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APPELLATE DIVISION.

JANUARY 25TH, 1915.

HUMBERSTONE v. TORONTO AND YORK RADIAL R.W. CO.

Street Railway—Injury to Person on Highway—Negligence—Evidence—Findings of Jury—Motion for Nonsuit—Speed of Car—Sounding Whistle—Ontario Railway Act, R.S.O. 1914 *ch.* 185, *sec.* 155—*Contributory Negligence—Ultimate Negligence.*

Appeal by the defendants from the judgment of MEREDITH, C.J.C.P., of the 17th November, 1914, upon the findings of a jury, in favour of the plaintiff, for $1,000 and costs, in an action for damages for personal injuries sustained by the plaintiff by being struck by a car of the defendants upon a highway.

The appeal was heard by FALCONBRIDGE, C.J.K.B., HODGINS, J.A., and LATCHFORD and KELLY, JJ.

C. A. Moss, for the appellants.

M. K. Lennox, for the plaintiff, respondent.

The judgment of the Court was delivered by FALCONBRIDGE, C.J.K.B.:—This is an appeal from the judgment of the Chief Justice of the Common Pleas, pronounced at the trial of the action with a jury.

The action is for damages for injuries which the plaintiff sustained by reason of the alleged negligence of the defendants in operating an electric car on Yonge street, in the village of Newtonbrook.

The jury answered questions, and the learned Chief Justice on their answers entered a verdict for the plaintiff for $1,000.

Several grounds were taken in the notice of appeal, but the only one relied on was that there was no evidence in support of the findings in the plaintiff's favour, and that therefore there should have been a nonsuit.

The learned Chief Justice who tried the case has put himself upon record in more than one reported judgment as to the imperative duty of the Judge at *nisi prius* to enter a nonsuit in a proper case, and not to expose the defendants to the peril of something being developed in their own case or in the reply to strengthen the case originally put forward by the plaintiff. So that it may be taken for granted that the Judge here was clearly of opinion that there was a case which could not be withdrawn from, but must be submitted to, the jury.

A careful perusal of the evidence, with the assistance of the plan which was not before us at the argument, satisfies me that the Chief Justice could not have withdrawn the case from the jury. There was abundant evidence on the question of the speed of the car. As to the sounding of the whistle, the Ontario Railway Act, R.S.O. 1914 ch. 185, sec. 155, has no application. This car was not approaching a highway, it was travelling along a highway; but there is a duty imposed on a railway company to give a warning under conditions when such warning would be necessary. On both these points the jury found in favour of the plaintiff.

As to the question of contributory negligence on the part of the plaintiff, that was a matter for the jury, who found that he could not, by the exercise of ordinary care, have avoided the injury.

In view of this finding, the last question as to the ultimate negligence of the driver of the car became unnecessary, but that question also has been answered in favour of the plaintiff.

The appeal must be dismissed with costs.

JANUARY 25TH, 1915.

*PRICE v. FORBES.

Building Contract—Architect's Certificate—Claim of Building Owner for Bad Material and Improper Performance of Work — Finding of Referee that Amount Paid Exceeds Value of Work Done — Collusion between Builder and Architect—Construction of Contract—Specifications—Appeal from Findings of Referee—Costs.

Appeal by the plaintiff from the judgment of J. A. C. Cameron, an Official Referee, dismissing an action or proceeding to recover the amount due for work done under a building contract, and to enforce a mechanic's lien.

*To be reported in the Ontario Law Reports.

The appeal was heard by FALCONBRIDGE, C.J.K.B., HODGINS, J.A., LATCHFORD and KELLY, JJ.

M. K. Lennox, for the appellant.

R. H. Holmes, for the defendant, respondent.

The judgment of the Court was delivered by HODGINS, J.A.:—Mr. Lennox did not attack any of the findings of the Official Referee appearing in the report appealed from, but contended that the appellant was entitled to judgment for the amount of the architect's certificate for $1,400, dated the 3rd June, 1913, which the respondent had refused to pay. He contended that it was conclusive as between the appellant and respondent, no matter whether the respondent had a claim arising out of the non-completion of the work or from its improper performance.

This contention leaves out of sight the meaning of the contract in this case, as well as the effect of the Referee's findings, supplemented as they were by a certificate procured, at the suggestion of the Court, by the parties.

