THE

ONTARIO WEEKLY REPORTER

VOL. XIII. TORONTO, FEBRUARY 11, 1909. NO. 6

BOYD, C. FEBRUARY 1ST, 1909.

TRIAL.

ESSERY v. BELL.

Easement—Right of Way—Extinguishment by Tax Sale—Liability of Easement to Assessment and Taxes—Validity of Assessment not Established—Onus—Statutes—"Privilege"—Judgment Declaring Right to Enjoyment of Easement.

Action for a declaration of the plaintiff's right to an easement in respect of a strip of land owned by the defendant, who alleged that the easement had been extinguished by a tax sale.

R. S. Robertson, Stratford, for plaintiff.

W. A. Henderson, for defendant.

BOYD, C.:—By statute going back as far as 32 Vict. ch. 36, sec. 107, taxes accrued on any land are made a special lien having preference over any claim, lien, privilege, or incumbrance of any party except the Crown. This provision was in force during the presumed assessment and the actual sale of the strip of land 10 feet wide which is the present cause of contention.

The only decision touching on the section that has been brought to my notice is Tomlinson v. Hill, 5 Gr. 231, in which a valid tax sale and deed was held to extinguish the inchoate right of dower of the widow of the owner. A parliamentary title was given which was paramount to her claim.

The defendant's contention here is, that the easement which was enjoyed by the plaintiff over the 10 feet sold was extinguished by the tax sale as being included in the word "privilege" used in the statute. And, no doubt, in Ramsay v. Blair, 1 App. Cas. 701, the words "privilege, servitude, or easement" were used as synonymous terms: see pp. 703, 706. Against the status of the defendant it was urged comprehensively that the Municipal Act of 1892 defined "land" and "real property" as including any estate or interest therein or right or easement affecting the same: 55 Vict. ch. 42, sec. 2 (7). This is carried into the present Act of 1903, 3 Edw. VII. ch. 19, sec. 2 (8). And by R. S. O. 1887 ch. 100, sec. 12, the conveyance of a lot includes all privileges, easements, and appurtenances to the lands in any wise appertaining thereto or used and enjoyed therewith. This was in force during the period of assessment herein before the sale. The argument is, that when taxes were imposed on the land owned by the plaintiff it must be taken that such taxes were imposed in right of this easement, which was expressly attached to the lot by prior conveyances running from the common owner of this and the defendant's lot, and that there could be no sale as for arrears, because all these taxes have been paid.

It was also urged that easements as such cannot be taxed, citing Chelsea Waterworks Co. v. Bowley, 17 Q. B. 358.

It is not necessary for me to pass upon these different arguments, for the fatal objection to the defence is, that the onus of proving a valid sale for taxes has not been met. The production of the tax deed is not enough—it is a mere starting point: further evidence must be given going to the foundation on which the deed rests, in order that the validity of the assessment and all subsequent proceedings may be exhibited: Jones v. Bank of Upper Canada, 13 Gr. 74; Stevenson v. Traynor, 12 O. R. 804.

This line of evidence is all the more necessary in this case because the purchaser appears to have been the mortgagee of the servient tenement, over whose soil the easement ran, and whose duty it was to pay the taxes. It would be a piece of strategy not to be encouraged if he let the taxes go into arrear and bought for the purpose of extinguishing the easement subject to which he acquired his mortgage. But, again, it would be interesting to know upon what principle the taxation was based of this particular 10 feet. Was the soil alone taxed, or was regard had to the easement? Or was

the easement taken into account with regard to either tenement, the dominant or the servient? Our law seems to be silent on the subject of taxing easements. In the United States the method of procedure is stated to be as follows: when they are appurtenant to the realty, they are to be taxed as part of the land to which they belong; but easements in gross must be valued and taxed separately from the land out of which they are granted: see Black on Tax Titles, 2nd ed. (1893), sec. 104.

Certainly it would be an extraordinary state of the law if, by the sale of the servient lot, the title to the easement could be extinguished, and that without any notice to the person who uses it, or any opportunity given for him to exonerate the land by the payment of taxes—with right of resort in cases where he is not the proper person to pay. An analogous protection is now given to incumbrancers by the late statute (1904) 4 Edw. VII. ch. 23, sec. 165.

However, no defence being established, the plaintiff's right to the enjoyment of the easement granted in the 10 feet should be declared and established by this judgment, with costs to be paid by the defendant.

FEBRUARY 1ST, 1909.

DIVISIONAL COURT.

SASKATCHEWAN LAND AND HOMESTEAD CO. v. LEADLAY.

Mortgage—Mortgagees' Account—Allowance to Mortgagees for Expenditures in and about Care and Sale of Lands—Agreements between Mortgagees and Agent.

Appeal by plaintiffs from order of TEETZEL, J., 12 O. W. R. 1198, varying a report of the Master in Ordinary, the reasons for which are reported, 12 O. W. R. 629.

A. B. Cunningham, for plaintiffs.

G. Kappele, K.C., for defendants the Leadlays.

A. J. Russell Snow, K.C., for defendant Moore.

THE COURT (FALCONBRIDGE, C.J., ANGLIN, J., CLUTE, J.), dismissed the appeal with costs.

FEBRUARY 1ST, 1909.

DIVISIONAL COURT.

SHUNK v. DOWNEY.

Limitation of Actions—Real Property Limitation Act—Adverse Possession—Evidence — Legal Estate — Fences—Boundaries—Isolated Acts of Ownership—Series of Trespasses—Acts not Exclusive of True Owner—Insufficiency.

Appeal by plaintiff and cross-appeal by defendant from judgment of LATCHFORD, J., dismissing without costs an action for trespass and to recover possession of about 5 acres of uncleared land.

The appeal was heard by BOYD, C., BRITTON, J., MAGEE, J.

L. F. Heyd, K.C., for plaintiff.

K. F. Mackenzie, for defendant.

BOYD, C.:—According to the evidence of Campbell, his father first got possession of the 5 acres in dispute when he bought from Whitmore's estate, of which he was executor, about 20 acres which was alongside of the 5 acres, and that was in 1876. About 30 acres in all, of which this 5 was part, had been stripped of its good timber, and was lying wild, scrubby land, forming a "slash"—which is indeed the present condition of the 5 acres. At that time a fence existed, formed of brush and piles, of most irregular shape, which was on Shunk's land, and which separated his grain fields from his "slash" of five acres, which was all within the boundary of his lot of about 160 acres in all. The plaintiff has lived there since 1860, and he tells us that this old fence was put there to protect Shunk's cleared fields from the cattle pasturing in the slash. That, I have no doubt, looking at the plan and the evidence, was the real object of the brush fence—for the plaintiff's own convenience. A line was run by Gibson, O.L.S., in 1874, which defined the boundary of the Whitmore land, afterwards acquired by Campbell in 1876, by a line running to the north of these 5 acres. Thus it is quite indisputable that the true boundary between Campbell (now Downey) and Shunk runs along the north limit of the 5 acres, excluding it from Downey's deed

