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COURT OF APPEAL.

DECEMBER 22ND, 1911.

*RE JOHNSTON AND TOWNSHIP OF TILBURY EAST.

Municipal Corporations—Drainage—Township By-Law Authorising Raising of Money to Pay for Work already Done—Absence of Previous Report by Engineer—Work Done without Authority of By-law—Failure to Observe Directions of Municipal Drainage Act—Motion by Ratepayer to Quash By-law—Estoppel—Discretion.

Appeal by James Johnston from an order of the Drainage Referee dismissing the appellant's application to quash a by-law passed by the township council.

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

O. L. Lewis, K.C., and W. E. Gundy, for James Johnston, the appellant.

M. Wilson, K.C., and J. G. Kerr, for the Municipal Corporation of the Township of Tilbury East, the respondents.

GARROW, J.A.:—The by-law was finally passed on the 26th September, 1910, and was intituled "a by-law for the repair and maintenance of the Forbes drainage works in the township of Tilbury East, and for borrowing on the credit of the municipality the sum of $7,599 for completing the same." The by-law, however, as its numerous recitals shew, was not intended to provide for doing any work under it, but solely for the purpose of recouping the respondents in respect of work already done and paid for by them, under the circumstances hereafter appearing. . . .

*To be reported in the Ontario Law Reports.

Seventeen grounds are set out in the applicant's notice of motion before the learned Referee, but those mainly relied on before us are: (1) that the work for the payment of which the proposed assessment is made was work requiring to be based upon a previous report by an engineer, and there was no such report; (2) an erroneous assessment of all lots in the drainage area for injury liability; (3) the work was done, without authority, before the by-law was passed; (4) misdescription and improper description of parcels; (5) misapplication of funds to the benefit of which the drainage area was entitled; (6) improper inclusion in the total amount, of arrears, and of other items not properly or lawfully chargeable against the drainage area.

Of these it is obvious that the first and third, since they go to the root of the matter, are the most important.

In the beginning, the respondents evidently considered, properly, I think, that the then proposed work was of such a nature as to require the services of an engineer to examine and report. And, accordingly, the council appointed Mr. Baird, an engineer of experience, to take the matter in hand.

He made a report, dated the 11th September, 1906, containing a large number of suggested changes and improvements, the whole to cost $20,988; but, owing to the heavy cost, the report was not adopted; and the matter was, on the 14th January, 1907, referred back to him for reconsideration, with the request that, in view of the cost, he should consider the advisability of abandoning or postponing all works except the repairs and improvement of pumping station No. 2 and its plant.

He made a second report, dated the 5th September, 1907, in which he said that he had reconsidered his former report in the light of the resolution of the council, and therein made certain recommendations of necessary repairs and improvements, to cost in all $10,893.29, for which he had, in the usual form, assessed the lands to be benefitted. This report was apparently received and adopted by the council by a by-law provisionally passed on the 2nd October, 1907.

But in the previous month of July the council met at the pumping station, and certain improvements were then suggested, apparently by members of the council and by a Mr. Flook, a contractor, who was required by the council to make an estimate of the cost of the suggested improvements; and the clerk was instructed to correspond with Mr. Baird and ascertain whether he would approve of the suggestions.

And, apparently without obtaining any further report from him, the council employed Mr. Flook to prepare specifications

and to do the work, which he at once proceeded to do. His specification, which might also be called a tender was dated the 2nd August, 1907. The work itself was commenced early in August, and was apparently completed before the end of the year; for on the 16th December, 1907, the council passed a resolution directing the clerk to request Mr. Baird to examine the work and see if it was satisfactorily completed. On the 5th January, 1908, Mr. Baird reported, stating: "I have made an examination of the work of repair and improvement lately constructed in the remodelling of No. 2 pumping station of said works, its machinery and plant, and beg to submit in connection therewith the following report." He then, in the report, proceeded to review the work, in general favourably, but otherwise as to some of the details, not necessary now to speak of, which he recommended should receive further attention. But the work which he inspected, and in part approved of, was not done under any report previously made by him, or by any other engineer, but was work done entirely upon the recommendation of Mr. Flook, for the doing of which there does not appear to have been even a previous by-law of the council.

The appellant does not now complain that the work was not useful work, or even that it was insufficient to meet the then requirements in the way of repair of the system; nor that it was not well done, or not completed. His whole complaint upon these heads is, that, under the circumstances, it had not been preceded by a report from the engineer and a by-law authorising the work, as the statute requires. And to that objection I am quite unable to see a satisfactory answer. The procedure from beginning to end is statutory; and the directions of the statute must, of course, be substantially observed. Where the proceedings for the original construction of a drain are instituted, they begin by a petition, followed by a report from the engineer. Both are in the nature of conditions precedent, required to found jurisdiction in the council to charge and assess the lands in the drainage area for the expense of the work. If subsequent repairs are required, and do not exceed $800, they may be undertaken without previously obtaining an engineer's report (sec. 76); but, if they exceed that sum, they fall within sec. 77, which, while dispensing with the petition required by sec. 3, expressly requires a report; and, only when the council has received and formally adopted such a report, may it undertake the work "specified in the report," for the doing of which the engineer is given all the powers to assess, to the same extent, and by the same proceedings and subject to the same rights of appeal, as are provided in respect of an original work.

The report is intended, not merely for the information and benefit of the members of the council, but of the various landowners in the drainage area whose lands it is proposed to charge. It is a document of very great importance, indeed, in the scheme of proceedings provided by the statute. It may itself be the subject of an appeal to the Drainage Referee, who may set it aside: see secs. 94 (3), 99; and, if set aside, the whole drainage scheme would certainly fall with it.

The provisions of sec. 89 do not help the respondents. They clearly imply an assessment lawfully made, upon the faith of which money has been advanced out of the general fund. There was no lawful assessment here, no assessment indeed at all, and not even a by-law authorising the work to be done. The whole affair was as irregular as it well could be, and quite incapable of cure by the various flounderings, for they are nothing else, through which the council, in a vain effort to extricate itself, subsequently passed.

Nor am I able to see any proper evidence of estoppel on the part of the appellant, even if estoppel could arise in respect of a statutory condition precedent conferring jurisdiction such as this: see Maxwell on Statutes, 4th ed., p. 578 et seq.; Township of McKillop v. Township of Logan, 29 S.C.R. 702, p. 705.

We were referred to a number of cases in which it is said that the Court may exercise a discretion on applications to quash by-laws; and, doubtless, that has been frequently said. We were, however, referred to no case under the drainage legislation of the province in which the Court declined to give effect to an objection such as the one in question. On the contrary, there are cases in which the Courts have acted where the objection was in substance much less fundamental; as, for instance where the engineer, although he made a report, had omitted to take the oath as required by the statute: Township of Colchester North v. Township of Gosfield North, 27 A.R. 281. The discretion is, of course, a judicial one, to be exercised judicially, and not arbitrarily; and I see no reason at all, in the circumstances, why I should interpose my discretion, if I have one, to shield the respondents in their exceedingly irregular and ill-advised proceedings.

That being my conclusion, I do not think it necessary to discuss the other grounds of attack, further than to say that, as at present advised, I would not have set aside the by-law upon them or any of them alone.

The appeal should be, in my opinion, allowed, and the by-law in question quashed, the whole with costs to the appellant.

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

MEREDITH, J.A., dissented, for reasons stated in writing. He was of opinion that the appellant had waived his right, as he might, to the proceedings not taken, and was estopped from seeking the unjust advantages which he was seeking in this proceeding. Further, he was not satisfied that the work done was such as required a petition.

Appeal allowed; MEREDITH, J.A., *dissenting.*

DECEMBER 22ND, 1911.

STECHER LITHOGRAPHIC CO. v. ONTARIO SEED CO.

Judgment—Motion to Vary—Court of Appeal—Restoration of Judgment of Trial Judge—Variance as to Costs of Reference—Point not Raised in Appellate Courts—Jurisdiction.

Motion by the defendant Adam Uffelman to vary the judgment of the Court of Appeal of the 20th September, 1911 (24 O.L.R. 503, ante 34.)

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

Sir George C. Gibbons, K.C., for the applicant.

M. A. Secord, K.C., for the plaintiffs.

MOSS, C.J.O.:—This application, which, in substance, is an application to reopen the appeal and to urge objections to the judgment pronounced at the trial which were not brought before the Divisional Court nor before this Court until after judgment had been pronounced, comes late in the day, but it may be assumed for present purposes that the matter has not passed entirely beyond the power of the Court. See Con. Rule 817.

But what is sought is, to reverse the trial Judge's disposition of the costs of the reference directed. Upon reference to the learned Judge, it appears that he deliberately exercised his discretion over the costs in the way shewn in the formal judgment. Under the circumstances, it is very improbable that, even if the question had been raised before the Court upon the argument, there would have been any interference with the Judge's

disposition of these costs. It is not to be assumed, even now, that the plaintiffs will make an improper or unreasonable use of their rights on the reference, or that any attempt at such a course will not be checked or prevented by the Master or Referee.

The only order we make is, that the costs of this application be costs in the action to the plaintiffs.

The certificate will be settled in accordance with the memorandum of judgment in the Registrar's office.

GARROW, MACLAREN, and MAGEE, JJ.A., concurred.

MEREDITH, J.A.:—The difficulty that I find in acceding to the present application is as to the power of this Court to grant it.

No motion was made to the Divisional Court to vary the judgment in respect of the costs of the reference; the motion of the present applicant was only to reverse the judgment at the trial, and dismiss the action. That motion was dismissed; and, upon a cross-motion, greater relief was given to the now respondents than had been given to them at the trial.

Then this applicant appealed to this Court; but not in any manner in respect of the costs of the reference. He again sought a dismissal of the action, adding only an alternative claim for, in effect, a restoration of the judgment at the trial; and that alternative claim was allowed; but this motion is for something quite different; something not before, at any time, asked.

His position, on coming into this Court, is made very plain in the following words taken from his reasons for the appeal: "The appellant seeks to have the judgment of the Divisional Court reversed, and the action dismissed with costs, or, in the alternative, to have it declared that the appellant is entitled to a lien upon the assets in his hands to the extent of the value of the security (book-debts) held by the Merchants Bank at the time the claim of the bank was paid by the advance made by the appellant to the company."

Without exceeding the power of the Courts, I can see no way of giving effect to the application; the trial Judge is functus officio, the formal judgment at the trial having been long since entered up; the same reason, as well as the reason that no such motion was made to it, applies to the Divisional Court; and, for the double reason that no such appeal was made to that Court, or to this Court, there seems to me to be no jurisdiction here.

I would make no order.

No order except that costs of the motion be costs to the plaintiffs in the action.

DECEMBER 22ND, 1911.

REX v. TANSLEY.

Criminal Law—Indecent Assault—Evidence—Corroboration—Misdirection—Direction to State Case.