An architect's certificate may be made, by express agreement, final and binding on both the owner and contractor, and in that sense conclusive as between them. But, as pointed out by the judgment of the Court of Appeal in Smallwood Brothers v. Powell (1910), 1 O.W.N. 1025, that result by no means follows if the contract itself affords evidence that the certificate is not finally to settle the matters which it deals with, and does not absolve the contractor from responsibility for work badly done or omitted. See also Watts v. McLeay (1911), 19 W.L.R. 916, and Contractors Supply Co. v. Hyde (1912), 3 O.W.N. 723.

In this case no payment is to be made except on the architect's certificate "that a certain amount of work has been done to their (sic) satisfaction." Payment is to be made "at the rate of 80 per cent. on the value of work executed from time to time, and of the remainder a further 10 per cent. on the certified completion of the work, and the balance of 10 per cent. within six months after the architect has certified that the works are completed to his satisfaction." It is not stated in the architect's certificate here what amount of work has been done; and the finding of the Referee is, that "the amount paid by the defendant on account of the said contract far exceeds the value of the work done and material furnished." This affords a complete answer to the claim; for the appellant is entitled to only 80 per cent. of that value, and he has already received more than 100 per cent. thereof.

Apart from that, however, the certificate is not conclusive. Payment on any certificate is not, by the terms of the specifications, to exonerate the contractor from liability for any defect attributable to bad material or bad workmanship. The Referee found that the material was bad and the work improperly done. If payment of the amount of a certificate forms no bar to the contractor's liability, then, à fortiori, the giving of the certificate can put the matter in no better position.

But it is unnecessary to consider this point further, for the report charges the architect with improperly issuing this certificate, and the Referee's later finding states that both the appellant and the architect knew, when the certificate was given, that there was nothing due from the owner: a clear case of fraudulent collusion.

It may be noted that in Hickman v. Roberts, [1913] A.C. 229, the House of Lords has decided that improper interference by a contractor with the architect, in forbidding him to issue a certificate, was sufficient in itself to shew that the architect had abandoned his attitude of impartiality, and that the obtaining of his certificate was therefore not a condition precedent to recovery of the amount properly due.

I have not considered whether the contract limits the appellant to his commission of 10 per cent. on the cost of erection, and does not go far enough to enable him to demand and receive the cost itself in the way indicated in the specifications.

The appeal should be dismissed with costs, which, however, are not to include the cost of procuring the evidence, in view of the application of the appellant, when launching his appeal, to dispense with it, on the ground that he proposed to argue the case wholly upon the findings of the Referee: a course which he scrupulously pursued.

JANUARY 29TH, 1915.

MILLAR v. PATTERSON.

Assessment and Taxes—Tax Sale—Action to Set aside Sale Made for two Years' Taxes in Arrear—No Arrears for one Year—Validity of Assessment — Irregularity — Validating Enactment—Assessment Act, 4 Edw. VII. ch. 23, sec. 22, sub-sec. (1) (d), sec. 172—Costs—Successful Appeal.

Appeal by the defendant from the judgment of the Senior Judge of the District Court of the District of Algoma, in favour of the plaintiffs, in an action to set aside a sale of land for taxes.

The appeal was heard by FALCONBRIDGE, C.J.K.B., HODGINS, J.A., LATCHFORD and KELLY, JJ.

R. C. H. Cassels, for the defendant.

A. R. Clute, for the plaintiffs, respondents.

The judgment of the Court was delivered by KELLY, J.:—This appeal is against the judgment of the Senior Judge of the District Court of the District of Algoma, setting aside a tax sale, so far as it affects the easterly one foot and six inches of lot 30 in Leys' subdivision of the town of Sault Ste. Marie, plan 8454—the grounds of appeal being that (1) there were no irregularities invalidating the sale, and (2) if such irregularities existed the respondents are barred by the curative sections of the Assessment Act, 4 Edw. VII. ch. 23.

The taxes to realise which the sale was held were for the years 1904 and 1905, upon the easterly nine feet of lot 30, the sale of which took place on the 10th October, 1910, to one Davis, who assigned to the appellant the certificate of sale received from the Treasurer. At the time of the hearing, the tax deed had not been executed.

Adjoining lot 30 on the east is lot 29 in the same subdivision. The registrar's abstract of title shews a conveyance registered in October, 1903, of this one foot and six inches, to one Terry, from whom, through various instruments, the plaintiffs have derived title.