and including it in Shunk's. As a matter of fact, taxes upon it have always been paid by Shunk since his father was there from 1855. This slash of 30 acres in all was used by Campbell for pasturing cows in summer, and was resorted to in winter for firewood, first by Campbell in 1878 (p. 39). According to Shunk's evidence, his people also resorted to this 5 acres (part of his own land) for timber and firewood whenever it was wanted. Upon this evidence, I should conclude that there was common use made of the plan, and that there was a tacit understanding and permission, as between the co-owners, so to use it as occasion required. The general tenour of the evidence fails to shew any adverse or exclusive or expulsive occupation by Campbell during those early years. The testimony is meagre and unsatisfactory from the necessary failure of memory and from the very fact that affairs were marked by no salient act of aggression on Campbell's part which would have aroused Shunk. There are few landmarks from which or as to which the two witnesses who alone know about it, can speak. One of the landmarks is by Campbell, that he leased from his father in 1882 his place of 150 acres—but these 5 acres were not included in the lease, and the son (the witness) went away to the North-West in January, 1888, and did not return till 1894. The first change of user in regard to the big slash of 30 acres was before 1886, and it began by Campbell clearing it up by degrees on his own land from the Hollingshead small lot along the line of division between the parties' lots, and putting up a fence as the clearing went on. This fencing approximately marked the boundary between the two, and was carried on 40 or 60 rods from the concession road, and to within about 12 rods from the north-west corner of the 5 acres. Campbell broke up some 5 acres of the new cleared land in 1886, and now about 13 acres of it is enclosed with a fence. This was put up (just as the old brush fence) by Campbell to protect the newly cultivable land from the cattle out pasturing.

Campbell says there was a dispute about the ownership of these 5 acres, and about the right line between his father and Shunk in 1893, when he was away. Lawyers were called in, and there was a compromise, and there was a line to be run between them. This was apparently the result of the first collision between the co-owners in 1892 when Shunk sold all the large pine trees on the 5 acres to Thompson, who cut and drew off the logs and paid Shunk for them. Shunk says that Campbell cut a pine tree on the 5 acres about 20 years

ago, and he admitted it had been cut in Shunk's bush, and paid him for it. This would be about 1887.

In view of the fact that the title was vested in Shunk, he would be legally in possession of the 5 acres, though it was separated by a brush fence from the rest of his land from 1876 on, unless there is proved some actual visible possession inconsistent with his legal ownership. The acts relied on are of isolated and temporary character, and, as proved, are of two kinds only: one in summer, when Campbell's cattle pastured in this and the other slash (which was his own); and the other in winter, when resort was had to this place and the other slash for firewood. But there was a common user in winter for this purpose by Shunk. At that point of time, then, and on this vague evidence, does the statute begin to run against the legal owner, who was living alongside and exercising such enjoyment of the land as he desired, and not objecting to his neighbour having a like use of it? We must not unduly legalise the stealing of a neighbour's land by attributing significance to slight concessions of kindness which might pass between adjoining farmers.

As a matter of evidence it is not proved that the land owned by Campbell was enclosed by fence by him during the time that he was having the intermittent use of the 5 acres for firewood and summer pasture. Any one could see and know that this crooked and zigzag brush construction was not meant to be and could not be a line fence of the Shunk farm. There was no overt act on the part of Campbell which necessitated the assertion of Shunk's rights until perhaps the cutting of the valuable pine tree. The taking off of the scrubby growth for firewood would be welcomed in those early days, as helping towards the ultimate clearing of the land, if indeed this soil is worth that trouble.

When Downey bought the lot in 1907 he tried to get a deed of the 5 acres, but Campbell's executors refused, saying that they did not own it. When he proceeded to repair this old fence by putting in new rails, he was checked by the plaintiff, who pulled down part of his work, and when he went on and cut some new growth of pine trees, that ended in this litigation.

I think the evidence insufficient, in the circumstances of this case, to start the Statute of Limitations in favour of the third party Campbell. As against defendant, who has little claim to consideration, the action should succeed; possession should be given to plaintiff, and damages for

cutting the trees to the extent of $50; subject to a reference if either party desires it. The defendant should pay the costs of the action and appeal and cross-appeal. If a reference is taken by either party, the Master will dispose of the costs before him.

In the periodical yearly intervals recurring between the summer pasture and the getting of firewood in winter (in the early spring and the late fall), when the pedal possession of the land would be vacant, the ownership and legal possession would revert to the true owner. This is putting it in the strongest way for the defendant, and treating the occupation of the land for wood and pasture purposes as adverse to the legal owner, or as interrupting his possession in point of law.

The special points of the possession of the land in this case are:—

(1) That the legal estate in the 5 acres has always been in the plaintiff and those under whom he claims, and the defendant and those under whom he seeks to claim the benefit of possession had no right nor colour of right to the parcel of 5 acres in question.

(2) That the old bush fence was put up, by the owners of it and the rest of the farm lot, for the purpose of their own convenience, and it does not in any sense mark a boundary as between lands of different ownership.

(3) That the acts of possession relied on by the defendant and the Campbells are of occasional and intermittent character—isolated acts inter se, though they may represent a series of trespasses, but not going to displace the legal title and ownership of the 5 acres, which always remained in the plaintiff.

(4) That these acts on the 5 acres, relied on by the defendants, were not exclusive of the plaintiff, who also used the place for purposes of timber and firewood—quite enough to negative any idea of abandonment or relinquishment of their rights.

The following cases are in point and shew the importance of these salient facts: Sherren v. Pearson, 14 S. C. R. 581 (1887); and two decisions of very high authority in 1904, Reynolds v. Trivett, 7 O. L. R. 623, 3 O. W. R. 463, and Wood v. Leblanc, 34 S. C. R. 627.

I would note that the same principle of decision which distinguishes Canadian authorities has been carried out in the Privy Council in an Indian appeal, Radhamoni Debi v.

Collector of Khulna, L. R. 27 Ind. App. 136 (1900), of which it is enough to cite the head-note: "To constitute a plaintiff's title by adverse possession, the possession required to be proved must be adequate in continuity, in publicity, and in extent, and is displaced by evidence of partial possession by the defendant." The reasons are given by Lord Robertson, speaking for the Judicial Committee.

BRITTON and MAGEE, JJ., concurred, each giving reasons in writing.

CARTWRIGHT, MASTER. FEBRUARY 2ND, 1909.

CHAMBERS.

FARMERS' BANK v. HUNTER.

Summary Judgment—Rule 603—Action on Promissory Note Subscription for Shares — Agreement with Agent — Defence to Action—Unconditional Leave to Defend.

Motion by plaintiffs for summary judgment under Rule 603.

W. H. Hunter, for plaintiffs.

George Bell, K.C., for defendant.

THE MASTER:—The action is on a promissory note, given to the plaintiffs themselves. The defendant states that this note was given in payment on 25 shares of the stock of the plaintiffs. He further says that the subscription was obtained from him, by those soliciting it, on the representation that his doing so would induce others to do so as well, and with a promise that as soon as the bank declared a dividend it would be taken off his hands at par, or otherwise arranged to his satisfaction. In this he is corroborated by his brother, who was present at the interview when the subscription was obtained, and the original note given.

