No doubt, the plaintiff knew, as did the defendant, of the time-limit—but the plaintiff waited until some further opportunity to get a settlement. That was the plaintiff's desire, and he gave the defendant to understand that influence was being used on his behalf with the council; so time went by. The plaintiff and defendant were both busy men, and the defendant was exceptionally busy during September, but not likely to forget to have a writ issued, had he been instructed to have that done.

The plaintiff took his chances of the defendant being right in his contention that the limitation clause of the statute did not apply, in case that clause should be pleaded in bar of the plaintiff's claim.

It was, in my opinion, a case of oversight or forgetfulness on the part of plaintiff not to see that the defendant, or some other solicitor, was specifically instructed and in time. . . .

Upon the question of damages, the defendant objects on two grounds: (1) that the notice of action, which the plaintiff himself gave, was insufficient; and (2) that the plaintiff had not a good cause of action against the Corporation of the Township of Southwold—so that the plaintiff could not have succeeded had the action been fought out on its merits.

I think the plaintiff's notice of the accident and action was sufficient in form, and apparently the township corporation took no objection to that, but promptly disputed the plaintiff's

right to recover upon the facts of the accident, in addition to their objection that the action was not brought in time.

As to the second objection, I must say that, upon the facts so far as presented to me, I have grave doubts as to the plaintiff's right to hold the township corporation liable; and, if this case does not end with my decision, and if necessary, this objection may remain to be pressed by the defendant.

Mr. Waldron contended that, if the retainer and instructions were proved, the plaintiff was, in any event, entitlted to nominal damages. McLeod v. Boulton, 3 U.C.R. 84, supports that view.

As the matter stands, the plaintiff has not satisfied the onus which was upon him of establishing his cause of action. The plaintiff affirms, and the defendant as strongly denies. The account the defendant gives of his part in the matter, as I have stated above, is a reasonable one; and that the plaintiff should have allowed the time to go by is not improbable.

The plaintiff, in my opinion, acquiesced in the case being carried to appeal in the ordinary way without any undertaking on the part of the defendant to do so at his own cost. That the defendant should have come to the conclusion that the Corporation of the Township of Southwold, if liable at all, would be liable for misfeasance, is not actionable negligence. If an attorney or counsel can be held to warrant the correctness of his opinion, honestly formed and honestly given on a question of law, Judges may fear lest an attack be made upon them for difference of opinion.

The action should be dismissed, and with costs.

MIDDLETON, J. MARCH 20TH, 1913.

NIAGARA AND ONTARIO CONSTRUCTION CO. v. WYSE AND UNITED STATES FIDELITY AND GUARANTY CO.

Principal and Surety—Bond for Due Performance of Construction Contract—Alteration in Wording of Contract after Execution of Bond, without Consent of Sureties—Effect upon Contract—Immateriality—Absence of Prejudice—Variation of Contract by Subsequent Letter—Waiver of Claim for Compensation—Effect upon Sureties—Construction of Contract — Condition Precedent — Completion of Work — Advances made to Contractor—Liability to Recoup—Notice—Reference.

Action by a contracting company against a sub-contractor and his sureties, for breach of contract.

W. N. Tilley and A. W. Ballantyne, for the plaintiffs.

R. McKay, K.C., and W. B. Milliken, for the defendant guaranty company.

The defendant Wyse appeared in person.

MIDDLETON, J.:—This action arises out of the construction of the Hydro-Electric transmission line. . . . Wyse, it is said, failed to perform his sub-contract, and this action is brought upon the bond given to the plaintiffs.

A number of defences are raised. . . .

First, it is said that the contract between the plaintiffs and Wyse was, after the execution of the bond sued upon, altered without the consent of the sureties, and that this alteration operates to discharge the sureties.

After the bond had been arranged and settled, engrossments were made for the purpose of execution by Wyse. Wyse arranged with the defendant guaranty company to become his sureties, and furnished them with a copy of the unsigned agreement. The bond in question was then drawn and executed—the condition reciting that Wyse has entered into the written contract hereto annexed, and the condition is, that he shall "well and faithfully in all respects perform, execute, and carry out the said contract."