The trial Judge did not go into particulars in his reasons for judgment, the expression of his opinion being confined to the general statement that "many irregularities occurred in respect of the assessments of the one and a half feet in question." Reading this along with the ground on which, in the record, the plaintiffs rest their case, and keeping in mind the lines on which the evidence proceeded, a main ground of objection to the sale is invalidity of the assessment. It is important to determine in the first place whether there was a valid assessment on which any part of the taxes said to be in arrear was validly imposed. If there was not a valid assessment, there were no taxes legally imposed for which the lands could be sold, and the provisions of sec. 172 of the Assessment Act could not be invoked in aid of the party seeking to uphold the sale. That is the effect of the conclusions arrived at by a Divisional Court in Blakey v. Smith (1910), 20 O.L.R. 279—a judgment which meets with approval.

Section 22, sub-sec. (1) (*d*), of the Act requires that in making the assessment each subdivision shall be assessed separ-

ately, and every parcel of land (whether a whole subdivision or a portion thereof or the whole or a portion of any building thereon) in the separate occupation of any person shall be separately assessed.

The assessment rolls are not before me, but from the collector's rolls and the other evidence it is shewn that for 1905 the easterly one foot and six inches of the nine feet above referred to, and the adjoining twenty-six feet six inches of lot 29 were, by the same entry in the roll, assessed to Terry, the assessed value being at the rate of $10 for the one foot and six inches, and by a separate entry in the same roll the same nine feet appears as assessed to Armstrong; but the Court of Revision later altered this by assessing this one foot and six inches to Terry and the other seven feet six inches to Patterson. Prior to 1905, it is not shewn that there was occupation of the one foot six inches separate from the rest of the lot; but that cannot be said in respect of 1905, when the municipal officers treated it as separate, when the one foot and six inches was assessed with the adjoining part of lot 29. But the taxes for 1905 (amounting to 20 cents) on this one foot six inches, on its assessment in conjunction with the part of lot 29, are shewn to have been paid prior to the sale; and, therefore, no arrears for that year on that part existed at the time of sale. Even had they not been so paid, the assessment of that land with the remaining seven feet six inches of the nine feet offered for sale was invalid, it being in separate occupation, the assessment thus contravening the provisions of sec. 22, subsec. (1) (*d*). So that in either view of the matter there were not at the time of sale any taxes in arrear on this one foot and six inches for 1905, and the sale, in so far as it is for arrears for that year, cannot be upheld.

These conditions do not, however, apply to the year 1904. For that year, as well as for some earlier years, the whole nine feet was assessed on one parcel, and taxes based upon that assessment, and including a small sum for arrears for the two years immediately preceding, were in arrear for more than three years at the time of the sale. Having regard to the provisions of sec. 172, I find no reason for holding the sale invalid. True, the amount of the arrears was small; but that section does not concern itself with the quantum of the arrears, and the plain meaning of the language employed to express the intention of the Legislature is not to be narrowed.

The result is that it must be declared that there were no taxes in arrear for the year 1905 in respect of the lands now in ques-

tion; that at the time of the sale there were taxes in arrear, for three years, for 1904; and the curative section (172) applying in respect to 1904, the sale should not, therefore, have been set aside. For these reasons the appeal is allowed.

There remains to be considered the question of costs. Surprise is not unnaturally excited that in a matter in which so small an amount is at issue the opposing parties did not see their way to settle their differences without resort to the Court, where in such a case the expenditure of time and the expense must inevitably be out of proportion to the interests at stake. Litigants who, under such circumstances, unreasonably indulge in what is not infrequently termed the luxury of a law-suit, must be aware of the certainty of loss, whatever may be the result of the action. The present is not a case where costs should be awarded; and there will, therefore, be no costs of the appeal.

Appeal allowed without costs.

HIGH COURT DIVISION.

MIDDLETON, J., IN CHAMBERS. JANUARY 25TH, 1915.

RE ROGERS.

Land Titles Act—Refusal to Register Purchaser from Municipality as Owner of Portion of Highway Closed by Municipal By-law—"Notice of Proposed By-law" — Municipal Act, R.S.O. 1914 *ch.* 192, *sec.* 475—*Insufficiency of Notice—Description of Land—Time for Considering Proposed By-law —Indemnity to Assurance Fund—R.S.O.* 1914 *ch.* 126, *sec.* 123 (10)—*Discretion of Master of Titles—Appeal—Costs.*

Appeal by one Rogers from the refusal of the Master of Titles to register the appellant as the owner of the southerly 46 feet of Poucher street, in the city of Toronto, which portion of the street and certain lanes leading to it were closed by city by-law No. 7121, and afterwards conveyed to the appellant, save upon the terms that the appellant should indemnify the assurance fund against any adverse claim, which the appellant declined to do.

E. G. Long, for the appellant.
Irving S. Fairty, for the city corporation.
J. R. Cartwright, K.C., for the Attorney-General.