Motion by the defendant for an order directing WINCHESTER, Co.C.J., Chairman of the General Sessions of the Peace in and for the County of York, to state a case for the opinion of the Court, in regard to the trial and conviction of the defendant upon an indictment for indecent assault.

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

H. E. McKittrick, for the defendant.

E. Bayly, K.C., for the Crown.

The judgment of the Court was delivered by MOSS, C.J.O.:—Let a case be stated by the learned Chairman of the General Sessions of the Peace in and for the County of York, reserving for the opinion of this Court the following questions:—

1. Whether the evidence of Mrs. Pearson was properly admitted, as corroborative of the evidence, not given under oath, of the three children, Minnie Field, Morris Lever, and Alfred Field.

2. Whether there was misdirection in the learned Chairman charging the jury as specified in the 7th ground of objection set out in the notice of this application.

3. Whether there was any evidence corroborative of the evidence given not under oath, to submit to the jury.

DECEMBER 22ND, 1911.

REX v. YOUNGS.

Criminal Law—Offer of Bribe to Procure Office under the Crown—Indictment — Offence — Criminal Code, secs. 158 (*f*), 162 (*b*).

Case stated for the opinion of the Court, under sec. 1014 of the Criminal Code, by BRITTON, J., before whom and a jury the defendant was tried upon an indictment charging that he

did promise to pay one Robert E. Butler the sum of $1,000 to induce the said Butler to use his influence to procure the defendant's appointment to the office of keeper of the common gaol in and for the county of Oxford, and to procure the consent of the said Butler to such appointment.

The defendant was found guilty; and, at the request of his counsel, the learned Judge stated the case, in which was set forth that the material part of the evidence was, that the defendant promised Butler, a private individual (except that, being a defeated candidate for the legislature, he had the patronage of his riding), $1,000, if he would assist him in getting or recommend him for the position of gaoler of the common gaol at Woodstock.

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

J. C. Makins, K.C., for the defendant.

J. R. Cartwright, K.C., and E. Bayly, K.C., for the Crown.

MOSS, C.J.O.:—The first question, and, as it appears to us, the only one necessary to consider, is: "Does the indictment upon its face disclose an offence?"

We are of opinion that this question should be answered in the affirmative. The indictment does not purport to be framed under any particular section of the Code; but the language of the charge plainly brings it under the latter part of sec. 158 (f), viz., the case of one who offers or promises compensation, fee, or reward to another, under the circumstances and for the causes stated in the earlier part of the section.

We are also of opinion that the evidence is sufficient to sustain the conviction under sub-sec. (f) of sec. 158. And, in that view, the remaining questions appear to be immaterial and not to call for an answer. They are directed to matters that might have arisen under sec. 162(b), if the indictment had been framed under or with reference to it, but have no relation to sec. 158(f).

The result is, that the first question is answered in the affirmative, and the conviction is sustained. The other questions are not answered otherwise than as involved in the answer to the first question.

MEREDITH, J.A.:—The learned Judge met with some difficulties in applying the provisions of sec. 162 of the Criminal Code to the facts of this case; and the reserved case relates en-

tirely to such difficulties: but, as the case, as it seems to me, comes plainly within the provisions of sec. 158(f)—under which the indictment, judging from its language, seems to have been preferred—those difficulties become immaterial; the case should be dealt with under the provisions of the last-mentioned section; which, in so far as they are applicable to this case, are as follows: "Every one is guilty of an indictable offence . . . who . . . offers . . . to such person, under the circumstances and for the causes aforesaid, or any of them, any such . . . reward:" the circumstances and causes, as far as applicable, being: Every person who, by reason of possessing influence with the Government, or any Minister or official thereof, is offered such a reward for procuring or furthering the appointment of the briber, or of any other person, to any office, place, or appointment.

Section 158(f) being exactly in point, and the indictment coming quite under its provisions, there is no good reason why the trial Judge, or this Court, should be troubled with any question as to the effect of sec. 162.

GARROW, MACLAREN, and MAGEE, JJ.A., concurred.

Conviction affirmed.

HIGH COURT OF JUSTICE.

MEREDITH, C.J.C.P. DECEMBER 8TH, 1909.

BAXTER v. YOUNG.

Pleading—Statement of Claim Disclosing no Reasonable Cause of Action—Striking out—Con. Rule 261—Action for Damages for Bringing Former Action Maliciously and without Reasonable and Probable Cause.

Motion by the defendant to strike out the statement of claim as disclosing no reasonable cause of action.

R. McKay, K.C., for the defendant.
T. H. Wilson, for the plaintiff.

MEREDITH, C.J.:—I think it is quite clear that the statement of claim discloses no cause of action. It has long been settled that the bringing of an action, even although it is brought maliciously and without reasonable and probable cause, is not the foundation for an action to recover damages for the wrong done.

The reason for that conclusion being reached is, that the only damage which the person complaining suffers will be compensated for by the costs which may be awarded to him.

The law is stated in the last edition of Pollock on Torts, p. 317, in this passage: "Generally speaking, it is not an actionable wrong to institute civil proceedings without reasonable and probable cause, even if malice be proved. For, in contemplation of law, the defendant who is unreasonably sued is sufficiently indemnified by a judgment in his favour which gives him his costs against the plaintiff."

Then, in the case of Quartz Hill Gold Mining Co. v. Eyre, 11 Q.B.D. 674, Lord Justice Bowen, at p. 689, applying the test which he speaks of as to the three heads of damage referred to by Holt, C.J., in Savile v. Roberts, 1 Ld. Raym. 374, at p. 378, states the law in this way: "To apply this test to any action that can be conceived under our present mode of procedure and under our present law, it seems to me that no mere bringing of an action, although it is brought maliciously and without reasonable or probable cause, will give rise to an action for malicious prosecution. In no action, at all events in none of the ordinary kind, not even in those based upon fraud where there are scandalous allegations in the pleadings, is damage to a man's fair fame the necessary and natural consequences of bringing the action. Incidentally, matters connected with the action, such as the publication of the proceedings in the action, may do a man an injury, but the bringing of the action is of itself no injury to him. When the action is tried in public, his fair fame will be cleared, if it deserves to be cleared; if the action is not tried, his fair fame cannot be assailed in any way by the bringing of the action."

Then the other rule of law, which is very well settled, and is dealt with in Munster v. Lamb, 11 Q.B.D. 588, and has been recently re-affirmed, is, that, no matter how scandalous a statement in a legal proceeding is, and no matter how false, it is essential for the administration of justice that it may be made with impunity; for otherwise justice could not properly be administered, if people were subject to being prosecuted for what they do in the course of a proceeding.

I think the statement of claim must be struck out, under Con. Rule 261, with costs.

BOYD, C. DECEMBER 22ND, 1911.

EVEL v. BANK OF HAMILTON.

Pleading—Counterclaim—Damages for Conspiring to Bring Foundationless Action—Counterclaim Dependent on Failure of Action—Unnecessary and Embarrassing Pleading—Striking out—Con. Rules 254, 261, 298.

Motion by the plaintiff to exclude the counterclaim or to strike it out as disclosing no reasonable cause of action or as unnecessary and embarrassing.

Grayson Smith, for the plaintiff.
C. A. Moss, for the defendants.

BOYD, C.:—The plaintiff claims relief from the defendants respecting transactions of a complicated character involving accounts and the cancellation of agreements and the adjustment of shares in the defendant company.

Besides the defence proper, which has been filed for all the defendants, some of them have set up by way of counterclaim certain allegations that the plaintiff's action is without foundation and is the outcome of a conspiracy between the plaintiff and his solicitor to coerce the payment of money whereby damage of $1,000 has been suffered by the defendants.

The plaintiff now applies to remove this part of the record, under various provisions of the Rules—254, 261, 298. I am asked to strike it out as not disclosing any cause of action, on the authority of Baxter v. Young, 8th December, 1909, an unreported decision of Chief Justice Meredith, (It appears to me that this case should appear in some form in the reports accessible to the profession.)*

But here it may be that the allegation of conspiracy differs it from Baxter's case, and I prefer not to deal with the difficulty on a summary application, when a more obvious method of disposing of the application is manifest.

The counterclaim can only begin to possess an appearance of substance if the trial of the action fails on the part of the plaintiff, and there is no good purpose to be served by keeping it as a shadow of an excrescence upon the record. Under Con. Rule 254, I have power to "exclude" it, and under Con. Rule 298 to strike it out as unnecessary and tending to prejudice and embarrass the proper disposition and trial of the main action.

*See now ante 413.

This order I make—to strike the counterclaim from off the record.

The parties agreed that, if this were my decision, there should be no costs, because of earlier proceedings herein, all of which, as to the varying incidence of costs, will be hereby adjusted.

DIVISIONAL COURT. DECEMBER 22ND, 1911.

*RE ZUBER AND HOLLINGER.

Arbitration and Award—Sale of Hotel Property—Valuation of Assets—Appointment of Third Arbitrator—Interference by Parties—Proceeding with Arbitration and Taking Chances—Award Drafted by Solicitor for one Party—Amount Left Blank—Allowance for Goodwill of Hotel Business—Motion to Set aside Award—Matter not to be Determined on Affidavits—Undertaking to Bring Action on Award—Motion to be Made in Action—R.S.O. 1897 *ch.* 62, *sec.* 45—*Extension of Time for Moving—Special Circumstances—Terms—Cost—Estoppel—Contradictory Affidavits—Perjury—Investigation.*

Appeal by E. Hollinger from an order of TEETZEL, J., made upon the application of Joseph Zuber, setting aside an award of arbitrators.

The appeal was heard by FALCONBRIDGE, C.J.K.B., RIDDELL and LATCHFORD, J.J.

M. A Secord, K.C., for Hollinger.

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

RIDDELL, J.:— . . . Hollinger, in and before April, 1911, occupied the Walper House, Berlin, under a lease expiring on the 8th May. Zuber, in April, 1910, procured a lease from the landlord for one year, beginning at the termination of Hollinger's term. He made an arrangement with Hollinger to take over and pay for his property. . . . Not being able to agree as to the price to be paid, it was agreed to leave that to arbitration. The solicitor for Hollinger drew up, in pencil, an informal

*To be reported in the Ontario Law Reports.

memorandum, in the presence of the parties, which contained a clause that the question whether or not Hollinger should receive anything for goodwill was to be left to the discretion of the arbitrators. Affidavits . . . are filed that it was agreed between the parties that nothing was to be allowed for goodwill, and that the arbitration should be confined to the valuation of Hollinger's interest "in the assets in and about the said hotel premises." This is categorically denied by Hollinger and his solicitor. However the fact may be, this memorandum, when produced, has the clause providing for goodwill scored through. A draft agreement, signed by the solicitors for both parties, is also produced without this clause. . . .

