THE
ONTARIO WEEKLY REPORTER

VOL. 25 TORONTO, JANUARY 29, 1914. NO. 11

HON. MR. JUSTICE KELLY. DECEMBER 30TH, 1913.

TOWNSHIP OF TORONTO v. COUNTY OF PEEL.

5 O. W. N. 632.

Municipal Corporations — Highway — County Road in Township — Judgment against County for Non-repair of — Highway Improvement Act, 2 Geo. V. c. 11, s. 7, 13 — Requisition under — Right of County to Charge Amount of Judgment against Township or "Good Roads Fund" — Minister of Public Works — Jurisdiction of.

KELLY, J., *held*, that where a township council had made application to the county under 2 Geo. V. c. 11, s. 13 to levy a special rate upon the township for the construction, improvement and maintenance of county roads within the township and a by-law passed and moneys raised for such purposes, that the county could not divert any part of such moneys to the payment of a judgment against the county arising from the negligence of the county in allowing a county road in the said township to fall into disrepair.

Action to restrain defendants from paying a sum of $1,431.75 out of funds in their hands belonging to plaintiffs and for a declaration that that sum should be paid by defendants out of their general funds and not out of the "Good Roads Fund."

Tried at Brampton on the 21st November, 1913.

B. F. Justin, K.C., and W. S. Morphy, for plaintiffs.

T. S. Blain, for defendants.

HON. MR. JUSTICE KELLY:—This action is a result of the judgment in the action of the *Armstrong Cartage & Warehouse Co.* v. *County of Peel*, reported 24 O. W. R. 372, whereby defendants were held liable to The Armstrong Company for damages sustained owing to the falling of a bridge on Hurontario street, in the township of Toronto in the county of Peel, over which that company's motor truck was

being driven. Prior to the accident that part of Hurontario street had been assumed by the defendants as part of a county roads system under the provisions of the Act for the Improvement of Public Highways, and amending Acts, and defendants had participated in the sums set apart under these Acts to aid in the improvement of public highways. At the time of the accident the defendants were, and so far as the evidence shews, still are, liable for the maintenance and repair of this particular road.

The occurrence out of which The Armstrong Company's action arose happened on June 22nd, 1912. On the 8th June, 1912, By-law No. 426 of the defendants was passed providing for their expending $30,000 in the improvement of highways in the township of Toronto, and authorizing the issue of debentures to that amount for that purpose, and the levying of a special rate annually upon the rateable property of the township to repay the amount of these debentures and interest as they should mature. This course was adopted on the authority of sec. 13 of 2 Geo. V. ch. 11, the Municipal Council of the township having made application to levy a special rate upon the township for the construction, improvement and maintenance of county roads within the township.

The defendants paid the amount of the Armstrong judgment and then sought to charge against the plaintiffs' portion of what is referred to as the "Good Roads Fund" the amount so paid and the costs which the defendants incurred in defending the action, and other items in connection with it, amounting in all to $1,431.75. The present action is in effect to prevent defendant paying this sum out of plaintiffs' portion of the "Good Road Fund" and for repayment of it if defendants have so paid it or charged it against plaintiffs.

I fail to see on what ground defendants can successfully claim the right to charge this sum against the plaintiffs either by deducting it from plaintiffs' portion of the "Good Roads Fund" or otherwise. The occurrence in respect of which the Armstrong judgment was obtained was the result of defendants' negligence in not having done what was their plain duty to have done, namely, to maintain and repair the bridge which formed part of the road that they had assumed. There was no obligation on the plaintiffs to repair, and they were in no way responsible for what happened; nor was there anything entitling the defendants to claim over against the

plaintiffs for the amount they paid as the result of the action of the Armstrong Company. Plaintiffs are entitled to have the whole $30,000 expended upon the county road or county roads within that township, and should not suffer the loss to these roads that would result if these moneys or any part of them be diverted by defendants towards meeting obligations of their own which they have incurred through their negligence or default, and from which plaintiffs derive no benefit. Payment of the sum in dispute out of these moneys which were raised at plaintiffs' request for another and different purpose would be a distinct loss to the plaintiffs. The same may be said about any attempt to charge the sum in dispute against plaintiffs' portion of the other moneys which were obtained by defendants from the appropriations by the Legislature for road improvements. If it were material to the issue (and I think it is not), it might be mentioned that though plaintiffs' application to defendants in respect of the raising of the $30,000 was to levy a rate upon the property of the township of Toronto, under sec. 13 of 2 Geo. V. ch. 11—that is for the construction, improvement or maintenance of the county roads, etc.—defendants' by-law passed in pursuance of that application, specifies that the $30,000 shall be expended by the county in the improvement of the highways of this township. How can it be said that payment of the sum in question in the manner defendants have appropriated it is a proper application of that sum, either for improvements or for construction, improvement or maintenance of these roads.

The expenditure of these moneys is not in the hands or under the control of the township, and there being no obligation on it to construct, repair or maintain, it would be most unfair to deprive it of the full benefit of having all of its share of these moneys applied in the manner and for the purpose contemplated by the statute.

Defendants contend, too, that the decision of the matter here in dispute rests with the Minister of Public Works, under 2 Geo. V. ch. 11, sec. 7. That section draws a distinction between what are works of maintenance or repair (for which the county is made liable in the earlier part of the section), and what, on the other hand, constitutes works of construction and the purchase, maintenance and repair of road machinery, plant and equipment; and it is in cases of doubt or dispute as between these two classes of works that

the decision of the Minister of Public Works is to be invoked. The present dispute is not of that character.