MIDDLETON, J.:—The Master bases his refusal upon what he regards as defects in the notice given under sec. 475 of the Municipal Act, R.S.O. 1914 ch. 192.

The due giving of notice under this section is clearly a statutory condition precedent to municipal action. The section itself makes this clear, and if any authority is needed it will be found in Wannamaker v. Green (1886), 10 O.R. 457.

The learned Master thinks the notice here given is not adequate because it contains no reasonable intimation of what was proposed.

What the statute requires is "notice of the proposed by-law." The notice published was, that the council would consider "a by-law to close a certain portion of Poucher street and certain lanes in connection therewith." It was then stated that the by-law and plan shewing the land affected might be inspected at the city clerk's office.

This, it seems to me, falls far short of affording notice of the by-law. The lands need not be, and in many instances ought not to be, described by metes and bounds and by reference to plans and lots, but the notice should state, in language that can be understood by one reading it, what is proposed. Reference to a document that may be seen elsewhere is objectionable, and for that reason reference to a registered plan to be found in the office of the registrar of deeds may be as bad as reference to a plan in the city clerk's office. This is in accordance with the holding that a prospectus which stated that certain contracts relating to a company's affairs might be seen at its office, was not notice of these contracts.

The Master also holds the notice insufficient as not indicating when the proposed by-law would be considered. The notice says it will be passed "on the 10th day of August, 1914, or so soon thereafter as it may be deemed advisable." I do not know from the material, and counsel were unable to tell me, whether the council met on the day named. The by-law was considered and passed on the 4th September, 1914.

The case of In re Birdsall and Township of Asphodel (1880), 45 U.C.R. 149, 152, determines that the statute requires notice of the time when the by-law will be considered to be given, so that those interested may then attend and be heard. The case

has been followed, and, so far as I can ascertain, has never been criticised, so that the notice is clearly insufficient to justify action on the 4th September. I say nothing as to the validity of any action that might have been taken had the council met on the 10th August and then dealt with the matter.

I am inclined to think that the Master went too far in offering to allow registration upon an indemnity to the assurance fund under the Land Titles Act, R.S.O. 1914 ch. 126, sec. 123 (10). Certainly I should not interfere with the exercise of his discretion to exact this security.

The appeal should be dismissed with costs to be paid to the Attorney-General.

MEREDITH, C.J.C.P., IN CHAMBERS. JANUARY 28TH, 1915.

*RE BERANEK.

Alien Enemy—Arrest and Detention on Suspicion—Habeas Corpus — Application for Release — Jurisdiction of Court—Dominion War Measures Act, 1914, *secs.* 6, 11—*Consent of Minister of Justice—Necessity for—Naturalised Alien.*

Application, upon the return of a writ of habeas corpus, for an order for the release of Rudolf Beranek, a military prisoner.

W. A. Henderson, for the prisoner.

Lieutenant Boulter, the custodian of the prisoner, appeared in person in answer to the writ.

MEREDITH, C.J.C.P.:—The writ in this case was obtained on the assertion that the prisoner is held in military custody as an alien enemy, although, in fact, a British subject by naturalisation.

Assuming that to have been an accurate statement of the facts of the case, it by no means follows that the prisoner is entitled to be released from custody, nor indeed that the writ should have been issued, although the lawful power of the military at the present time, may be to detain an alien enemy only.

In extraordinary times, extraordinary laws have been passed "for the security, defence, peace, order, and welfare of Canada;" and the power of the military authorities, and the rights

*To be reported in the Ontario Law Reports.

of the prisoner, depend upon those laws, and that which has been rightly done under them; I mean, especially, the Law Measures Act, 1914, and the orders in council and proclamations made under it.

Under that enactment great authority has been conferred not only upon the Governor in Council but also upon the Minister of Justice.

The 6th section of the Act gives to the Governor in Council power to do, and to authorise, such acts and things, and to make from time to time such orders and regulations, as he may, by reason of the existence of actual or apprehended war, invasion, or insurrection, deem necessary or advisable for the security, defence, peace, order, and welfare of Canada, including expressly, among other things, "arrest, detention, exclusion, and deportation."

And, under the 11th section, no person who is under arrest or detention as an alien enemy, or upon suspicion that he is an alien enemy, shall be released upon bail or otherwise discharged or tried, without the consent of the Minister of Justice.

So that, in the very case made for the prisoner, upon the application for the writ, there is not only a prohibition against release, but a prohibition against even a trial—a trial, for instance, of the question whether he is or is not an alien enemy—without that which he has not only not obtained but not applied for, the consent of the Minister of Justice.