Wyse, after executing the contract, sent it and the bond to the plaintiffs. Mr. C. L. de Muralt, the chairman of the directors of the plaintiff company, who acted for them throughout in the transaction, compared the executed copies and the draft, with the result that he discovered some minor errors in the preparation of the copies signed—probably arising from the omission to insert words added upon its revision. He thereupon wrote Wyse, sending him four new copies prepared from the draft, including the added words, asking him to execute these instead of the four copies which had been forwarded—undertaking that the plaintiff company would execute them as soon as they received the copies executed by Wyse. He added: "You may consider the contract as existing between us as soon as you have executed the four copies and mailed them to us." Wyse in due course executed and mailed the four copies; and the plaintiff also executed them.

The bond executed by the sureties is dated the 19th February, 1909. The copy of the contract annexed is dated the 15th February, 1909. The contract actually executed bears date the 15th

February, 1909, but was not in fact executed until after Mr. de Muralt's letter above referred to, which bears date the 24th February. . . .

The alterations . . . occur in one short clause of the contract, and consist in the insertion of the words italicised: "The parties of the second part shall, *before doing any work*, submit for the approval of the Commission's engineer samples of all materials to be used; and the party of the second part shall place his order for all materials in time to avoid delays *in the progress of the work* on this account."

This clause is, I think, a separate and independent obligation undertaken by the contracting party. He contracted to do the work; and for this the sureties are responsible. He has contracted, before doing the work, to submit samples; and for this also the sureties are to be responsible. If the words constitute an alteration in the contractual relationship between the parties, they would operate to discharge only in so far as the plaintiffs claim on account of a breach of the second of these two obligations. See Harrison v. Seymour, L.R. 1 C.P. 518; Croydon, etc., Co. v. Dickson, 2 C.P.D. 46.

Beyond this, I think the words inserted do not in any way alter the contract. I think it would be implied that the samples were to be submitted before the work was done; and the second set of words added—"in the progress of the work"—do not, I think, change the meaning of the sentence in any degree.

If it be of any importance, and if it be a question of fact, as I think it is, then I find that the alterations made in the contract are in no way material and could in no way prejudice the sureties.

For these reasons, I think, this objection fails.

The second objection is also based upon an alteration of the contract. . . .

On the 14th April Wyse wrote a letter to the plaintiffs . . : "I understand and accept your letter of April 1st as an order to proceed with the work, and hereby agree that you are not to be held responsible by me for any delays or interruptions arising over the matter of right of way or by reason of any action on the part of the Hydro-Electric Power Commission or the McGuigan Construction Company (the principal contractors) resulting in stoppage or delay of the work."

This, it is said, constitutes an agreement by which the contract is materially varied. It is said that by this arrangement Wyse undertook to do the work not in accordance with the provisions of his contract—which entitled him to proceed to completion upon a waiting right of way—but upon an uncompleted

right of way, which might occasion the shifting of the construction camps and their return at great expense; and that, the sureties not having been consulted, they are discharged.

Having regard to the terms of the contract between Wyse and the plaintiffs, I do not think that this constitutes any change in his contractual obligation, or in any way enlarges the obligation of the sureties. The plaintiffs were entitled to give notice at any time. Wyse simply waives any claim against them for damages, if they gave him notice at a time which was convenient to him.

I do not find anything in the contract imposing any such liability upon the plaintiffs. The default in the preparation of the right of way was not their own, but was the Commission's or the McGuigan Construction Company's; and the letter was, in my view, demanded entirely through overcaution on the part of the plaintiffs' manager.

Moreover, I should not regard the releasing of any possible claim by Wyse with respect to this one matter as such an alteration of the contract as would discharge the surety. If Wyse, on the contract, could have any claim for an allowance waived by him, then the sureties' right would be to have the amount which he voluntarily released credited upon the taking of accounts.