As the note was taken direct to the plaintiffs, it seems probable that those who solicited the subscription of the defendant were agents for the plaintiffs, who would be bound by their representations. The decision in Dominion Bank v. Crump, 3 O. W. R. 58, would therefore be applicable,

as well as the leading authority of Jacobs v. Booth's Distillery Co., 50 W. R. 49, 85 L. T. 262.

The bank declared its first dividend on 1st September last, so that the matter has been running for some time. It is admitted that the first note was given on 11th May, 1906, and payable a year thereafter. This of itself corroborates the defendant's statement.

The course of dealing on the part of the defendant is at least as consistent with his contention as with that of the plaintiffs. He has paid the discount or interest until a dividend was declared, and that dividend was applied in that way. He now requires to be released from his obligation, and may succeed. No allotment is alleged of stock subscribed for.

The motion will be dismissed, with costs in the cause.

CARTWRIGHT, MASTER. FEBRUARY 2ND, 1909.

CHAMBERS.

McDONALD v. LONDON GUARANTEE AND ACCIDENT CO.

Pleading—Statement of Claim—Extension of Time for Delivery—Time Limit for Bringing Action—Application to Delivery of Statement of Claim—Con. Rules 243, 353—Costs.

Motion by plaintiff for an order for leave to deliver a statement of claim notwithstanding the lapse of 3 months from date of appearance in an action on a guarantee policy.

R. McKay, for plaintiff.

C. Swabey, for defendants.

THE MASTER:—Usually the motion is one of course, even after such long delay as in Milloy v. Wellington, 3 O. W. R. 37, where the cases are collected and considered. See especially Finkle v. Lutz, 14 P. R. 446. Here the motion is resisted on the ground that the action is barred under the condition in the policy "that no suit or action of any kind against the company for the recovery of a claim shall

be sustainable, unless the suit or action is commenced and the process for commencing the same served within the term of 6 months next after the first discovery of defalcation."

It was argued that, inasmuch as the statement of claim had not been delivered within the time limited by Con. Rule 243, the action was just as much dead as if it had not been begun within the 6 months. It was therefore said that the case was within the decision in Williams v. Harrison, 6 O. L. R. 685, 2 O. W. R. 1061, 1118, and cases cited there. What was said by Lord Esher, M.R., in Hewett v. Barr, [1891] 1 Q. B. 99, was especially relied on, viz., that amendments "ought not to be granted where they would have the effect of altering the existing rights of the parties," and that the order necessary here was in the nature of an amendment.

In the analogous case of Canadian Oil Works v. Hay, 38 L. T. 549, a similar motion was allowed under a Rule equivalent to Con. Rule 353. There the distinction was pointed out between such a case as Hewett v. Barr, supra, and one where it is only a matter of procedure over which the Court has complete jurisdiction: and the principle of Con. Rule 312 was applied. In the present case it is stated that the accounts were so badly kept by the bookkeeper that it required very careful and minute examination by skilled accountants to ascertain and prove the defalcations, which were alleged to amount to over $48,000. This was rendered more necessary by the fact that the bookkeeper has been twice acquitted on two of these charges of embezzlement from the plaintiff, and that a third indictment is thought to be still pending. If he had been convicted, it would have been a different matter. But, as it is, the plaintiff will have to establish very clearly the misconduct of his bookkeeper before he can hope to recover from the defendants on their guarantee bond.

I think the motion must be allowed, and that the statement of claim should be delivered this week.

As it is now over 7 months since the writ was issued, the costs of the motion will be to the defendants in any event.

The plaintiff was in default, and the defendants were not unreasonable in requiring an order to be made only after hearing what was to be said on the condition in the bond sued on, though, in my opinion, it has been complied with by commencing the action within the 6 months' limit, and serving the writ. If the writ had not been served within a year,

or even within the 6 months, then probably the plaintiff would be barred, but in the latter event it would have been matter of defence, and the action could not have been dismissed or stayed in Chambers.

BOYD, C. FEBRUARY 2ND, 1909.

TRIAL.

ALEXANDRA OIL AND DEVELOPMENT CO. v. COOK.

Fraudulent Conveyance—Transfer of Property by Husband to Wife—Prosperous Financial Condition of Husband at Time of Transfer — Intention to Enter into Hazardous Business—Fear of Future Creditors—R. S. O. 1897 ch. 334—Finding of Fraudulent Intent—Judgment—Creditors' Claims—Reference—Costs.

Action by execution creditors of defendant John W. Cook to set aside conveyances of land and transfers of personal property by that defendant to his co-defendant, his wife, as fraudulent as against the plaintiffs and other creditors, and to make the property transferred available for payment of creditors' claims. The judgment of the plaintiffs against the defendant John W. Cook was obtained in a previous action of the same name, reported 10 O. W. R. 781, 11 O. W. R. 1054.

G. H. Watson, K.C., for plaintiffs.

M. Wright, Belleville, for defendants.

BOYD, C.:—It is somewhat difficult to gauge accurately the financial condition of the husband at the time he made a gift to his wife of $5,000 on the 3rd March, 1905. He gave her, besides, $500 on 6th April, and $500 on 2nd May of that year: $6,000 in all. Of tangible assets all that appears is that after payment of these sums he had a bank balance at the end of March of $9,716, at the end of April of $2,822, and at the end of May, $1,928—all to his credit. Besides this, the farm and chattels thereon, now in question, were worth then, he says, about $4,000 and $2,000 respectively. As to his obligations, that is, as I understand, those not secured, he says he did not owe $4,000 or $5,000 in March, 1905, but

he did owe $2,000, and it might be more, all of which he has since paid except perhaps $40 or $50. The land was subject then to a mortgage to Crawford, on which stood unpaid $2,784.32, and there was a lien on the barn for lumber, amounting to $400.

There was also a borrowing in the name of the wife of $2,400, which was paid by her. Upon this footing, and roughly speaking, his total assets in March, 1903, would be about $21,000; his liabilities not less than $10,000. So that the donation of $5,000 to his wife would subtract about half his total substance.

The wife applied the funds derived from her husband in paying off the Crawford mortgage, being the $2,784.32, and took an assignment to herself on 14th April, 1905; she also paid off the $2,400 to the Sovereign Bank out of this donation with some money borrowed from one Black, and took a mortgage from her husband on the farm to secure it, dated 22nd October, 1906. She thus held two mortgages on the 200-acre farm, amounting in all to $5,184.32. Next she borrowed $1,500 from Miss Rous, and applied this to buy from her husband his equity of redemption in the land for $300, and the whole of the chattels and farm stock for $1,200, and took a release of the one and a bill of sale of the other on 12th February, 1908.