In these circumstances, after conferring with the learned Judge who granted the writ, I am unable to change, or modify, the view expressed by me upon the argument of this motion, for the discharge of the prisoner from custody, that the motion should be refused.

It is quite true that soldier and sailor as well as civilian, Cabinet Minister as well as cabman, all are amenable to the process of this Court; but it is equally true that, where the law of the land confers upon Court or person any power, this Court has no right to interfere with the exercise, in good faith, of that power; it is only when the power so conferred is exceeded that this Court can interfere; unless some right of appeal to it is also conferred.

It is also, as a matter of law, quite immaterial what the opinion of any Judge, or other person, may be, respecting the wisdom or unwisdom of conferring such powers, or of the wisdom or unwisdom of the way in which the power is exercised, provided it is exercised in good faith: but it should be plain to

every one that in the stress and danger to the life of any nation in war, the Courts should be exceeding careful not to hamper the actions of those especially charged with the safety of the nation; careful, among other things, not to take up the time and attention of those who should be fighting the enemy in the field, in fighting law-suits in the law-courts over private rights. It is not a time when the prisoner is to have the benefit of the doubt; it is a time when in all things, great and small, the country must have every possible advantage: when it must be the general safety first in all things always; until the final victory is won; even though individuals may suffer meanwhile. Private wrongs can be righted then: while final defeat would not only prevent that but bring untold disasters to all.

It may be that the prisoner is a British subject, and if so, under the law as it now stands, his imprisonment is unlawful; but, being detained as he alleges he is, "as an alien enemy, or upon suspicion that he is an alien enemy," he cannot "be released upon bail, or otherwise discharged, or tried, without the consent of the Minister of Justice:" the Parliament of Canada has so decreed in its War Measures' enactment, and decreed it "for the security, defence, peace, order, and welfare of Canada:" and it is the duty of the Courts to give full effect to that enactment: to attempt to whittle it down, or to evade its provisions in any respect, would be inexcusable, even in a hard case; which, I feel bound to say, this case does not appear to me to be: the prisoner, according to his own statement, made, at his own urgent request, in open Court, is an Austrian—Viennese—by birth: a resident in Canada for about 8 years: the husband of a Canadian wife, and the father of several children by her, all born in Canada, where his marriage took place: a British subject since the year 1910, when he became naturalised through proceedings in one of the Courts of General Sessions of this Province: arrested recently when seeking work at his trade of bricklayer, on, as he knew, forbidden grounds; and held as a prisoner of war ever since.

Whether he is in law a British subject may depend upon several questions of law and fact—for instance: whether the certificate of naturalisation on which he relies is a genuine one; whether it was obtained by fraud or is for any other reason invalid: whether naturalisation under the former laws of Canada, as distinguished from those passed last year, take the man out of the category of an alien enemy, or are confined to property and civil rights in Canada other than that in question: whether, in short,

he can be, for war purposes, a British subject in Canada and an alien enemy on all other British soil.

Upon the man's own statement, to which I have referred, a strong suspicion was caused in my mind that he would not have been wrongly arrested if he could have been and had been arrested for spying out the land, though probably not in connection with any organised system, but only on his own account, to be made use of should there be opportunity. In these circumstances, and having regard to the fact that under one of the orders of the Governor in Council, made under the War Measures Act, 1914, the family of the prisoner may go with him, I cannot perceive any justification for these proceedings without first applying to the Minister of Justice, even if there had been some power here to deal with the case, in the first instance.

These observations do not of course affect the prisoner's rights: if he be a British subject he ought not to be detained as an alien enemy, whatever other charge might be laid against him: but all that is for the consideration of the Minister of Justice first.

The application for the prisoner's discharge is dismissed; and his conditional remand is made absolute.

BRITTON, J. JANUARY 29TH, 1915.

BATEMAN v. SCOTT.

Fraudulent Conveyance—Husband and Wife—Property Conveyed to Wife by Stranger—Interest of Husband—Rights of Creditor of Husband—Absence of Fraud.

Action to set aside a conveyance as fraudulent, tried without a jury at London.

J. M. McEvoy, for the plaintiff.
R. G. Fisher, for the defendants.

BRITTON, J.:—On or about the 23rd December, 1912, the defendant Cornelius Scott, being indebted to the plaintiff in the sum of $150, gave to the plaintiff his promissory note for that amount, payable three months after date.