I was told by counsel . . . that whatever delay was occasioned by the failure of the Commission to have its right of way ready in time was compensated for by an allowance . . . credited to Wyse; so that, in fact, the sureties had sustained no damage.

The third matter to be dealt with is one of far greater importance and difficulty. It is said that there is no default under the bond. . . . The contract was for the construction of the work by Wyse. The bond was for the due performance of this contract. It is said that the work was constructed by Wyse; that he has performed his contract; and that, therefore, there can be no liability. It is said that the plaintiffs have not been damnified by any default of Wyse in that which he undertook to do. The McGuigan Construction Company have advanced moneys to Wyse to enable him to complete his work, and they seek to recoup themselves out of the moneys payable to the plaintiffs in respect to this work. They may be so entitled, by virtue of the terms existing between them and the plaintiffs; if so, this is something against which the sureties did not undertake to indemnify.

I have come to the conclusion that this argument is well-founded, in so far as it is applicable. I do not see how the payments withheld by the McGuigan Construction Company from

the plaintiffs, to recoup themselves for advances to Wyse, which were made to enable him to complete his contract, can be placed in any higher position than advances made by the plaintiffs themselves for the like purposes. In either case, they do not fall within the letter of the bond.

The plaintiffs rely upon the clause at the end of the general conditions, providing that, before payment is made upon the final certificate, the contractor shall furnish satisfactory evidence that he has paid for his labour and material. Even if this clause can be carried into the contract, as referring to the obligations between the plaintiffs and defendant, it has at most no greater effect than to make the proof of payment for labour and material a condition precedent to the right to obtain payment under the contract. The mere default in paying for labour and material is not the thing stipulated in the bond, which is performance and carrying out of the contract and its condition. . . .

[Reference to Cadwell v. Campeau, 3 O.W.N. 616.]

The facts relating to the completion of the work here are not fully developed. It appeared . . . that $2,000 was withheld to answer the completion of the work. It also appeared that this sum was entirely inadequate. If my memory serves me rightly, it did not appear whether the work which had to be done to complete was in fact done by Wyse or by the McGuigan Construction Company and charged up to Wyse. If the work was done by that company and charged up to Wyse and the amount deducted from the money coming to the plaintiffs, this will be within the terms of the bond; and, provided notice was duly given, the plaintiffs will be entitled to recover.

Owing to the lack of definite information, I am not able to deal with the question of notice. If the plaintiffs desire to have a reference to ascertain what sum, if any, can be recovered under the above finding, this question will be open upon a reference.

At the hearing it was arranged that, if I thought there was liability upon the bond, judgment should be entered for the penalty, and the case be referred to ascertain the sum for which execution should issue. I am not sure, in view of the doubt upon the evidence whether there is anything which the plaintiffs are entitled to recover, that this can be done; but the result can probably be accomplished by inserting appropriate declarations embodying the views expressed.

Costs should be reserved until the final result is known.

CHWAYKA v. CANADIAN BRIDGE CO.—MASTER IN CHAMBERS—MARCH 18.

Venue—Motion by Plaintiff to Change—Convenience in Getting to Trial—Venue Improperly Laid—Costs.]—The plaintiff was injured while in the service of the defendant company at Walkerville on the 28th November, 1912. He brought this action, to recover damages for his injury, on the 28th January, and delivered a statement of claim on the 7th February, naming London as the place of trial, though the jury sittings were fixed for the 24th February, and so the case could not be tried there without the defendants' consent. The statement of defence was delivered on the 17th February. The plaintiff moved to have the venue changed to Sarnia or Chatham. On the 8th February, the defendants' solicitors wrote to the plaintiff's solicitors: "We think the action ought to be tried at Sandwich, and it may be necessary for us to move to change the venue." Apparently this was construed by the plaintiff's solicitors as a consent to a trial at Sandwich; and, without anything more appearing, a letter was sent on the 21st February with notice of trial for the Sandwich sittings on the 4th March. This was returned; and, apparently, the plaintiff's solicitor tried to get a change to Chatham or Sarnia—a proposition which the defendants' solicitors, on the 1st March, said they must take up with their client. On the 4th March, they wrote again, saying that they could not speak as yet as to a change of venue, but thought it unlikely that the defendants would consent to any other place than Sandwich. The Master referred to the similar cases of Brown v. Grand Trunk R.W. Co., ante 113, and Taylor v. Toronto Construction Co., 3 O.W.N. 930, where it was laid down that a motion of this kind could not succeed. Here the action was begun at a time when, if the venue was laid at London, a trial could not be had at the jury sittings. If the suggestion of the defendants' solicitors that Sandwich was the proper place had been adopted, then all would have been well, and the trial would have already taken place. As the case stood, the only relief that the plaintiff could have was to be allowed to withdraw his jury notice, if one had been served, and go to trial at the non-jury sittings at London on the 21st April—subject to the right of the defendants to move to change to Sandwich for the sittings beginning on the 27th May. If the plaintiff accepted the offer to go to the non-jury sittings, the order would