The agreement (dated the 27th April) was signed and sealed by both parties. The important clauses are as follows:—

"Whereas differences have arisen between the parties hereto relative to the proper amount to be paid by Joseph Zuber to E. Hollinger in connection with the Walper House assets.

"And whereas it has been agreed between the said parties that such differences shall be referred to arbitration in the manner hereinafter set forth.

"Now this agreement witnesseth that it is hereby agreed by and between the parties hereto that the said disputes and causes of difference as hereinafter set forth shall be and they are hereby referred and submitted to the arbitration and determination of three arbitrators, one of whom shall be appointed by each of the parties hereto within one day after the delivery of these presents, and the third arbitrator shall be appointed by the two arbitrators chosen by the parties hereto, and in the event of their being unable to agree . . .such third arbitrator shall be appointed by E. J. Beaumont. . . .

"The question to be decided by the arbitrators is, what is a just and proper amount to be paid by Joseph Zuber to E. Hollinger for all the interest of E. Hollinger arising in any manner whatsoever in connection with the assets of the Walper House property . . .

"The arbitrators shall have full control over all the arbitration proceedings, and the arbitration proceedings shall not be invalid or become inoperative by reason of any act or omission on the part of the arbitrators or any one or more of them, and the award of the arbitrators or a majority of them, when made, shall be valid and binding upon the parties hereto, notwithstanding any defect or irregularity in any of the proceedings or in the making of the award. . . .

"And the said Joseph Zuber hereby agrees that he will pay

the fees and disbursements of all the arbitrators in connection with the said arbitration.

"It shall not be necessary for the arbitrators to call any evidence whatsoever unless in their discretion they think it advisable so to do; and the said arbitrators shall have the power to act as valuators and to make the award upon their own valuations."

. . .

Hollinger appointed P. J. Mulqueen his arbitrator; Zuber appointed J. Scully; and these were not able to agree upon a third. Accordingly, Mr. Beaumont . . . appointed a third, William Hassard, who is, like Mulqueen, a licensed victualler residing in Toronto. . . . I can see no reason for disbelieving Beaumont when he says that in appointing the third arbitrator his sole desire was to appoint some one having knowledge of the matters in question and who would act impartially.

The arbitration proceeded without objection. Scully swears that he and Mulqueen went over the articles and valued them, agreeing on the valuation in each instance before leaving the article, and made the value $6,001. Hassard also assisted in fixing the value on some articles. This done, Mulqueen and Hassard contended that a sum should be allowed for goodwill; to this Scully demurred. The two agreed that the award should be $14,000; Scully was in favour of $6,001 only.

Mulqueen swears . . . that he did not concur in Scully's valuations, but regarded them as valuations put upon the articles as if at a forced sale; that Hassard and he (Mulqueen), in arriving at the valuation of $14,000, took into consideration the fact that the Walper House was a licensed hotel, and that the assets were being transferred to Zuber by Hollinger as a going concern; that Scully is mistaken when he tries to make it appear that Mulqueen and Hassard allowed $8,000 for lease and license. He swears further that he regards the sum of $14,000 as a fair valuation of the assets of the Walper House as on the 27th April. . . .

Hassard swears also that the prices set by Scully were prices as at a forced sale; that no specific amount was included for the license, the lease, or for the goodwill . . . (corroborating Mulqueen).

The two, Hassard and Mulqueen, made an award for $14,000, in this form:—

"Whereas by a certain agreement in writing made between Joseph Zuber and E. Hollinger it was agreed that all matters in difference as set out in the said agreement should be referred to arbitration.

"And whereas Joseph Zuber appointed J. Scully his arbitrator, and E. Hollinger appointed P. J. Mulqueen his arbitrator, and E. J. Beaumont appointed William Hassard third arbitrator.

"Now we, the undersigned, do award and fully determine as follows, that Joseph Zuber shall pay to E. Hollinger the sum of $14,000 as a just and proper amount to be paid by Joseph Zuber to E. Hollinger for all the interests of E. Hollinger arising in any manner whatsoever in connection with the assets of the Walper House. . . ."

Before the arbitration began, the solicitor for Hollinger had prepared a draft form for the award and had handed it to Mulqueen, telling him that he did so in order that he (Mulqueen) might know in what form to draw the award; but the amount was left blank, and no suggestion made to Mulqueen as to the amount. . . .

A motion was made to set aside the award, and the motion succeeded, my brother Teetzel setting aside the award with costs, on the 26th October, 1911, upon the sole ground that the arbitrators had allowed something for goodwill. . . .

The first ground of misconduct is the alleged impropriety of the appointment of William Hassard. What is said about that is, that, when the solicitors were discussing the terms of the agreement, Hollinger's solicitor suggested to Zuber's that G. G. . . . would be a proper person to appoint, but Zuber strongly objected, and so it was left to Mr. Beaumont to appoint; that, notwithstanding this, Beaumont had telegraphed G. G. asking him if he would act; G. G. declined, but suggested William Hassard instead; that the solicitors had agreed that "neither of us should in any way interest ourselves in the arbitration or in any of the proceedings;" and that Hollinger's solicitor "directly violated" this agreement by suggesting G. G., Hassard, or R. H. G. Surely this was no worse than Zuber suggesting a Berlin merchant ("the party complaining ought to be free from blame"—per Lord Eldon in Fetherstone v. Cooper, 9 Ves. 67, 69). And, in any case, the parties knew all about the circumstances connected with the appointment of Hassard and went on and took their chance of a favourable award. It is now too late to object.

The second alleged impropriety . . . is, that Hollinger's solicitor prepared a blank award and handed it to Mulqueen. . . . This does not seem to me more objectionable than Mulqueen procuring a blank from a law stationer. . . . The cases do not decide that an award shall be set aside simply on this ground. . . .

[Reference to Fetherstone v. Cooper, 9 Ves. 67, 68; In re Underwood, 11 C.B.N.S. 442; Galloway v. Keyworth, 15 C.B. 228; Behren v. Bremer, 3 C.L.R. 40, 41; In re Manley and Anderson, 2 P.R. 354, 355, 367; Re Armstrong and Moyes, 6 O.W.R. 104.]

I am wholly unable to see any indelicacy or impropriety in the solicitor furnishing such a form; and no case has been brought to our notice deciding or indicating that there is—whatever may be the case where the award itself is prepared and not a mere blank.

Then, as to the merits, it seems to me that too much has been made of the alleged agreement that nothing should be allowed for goodwill, in view of what the arbitrators who made the award say. Whether anything should be allowed for goodwill under the general wording, "all the interest of E. Hollinger arising in any manner whatsoever in connection with the assets of the Walper House property at present belonging to E. Hollinger," we need not consider. And we could not, on the present motion to set aside the award, set aside the submission, even if obtained by fraud or mistake: Doe d. Lord Carlisle v. Morpeth, 3 Taunt. 374; Sackett v. Owen, 2 Chit. R. 39. That Zuber would be allowed to revoke his submission under R.S.O. 1897 ch. 62, sec. 3, may perhaps be doubtful after award made, even if he established fraud or mistake. But it could not, in any event, be done simply upon affidavits which are squarely contradicted. Even the fact that six persons swear one way to only two the other, is not conclusive—*penderantur non numerantur.*

In my judgment, too, the question whether the arbitrators did allow anything for goodwill should not be tried on affidavits—and the award should not be set aside on the ground that they have done so, when only one arbitrator swears to that effect and is contradicted by the others—I mean, without allowing the party in whose favour the award is an opportunity of shewing that the attack is not well-founded. . . .

The award being allowed to stand, the party in whose favour it is may enforce it by two methods—the award being nothing in itself: . . . (1) under R.S.O. 1897 ch. 62, sec. 13, enforcing it as a judgment by leave of the Court or a Judge; and (2) by action.

The Court or a Judge, on an application made under the Act, would be in no better position than we are in the endeavour to discover the truth. In a case like the present, redolent with suspicion, no doubt the practice would be followed usual when the validity of an award is doubtful, and the Court would leave

the applicant to his action—unless, indeed, the grounds were not such as could be taken advantage of in an action: Stalworth v. Jones, 13 M. & W. 466; In re Hall, 2 M. & Gr. 847. If an action were to be brought, there seems much doubt whether all the objections taken to the award upon this motion could be raised by way of defence: Smith v. Whitmore, 2 DeG. M. & G. 297; Bache v. Billingham, [1894] 1 Q.B. 107, at p. 112; Pedler v. Hardy, 18 Times T.R. 591.

It would seem that the proper course is to move to set the award aside; but there seems to be no good reason why it should not be made on a motion in an action brought to enforce the award: Halsbury, Laws of England, vol. 1, p. 475. This application is, under our statute (ch. 62, sec. 45), to be "made within 6 weeks after the publication of the award; but the Court or a Judge may, under special circumstances, allow the application to be made after the said time."

If, then, Hollinger were to bring his action to enforce the award, Zuber should be at liberty to move in the action to set it aside. Under the special circumstances, we (or, if there be technical difficulty in the way of the Divisional Court making such an order, one of us sitting as a Judge) could give leave to Zuber to make such a motion (limited as hereinafter mentioned) notwithstanding the lapse of time. Then the whole matter could be fought out on vivâ voce evidence . . . If Hollinger is willing that this course be pursued, he should have an opportunity of so doing; but, if he refuses, it would not, in my judgment, be proper to allow the award to stand.

If, then, the appellant undertakes either to abandon the award or to bring an action to enforce the same within 6 weeks, and further undertakes in the said action not to object to the regularity of a notice of motion by Zuber to set aside the award, made upon grounds set up in the present application (except those referring to the appointment of the third arbitrator and to the drafting of the award), the appeal will be allowed, costs here and below to be disposed of by the Judge trying the said action, and, if not so disposed of, to be costs in the said action to the successful party—if no action be brought ,the costs to be paid by Hollinger. If an action be brought, neither the judgment of the Court below setting aside the award, nor ours allowing the appeal, is to be an estoppel—as we express no opinion on the merits.

If Hollinger refuse this undertaking, the case is of such a suspicious character that the award should not be allowed to stand; and the appeal should be dismissed with costs.

Two solicitors swear to directly contradictory stories: one of them must be perjuring himself; they owe it to themselves and their profession to make it clear which it is.

Again, the two clients do the same thing—the one procuring four persons to back up his story: and the one arbitrator is contradicted by the other two. This is a shocking state of affairs, and loudly calls for a thorough investigation. Sometimes local officers are loath to act; the whole mass of affidavits here should be brought at once to the attention of the Attorney-General, who is charged with the supervision of the administration of the criminal law. . . .

FALCONBRIDGE, C.J., and LATCHFORD, J., agreed in the result.

DIVISIONAL COURT. DECEMBER 22ND, 1911.

*RE WEST LORNE SCRUTINY.