As is alleged in the statement of claim, the plaintiff on or about the 30th April, 1913, recovered a judgment in the Sixth Division Court in the County of Middlesex against Cornelius

Scott for the sum of $151.88 debt and $5.15 costs. Execution against goods was issued upon this judgment. The bailiff made a return of nulla bona, and an execution against the lands of Cornelius Scott was issued, which is now in the hands of the bailiff, unsatisfied.

The defendants were married in 1891. The father of Margaret Scott gave her money and cattle to the value of about $700 —perhaps not quite so much. She subsequently received $105 from her father's estate. This money was used by the husband and by the wife in maintaining the house and family and in raising, buying, and selling cattle. No accurate detailed account was kept of this money, but there came a time when they decided to purchase a house and lot in Strathroy. There is no evidence that Cornelius Scott was then in insolvent circumstances or unable to pay his debts in full, if any debts were then owing. It was understood and agreed between the defendants that the house and lot then to be purchased should belong to the defendant Margaret Scott.

I am of opinion that there was no fraud in this transaction. There was no intent on the part of either defendant to defraud, defeat, delay, or hinder any creditor of Cornelius Scott in the recovery of any debt.

Apart from any question of gift, I should think from the evidence that there was at least the sum of $700 in money or money's worth that Margaret Scott could claim from her husband. I accept the evidence as true that the understanding was that the conveyance of the Strathroy property was to be made to Margaret. The conveyance was in fact to both defendants, and they held it, so far as paper title represented it, as tenants in common.

I find that in what was done at the time of and in reference to the purchase of the Strathroy property there was no intention of defrauding the plaintiff or any creditor of the defendant Cornelius Scott.

Both defendants say that the agreement was that the Strathroy property should belong to the wife. The conveyance was taken to both defendants, and the legal estate was, as above stated, in both defendants as tenants in common. The defendant Margaret Scott did not know, until informed at the trial of this action, that the conveyance was to both defendants. Cornelius Scott says he did not know that he was named in the conveyance until shortly before the present trial.

My finding is, that it was understood and that the intention was that the Strathroy property should belong to the wife, and that there was no fraud or fraudulent intent.

Prior to the 9th April, 1913, the defendant Margaret Scott desired to go back to farm life. Having this in view, the Strathroy property was sold, and $1,100 was realised from its sale. Then the property in question in this action was for sale.

The defendants negotiated for its purchase. If purchased it was to be by and for Margaret Scott. Both inspected the property, and finally it was bought for $4,700. This amount was to be paid as follows:—

Mortgage for	$3,000
Cash	1,700
	$4,700

The defendant Margaret Scott paid in $1,100 received from the Strathroy property, and $600 borrowed from her brothers upon a note—still current and unpaid. There is no evidence that the brothers would or did lend it to Cornelius. The conveyance is to Margaret Scott.

The plaintiff claims that this conveyance is void, although not a conveyance from the husband, but from a stranger-owner. That claim cannot be sustained. The plaintiff next asks that the land should be charged with the undivided half of the $1,100, or at least with $400, as that sum, it is contended, belonged to the defendant Cornelius and should be followed.

In the absence of fraud, I do not think that this can be done. There was no evidence of any fraudulent scheme or device prior to the impeached conveyance to defeat future creditors. There was nothing from which fraud can be inferred or implied. The defendant Cornelius was not embarking in a hazardous or speculative business.

If the conveyance of the Strathroy property should in fact have been to Margaret alone, it could not be impeached; and I think, if it could not then, that it would be unjust now to give to the plaintiff a benefit by reason of that mistake, and charge the land with any sum on account of the present debt to the plaintiff, thus adding to the burden the defendant Margaret Scott has assumed of the mortgage for $3,000 and the loan of $600, over and above the $1,100 which she regarded as her own.

The debt to the plaintiff is comparatively small. It may be that the plaintiff will be able to get his pay from the earnings of the debtor on or off this farm; but, however that may be, this action fails. I cannot find any case that goes as far as the plaintiff desires to push this.

The action will be dismissed with costs.

BRITTON, J., IN CHAMBERS. JANUARY 29TH, 1915.

FARAH v. LAWLESS.

Practice—Action Begun by Writ of Summons Specially Endorsed—Affidavit of Merits Made by Defendant—New Claim Added by Amendment of Endorsement—Necessity for New Affidavit of Merits—Pleading—Rules 56, 127, 128.

Appeal by the defendant John A. Lawless from an order of the Master in Chambers, made on the 22nd January, 1915, directing the appellant to file an affidavit of merits as to a claim added by the plaintiff by way of endorsement upon the writ of summons, or, in default, that judgment be entered against the appellant for the amount of the added claim.