be made accordingly, with costs to the defendants in the cause; otherwise, the motion to be dismissed, with costs to the defendants in any event. E. C. Cattanach, for the plaintiff. Featherston Aylesworth, for the defendants.

SCULLY v. MADIGAN —MASTER IN CHAMBERS —MARCH 18.

Attachment of Debts—Judgment Debt—Entry of Judgment Stayed—Discharge of Attaching Order.]—Motion by the defendant (judgment creditor) to make absolute an attaching order and garnishing summons. The defendant was admittedly a judgment creditor of the plaintiff. The plaintiff had recovered judgment in an action against the garnishee, but a stay of thirty days was granted by the trial Judge, which had not expired when the attaching order was granted. It was also said that the garnishee would probably appeal from the judgment. It was said in answer to the motion that it must fail because there was no present debt due by the garnishee to the judgment debtor; and also because of an assignment of the claim against the garnishee made before the order. Upon the first ground, the Master referred to the judgment of the Chancellor in Burdett v. Fader, 6 O.L.R. 532, affirmed by a Divisional Court, 7 O.L.R. 72: "The plaintiff has recovered a verdict in an action in which the entry of judgment has been stayed, *so that he is not yet a creditor.*" Applying that principle to the present case, Scully was not yet a creditor of the garnishee, and, therefore, the garnishee was not yet his debtor. There was, therefore, nothing *debitum in præsenti*, and nothing on which the attaching order could operate. Order discharged, with costs (fixed at $20) to the garnishee, to be paid to him by the applicant, and to the judgment debtor (to the same amount) to be set off against the judgment recovered against him by the defendant. It was not necessary to consider the second ground. A. W. Ballantyne, for the judgment creditor. J. P. MacGregor, for the judgment debtor. Cook (Ryckman & Co.), for the garnishee.

GARRETT v. GIBBONS —BRITTON, J.—MARCH 18.

Fraud and Misrepresentation—Sale of Business—Damages for Deceit—Counterclaim—Judgments — Set-off.]—Action for the rescission of an agreement and for damages. The contract was for the purchase by the plaintiffs from the defendant Gibbons of a garage business, chattels, goodwill, and tenant-right

under a lease. The agreement was in writing, dated the 23rd September, 1912, on which day $100 of the purchase-price of $1,000 was paid, and the balance of $900 was paid on the 3rd or 5th October, 1912. The plaintiffs went into possession; they very soon became dissatisfied; and on the 23rd October, 1912, this action was begun. The plaintiffs alleged false and fraudulent misrepresentations. The action was tried with a jury. Certain questions were left to the jury, which they answered in a manner generally favourable to the plaintiffs, and assessed the plaintiffs' damages at $500. They also found that the value of certain articles taken by the defendant Gibbons was $15. The learned Judge, in a considered opinion, said that there was some evidence upon the question of the lease of the premises being renewable which could not have been withdrawn from the jury. Judgment for the plaintiffs for $515, with costs; judgment for the defendants on their counterclaim for $111, with costs. Judgments to be set off pro tanto. John MacGregor and R. H. Holmes, for the plaintiffs. T. J. W. O'Connor and E. D. Wallace, for the defendants.