Municipal Corporations—Local Option By-law—Voting on—Scrutiny—Votes of Tenants—Residence—Finality of Voters' Lists—Votes of Persons not Entitled to Vote—Effect in Computing Three-fifths Majority—Inquiry as to how Ballots Marked—Municipal Act, 1903, *secs.* 200, 371.

An appeal by Damon M. Mehring from the order of MIDDLETON, J., 23 O.L.R. 598, 2 O.W.N. 1038.

The appeal was twice heard. The result of the first hearing was a disagreement of the Judges composing a Divisional Court: see ante 25.

The second hearing was before MULOCK, C.J.Ex.D., TEETZEL and CLUTE, JJ.

C. St. Clair Leitch, for the appellant.

W. E. Raney, K.C., for Dugald McPherson, the respondent.

TEETZEL, J.:—The two questions for determination upon this appeal are: (1) whether, upon a scrutiny under the Municipal Act, the County Court Judge may declare void and deduct from the result the vote of a tenant whose name was upon the certified voters' list, but who was not in fact a resident of the municipality when the list was certified, and who never afterwards became a resident therein; and (2) whether, if the County Court Judge,

*To be reported in the Ontario Law Reports.

upon such scrutiny, finds that a person whose name was upon the list, but who had no right to vote, voted, such person must disclose before the County Court Judge how he voted.

As to the first question, it is to be observed that until In re Local Option By-law of the Township of Saltfleet, 16 O.L.R. 293, it had not been decided that, upon such a scrutiny, the County Court Judge had any authority to inquire into the qualification of voters whose names appeared upon the voters' list used at the election; and, though this decision has been adversely commented upon in a number of subsequent cases (In re McGrath and Town of Durham, 17 O.L.R. 514, at p. 521; Re Orangeville Local Option By-law, 20 O.L.R. 476, at p. 477, and Re Ellis and Town of Renfrew, 21 O.L.R. 74, at p. 83), it is, until reversed, binding upon this Court. That decision, however, limited the inquiry to disqualification which arose after the date of the certification of the voters' list.

In Re Ellis and Town of Renfrew, Riddell, J., at p. 83, held that, in the case of a person whose name was upon the certified list as a tenant, but who was not, at the date of the certificate or subsequently, a resident in the municipality, and who voted, the County Court Judge had no authority, upon a scrutiny, to inquire into the right of such person to vote, as the Saltfleet case did not apply, because there had been no change of residence subsequent to the certification. On an appeal to a Divisional Court, the judgment . . . was affirmed, but the question now being considered was not passed upon . . . On an appeal . . . to the Court of Appeal, the judgment was affirmed: 23 O.L.R. 427. . . .

[Reference to the observations of Mr. Justice Garrow in that case, p. 435, as *obiter*, agreeing with the remarks of Riddell, J., in the Divisional Court which first heard the present appeal, ante 25, 27.]

In the judgment appealed from, my brother Middleton adopted the view of Mr. Justice Garrow in Re Ellis and Town of Renfrew, and held that the voters' list, while conclusively establishing that the voter was a tenant at the time of the certification, does not determine this question of residence, and that it can make no difference that the evidence upon the question of residence may incidentally disclose the fact that the voter ought not to have been upon the list at all.

In this case it appeared from the findings of the County Court Judge upon the scrutiny that five tenants voted who were not residents of the municipality at the time of the voting; that

four of them were not residents when the voters' list was certified and did not afterwards become residents; and the Judge finds that the five votes were illegal. . . . There was no determination of this question by the Divisional Court in Re Ellis and Town of Renfrew. . . .

In the Saltfleet case, 16 O.L.R. 293, the Chancellor, in discussing sec. 24 of the Voters' Lists Act, 1908, . . . at p. 302, says: "A subsequent change of residence, which would disqualify, may be investigated under sub-clause (2), but not a subsequent change of status. . . . If the farmers' sons votes struck off as non-resident became so non-resident subsequently to the list being certified, that might be dealt with upon proper evidence by the County Court Judge. The Judge has, therefore, exceeded his jurisdiction in going behind the ballot papers and the voters' list in these particulars, and he should be enjoined. Mabee, J., concurred in this judgment.

This construction was also adopted in Re Orangeville Local Option By-law, 20 O.L.R. 476.

The effect of the decision in the Saltfleet case, in thus limiting the inquiry, was not discussed by Mr. Justice Garrow in his dictum in Re Ellis and Town of Renfrew; and I learn from my brother Middleton that, upon the argument in this matter before him, counsel for both parties assumed that the Court of Appeal in Re Ellis and Town of Renfrew overruled on this point the judgment in the Saltfleet case.

Although it leads to the incongruous result that, while the vote of tenant A., who may have become a non-resident a month or more before the list was certified and remained a non-resident until after the election, is good, the vote of tenant B., who did not become a non-resident until a day before the election, is bad, and although sec. 86 of the Municipal Act, 1903, requires, inter alia, as a qualification of tenant voters that they must have resided within the municipality "for one month next before the election," the decision in the Saltfleet case is, nevertheless, binding upon this Court. Following it, therefore, it must be held that the votes of the four tenants who were non-resident when the list was certified cannot be attacked on the scrutiny. With these votes held good, the County Court Judge must certify to the municipality that the by-law was carried.

While it would, therefore, be fruitless for him now to inquire how the ballot of the one illegal vote was marked, as he is directed to do by the judgment appealed from, the question of his right to do so is of sufficient importance for determination by

this Court, although the result would not be affected if he found that such voter had marked his ballot against the by-law.

Section 200 of the Municipal Act, 1903, provides that "no person who has voted at an election shall, in any legal proceeding to question the election or return, be required to state for whom he has voted." . . .

[Reference to the opinion of MIDDLETON, J., in this case, 23 O.L.R. 598.]

With the greatest possible respect for the opinion of my learned brother, I am unable to adopt it in this case, because I think it is precluded by authority. . . .

[Reference to In re Lincoln Election Petition, 4 A.R. 206, 210, 212; Haldimand Election Case, 1 Ont. Elec. Cas. 529; Rex ex rel. Ivison v. Irwin, 4 O.L.R. 192; Re Orangeville Local Option By-law, 20 O.L.R. 476, 477.]

It is to be observed that the language of sec. 200 is, "no person" who has voted, etc., not "no voter," etc.; so that it follows that such person, if his name was on the list, is clearly protected if he actually voted, although he may not have had a legal right to vote.

The appeal must, therefore, be allowed and the order amended by striking out in the first paragraph all the words after "qualified voters voting thereon" and by striking out the second and third paragraphs; and I think there should be no costs either here or below.

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

MULOCK, C.J., also concurred.

TEETZEL, J. DECEMBER 23RD, 1911.

FOSTER v. MITCHELL.

Partnership—Account—Period of Accounting—Stated Account—Estoppel—Valuation of Assets — Book-debts — Capital — Goodwill of Business Taken over— Valuation as Asset—Interest—Compound Interest—Depreciation of Plant—Loan—Repayment of Part—Profits—Findings of Referee—Appeal.

An appeal by the defendant from the findings of His Honour Judge Chadwick, to whom, as Special Referee, the action was referred for trial.

The action was for a declaration of the rights of the parties, as partners, a dissolution of the partnership, the appointment of a receiver, and for the taking of partnership accounts, etc.

I. F. Hellmuth, K.C., and C. L. Dunbar, for the defendant.
F. E. Hodgins, K.C., for the plaintiff.

TEETZEL, J.:—While the learned Referee's findings do not specifically determine the proportionate interests of the parties in the partnership estate under the agreement, or whether, as alleged in the statement of claim, the factory, plant, and machinery existing thereon on the 1st August, 1899, as well as the buildings, etc., placed there since that date, belonged to the defendant, there is no serious dispute as to the terms of the partnership agreement except on the question of goodwill, which I will discuss later.

The agreement was an oral one, which was intended to be, but never was, reduced to writing. Under it, the partnership between the plaintiff and the defendant was to begin on the 1st August, 1899, and was to continue for three or five years. The following salaries were to be paid: to the plaintiff, $1,250; to the defendant, $1,500; and to Cutten and Engeland, $1,000 and $750 respectively. These two gentlemen were parties to the agreement as employees, upon a profit-sharing basis.

In addition to his salary, the plaintiff was to be entitled, if he desired, to draw $250 a year additional out of his profits; and, with this exception, all profits were to remain in the business for three years.

The plaintiff was to be entitled to 25 per cent. of the profits; the defendant, to 40 per cent.; and the remaining 35 per cent. went to Cutten and Engeland, whose rights under the agreement were declared in Cutten v. Mitchell, 10 O.L.R. 734, at p. 739.

Since the termination of the engagement of Cutten and Engeland, on the 1st August, 1905, the plaintiff has been entitled to 25-65ths, and the defendant to 40-65ths of the profits of the partnership.

The defendant had for a number of years carried on business under the name of "The Guelph Carriage Top Company," and by his agreement with the plaintiff the plaintiff was to become a partner in that business without contributing any capital, all of which was to be contributed by the defendant, and was to consist of his stock-in-trade, buildings, plant, machinery, book-accounts, and other assets of the business as a going concern then

being carried on by the defendant. The defendant was to take stock, and was intrusted to value all the said assets, and he was to be paid interest at six per cent. per annum on the amount so ascertained.

The first finding complained of is, that the plaintiff is entitled to an account of the partnership dealings from the 1st August, 1899, to the 5th January, 1909 (date of dissolution). The defendant seeks to confine the accounting to the period subsequent to the 1st August, 1905, up to which time, he contends, an account was prepared by him of the partnership affairs for use in settling the claim of Cutten and Engeland; and he contends that the plaintiff accepted that statement as satisfactory to him, and also that he is estopped by laches and acquiescence from going behind that.

In his written reasons for judgment, the learned Referee seems to have carefully considered the evidence bearing upon this question, which, as he points out, is conflicting, and has found in favour of the plaintiff upon it. Having carefully perused the evidence myself, I can find no reason for disturbing that finding, except as to the item of goodwill, to be considered later. I do not think the plaintiff is precluded by anything that appeared in that account, other than the valuation placed by the defendant upon the items, except book-accounts, which made up his capital.

The next finding complained of is, that "the accounts receivable of the defendant at the inception of the partnership should be reduced by $2,149.96." The amount at which the defendant purported to value the book-accounts, when making up the amount of the capital which he was putting into the partnership, was $4,527, which was apparently their face value according to his books, and which was entered as their value without any effort having been made to get at their actual value. Some of these accounts were plainly worthless at that time; and subsequently the defendant, of his own motion, as I understand the evidence, charged back or wrote off as bad in all $2,149.96.

There being nothing in the evidence to warrant a finding that the plaintiff ever agreed to or acquiesced in the value of these accounts being fixed at $4,527, and the defendant having himself conceded that the amount should be reduced by $2,149.96, there is no reason why he should not be concluded by his own just interpretation of the rights of the parties. I agree, therefore, with this finding.