M. G. Hunt, for the appellant.

B. H. L. Symmes, for the plaintiff.

BRITTON, J.:—The writ of summons herein, specially endorsed, was issued on the 27th May, 1914. This writ was duly served upon John A. Lawless, and on or about the 23rd June, 1914, he made an affidavit of merits and put in an appearance, and so was in a position as of right to go down to trial.

On or about the 28th November, 1914, the plaintiffs obtained an order allowing an amendment of the special endorsement upon the writ of summons, by adding another claim—a new claim. The endorsement upon the writ was amended, and service was made upon the said defendant.

On or about the 9th December, 1914, the said defendant specially pleaded, by a new statement of defence, which was filed and served, to this added claim.

The contention of the plaintiff is, and the learned Master has so held, that an affidavit of merits as to this added claim was necessary; and, in the absence of it, the plaintiff is entitled to sign judgment treating the special statement of defence as a nullity.

Rule 56 does not in terms apply to such a case as this.

The Rule is restrictive, and is intended to prevent frivolous defences, and defences merely for time. In this case the defendant had the right to go to trial, as to the claim, prior to the amendment. After the amendment, he at once pleaded, and in effect said that he was willing to go to trial upon the added claim as well as the original.

The defendant's proceeding does not depend upon Rule 56 alone, but his statement of defence must be allowed to stand, either as originally put in or amended under Rules 127 and 128.

If a new affidavit of merits is required after an amendment, the Rule should say so, and it should not be left to inference.

The appeal will be allowed, order set aside, and the plaintiff will go to trial with the defence as pleaded. Costs to be costs in the cause to the defendant Lawless.

BRITTON, J., IN CHAMBERS. JANUARY 29TH, 1915.

RE BARR REGISTERS LIMITED v. NEAL.

Division Courts—Trial of Plaint with Jury—Motion for Nonsuit—Power of Judge to Order New Trial without Application therefor—Mandamus.

Motion by the plaintiffs for a mandamus to the Judge of the County Court of the County of Peterborough directing him to enter judgment for the plaintiffs upon the verdict of the jury at the trial of an action in the First Division Court in the County of Peterborough. The learned Judge refused a nonsuit and ordered a new trial.

G. M. Willoughby, for the plaintiffs.
H. E. McKittrick, for the defendant.

BRITTON, J.:—I see no useful purpose that would be served by granting a mandamus in this case, and one should not be ordered unless the plaintiffs are clearly and beyond any doubt entitled to it. After the verdict of the jury, the Judge should have, as it is contended, directed a nonsuit or dismissal of the action.

Acting under a mandamus he could do either one or the other. Whatever he did would not place the plaintiffs in any better position than at present. If the plaintiffs desired a nonsuit, no doubt the Judge would grant it, and that would be the same as a dismissal of the action, unless the plaintiffs desired to have, as part of the judgment, reserved to them the right of bringing another action. The plaintiffs would then be in no better position than at present. Apart from either, I am of op-

inion that the Judge had power, instead of either directing a nonsuit or a dismissal of the action, to order a new trial. He has power to grant a new trial on the ordinary application for such and upon hearing the parties. Where the facts are known to him, and where the jury is thought to have given a perverse verdict, so as to entitle the parties or either of them to a new trial, it seems to me not improper on the part of the Judge and quite within his power to make an order at once, instead of directing either a nonsuit or a dismissal of the action.

Motion dismissed without costs.

STUART v. BANK OF HAMILTON—MIDDLETON, J.—JAN. 26.

Contract—Company—Sale of Assets—Debenture Mortgage—Claim against Trustees—Securities Held by Bank—Subrogation—Evidence.]—Action for a declaration that an alleged contract for the purchase of the assets of the Ashcroft Water Electric and Improvement Company (a British Columbia company) had been rescinded, and for repayment of the sum of $22,861.25 by the defendants the Bank of Hamilton, Turnbull, and Wilson, and for damages against the defendants Turnbull and Wilson for breach of the contract of sale. The action was tried without a jury at Toronto. MIDDLETON, J., said that he had come to the conclusion, upon the entire evidence, that the defendant bank took the position that it was ready to assist in the sale of the property, so that it might receive as the result of the realisation the amount of its claim, but that the bank in no sense became the vendor of the property. The defendants Wilson and Turnbull, who were trustees, were ready to acquiesce in anything which was desired by the bank, but they took no independent part in what followed. The plaintiff was well aware of the situation, and relied entirely for his protection upon the advice and assistance of a Mr. Gray, who went to British Columbia and investigated the affairs of the company, etc. The real difficulty between the parties, so far as the bank was concerned, was, whether the plaintiff ultimately paid the money which he afterwards paid to the bank, as a payment of the indebtedness of the company which entitled him to receive from the bank the securities held by the bank, so that he became subrogated to the bank's right against the company, or whether the bank undertook to exercise, by itself or through its officers, who were trustees under the debenture mortgage, the power of sale so as to vest the assets in the