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GRILLS v. CANADIAN GENERAL SECURITIES CO.—MASTER IN CHAMBERS—MARCH 19.

Discovery—Production of Documents—Principal and Agent—Commissions on Sales of Land—Account—Sub-agents—Entries in Books—Right to Account not Determined.]—This action was for an account and payment of commission in respect of certain sales of lands made for the defendant company by the plaintiff and others who acted as his sub-agents. The defendant company admitted that some, but not all, of those said by the plaintiff to have been his sub-agents were so, and some of these only in part. The company had furnished a list of all those who acted for it in the matters in question—about 80 in all. The plaintiff moved for a further affidavit on production by the company, so as to enable the plaintiff to examine the books, and see if his contention as to this was borne out by the entries to be found there. The Master said that Evans v. Jaffray, 3 O.L.R. 327, shewed that a plaintiff was not entitled, in an action of this kind, to the disclosure of facts which would become material only when his right to recover damages had been established; referring also to Graham v. Temperance and

General Life Assurance Co., 16 P.R. 536, and Dickerson v. Radcliffe, 17 P.R. 586. On the other hand, Stow v. Currie, 14 O.W.R. 62, 154, 248, shewed that the Courts lean "very decidedly against separating issues." Without further discovery, the plaintiff could not satisfy the demand for particulars of paragraphs 9 and 10 of the statement of claim. But, apart from this, it was essential to the plaintiff's case to shew, if he could, that all the persons said by him to have been his sub-agents were really so and to the full extent alleged. Entries might or might not be found in the company's books which would assist him in so doing. These men were all admittedly acting for the company; and it seemed, from the course of dealing between the plaintiff and the company, that accounts of the company with the fifteen persons named in the notice of motion might assist the plaintiff in establishing his right to commission in respect of the whole or part of the business they did. This would not extend to such a minute investigation of the accounts as would be proper after the right to an account had been established, unless the defendants' demand for particulars of paragraph 10 of the statement of claim was pressed. Whether the discovery to which the plaintiff was entitled could in fact be separated from the fuller consequential discovery to which the plaintiff would be entitled after a judgment in his favour, might present some difficulty. But, no doubt, this could be arranged so as to give the plaintiff all he was entitled to now, and yet limit him to that. If any more precise directions were required by either side, they could be considered on the settlement of the order. Costs of the motion to the plaintiff in the cause. F. Arnoldi, K.C., for the plaintiff. C. Evans-Lewis, for the defendants.

BROWNE v. TIMMINS—FALCONBRIDGE, C.J.K.B., IN CHAMBERS—MARCH 19.

Practice—Addition of Party Plaintiff—Leave to Amend—Late Delivery of Amended Statement of Claim—Validation—Terms—Interest—Costs.]—Appeal by the defendant from the order of the Master in Chambers, ante 897. The Chief Justice said that the Master had taken the correct view. The United Cobalt Exploration Company were added as plaintiffs by the Divisional Court; and the only question before the Master was as to the extension of time. The attention of the Judge at the trial was pointedly and properly drawn to the question of interest. Appeal dismissed with costs to the plaintiffs in any event. Grayson Smith, for the defendant. R. McKay, K.C., for the plaintiffs.

MURRAY v. THAMES VALLEY GARDEN LAND CO.—FALCONBRIDGE, C.J.K.B.—MARCH 20.

Jury Notice—Motion to Strike out—Con. Rule 1322—*Practice.*]—Motion by the plaintiff to strike out the jury notice. The nature of the action appears from the notes of the decisions upon previous applications, ante 773, 886. The learned Chief Justice said that neither he, nor, he ventured to say, any other Judge on the bench, would think of trying this case with a jury. Con. Rule 1322 made very material changes as to the power and discretion of a Judge in Chambers; and the cases before the 23rd December, 1911, had no application. Order made directing that the issues be tried and the damages assessed without a jury. Costs in the cause. N. F. Davidson, K.C., for the plaintiff. W. J. Elliott, for the defendants.