According to the evidence, the husband had been a farmer the most of his life, with occasional excursions into deals and speculations, some of which were profitable, but the last one proved disastrous. He speaks of being engaged in litigation about oil lands in 1903. He had some mining operations, as to which he moralised that "farmers do not succeed in going into mining, especially if getting old." He had a lumber deal in 1904, out of which he took some $8,000, and finally, in January and February, 1905, his activities were directed to oil lands and leases in Essex, and he went to Detroit to consult and to co-operate with one Boerth. A plan was formed to organise a syndicate, which took shape definitely on 13th April, 1905, when Cook obtained a transfer of various interests and options in oil lands in Essex as "trustee" for the people who were to join him. Before this, in the earlier months of the year, he had been absent from home for weeks at a time, as his wife knew, at Detroit and in the west, and he was then, after discussion with Boerth, looking over the country, and, when the roads were fit for driving, going out to see the properties and then buying

them and making some payments, before, as he says, "he took any one in"—an equivocal form of expression which carries a sinister meaning, in view of the way in which his plans developed. He is somewhat loose in his recollections and dates, but this was his course of action in the speculation during the months of January, February, and March. He says the venture was to "turn out a big speculation, but he thought to come off victorious." Boerth spoke of taking his wife into it, and Cook thought he would do so also, but then he thought it was better not—"not exactly a risky business, but a lot of bother." He explains as to why she was left out (p. 20 of examination.)

Mrs. Cook says that she took an assignment of the Crawford mortgage, so that she might have that much hold on the place. Her husband suggested that she should hold the mortgage, and then she adds, "Well, I thought it would save the farm, I suppose." She says later in the examination: "I did not take the assignment of the mortgage to save the property, for I did not think there was any danger in it." He was away weeks at a time, she admits, and she wondered why he went to Detroit, but she did not pry into his affairs. She does not know when he began speculating, but the trouble began when he began to speculate.

The upshot of this oil syndicate was the formation of a company on 11th October, 1905, and an action by the company begun on 24th April, 1906, against Cook and Boerth, alleging a conspiracy to defraud the promoters of the syndicate by fraudulent misrepresentations of various kinds, which closed in a judgment against both for over $10,000, and which, after a series of appeals, ended in the issue of an execution by the company on 9th July, 1908, for $10,792.74, to which nulla bona was returned.

This present action, begun 6th August, 1908, is to lay hold of the land and chattels in the hands of the wife as available for creditors by virtue of the plaintiffs' rights under R. S. O. 1897 ch. 334.

The husband swears that he did not act as he did in disposing of the property with a view to defeat his creditors, and that may be literally true, but the statute extends to "others," such as, e.g., these persons forming the company, who were not then creditors, but who have since become so by the judgment of the Court.

The case then is one, or may be treated as one, where there are no creditors existing who were such at the date of

the transactions impeached, but there were persons who subsequently became creditors. And the question is, whether a man contemplating entry upon a new and venturesome enterprise, which may involve loss to himself and those who trust him, can make a valid gift of a substantial part of his assets, to the prejudice of future creditors. Most of the cases of this complexion are where the bulk of the property has been withdrawn; here there was a substantial part left, equal perhaps to what was bestowed upon the wife.

Where in such cases the bulk is given, an inference arises that the property has been given over with a view to protect it from future executions. That is not a necessary inference in this case, and one has to seek for evidence to induce a fair and reasonable conclusion as to the motive of the donor. Here was no special reason for the gifts--all that the husband says is: "I gave her $5,000 because I had a lot of money, and she helped and was entitled to it." A good moral claim, no doubt, if that was the moving cause, and no thought existed of providing a shelter for husband and wife in case disaster arose out of the projected speculation. But it was an unusual thing for a farmer to give such a present to his wife. There was no reckoning up as to what his financial condition was, and there was an existing apprehension of risk in what was then under way as to the acquisition and dealing with the oil lands and the formation of a syndicate.

A lurid light is thrown upon the whole situation when one turns to the judgments of the various Courts in the course of this litigation, which are reported, as to the Divisional Court in 10 O. W. R. 781, as to the Court of Appeal in 11 O. W. R. 1054, and as to Mr. Justice Teetzel, the primary judgment, in the appeal book, p. 205. Mr. Justice Teetzel says: "From the beginning the defendants conceived the idea of forming a joint stock company, and from the beginning they were engaged in obtaining properties for the prospective company, and in inducing persons to join in forming a company, and I think it was the intention of these men from the beginning to make a secret profit on the transaction out of the company." The learned Judge comments adversely upon the credibility of Cook, and stamps the scheme as "a bare-faced fraud:" p. 208. The trial Judge's findings of fact were not questioned on appeal, and his judgment was affirmed and re-affirmed by both Courts. This action is really a continuation of the former: it was possible

to have attacked the transaction by summary application in the first action: see Rule 1015 et seq.: and all the evidence taken therein and the findings of the Judge are available in this case against the defendant the husband. His motive in entering upon the speculation appears very distinctly even without resort to the further commentary of Mr. Justice Teetzel; and I cannot avoid the conclusion that the setting apart of the money in the hands of the wife was one outcome of the fraudulent scheme, with a view of securing this result, that whereas at the beginning all the property, farm and stock, was in the name of and owned by the husband, at the end when the possible crash came, all might be found in the name of the wife.

From the beginning of 1905 the farmer was transformed into the speculator; the one business on which Cook's thoughts revolved and to which his energies were directed was this great oil "proposition." He acted with unwonted generosity to his wife, and long before she had expended the money received from him in clearing the farm and paying the urgent debts of her husband, she must have been fully aware of what was going on and the risks which were being run. The husband, to judge by his demeanour in the box, is not a secretive man, and the knowledge of his plans and movements may be readily imputed to his wife, if that was necessary to the plaintiffs' success in this action. Cook interviewed the different syndicates in the spring of 1905, and had them gathered in a general meeting on the last day of August, 1905, in order to form a company.

I should find upon the evidence, as a jury, that the bestowment of money upon the wife to such a considerable extent was to enable her to pay off pressing creditors and to acquire both farm and farm stock in her own name, and this with the intent to hinder the future claimants possibly or probably expected to arise in consequence of misrepresentations about to be practised upon them by Cook.

It needs no cases to fortify the legal issue of this state of facts: the statute itself forbids in terms such a transaction, and avoids it as against the future creditors, even though the claim arises out of a tort. The question of quantum of the property given away and the property retained is not material if the latter part becomes soon after dissipated or is not forthcoming for creditors, and if the gift was made with intent to protect the part from anticipated creditors. That is the broad principle which governs

this case, as defined in the Privy Council in Godfrey v. Poole, 13 App. Cas. 497, 503. I may also note Barling v. Bishopp, 29 Beav. 417, 421; Reid v. Kennedy, 21 Gr. 86, 92. Boustead v. Shaw, 27 Gr. 280, 292, was a case in which the intent to delay or defeat was not made out.

The judgment of the Court is that the real and personal property in question held by the wife is available for the creditors—whose claims are to be ascertained and determined by the Master, having regard to the provisions of the Creditors' Relief Act, R. S. O. 1897 ch. 78. The mortgage on the land given to Miss Rous for $1,500 is not to be prejudiced by this judgment. The claim of Black, who apparently holds a note for a loan made to the wife, will be dealt with by the Master. The costs of proving creditors will be added to their claims, save that as to the costs of action up to this judgment. the costs of the plaintiffs should be a first charge upon the fund raised by the sale of the real and personal property, as directed by the Master, to whom the cause is referred.