The next finding complained of is, that the capital of the de-

fendant at the inception of the partnership should be reduced by the sum of $5,000, constituting the item of goodwill.

It is not pretended by any of the parties that the item of goodwill was expressly mentioned as an asset of the defendant which was to be valued and the amount thereof to be included in the capital which the defendant was putting into the partnership. But the fact is, that the defendant did fix its value at $5,000, and placed that sum to his credit in his private ledger with the other items representing values of his assets contributed; and, while the plaintiff disclaims ever having seen this ledger until this action was brought, it is established by his own evidence that, when the defendant made up the account for the purpose of the action of Cutten v. Mitchell, this item of $5,000 for goodwill was included and was discussed with the defendant, and that, to his knowledge, the share of profits allowed to Cutten and Engeland was affected by the charge. As one of the defendants in that action, he got the benefit of this item as against the plaintiffs therein; but, apart from any question of acquiescence in this item, I think, on the undisputed facts and the law applicable, the defendant is entitled to succeed upon the appeal from the learned Referee in regard to it.

As already stated, the defendant had been carrying on business for several years under the trade name of "The Guelph Carriage Top Company," which was to be continued by the partnership; and I think the proper conclusion from the evidence is, that the business had been fairly successful, that the articles manufactured had acquired a good reputation, and that an extensive and valuable trade connection had been established by the defendant; and, therefore, I think the defendant in fact had acquired an asset in the business in the nature of goodwill which was capable of valuation either upon a sale outright or upon converting it into a partnership concern.

As stated in Lindley on Partnership, at p. 476, the expression "goodwill," when applied to a business, "is generally used to denote the benefit arising from connection and reputation, and its value is what can be got for the chance of being able to keep that connection and improve it." Or, as put by Lord Macnaghten in Inland Revenue Commissioners v. Muller, [1901] A.C. 217, at pp. 223-4: "It is the benefit and advantage of the good name, reputation, and connection of the business; it is the attractive force which brings in custom; it is the one thing which distinguishes an old-established business from a new business at its first start." See also Trego v. Hunt, [1896] A.C. 7; and Hill v. Fearis, [1905] 1 Ch. 466.

The proposition that the terms of the partnership agreement in this case were sufficiently comprehensive to include the taking over of the defendant's goodwill without that item of his business being specifically mentioned, is abundantly supported by Jennings v. Jennings, [1898] 1 Ch. 378, where, in a compromise agreement settling a partnership action, A. was to retain the "assets," and it was held that, though not specifically mentioned, the goodwill of the business was included; and by In re Leas Hotel Co., Salter v. Leas, [1902] 1 Ch. 332, where it was held that the word "property" was sufficient to include goodwill in the business, though not specifically mentioned. See also In re David and Matthews, [1899] 1 Ch. 378.

The next item appealed against is the finding that the defendant is not entitled to charge compound interest.

The appeal as to this item must be dismissed, because there was no agreement between the parties to pay compound interest, and in fact no other agreement established as to the payment of interest except the one providing for paying the defendant interest at the rate of 6 per cent. on the amount of his capital; and that, of course, in the absence of further agreement, must be computed at simple interest.

There was no provision for a partner receiving interest on profits allowed to remain in the business; and, therefore, none should be allowed.

The next item appealed against is the finding that the profit and loss account of the firm should not be charged with depreciation on buildings, plant, and machinery. During the course of a business, it is perfectly proper, as a matter of book-keeping, in ascertaining the value of the assets for determining the profits of any year, to charge against profit and loss account the actual estimated depreciation during the year in buildings, plant, and machinery, or an agreed amount or percentage; but, as I understand, it is contended by the defendant that the arbitrary percentage charged up for depreciation is too large, and one which he never assented to, and is not bound by, and that the buildings, plant, and machinery accounts do not truly represent the present value of those assets.

In the first place, the evidence fails to satisfy me that the plaintiff is bound by any charge that has been made in the books for depreciation; and, I think, in the winding-up proceedings he is entitled to have the actual value of all the assets as of the 5th January, 1909, ascertained, quite apart from any values thereof that may appear in the books.

In the result, therefore, the finding is right, so far as it holds that the amount for depreciation charged up in the books is not binding on the plaintiff.

The last finding complained of is in reference to interest on the sum of $3,500 borrowed by the defendant on a mortgage of real estate and which was put into the business as part of the capital, but of which $1,000 was concurrently repaid to the defendant and charged up to him.

The learned Referee holds that the defendant should not be allowed interest under the agreement upon more than $2,500. In this I think he is wrong. As between the defendant and the firm, the latter became indebted to the defendant for the whole $3,500 in the same manner that it became his debtor for the other items of capital contributed by him, and was bound to pay him interest on it in the same way.

If the defendant had first deducted the $1,000 from the loan, and only placed to the credit of the firm $2,500, he would, of course, be entitled to interest upon that sum only; but, when he drew the $1,000 from the firm, his capital account was charged with that sum, so that, as between him and the firm, his capital account upon which interest would be paid thereafter, was $1,000 less than before. Consequently, interest must be reckoned on the $3,500 and not on $2,500 only. The result is the same as it would have been had the defendant kept back $1,000 of the mortgage, in which case he would not have been charged with the $1,000, and would only have been credited with $2,500.

With these variations, I think the findings should be remitted to the learned Referee, with directions to make the following further findings:—

(1) The actual value of all the partnership property as a going concern, including goodwill, as of the 5th January, 1909; and for that purpose it is declared that, upon the formation of the partnership, everything that was put into the partnership became the property of the partnership, subject to the account in which the defendant was credited with the values; and must, in taking the accounts and making the inquiries, be treated as partnership and not as separate property: see In re Owen, 4 DeG. & S. 351, and In re Hunter, 2 Rose 382.

(2) The actual amount of all liabilities, including the liability to the defendant on his capital account, as of the 5th January, 1909.

(3) The state of the personal accounts of each partner between himself and the firm on the 5th January, 1909.

With the value of all assets and the amount of all liabilities ascertained, the difference, assuming solvency, will shew the amount of undivided profit to be apportioned between the parties according to their respective interests therein, and to be credited to their respective accounts.

If either party desires any additional inquiry to be directed, it may be spoken to before me any day during vacation, upon notice.

The costs of the appeal should be costs in the cause.

MEREDITH, C.J.C.P. DECEMBER 23RD, 1911.

*RE ROBERTSON AND DEFOE.

Vendor and Purchaser—Contract for Sale of Land—Building Restrictions—Covenant—Detached Houses—Use as Residences—Use for Purposes of Trade or Business—Apartment Houses—Trade of Letting Apartments—Nuisance.

Motion by the purchaser under the Vendors and Purchasers Act with respect to his objections and requisitions on the title to certain land.

F. J. Dunbar, for the purchaser.
R. D. Hume, for the vendor.

MEREDITH, C.J.:—The vendor's title is derived through a conveyance from the Hallam estate to the Provident Investment Company Limited, which contains a covenant on the part of the grantees that every residence erected on the land shall be a detached house, that the land shall be used for residential purposes only, and that no buildings erected on any part of the land shall be used for the purposes of any profession, business, trade, or employment, save and except that of a duly qualified physician or dentist, or for any other purpose whatsoever which might be deemed a nuisance.

By the terms of the contract of sale between the vendor and the purchaser, the land is subject to certain building restrictions, which are to remain in force for 25 years from the 1st April, 1911. These restrictions, so far as they are material to the present inquiry, are that:—

*To be reported in the Ontario Law Reports.

"(1) No detached or semi-detached house shall be permitted, and one detached three-suite dwelling-house and no more and not more than three storeys in height, with or without suitable coach-houses, outhouses, and stabling . . . may be erected and standing at any one time on any one parcel of land having at least 58 feet of frontage. . . .

"(2) No such building or the land appurtenant thereto shall be used during said period for the purpose of any profession (save of a duly qualified doctor or dentist), business, trade, sport, or employment, or for any purpose which might be deemed a nuisance, but may be only used for residential purposes."

There is nothing in the material before me to indicate what is meant by "detached three-suite dwelling-house;" but my understanding, as gathered from the statements of counsel, is, that what is intended is a detached dwelling-house divided into three suites of apartments, each of which is to be separately let and occupied, and that there is to be but one front door and a common entrance and staircase leading to the suites.

The purchaser's principal objection is, that the erection of this three-suite dwelling-house would constitute a breach of the covenant, in the conveyance to the Provident Investment Company Limited, that every residence shall be a detached house; and it is also objected that such a house would be used for the purpose of a trade or business, and that its use would, therefore, constitute a breach of the covenant that no building erected on the land should be used for the purpose of any profession, business, trade, etc. It was also, though but faintly, argued that the use of the house by letting it in suites for separate occupation would or might be a breach of the covenant that no building erected on the land should be used "for any other purpose that might be deemed a nuisance."

In my opinion, this last objection is not well-founded. I cannot imagine how the occupation of the three suites as separate residences could possibly in itself be deemed a nuisance; and, if any of the suites was so occupied as to constitute a nuisance, the nuisance would not be caused by anything which the purchaser is to be permitted to do; and, besides, among the vendor's restrictions is one at least as wide as that to which the covenant extends, as to using the building for any purpose that might be deemed a nuisance. See Harrison v. Good, L.R. 11 Eq. 338.

In order to ascertain the scope and effect of the covenants of the Provident Investment Company, regard must be had to the

object which they were designed to accomplish: Ex p. Birrell, In re Bowie, 16 Ch.D. 484; and the language used is to be read in "an ordinary and popular, and not in a legal and technical, sense:" per Collins, L.J., in Rogers v. Hosegood, [1900] 2 Ch. 388, 409.

I have no doubt that the use of the three-suite dwelling-house for the purpose for which it is designed would be a use for residential purposes, and not for the purpose of a business or trade, within the meaning of the covenants.

There are some observations of Farwell, J., in Rogers v. Hosegood, at p. 394, indicating that, in his opinion, if a large building which is to be used as thirty or forty separate residential flats could be regarded as a private residence, the owner would be carrying on the trade of letting apartments. It may be that he was of that opinion because of the large number of separate flats; but, however, that may be, I am, with great respect, of a contrary opinion. It would be rather a surprise to an owner of houses who lets them to tenants, to be told that he was carrying on the trade of letting houses; and, if such a person does not, as I think he does not, carry on that trade, I do not see how the case is differed where, instead of letting separate houses, he lets separate flats in one house.

I have had more difficulty in reaching a conclusion as to whether or not the erection of a three-suite dwelling-house, where the suites are intended to be separately let and separately occupied, would constitute a breach of the covenant that every residence erected on the land shall be a detached house; but my conclusion is, that it would not.

The cases draw a distinction between a covenant of this nature, which deals only with the character of the physical structure which is prohibited, and one which deals with the internal arrangement of the structure or the purpose for which it is used; but the line of demarcation between the two covenants is not well-defined. . . .