plaintiff. MIDDLETON, J., said that he was unable to find anything which indicated that the bank, or its officers, the trustees, the defendants Turnbull and Wilson, ever assumed any greater obligation than to hand over to the purchaser the securities held by the bank, and to assist, as far as they legally could, in the perfecting of the title of the plaintiff to the assets, under any powers they might have by virtue of the debenture mortgage. Action dismissed with costs. Glyn Osler, for the plaintiff. W. Lees, K.C., and W. N. Tilley, for the defendant the Bank of Hamilton. E. D. Armour, K.C., for the defendants Turnbull and Wilson. J. Haverson, K.C., for the defendant Ryan.

NAIMAN v. WRIGHT—BRITTON, J., IN CHAMBERS—JAN. 28.

Summary Judgment—Application for—Evidence—Defence—Unconditional Leave to Defend.]—Appeal by the defendants from an order of the Master in Chambers, upon a summary application, allowing the plaintiff to sign judgment for the amount of his claim. BRITTON, J., said that a careful reading of the depositions of some of the parties and of other papers filed satisfied him that this was not a case, either upon the law or facts, for summary judgment. Appeal allowed. Action to go to trial. Costs in the cause. J. J. Gray, for the defendants. G. M. Willoughby, for the plaintiff.

VILLAGE OF MORRISBURG v. SHARKEY—FALCONBRIDGE, C.J.K.B.—JAN. 28.

Contract—Agreement or Lease—Water Power—Breach of Covenants—Forfeiture — Possession — Counterclaim — Rent—Former Action — Damages — Reference — Amendment — Costs.]—Action for a declaration that the defendants have broken the covenants in a lease or agreement and have forfeited their rights thereunder, and for consequent relief. The learned Chief Justice finds (1) that the defendant Sharkey and his assigns have neglected to furnish the security required under the agreement; (2) that the defendant Sharkey was not entitled to assign or sublet the power plant and Government lease of water power, with the premises etc., to the Rapids Power Company Limited; and that, by reason of his assignment to that company,

the defendant Sharkey has forfeited his rights under the plaintiffs' by-law and lease or agreement made pursuant thereto; (3) that the plaintiffs are entitled to judgment for possession of the water power, power plant, premises, etc.; (5) that the plaintiffs should have costs of the action, and there should be no costs of the counterclaim.—It was stated in argument and not denied that on the 22nd October, 1913, the plaintiffs commenced an action against the defendant Sharkey wherein they sought possession of the premises. This, the learned Chief Justice holds, would preclude the plaintiffs from maintaining an action for rent subsequently accruing: Jones v. Carter (1846), 15 M. & W. 718; Woodfall's Landlord and Tenant, 19th ed., p. 487. The defendants should be allowed to amend by adding paragraph 17a to their statement of defence and counterclaim. Counsel for the defendants admitted that the plaintiffs would, however, be entitled to damages for not obtaining possession of the power plant and premises in the meantime. Reference to the Local Master at Cornwall to take all the accounts between the plaintiffs and defendants for rent or otherwise. The plaintiffs to have leave to amend, if so advised, by claiming alternatively damages instead of rent. Further directions and subsequent costs reserved. W. B. Lawson, K.C., for the plaintiffs. I. Hilliard, K.C., for the defendants.

HALSTEAD v. SONSHINE—BRITTON, J., IN CHAMBERS—JAN. 29.

Mortgage—Action for Foreclosure — Motion for Summary Judgment—Account.]—Appeal by the plaintiffs from an order of the Master in Chambers refusing the plaintiffs' motion for summary judgment, in a foreclosure action, against the defendants Shapiro and wife. BRITTON, J., said that, as the plaintiffs held the mortgage sued upon only as security for a loan made to the defendant Sonshine, and as the account between the plaintiffs and Sonshine might require to be investigated, it was not a case for summary judgment against Shapiro and wife, as asked. Appeal dismissed. Costs in the cause. F. J. Hughes, for the plaintiffs. A. Cohen, for the defendants Shapiro and wife.