JANUARY 18TH, 1909.

DIVISIONAL COURT.

RE HAMILTON AND CANADIAN ORDER OF FORESTERS.

Life Insurance—Benefit Certificate—Designation of Insurance Moneys in Favour of "Legal Heirs" — Insurance Act, R. S. O. 1897 ch. 203, sec. 2, sub-sec. 36—7 Edw. VII. ch. 36, sec. 1—Will.

A life insurance certificate for $2,000 was issued by the High Court of the Canadian Order of Foresters on 29th September, 1903, to one Alexander Hamilton, payable at his death to his legal heirs, in pursuance of his application for membership. Alexander Hamilton died on 9th May, 1908, leaving him surviving his widow and 8 children, 6 of whom were infants, and without having designated any new beneficiaries to receive the moneys payable under the certificate. He left a will and codicil which did not in any way refer to this life insurance certificate or to any of his life insurance.

On an application made by the High Court of the Canadian Order of Foresters to pay these moneys into Court, TEETZEL, J., by an order dated 6th November, 1908, directed that the High Court of the Canadian Order of Foresters pay these moneys into Court after deducting the costs of all parties, and further ordered that the determination of the question whether the moneys payable under this life insurance certificate belong personally to the legal heirs of Alexander Hamilton or to his estate, to be disposed of under the provisions of his will, be referred to a Divisional Court of the High Court of Justice.

In pursuance of this order the matter came before a Divisional Court composed of BOYD, C., MACLAREN, J.A., and BRITTON, J.

Lyman Lee, Hamilton, for the official guardian, on behalf of Lottie M. Hamilton, Roland Hill Hamilton, Theodore Hamilton, and Emma Hamilton, infant children of Alexander Hamilton, deceased, contended that the widow and each of the 8 children of the deceased Alexander Hamilton were entitled to a one-ninth share in these moneys under the terms of the certificate and under the definition of "legal heirs" contained in the Ontario Insurance Act, R. S. O. 1897 ch. 203, sec. 2, sub-sec. 36, as amended by 7 Edw. VII. ch. 36, sec. 1.

S. H. Bradford, K.C., for the Toronto General Trusts Corporation, the executors under the will and codicil of Alexander Hamilton, deceased, and for Gerald Ross Hamilton and Desmond Russell Hamilton, infant residuary legatees, under the will of Alexander Hamilton, cited Re Duncombe, 3 O. L. R. 510, 1 O. W. R. 153, in support of his contention, that these moneys should be paid to the executors and be disposed of as part of the estate.

THE COURT held that the moneys payable under this certificate belonged to the "legal heirs" personally, that is, that the widow and the 8 children were entitled each to a one-ninth share in same. Re Duncombe, supra, not followed.

Costs of all parties out of the fund.

TEETZEL, J. FEBRUARY 4TH, 1909.

TRIAL.

McCRACKEN v. CANADIAN PACIFIC R. W. CO.

Railway — Animals Killed on Track — Negligence — Railway Act, R. S. C. 1906 ch. 37, sec. 254, sub-sec. 3—Fences—Inclosed and Improved Land—Damages.

Plaintiffs were butchers, and had the right of pasturage for their cattle over parts of lots 36, 37, 38, 39 and 40 in the 16th concession of the township of Ferris, in the district of Nipissing. The defendants' line of railway crossed the lots diagonally. On 16th October, 1907, the plaintiffs' cattle broke through the railway fence on lot 36, and a large number were killed, and this action was brought to recover damages for their loss.

G. V. Gould, North Bay, for plaintiffs.

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

TEETZEL, J:—In my opinion, relying chiefly upon the evidence of Richard Power, the fence was not "suitable and sufficient to prevent cattle and other animals from getting on the railway," as required by sub-sec. 3 of sec. 254 of R. S. C. 1906 ch. 37. It had been erected for about 23 years and, though some repairs had been made in the meantime, I find its unsuitability and insufficiency were owing to dilapidations.

I also find that it was by reason of the insufficiency of the fence that the cattle got upon the railway.

I further find that the plaintiffs were not guilty of negligence in the matter.

The chief defence was that the lands in question were "not inclosed and either settled or improved," and that therefore the defendants were not bound to fence under sub-sec. 4 of sec. 254, which reads: "Whenever the railway passes through any locality in which the lands on either side of the railway are not inclosed and either settled or improved, the company shall not be required to erect and maintain such fences, gates, and cattle-guards, unless the Board otherwise orders or directs."

The Railway Board had not been applied to for an order.

I find upon the evidence that the lands in question were both inclosed and improved within the meaning of said subsection.

The evidence of Power, I think, established that fact, though Mr. Randall said it was not wholly inclosed; but the fact that Mr. Parks declared that he had pastured his cattle on the tract for about 18 years, and none had strayed off, corroborates Power's evidence.

I assess the plaintiff's damages at $240, and direct judgment in their favour for that sum and costs.

BOYD, C. FEBRUARY 4TH, 1909.

TRIAL

McKECHNIE v. GRAND ORANGE LODGE OF BRITISH AMERICA.

Life Insurance—Benefit Society—Certificate of Membership—Rules of Society—Conditions as to Death Benefit—Fraternal Society—Membership in Good Standing in Private Lodge—Refusal of Lodge to Certify at Death—Forfeiture of Benefit notwithstanding Payment of Assessment to Insurance Department of Grand Lodge—Parties to Action—Private Lodge not before the Court—Resort to Domestic Tribunals—Insurance Act, R. S. O. 1897 ch. 203, sec. 165 (1)—Repayment of Assessments.

Action to recover the sum of $1,000 upon a certificate or policy of life insurance issued by defendants in favour of Alexander McKechnie, deceased.

D. Urquhart, for plaintiff.

J. A. Worrell, K.C., for defendants.

BOYD, C.:—The "certificate of membership" under which McKechnie obtained this insurance was pursuant to his application of 31st July, 1889, and sets forth that he is of Loyal Orange Lodge No. 262, held in London, and is a member in good standing of the Loyal Orange Association of British America and in the Orange Mutual Insurance Society of Ontario. He undertakes to pay all assessments to the said society, and to comply with all laws now or here-

after to be in force, and payment of the insurance is conditional on proof being made of his good standing in the Loyal Orange Association and in this society, i.e., the mutual insurance one (at the time of his death).

Proof was made of payment of the annual assessment fee to O. L. Benefit Fund of $7.88 in the year of his death, i.e., in July, 1907.

The defendants were incorporated in 1890 (53 Vict. ch. 105), and established a benefit fund, and took over the certificates of insurance theretofore issued by the Orange Mutual Insurance Society of Ontario West, and assumed liability therefor, under the corporate name of the Grand Orange Lodge of British America.