[Reference to Attorney-General v. Mutual Tontine Co., 1 Ex. D. 469; Yorkshire Insurance Co. v. Clayton, 8 Q.B.D. 421, 424; Grant v. Langston, [1900] A.C. 383; Kimber v. Admans, [1900] 1 Ch. 412; Rogers v. Hosegood, [1900] 2 Ch. 388; Airdrie v. Flanagan, 43 Sc. L.R. 422; Bristol Guardians v. Bristol Waterworks Co., 28 Times L.R. 33, [1911] W.N. 208; Ilford Park Estates Limited v. Jacobs, [1903] 2 Ch. 522.]

In my opinion, the determining factor in Rogers v. Hosegood was the use of the word "private" qualifying the word "re-

sidence." There is no such qualifying word in the covenants I have to construe; and the only limitation upon the user to which any building erected on the land may be put is, that the land shall be used for residential purposes and that no building erected on any part of it shall be used for the purpose of any profession, business, trade, or employment (save and except that of a duly qualified physician or dentist) or for any other purpose whatsoever which might be deemed a nuisance. . . .

[Reference to Halsbury's Laws of England, vol. 17, p. 240, note (*e*), as to the decision in Rogers v. Hosegood.]

Applying the principle of these cases, so far as I am able to extract any principle from them, I come to the conclusion that the dwelling-house which the purchaser is to be permitted to erect constitutes one residence only, and none the less so because the suites into which it is to be divided are to be separately let and separately occupied; and, for the reasons I have mentioned, I am of opinion that neither the erection of the proposed three-suite dwelling-house nor its use for the purposes for which it is designed would constitute a breach of any of the covenants in the conveyance from the Hallam estate to the Provident Investment Company Limited.

I make no order as to costs.

DIVISIONAL COURT. DECEMBER 23RD, 1911.

WRIGHT v. OLMSTEAD.

Limitation of Actions—Possession of Land—Acts of Ownership —Insufficiency—Highway—Dedication—Plan—Informality in Registration—1 *Geo. V. ch.* 42, *sec.* 44.

Appeal by the plaintiff from the judgment of the Junior Judge of the County Court of the Counties of Leeds and Grenville, dismissing an action brought in that Court for a declaration that the plaintiff was the owner and entitled to possession of certain land, and for damages.

The appeal was heard by MULOCK, C.J.Ex.D., TEETZEL and CLUTE, JJ.

G. F. Henderson, K.C., for the plaintiff.

J. A. Hutcheson, K.C., for the defendant.

MULOCK, C.J.:—The plaintiff claims title by possession to a certain strip of land. Ambrose Olmstead, the defendant, owned a farm fronting on the Queen's Highway in the township of Kitely; and, intending to sell off a portion thereof in lots, caused a plan to be prepared which shewed two lots Nos. 6 and 7 fronting on the Queen's Highway, and between them the strip in question, which was forty feet wide and extended back from the Queen's Highway the whole depth of lots 6 and 7, when it reached Ambrose Olmstead's remaining land, then occupied by him and his family as a farm. This plan was deposited unregistered in the registry office in 1862. By deed dated the 12th March, 1886, Ambrose Olmstead conveyed to Silas E. Cooledge lot No. 6 as laid out on the plan in question; and by deed dated the 7th April, 1893, Silas E. Cooledge conveyed this lot to Thomas Herbert Cooledge, and by deed dated the 28th February, 1910, Thomas Herbert Cooledge conveyed this lot to the plaintiff. By deed dated the 2nd February, 1911, Thomas Herbert Cooledge granted to the plaintiff his interest in the strip in question.

In each of these conveyances, lot No. 6 is described by reference to the plan therein said to have been registered. On this plan the strip is marked "William street." The plaintiff alleges that Thomas Herbert Cooledge had obtained title by possession to this land, and that such title passed to him under the conveyance from Thomas Herbert Cooledge.

To succeed, the plaintiff must shew: (*a*) actual possession for the statutory period by himself and those through whom he claims; (*b*) that such possession was with the intention of excluding from possession the owner or persons entitled to possession; and (*c*) discontinuance of possession for the statutory period by the defendant and all others, if any, entitled to possession. If he fails in any of these respects, he fails to establish a right to possession: Marshall v. Smith, [1895] 1 Ch. 641; Littledale v. Liverpool College, [1900] 1 Ch. 19 (C.A.).

The evidence as to the user of this strip is as follows. The defendant continued to occupy and use as a farm his land adjoining the strip in question in the rear; and Thomas Herbert Cooledge, with the consent of the defendant, given through his son William, erected a rail fence across the rear of the strip in 1886, such consent being given on the understanding that the fence was to remain only so long as the defendant was willing. At this time there was a rail fence on the front of the strip.

The deeds under which Silas E. Cooledge and Thomas Her-

bert Cooledge acquired title to lot 6 describing their land according to the plan alleged to have been registered, and the strip being described on this plan as "William street," they took with notice that the strip was intended to be dedicated as a public highway.

Prior to the conveyance of lot No. 6 to Silas E. Cooledge, the defendant sold and conveyed lot No. 7 to Annie Ferguson, and she continued to occupy it for 20 years, and throughout that period to make certain use of the strip.

The acts relied upon by the plaintiff as shewing possession by him are: the erecting of a rail fence on the rear, and later a picket fence with a gate in it on the street line; cultivating a part of the rear of the strip; playing croquet on the front portion; and occasionally piling fuel upon it, and once certain building material.

The cultivation consisted of the ploughing and planting by Thomas Cooledge of a small piece along the rear of the strip, said to have been about ten or twelve feet wide . . . and is said to have been begun some 20 years ago. . . . It is shewn that the area so cultivated was gradually increased, but the extent under cultivation at any particular time is not shewn. In thus using the land, Thomas Herbert Cooledge says: "I never owned it, and, as no one objected, was willing to use it."

The use of the front part for croquet was only for two or three years—Miss Ferguson joining with Thomas in thus using it as a common play-ground. It can hardly be pretended that, where two neighbours occasionally meet and play croquet on a piece of ground which neither owns, but over which each is exercising a right of way, either of them is thereby in actual possession, to the exclusion of the real owner. . . .

There was no continuous user of the land for a piling-ground. At best it was but intermittent user and not throughout the statutory period. During all this time Miss Ferguson also made use of the strip as a way to the rear of her own premises, cultivating occasionally a portion of it, also piling fuel on the strip and throwing her ashes upon it, which Thomas Herbert Cooledge was in the habit of spreading upon the land. . . .

Thomas Herbert Cooledge knew that the strip was intended to be used as a public way, and that he had no right to it except as one of the public. He admits that he was using it only until it was required for the purpose for which it was laid out. Thus his attitude was not that of a person claiming to be in possession to the exclusion of others having the right to use it; and, for this reason alone, the plaintiff fails.

Further, Thomas Herbert Cooledge's acts of user, even if intended to be to the exclusion of others having the right to use the strip, do not, I think, shew actual continuous possession for the statutory period. At no time could he be said to have been in exclusive possession of any portion of the strip.

Practically throughout the whole period, William Achison Olmstead, a member of the defendant's family, entered upon it as a matter of right whenever he desired. He was living with his father and assisting him in working his farm. In thus making use of the strip, he was acting in his father's behalf. The same observations apply in regard to William's action in repairing the rear fence from time to time. It thus seems to me that the defendant never discontinued possession.

Even if there was no evidence except as to cultivation by Thomas Herbert Cooledge, it is impossible to say what particular area, if any, was under continuous cultivation throughout the statutory period.

For each of these reasons, I think the plaintiff has failed to shew possession within the meaning of the statute; and that this appeal should be dismissed with costs.

CLUTE, J., agreed, for reasons stated in writing. He referred to Tottenham v. Byrne, 12 Ir. C.L.R. 376; Leigh v. Jack, 5 Ex. D. 264; Littledale v. Liverpool College, [1900] 1 Ch. 19.

The learned Judge was also of opinion that there was a further difficulty in the plaintiff's way. It was not for him to question the formality in regard to the registration of the plan, under which he and his predecessors in title claimed. The statute 60 Vict. ch. 27, sec. 2 (R.S.O. 1897 ch. 181, sec. 39, now 1 Geo. V. ch. 42, sec. 44), is retroactive so as to apply to all roads and streets laid out in unincorporated villages and townships; and the strip in question may have become a highway: Gooderham v. City of Toronto, 21 O.R. 120, 19 A.R. 642, 25 S.C.R. 246; Dawes v. Hawkins, 8 C.B.N.S. 848; Nash v. Glover, 25 Gr. 219; Elliott on Roads and Streets, 2nd ed. (1900), p. 969.

The learned Judge stated, however, that he rested his opinion that the appeal should be dismissed, upon the ground that the plaintiff had not shewn a possession sufficient under the statute to bar the defendant's title.

TEETZEL, J., agreed in the result.

Appeal dismissed with costs.

DIVISIONAL COURT. DECEMBER 26TH, 1911.

D'AVIGNON v. BOMERITO.

Assignments and Preferences—Chattel Mortgage Made by Insolvent—Security for Current Promissory Note and Moneys Advanced to Satisfy Execution—Assignment for Benefit of Creditors within Sixty Days after Chattel Mortgage Given —Action by Assignee—Onus—Assignments Act, sec. 5(4)—Preferential Payment—Account of Proceeds of Goods Sold.

Appeal by the defendant from the judgment of Boyd, C., ante 158.

The appeal was heard by FALCONBRIDGE, C.J.K.B., BRITTON and LATCHFORD, JJ.

J. F. Boland, for the defendant.

J. W. G. Winnett, for the plaintiff.

LATCHFORD, J.:—This appeal is from the judgment of his Lordship the Chancellor setting aside the chattel mortgage given to the defendant by his son on the 4th November, 1910. The son's assignment for the general benefit of his creditors was made on the 6th December, 1910, less than sixty days after the transaction attacked by the plaintiff. In the circumstances, 10 Edw. VII. ch. 64, sec. 5, creates the presumption that the chattel mortgage was made with intent to give the defendant an unjust preference over the other creditors of his insolvent son.

There was no evidence adduced sufficient, in the opinion of the learned Judge who heard it, to remove the onus which the statute casts upon the defendant. After a careful perusal of the evidence, I am satisfied that the facts might well have been found more strongly against the defendant. As found, however, the application to them of the provisions of the statute was, I think, quite properly made.

The appeal fails and should be dismissed with costs.

See Stecher Lithographic Co. v. Ontario Seed Co., 22 O.L.R. 577, and 24 O.L.R. 503.

FALCONBRIDGE, C.J., and BRITTON, J., agreed that the appeal should be dismissed with costs.

MIDDLETON, J. IN CHAMBERS. DECEMBER 27TH, 1911.

VANHORN v. VERRAL.