The proofs of death prescribed require that there be a certificate of the particular lodge that the deceased was a member in good standing, at the time of his death, of the Lodge, and also a statutory declaration to the same effect by the financial secretary or treasurer of the Lodge. Neither of these was furnished because, it is alleged, the deceased McKechnie had been suspended, had failed for many years to pay his monthly dues to the Lodge, and had ceased to be a member in good standing in the primary Lodge and in the Grand Orange Lodge of British America.

The insurance or benefit fund department of the defendants can only ascertain by reference to the Lodge at London whether the person insured has continued to be and is a member in good standing, and can only act according to the rules and practice upon the proper certificate and declaration to that effect. The opinion given by the secretary of the insurance department to the head of the London Lodge, on being informed of the facts, was this: "If, as you state, the late A. McKechnie has not been at a meeting in your Lodge for the last 9 or 10 years, and has not kept his dues paid up therein, he could not be in good standing at the time of his death." "One of the principal reasons for the organisation of this fund," he proceeds, "is to keep insured members continually in good standing and in close touch with their primary Lodge."

I will now note the important dates as far as can be traced: 1889, June 20, he entered the body; 1889, July 31, he applied for and obtained certificate of insurance; 1890, April, incorporation of the body: his address, at first London, is changed to Milton in the roll of members of this year; 1891, his address is changed to Rocky Saugeen P. O.; and

in 1891 or 1892, February, he is marked in the roll as "suspended;" 1893, January, his name is entered and address, Merton P. O.; and so in 1894; 1895, he is on the roll, and is in arrear as to payment of dues; 1896, his name is on the roll with $5.40 arrears in January, which has increased in October to $6.75.

It is now important to observe that, being suspended, he makes a new application to be reinstated in membership in the Grand Orange Lodge of British America Benefit Fund, and signs an agreement that the rules of the Benefit Fund shall form the basis of his application, and also that any neglect to pay any dues, fines, taxes, or assessments, within the time provided by the said constitution and laws, or any suspension from the Loyal Orange Association, shall void the contract, and forfeit all rights thereunder. No new certificate was actually issued to him, but he underwent a new medical examination requisite in order to be reinstated after suspension.

This action of the deceased and of the society proceeded, so far as I can discover from the papers before me, upon certain resolutions of the Lodge. First, on 9th August, 1894, it was resolved that all suspended members (he then being one) be reinstated on payment of $1, upon condition that they remain in the Lodge for 12 months, and if they demand their certificates, they will have to pay all back dues, except leaving the city (sic). And on 13th June, 1895, it was resolved that all members 6 months in arrear be summoned to attend the meeting on 11th July. At the time of that meeting McKechnie was in arrear $5.40, as of January, 1906. Being reinstated on his application of 25th July, 1896, he does not pay the arrears, which increased to $6.75 in October.

In 1897 his name does not appear on the roll of membership: 35 other names do appear as members of the Lodge. This disappearance is explained by the fact that in the yearly returns made by the Lodge to the superior (district?) Lodge for the year ending December, 1896, his name appears as H. McKechnie (clearly a clerical error for A.) as being suspended by the primary Lodge.

Not again does his name appear on the records of the society, and nothing more, apparently, is heard of him by this Lodge till the application is made for the certificate of good standing after his death.

I would take it that the real date of his suspension goes back to 1891 or 1892; that such suspension was recognised by the deceased when he applied for reinstatement; but that his application was not consummated by a certificate, for he made default in paying the arrears, and so continued till his death.

In the by-laws of the Forest City Loyal Orange Benefit Lodge No. 762, which was in force when McKechnie first obtained his certificate of insurance in July, 1889 (see the edition issued in 1886, No. 3, p. 6), it is laid down: "And should any member of this Lodge leave the city, he shall notify the Lodge of his removal, and the said member may still be a member of this Lodge on keeping up his dues and not being more than 3 months in arrears." And rule 6 says: "Any member who has been suspended shall on no account be entitled to any benefits within two months after he shall be reinstated." I find no explanation in these as to how suspension is effected, and I would infer that the mere absence by removal and the failure to make payment of the dues for 3 months would be treated, as it appears to have been treated by the Lodge, as operating a suspension.

The constitutional changes wrought by incorporation began after the Dominion statute 53 Vict. ch. 105 was passed on 24th April, 1890. The transfer of this insurance department from the local to the corporation was in February, 1893. A new constitution and laws of the Loyal Orange Association of British America was issued, of which the earliest imprint before me is dated 1895. Under "Duties of Private Lodges" (of which No. 762 is one) it is provided that "the financial secretary shall prepare and present at the meetings in March, June, September and December, a complete list of those in arrears:" No. 98, p. 35. Rule 196 provides that "suspension or expulsion may take place for a violation of obligation or of the constitution and laws." Rule 150: "Any member remaining in default for 6 months after payment has been demanded may be suspended until dues are paid:" p. 48. Rule 162½ (p. 59) provides "that one who has been suspended from the Association may apply to the Lodge in which the case was first investigated, and, should such Lodge deem the applicant worthy and the cause of suspension removed, it may apply to the higher Lodge to have him reinstated, and, sanction having been obtained, he shall be reinstated."

Again, in the Benefit Fund rules issued in 1895, No. 2 declares that the object is to establish a benefit fund from which, on satisfactory evidence of the death of a member who has complied with all its lawful requirements, a sum . . . shall be paid, etc. No. 3 declares that "the membership of the Benefit Fund shall hereafter be composed exclusively of brethren . . . who are members in good standing of some primary Lodge." No. 4: "Should a member of the Benefit Fund be suspended from his primary Lodge for any cause . . . he shall cease to be a member of the Benefit Fund, and in case of his death his representatives shall not be entitled to any benefits from the fund." No. 6: "The insurance benefit payable on the death of a member who was in good standing at the date of his death shall be $1,000," etc. No. 8: "The term 'good standing' signifies that the member is not suspended . . . and that he has paid within the prescribed time all . . . his dues," etc. No. 9: "A member not in good standing loses all his rights and claims upon the Benefit Fund, of whatever kind and nature, and can only regain them when reinstated according to the rules of the Benefit Fund." No. 10: "Upon satisfactory proof of the death of a member of this Benefit Fund who at the time of his death was in good standing, his representatives shall receive . . . a sum not to exceed $1,000 . . . according to the terms of his membership." No. 43: "No member shall be entitled to bring an action or other legal proceeding against the Benefit Fund till he has exhausted all the remedies provided for in the rules of the Benefit Fund by appeal or otherwise." No. 55 provides that the members of the Orange Mutual Benefit Society of Ontario West who were in good standing in that society on the 1st day of January, 1893, shall be held to be members in good standing in this Benefit Fund on that day, and the certificates of membership now held by them shall be acknowledged by this Benefit Fund to the same extent and subject to the rules of this Benefit Fund, in the same manner as if such certificates had been issued by this Benefit Fund. No. 56 provides that a member who changes his place of residence shall notify previously the secretary of the Benefit Fund . . . the member so removing must also continue in active membership with the Orange Lodge of which he has been a member, or within 90 days from change of residence become connected with an Orange Lodge working under a Grand Lodge recognised, etc. If

the old rules and the action as to suspension thereunder are to be regarded as governing the deceased, then he was not, under rule 55, in good standing on the 1st day of January, 1893, and his good standing was never effectually restored thereafter.

If he is also to be regarded as under the new rules (which I think is the case, and that the two sets of rules may be worked cumulatively), then he was clearly not in good standing at the time of his death. If technically he was not suspended by the action of the Lodge in 1896, he has been for years in default in respect of his dues, which are still unpaid, and he has also made default violating the regulations imposed upon members to secure their presence and co-operative activity in the local Lodge. He has been an absentee from the local Lodge, and has not transferred himself to another for over 10 years. It appears strange that the yearly assessments have been paid to the Benefit Fund till the year of his death—that was explained during the trial by the fact that the certificate was pledged to some one who kept up the payment of the assessments.

But, looking at the whole scheme of the Orange body in this regard of insurance, one must not forget the system of dual membership, which is of its essence. The Benefit Fund is not gathered for the insurance of everybody who applies, but for those who begin and continue and at death are proved to be members in good standing of a private Lodge. This is a requirement quite apart from good standing in the insurance department, which is secured by punctual payment of the assessments.

It was explained during the evidence that cheap insurance of this kind can only be successfully furnished by means of the primary Lodges keeping their members and fostering fraternal feeling and attracting others to their companionship in the Order, and so enlarging the constituency from which the financial supplies come.

All these duties were neglected by the deceased, and he also failed in meeting the monthly dues, and he had practically withdrawn himself from membership. I do not further elaborate the many difficulties in the way of this litigation. One cannot blame the primary Lodge for refusing to certify his good standing, and, in the absence of that certificate, bona fide withheld, there can be no proof of claim in its legal aspect. No judgment of this Court can reach that primary body in its absence from the record, and it is a

grave question whether litigation can be maintained, even in a more meritorious case, if an appeal or other resort had not been made to the local Lodge, as contemplated by the rules.

I may mention that I do not think the provision cited of the Insurance Act, R. S. O. 1897 ch. 203, sec. 165 (1), applies to a case like this, where the payment of monthly dues is fixed by the by-laws, and the dues are collected at the regularly appointed meetings, as appears by the rules of the Lodge: see Cunningham's Case, 29 O. R. 708. Wintemute v. Brotherhood of Railway Trainmen, 27 A. R. 524, would indicate that the section does not apply to this Benefit Fund. And quære, was the original of the Act in force when the suspension was declared in 1891 or 1892? The month was February, and the Act was first passed 14th April, 1892.

The facts in Dale v. Weston Lodge, 24 A. R. 351, are widely distinguishable from those now in hand.

The action must be dismissed, and, I suppose, with costs, if asked for. Under rule No. 9, before mentioned, I do not now see my way to direct the repayment of any or all of the assessments paid by or for the deceased—but the dismissal of the action may be without prejudice to that claim.

FEBRUARY 4TH, 1909.

DIVISIONAL COURT.

SANGSTER v. TOWN OF GODERICH.

Highway—Non-repair — Injury to Pedestrian — Liability of Municipal Corporation — Notice — Misfeasance — Hole in Highway Caused by Works Undertaken by Corporation.

Appeal by defendants from judgment of TEETZEL, J., in favour of plaintiff, in an action for damages for injuries sustained by plaintiff by a fall upon William street, in the town of Goderich, owing, as alleged, to the street being out of repair. There was no sidewalk on the east side of the street. There was a roadway in the centre fit for horses and vehicles. The plaintiff was leaving a house on the

east side of the street, and in crossing to the west side she stepped into a hole before reaching the travelled part of the street, and was injured. The trial Judge held that the defendants were affected with notice of the existence of the hole, and were bound to repair.

The appeal was heard by FALCONBRIDGE, C.J., ANGLIN, J., CLUTE, J.

E. L. Dickinson, K.C., for defendants, contended that a municipality owes no duty to a pedestrian using a part of the road allowance which the municipality have not assumed to make fit for pedestrians; if the municipality had laid down a walk, their duty to repair it and keep it in repair would have arisen, but, not having done so, that they were not responsible. He also contended that they were not affected with notice of the existence of the hole.

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

ANGLIN, J.:—The defendants appeal from the judgment of Teetzel, J., holding them liable in damages for injuries sustained by the plaintiff through stepping into a hole in William street in the town of Goderich, when crossing from the premises of one Morningstar on the east side of the street to the sidewalk laid upon the west side. There is no sidewalk on the east side.

The learned trial Judge found that notice of the existence of this hole should be imputed to the defendants. If this finding be material, the evidence, in my opinion, fully warrants it. The hole is shewn to have existed for at least 6 months before the plaintiff was hurt, and to have been readily observable from the travelled road.

It is, I think, important to ascertain whether the hole was due to natural causes only, or whether it was the direct or indirect result of works undertaken by the defendant corporation.

According to the evidence of Johnson, the hole was situated precisely where what is called a sand-box—a plank-covered opening in connection with the sewer system of the town—was formerly located. This sand-box fell into disuse because the sewer with which it was connected, having become wholly or partly blocked, was abandoned, and it was filled in with earth by the defendants' employees some years ago. Johnson's idea is that the sewer still carried water,

and that the suction thus created gradually undermined the old sand-box and caused it to cave in, thus creating the hole. Mr. Morningstar, on the other hand, is not certain whether the hole is upon the exact cite of the old sand-box. His idea is that, owing to the capacity of the sewer being insufficient in times of freshets, large quantities of waters are forced out upon the street through the man-holes, that other large volumes of water, carried down by a drain from the east end of the town, which have no proper means of escape, because of the old sewer which formerly carried them on to the lake being blocked, are also driven to the surface, and that the waters, thus accumulated and carried to this point by the defendants, "swirl around the corner and bore holes;" and he accounts in this way for the existence of this hole.

Upon the theory of the witness Johnson, or upon that of Morningstar—one or other of which I think must be correct, and I incline to accept the very clear recollection of Johnson—the existence of this hole was a direct result of sewer works of the defendant corporation. Their duty was to guard against and remedy any defect in the highway thus created at the risk, in the event of failure, of being held guilty of misfeasance. While I do not wish to be understood as holding the view that the judgment at the trial may not be supported on the ground on which it was put by the learned trial Judge, it seems to me so clearly sustainable upon the ground which I have stated that I have not thought it necessary to further consider the matter.

I would therefore dismiss the defendants' appeal with costs.

FALCONBRIDGE, C.J.:—I agree in the result.

CLUTE, J.:—While not dissenting from the view of my brother Anglin, I am of opinion that the appeal fails for the reasons given by the trial Judge.

CARTWRIGHT, MASTER. FEBRUARY 5TH, 1909.

CHAMBERS.

MICHAELSEN v. MILLER.

Security for Costs—Plaintiffs out of the Jurisdiction—Payment of Money into Court by Defendants—Admission of Liability—Con. Rules 419, 420—Reduction of Amount of Security.