Discovery—Examination of Defendant—Disclosing Names of Witnesses—Collision—Driver of Motor-Car—Passengers in Car—Scope of Discovery—Duty of Party to Inform himself—Dismissal of Driver—Reason for.

An appeal by the defendant from an order of the Master in Chambers, ante 337, directing further discovery.

W. G. Thurston, K.C., for the defendant.
J. W. McCullough, for the plaintiff.

MIDDLETON, J.:—Three different matters were discussed. The accident giving rise to the action was a collision between the plaintiff's waggon and the defendant's automobile. On the examination the defendant declined to give the name and address of the driver of the automobile. In this he was wrong.

He also declined to give the names of the passengers in the automobile. I do not think he was bound to give this information, even assuming that he has it in his possession or power.

Potter v. Metropolitan R.W. Co., 28 L.T.N.S. 231, is in point. There the Common Pleas (Bovill, C.J., Keating, Grove, and Honyman, JJ.) allowed an interrogatory as to the names of the driver of the engine and of the servants who accompanied the plaintiff home after the accident, but refused to allow the interrogatory, "Did any and what servant or servants of the defendants witness the occurrence?" This was regarded as a "fishing" interrogatory, and its impropriety is pointed out.

The motion is based upon a statement in the course of the judgment in Caswell v. Toronto R.W. Co., 24 O.L.R. 339, at p. 353: "It does not appear even that the defendants were asked for any information as to the persons who saw the accident." This is a mere dictum in the course of a judgment pointing out that no case had been made for a new trial. I do not think this remark can be taken to overrule the well-settled law that the names of persons who may be witnesses are not to be disclosed, unless material to the case intended to be set up, *e.g.*, in actions of slander, where the speaking of the words to a particular person or persons is of the gist of the action.

This is only a particular application of the general rule that discovery must be confined to the matters in issue in the action. The issues in this action relate to the happening of the accident and the negligence of the parties; and the fact that there may

have been spectators is not relevant, nor is their identity of any importance, save as possible witnesses.

Bishop v. Bishop, [1901] P. 325, is an illustration of the kind of case in which the identity of the onlooker becomes important.

Then it is said that the driver is not now in the master's employment, and he is ordered to disclose the reason for his dismissal. This seems clearly irrelevant. On cross-examination at the trial, it may be that this question can be asked (as to this see Cole v. Canadian Pacific R.W. Co., 19 P.R. 104); but the scope of examination for discovery is not determined by the same rules: Mack v. Dobie, 14 P.R. 465.

I have read the entire examination, and am impressed with the fact that the defendant has quite failed to understand that it is his duty to qualify himself to give some intelligent statement of the case, by learning what his servants and agents know. This is not, as suggested, only the obligation of officers of corporations, but the obligation of any person who is being examined for discovery—only by a fair regard for this rule can the plaintiff be informed of the nature of the case he has to meet. As a witness the party must confine himself to his knowledge. On examination he not only may but must give his information.

For this reason, while I modify the Master's order as indicated, I leave the costs as he dealt with them, and make the costs of this appeal in the cause.

Since writing the above, I have noticed the case of Knapp v. Harvey (1911), L.J.K.B. 1228, a decision which is quite in accordance with the order made.

FALCONBRIDGE, C.J.K.B., IN CHAMBERS. DECEMBER 27TH, 1911.

REX v. PFISTER.

Liquor License Act—Magistrate's Conviction for Second Offence—Evidence—Finding of Magistrate—Review on Motion for Habeas Corpus—Real Offender—Sec. 112 *of Act—Refusal of Adjournment after Evidence Taken—Foreigner—Right to Have Interpreter—Assistance of Counsel—Discretion—Proof of Prior Conviction—Sec.* 101 *of Act—Formal Conviction.*

Motion by the defendant—who was convicted of a second offence of selling intoxicating liquor without a license, and sentenced to imprisonment—for a habeas corpus.

D. I. Grant, for the prisoner.

J. R. Cartwright, K.C., for the Attorney-General, shewed cause in the first instance.

FALCONBRIDGE, C.J.:—As to the conviction for selling liquor on the 9th November: (1) the magistrate has passed upon the evidence; (2) if I were to review his judgment, I should find it to be amply sustained by the testimony.

The prisoner brought the whisky to the woman Rio, who served it to Larkin and Wells, and they paid her. I should say he is a real and principal offender. The woman swears that he "lives with" her, and that she is in partnership with him. "They run a bar and soft drinks."

If necessary, sec. 112 can be invoked. Rex. v. Brisbois, 15 O.L.R. 264, is not this case at all.

The prisoner did not ask for an interpreter nor for an adjournment, nor at any stage of the case did he ask for the assistance of counsel, until after the evidence was in, and the magistrate had intimated that he would find him guilty.

As to the right of a foreigner at his trial to have the evidence interpreted, see Rex v. Meceklette, 18 O.L.R. 408, per my brother Riddell; Rex v. Sciarrone, 1 O.W.N. 416.

And as to the discretion of the Justice to adjourn the trial in order to procure the assistance of counsel, see Regina v. Biggins, 5 L.T.N.S. 605; Rex v. Irwing, 18 O.L.R. 320.

The remaining objection is one which I thought at the argument to be more serious, viz., whether as to the prior conviction, the provisions of sec. 101 were sufficiently or substantially complied with. I think they were. The date was mentioned by the magistrate, and the conviction had been made by the same magistrate.

In Rex v. Teasdale, 20 O.L.R. 382, the previous conviction was put in the form of a charge, to which, it was said, the prisoner pleaded guilty.

In Rex v. Simmons, 17 O.L.R. 239, the record was, "The prisoner makes a statement that he was convicted of selling between 4th October and 14th October," which might mean that he had been previously convicted of an offence against other sections, which would not warrant a later conviction under sec. 72 being treated as a second offence.

These cases, therefore, do not govern the present one.

Habeas corpus refused. No costs.

The formal conviction which has been put in since the argument sets out the prior conviction with due particularity.

MIDDLETON, J. DECEMBER 27TH, 1911.

HESSEY v. QUINN.

Costs—Reference—Ascertainment of Rebate in Rent.

Motion by the plaintiff for judgment on further directions and as to costs, reserved by RIDDELL, J., 13 O.W.R. 907.

F. E. Hodgins, K.C., for the plaintiff.
A. E. H. Creswicke, K.C., for the defendants.

MIDDLETON, J.:—The only question is as to the costs of the reference.

The defendants were wrong in their contentions disposed of at the hearing, and have paid the costs up to and including the trial.

The reference was as to the amount of the "reasonable rebate" from the rent. On the reference, the plaintiff sought to reduce the rent from $1,200 to $600 or less, and the defendants contended that the rebate should be nominal only or nothing. The Master reduced the $1,200 to $900.

No offers were made by either party differing from the contentions made before the Master. The agreement embodied in the lease made the litigation (*i.e.*, the reference) necessary, unless the parties could agree upon the amount. Had either party named an amount which the Master had accepted as reasonable, then he could have blamed his opponent as the cause of the reference; but here the result shews that each party took too extreme a view of his rights, and neither is entitled to throw the burden of his costs on the other.

I have spoken to the learned trial Judge, and he agrees with me that no other order ought to be made than that there should be no costs.

If necessary, a judgment on further directions may issue, embodying the findings of the Master, without costs.

MIDDLETON, J. DECEMBER 27TH, 1911.

CASSON v. CITY OF STRATFORD.

Municipal Corporations—By-law Reducing Number of Licenses —Submission to Electors—Motion for Injunction to Restrain — Petition for Submission — Signatures — Separate Sheets each Headed by Petition—Several Petitions—Attempted Withdrawals—Other Objections—Interim Injunction—Motion Turned into Motion for Judgment.

Motion by the plaintiff for an interim injunction to restrain the defendants from submitting to the electors a by-law reducing the number of licenses in Stratford for taverns to ten and for shops to two.

F. R. Blewett, K.C., and J. B. Mackenzie, for the plaintiff.
R. S. Robertson, for the defendants.

MIDDLETON, J.:—Under 1 Geo. V. ch. 64, sec. 21, it is the duty of the council of any city to submit a by-law for license reduction to the vote of the electors on the day fixed for the municipal election, if a petition of ten per cent. of the persons appearing to be qualified to vote is filed with the clerk on or before the 1st November.

I pointed out to counsel upon the argument that the function of the Court, upon a motion for an interim injunction, is to preserve the matters in statu quo until the hearing, rather than finally to determine the rights of the parties; and suggested that, if I came to the conclusion that an interim injunction ought to be granted, I should in effect determine the action in the plaintiff's favour, as the day fixed for voting (1st January) would be past long before the trial, and the trial Judge would be rendered impotent by my interim order. To meet the situation, I suggested that no order be made interfering with the vote, but that terms should be arranged by which the plaintiff's rights should be preserved to him, and that he should not be prejudiced by the fact of the vote if at the trial it should be made to appear that he was right. This was agreeable to the defendants' counsel, was not acceptable to the plaintiff's counsel, and I heard the motion at length upon its merits.

The main contention was based on a misunderstanding of Re Williams and Town of Brampton, 17 O.L.R. 398. That case determines that the very document signed by the petitioners must be placed before the council; and that, when the signatures are cut from the foot of a petition and pasted to a similar

petition, these names cannot be counted, because this similar petition is not the one actually signed. This is so even when what was done was done with the intention of consolidating several similar petitions and without fraud.

What was done here was this. A large number of separate petitions were circulated—these are attached and have been treated as one. Some names appear on pages of paper pasted at the foot of some of these petitions. It is said that these, when signed, were not attached. A number of signatories have made affidavits that they authorised the attaching of the pages they signed.

If all the names appearing on these added pages are disallowed, the remaining names are enough.

What is contended is, that the addition of these pages without heading was not only ineffectual to make the names appearing thereon signatures to the petition, but to destroy the actual signatures that were duly appended to the petitions. This clearly is not so. Had a name been forged, it would not invalidate all the signatures. It is not the case of a joint promissory note, not to be operative till signed by certain persons. Each petitioner gave those circulating the petition the right to obtain as many further signatures as they could.

Then it is said that this petition does not comply with the statute, because it requires "a petition," and not a number of petitions; and it is pointed out that there is some verbal discrepancy between the documents, e.g., one says "Stratford" and another "The City of Stratford."

The Interpretation Act makes the singular include the plural; and all that is necessary is, that, before the 1st November, ten per cent. of the ratepayers should in writing signify their desire to have such legislation submitted.

Before dealing with the other objections, it is convenient to give the figures.

The applicant says there are 3,783 voters. Ten per cent. would be 379 petitioners necessary. There were on the petition in all 518. So he must successfully attack 139. He says there are on

the petition not qualified.....	83
on the added sheets	32
withdrawals	32
on page 15 of petition.....	17
on page 40 of petition	13
(both attacked on special grounds)	177 in all.

In addition to 63 on the tops of the pages added to.

This still leaves him 38 names if his grounds of attack are all valid.

The case of attempted withdrawals is governed by Re Keeling and Township of Brant, ante 324, a decision of my brother Sutherland, with which I entirely agree.

The signatures on page 15 are objected to, because the heading of the petition refers to "the license year beginning 1st May, 1912." The heading is typewritten except the figures "1912," which are inserted after the word May (at the end of a line) in ink. I am asked to assume that this was inserted after signature. I decline to do so. One witness says he does not know who wrote it and does not know if it is in his handwriting. This is all the evidence.

The signatures on page 40 are objected to, because the other 39 pages were handed in at one time to the clerk, and this was handed in a little later. It is contended that this makes it a separate petition. What has already been said covers this.

Assuming success in all other cases, this will not avail the plaintiff, as this leaves the petition a substantial margin; and I, therefore, refrain from investigating the other matters.

I may point out that the applicant states that the names on the list are 3,783, and admits that there are many duplicates. So he starts from too favourable a standpoint.

There are other objections which may be noticed. "Some considerable number of petitioners signed on Sunday." I do not know why this should invalidate the petition—no cases were cited and no reasons alleged.

One Carter signed the petition. He is a member of the council. It is said this indicates such a bias as to prevent him thereafter acting as a councillor and to render void corporate action, even though purely formal in its character, as the council has no discretion, but must submit the by-law on receiving a petition.

Very many cases were cited, but none in any way justify this extraordinary proposition.

Then it is said that one alderman was not present at the special meeting at which the by-law received its preliminary reading. He was in fact absent from the Province, and from this I am asked to infer that the meeting was not duly called. I cannot do so.

In one of the publications of the by-law there was a clerical error—the word "days" being substituted for "years." This was no error in the by-law itself. I cannot grant an injunction for a printer's slip of this kind. No one was misled.

The council did not direct where the by-law was to be posted up (Municipal Act, sec. 338). The by-law was posted, and the council has ratified what was done by its agents.

I have dealt with the case as presented by the plaintiff, but desire to say that, in doing so, I do not indicate any approval of his procedure. The Court has very limited right of interference in municipal matters, and, unless the contemplated by-law is clearly ultra vires, ought not to attempt to exercise its power.

To continue this action is idle; so the motion may be turned into a motion for judgment, and the action as well as the motion is dismissed with costs.

BRITTON, J. DECEMBER 27TH, 1911.

McCLEMONT v. KILGOUR MANUFACTURING CO.

Master and Servant—Injury to Servant—Dangerous Machinery in Factory—Proper Guarding—Negligence—Contributory Negligence—Evidence for Jury—Findings—Factories Act—Voluntary Assumption of Risk.

Action for damages for injuries sustained by the plaintiff while working for the defendants in their factory, owing to the negligence of the defendants, as the plaintiff alleged.

The action was tried with a jury at Hamilton.

W. M. McClemont, for the plaintiff.

T. N. Phelan, for the defendants.

BRITTON, J.:—The defendants are owners of a factory in the city of Hamilton, and are engaged in the manufacture of boxes. The plaintiff was in the employ of the defendants; and, while at work in their factory on the 17th February, 1911, was accidentally injured. The cause of the accident was, that the plaintiff's clothing was caught by the head of a set screw which projected about one inch from the outer face of a collar or disc upon and near the end of a revolving shaft—a part of the defendants' machinery. The plaintiff charges negligence in that the defendants did not have this head of the set screw countersunk, or in some way guarded against contact with any workman or his clothing when such workman was near the revolving shaft.

The undisputed facts are briefly these. A couple of years ago—more or less—an accident happened to a boy working for

the defendants in the same shop, by reason of his being caught by the same—then unguarded—set screw. After that accident, the defendants did put a guard box or case upon and over this collar or disc, completely covering both collar and head of set screw.

The plaintiff is an intelligent and competent workman. He was foreman of the men and of the work on the floor of that part of the factory where the former accident happened and at the time it happened. The plaintiff continued to be foreman and to have an oversight of the work being done and of the machinery, including the shaft pulley, belting, and set screw, and was so when the accident happened to him.

An employee of the defendants, while at work on the machine in question, had his driving-belt broken. He could not repair it himself, so took it to his foreman, the plaintiff. Before repairing the belt, the machinery had been stopped. The plaintiff removed the covering which guarded the set screw. With this covering on, the plaintiff could not have been injured in the manner in which he was injured. The plaintiff then went into the pit or open space close by the pulley, and close to the orbit of the projecting head of the set screw. Having repaired the belt, the plaintiff, without putting the guard or protecting box back in place, started the machinery, and, with the belt in place and the guard not in place, applied belt dressing to the inner surface of the moving belt. While he was doing this, his clothing was caught by the projecting head of the set screw, he was thrown upon the moving shaft and pulley, and was severely injured.

Upon that state of facts, counsel for the defendants, at the close of plaintiff's case, moved for a dismissal of the action. I reserved my decision and decided to submit questions to the jury.

The motion for dismissal was renewed after evidence for the defence had been put in.

The questions put to the jury with their answers are as follows:—

(1) Were the defendants guilty of any negligence which occasioned the accident to the plaintiff, in not having the projecting set screw in the collar upon the shaft in defendants' factory guarded otherwise than it was guarded when plaintiff was injured? A. Yes.

(2) If so, in what respect were the defendants so guilty? A. In not having a separate guard on set screw or in not having collar on shaft with a counter-sunk set screw. Also in not having proper appliances for applying belt dressing.

(3) Did the plaintiff know and appreciate the danger of the work at which he was employed at the time the accident happened, and did he, knowing the danger, voluntarily undertake the risk? A. Yes.

(4) Could the plaintiff, by the exercise of reasonable care, have avoided the accident? A. No.

(5) Amount of damages? $1,000.

There was no evidence that the guard when over the set screw was insufficient, and it was only unguarded when put in that condition by the plaintiff himself. The plaintiff's contention was, that it was part of his work to apply belt dressing, and this should be done when belt on and machinery in motion—that it was reasonably necessary for any person, in applying this belt dressing, to go into the pit close beside the shaft; and to go into that place it was necessary to remove the usual set screw guard; and that it was negligence on the part of the defendants not to have the head of the set screw guarded against danger to the workmen—when on duty in the place mentioned and when machinery in motion. There was evidence that the head of the set screw could have had a guard for protection of workmen in pit when machinery in motion, or that the head of the screw could have been counter-sunk.

The question of sufficiently guarding, or of guarding the machinery "so far as practicable," is one of fact, and, therefore, is for the jury; so the defendants' motion for dismissal of the action cannot prevail.

Then as to contributory negligence. There certainly was very strong evidence of that, but I cannot say that it was so conclusive and undisputed as to have it withdrawn from the jury. There was evidence that there was another way of applying the belt dressing.

The defendants also contend that upon the answer of the jury to the third question the defendants should have judgment.

The authorities cited by the plaintiff's counsel, viz., Dean v. Ontario Cotton Mills Co., 14 O.R. 119, Rodgers v. Hamilton Cotton Co., 23 O.R. 425, Love v. New Fairview Co., 10 B.C.R. 330, are against the defendants.

The maxim "volenti non fit injuria" does not apply when an accident is caused by the breach of a statutory duty.

The finding of the jury of negligence in not having proper appliances for applying the belt dressing may be entirely disregarded. There was no charge in the statement of claim or in the evidence of any such negligence. There was evidence that

it was possible and practicable to have a counter-sunk set screw, or to have the set screw further guarded.

The case is certainly very close to the line upon the two questions: first, as to there being any evidence of negligence or breach of the Factories Act which should properly be submitted to the jury; second, as to there being conclusive evidence of contributory negligence on the part of the plaintiff; but, in the view I take, the case could not have been withdrawn from the jury.

There will be judgment for the plaintiff for $1,000 with costs.

CANADIAN CONTRACTING AND DEVELOPMENT CO. v. JAMIESON—BRITTON, J.—DEC. 22.

Contract—Carriage of Goods—Payment by Weight—Breach of Contract—Delay—Action by Carriers for Damages.]—Action for damages for breach by the defendants of a contract made in December, 1910, whereby the plaintiffs agreed to freight and carry for the defendants from 1,000 to 1,200 tons of supplies from warehouse No. 1 on Ombabika Bay, on the north shore of Lake Nepigon, to that portion of the located line of the National Transcontinental Railway between mileage 90 and mileage 160, district E., on the terms and conditions set forth in the contract. The freight payable was 2¼ cents per 100 lbs. per mile. The defendants, in addition to having the goods ready for transport, were to furnish hay for the horses at $31.50 per ton, and oats at $2.10 per sack of 3 bushels; and the defendants further agreed to "cut all roads to the different points of delivery." The breach of contract alleged was, that the defendants did not cut roads to the different points of delivery and did not maintain and keep in repair for freighting whatever was necessary and convenient for the use of the plaintiffs. The plaintiffs claimed damages for delay at warehouse No. 1, at the rate of $10 per day per team and man, estimated at $4,480, giving credit for $1,023.70 earned in other work during the alleged delay, leaving $3,456.30 as the amount claimed. For a distance of about eight miles from warehouse No. 1 and on towards the points where the plaintiffs were to deliver the goods, a road had been cut by the Nepigon Construtions Company. On the 9th January, 1911, when the plaintiffs were ready to receive their loads from warehouse No. 1, they were notified in writing, by one McQuigge, purporting to act on behalf of the Nepigon Construction Company, that, if they (the

plaintiffs) wished to use the road, the Nepigon Company would demand $1,100. There was also a written notice posted upon the road forbidding trespassers. After receipt of the notice, the plaintiffs did not attempt to go on with their loading. This was the delay for which damages were claimed. BRITTON, J., was of opinion that the notice was not a sufficient reason for the plaintiffs desisting. There was no breach of the contract proved; and the defendants were not liable for the delay at warehouse No. 1. They certainly were not liable for the delay before the 9th January, On the 10th January, the plaintiffs received information that the supplies would be allowed to go forward over the road. Had that been acted upon, the delay would have been reduced to three days at most for each team delayed. The plaintiffs' excuse for the longer delay was, that, having been stopped by the notice, they hired their teams to haul cement, and could not put them on the defendants' work until the cement contract was at an end. That was not a good reason why the defendants' liability, if they were liable at all, should be so enormously increased; but, at any rate, the excuse was answered by the defendants by shewing that if the same loads had been taken in hauling cement as the plaintiffs said they could take in transporting, there would not have been any loss. The defendants were always ready to receive the supplies when the plaintiffs were ready to deliver; and all other matters were satisfactorily dealt with except those specifically complained of in this action. Action dismissed with costs. F. H. Keefer, K.C., for the plaintiffs. R. J. McLaughlin, K.C., for the defendants.