Motion by plaintiffs to set aside a præcipe order for security for costs.

R. U. McPherson, for plaintiffs.

Glyn Osler, for defendant.

THE MASTER:—The plaintiffs reside at Havana. Defendant bought cigars at different times from them. One of these purchases was made in November last, and defendant paid $786.83 for the same. He afterwards claimed that he was entitled to be allowed $521.07 on account of some of the goods being unsaleable. In the meantime, and before discovering the alleged defect in the previous lot, he made a further purchase to the amount of $662.72. This he has refused to pay for by reason of his claim to the $521.07. This action was thereupon brought for $662.72, and defendant has paid into Court under Con. Rule 419, with his appearance, $133.68.

It was contended that this is such an admission of liability as entitles plaintiffs to have the order for security set aside.

To this there is this answer: by Con. Rule 420 such payment "shall not be deemed an admission of the cause of action in respect of which it is paid in."

It is not like the case of Stock v. Dresden Sugar Co., 2 O. W. R. 896, where there was an unqualified admission of liability to plaintiff of over $400. Here the admission is only to pay $133.68 if plaintiffs would accept this in full and take back the unsaleable cigars.

I think justice will be done by allowing plaintiffs to give security in one-half of the amount specified in the order. Defendant will then have $233.68 as security if plaintiffs pay in $100. This will do in the meantime. Later on, if necessary, defendant can move for further security.

Costs of this motion will be in the cause.

FALCONBRIDGE, C.J. FEBRUARY 5TH, 1909.

TRIAL.

YOUNG v. BELYEA.

Way — Private Way — Easement — Boundaries of Land — Injunction—Buildings.

Action for a declaration of plaintiffs' right to a way and for an injunction restraining the defendant from interfering with plaintiffs' user of it. Counterclaim for an injunction restraining plaintiffs from interfering with defendant's erections.

George Kerr, for plaintiffs.

G. C. Campbell, for defendant.

FALCONBRIDGE, C.J.:—The authorities cited by Mr. Kerr refer to cases where a lot or close has been granted by a certain name, and it can be clearly shewn what land the lot or close so named contains. Then the lot as named is the governing feature, notwithstanding any erroneous description which, if literally carried out, would narrow or extend the quantity of land. Here the grant to plaintiffs is of part of lot 51, according to a plan, and particularly described by metes and bounds. So, too, is the grant to the defendant, and this entirely distinguishes the cases cited. I am unable to see that the situation of affairs on the ground at the time of the grant has any bearing on the subject. No right has been gained by the plaintiffs as of an easement or otherwise, and so defendant had a right to build his fence out to the north to the 100-feet limit. As to the easterly boundary, it is proved beyond question that defendant put the posts for his new fence into the old post-holes, and, according to the plan produced by plaintiffs, defendant is within the metes and bounds of his description.

The action will be dismissed with costs.

Defendant will have judgment with costs on the counterclaim for an injunction restraining the plaintiffs, their servants, &c., from destroying or breaking or interfering with defendant's house and fences.

TEETZEL, J. FEBRUARY 6TH, 1909.

TRIAL.

ALICE v. BRAUND.

Principal and Agent—Agreement by Joint Owners of Mining Claims for Development Work—Authority of one to Pledge Credit of Others—Partnership—Co-ownership — Termination of Authority—No Notice to Persons Supplying Labour and Goods—Action against Joint Owners for Price of Goods and Labour—Evidence—Construction of Agreement.

Action for the price of goods sold and delivered to defendants and to recover the amount of accounts owing by defendants and assigned to plaintiff.

S. White, K.C., for plaintiff.

F. D. Kerr, Peterborough, for defendants Braund and Dickson.

J. McNamara, North Bay, for defendant Crowley.

TEETZEL, J.:—Under an agreement of 30th January, 1907, the defendants are joint owners of six mining claims in the district of Nipissing, and it is recited in the agreement that the parties have agreed to merge or pool their respective interests in such claims upon the terms hereinafter stated; and it is agreed that the defendant Crowley is entitled to an undivided one-half interest in the same, and Braund and Dickson each to an undivided one-quarter interest therein, and that the parties should be entitled to the net proceeds of the sale of the said claims, or of any part thereof that may be sold, as well as of all the mineral that may be sold therefrom, in the same proportions. It is also agreed therein that the parties should pay the cost of development and all other expenses to be incurred in respect of any of the claims, in proportion to their respective interests therein, but that Braund and Dickson should in the meantime advance the cost of development work, Crowley paying his share of such expenses out of the first money to be received from a sale of the property or of a part thereof; Crowley also agreeing "to superintend and direct such development operations, and give his time thereto free of all charge."

The questions raised upon the argument were, among others, whether the agreement was a partnership agreement or a mere co-ownership; also whether as agent Crowley had authority to pledge the credit of his associates for labour and supplies in developing the claims.

If the agreement was a partnership, I would find upon the evidence that it was dissolved as between the parties, and would also find that as between the parties Crowley ceased to have authority to pledge his associates' credit.

The accounts sued for are for goods supplied to Crowley in connection with the development of certain of the claims and for wages and board of the men employed therein by him.

The defendants Braund and Dickson lived in Peterborough.

When Crowley applied to the plaintiff for credit, he shewed him the agreement, which was submitted to the plaintiff's solicitor; but Crowley did not inform the plaintiff that his authority to pledge the credit of his associates had been terminated, and I find as a fact that the plaintiff had no notice whatever of such termination of authority, and supplied the material to Crowley and acquired his other claims under the belief that the agreement referred to was subsisting.

As to whether the agreement constituted a co-partnership or co-ownership, I am of opinion that it was a co-partnership agreement. I think upon its face it covers the terms necessary to constitute the relationship of partnership, within the authorities.

The agreement provides for sharing profits by all the parties, not only those which may arise from the working of the mines, but from a sale thereof. But, whether I am correct in this view or not, I think that, if Crowley was not clothed with the authority of agent as partner, he was in fact agent for his associates in the work of developing the claims. The agreement fully intrusts him with the superintendence and direction of the development operations, and I think by necessary intendment it gave him authority to purchase supplies and hire men to carry on those works.

"Every agent who is authorised to conduct a particular trade or business or generally to act for his principal in matters of a particular nature or to do a particular class of acts, has implied authority to do whatever is incidental to

the ordinary conduct of such a trade or business or of matters of that nature or within the scope of that class of acts, and whatever is necessary for the proper and effective performance of his duties:" Bowstead on Agency, p. 74. See also Watteau v. Fenwick, [1893] 1 Q. B. 346; Smith v. Hull Glass Co., 11 C. B. 897; Hawken v. Bourne, 8 M. & W. 703.

Two of the claims for wages assigned to the plaintiff, amounting to $40, cannot be allowed against the defendants Braund and Dickson, as the assignors were minors; but the defendant Crowley consented as against him to the allowance of these claims.

Judgment will, therefore, be as against the defendants Braund and Dickson for $200.86, and against defendant Crowley for $240.86, with costs against all the defendants.