In my view of the case I can see nothing justifying the course pursued by the defendants of charging the $1,431.75 against the plaintiffs, and to the extent that such charge or payment has been made there will be a recharge or repayment to or in favour of plaintiffs. Judgment will go accordingly with costs.

HON. SIR JOHN BOYD, C. DECEMBER 23RD, 1913.

RE BECKINGHAM.

5 O. W. N. 607.

Will—Construction — Specific Devise—Subsequent Agreement for Sale—Conversion—Ademption — Non-Payment under Agreement —Discretion of Executors — Ascertainment of Next of Kin—Reference.

BOYD, C., *held*, that where land specifically devised is afterwards sold by the testator under an agreement for sale, the devisee takes no interest even though default should be subsequently made by the purchaser.

Farrar v. *Winterton*, 5 Beav. 1, and *Re Dods*, 1 O. L. R. 7, followed.

See *Re Mackenzie Estate*, 24 O. W. R. 678, for converse of above case.—[Ed.]

Motion by William Rogers for an order determining questions arising upon the will of Edwin Beckingham, deceased.

W. J. Code, for the applicant.

G. F. Henderson, K.C., for certain beneficiaries.

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

HON. SIR JOHN BOYD, C.:—The testator's will is dated the 5th October, 1910, and he died on the 22nd of that month. He directs debts and funeral and testamentary expenses to be paid by his executors, and directs them to erect a headstone over his grave; he also gives a few hundred dollars in pecuniary legacies and directs some chattels to be distributed, but makes no other disposition of his personalty —as to which, therefore, he dies intestate (*i.e.*, as to the surplus which remains after answering these demands).

He gives all real estate specifically to devisees named, and in particular the lot No. 16, situate in Brockville, to Mrs. Jones (now Boyce). This lot, however, he contracted to sell for $1,050 to Charles Hammond on the 10th October, 1910, five days after his will and twelve days before his death. Possession was to be given in March next, and the price was to be paid by $50 then paid, and afterwards by monthly instalments of $10 each, including interest and principal in each payment, and then, on completion of payment, a deed to be given. Provision is made in the agreement for the cancellation of the contract in case of default in payment. The purchaser has paid the first $50 and been let into possession; and, though he has been late in some of his after-payments, the executors have not sought to take advantage of this. The terms render this forfeiture optional, and the executors appear to have a large discretion as to that.

The question was discussed as to the effect which this transaction entered into by the testator had upon the status of Mrs. Jones, and whether the realty had been converted.

I think the authorities shew that the devise of land and the subsequent sale of it by the testator, even though the purchase is not to be completed till after the death, changes the nature of the property so that it is no longer under the control of the testator as land, but as personalty in the shape of the purchase-money to be received. The same result follows as the result of a valid contract to sell, even though the purchaser subsequently—*i.e.*, after the death of the testator—may lose his right to specific performance by laches. The estate in the latter case would go to the next of kin, and not to the heir at law. Both points were decided in *Farrar* v. *Winterton*, 5 Beav. 1, and in a case of *Curre* v. *Bowyer*, cited in a note at p. 6 of that volume.

Following the case of *Re Dods*, 1 O. L. R. 7, I answer the question by saying that Mrs. Jones has no interest in the purchase-money, and that it must all go to the next of kin of the testator.

There is difficulty about the next of kin because it is somewhat in evidence that there is a deceased wife in England who has had children by the testator—though this was not known to the public during his life in this country. He had a reputed wife here, who predeceased him, leaving no issue.

It will be referred to the Master at Ottawa to ascertain the next of kin and make distribution according to their respective rights—meanwhile the personalty should be paid into Court after the taxation of and less the costs of the parties appearing on this motion.

HON. MR. JUSTICE KELLY. DECEMBER 31ST, 1913.

McDONELL v. THOMPSON.

5 O. W. N. 654.

Assignments and Preferences—Husband and Wife—Alleged Conveyance to Defraud Creditors—Dismissal of Action—Costs.

KELLY, J., dismissed an action brought by a judgment creditor for a declaration that the wife of the judgment debtor was trustee for him in respect of certain lands conveyed to her, holding that the allegation had not been sufficiently proven.

Action by a judgment creditor of defendant W. S. Thompson for a declaration that his wife, the defendant Mary Stuart Thompson, was a trustee for him of certain land which had been conveyed to her and for equitable execution.

J. F. Boland, for plaintiff.

B. N. Davis, for defendant.

HON. MR. JUSTICE KELLY:—On February 27th, 1892, plaintiff obtained a judgment in the County Court of the county of York against defendant W. S. Thompson, which remained unpaid at the time the present action was instituted.

Defendant Mary Stuart Thompson, who is the wife of her co-defendant, is seized of certain lands referred to in the pleadings. Plaintiff claims that the conveyance thereof to her was made without any consideration from her, that no consideration given for the conveyance was given by or passed from defendant W. S. Thompson, that the conveyance was and is void as against plaintiff and the other creditors of W. S. Thompson, and that it was made for the purpose of defeating and delaying plaintiff and giving a preference to the transferee, Mary Stuart Thompson.

The circumstances under which this property was acquired are somewhat unusual and illustrate the manner by which, when the selling value of land is on the ascendant,

persons without means may get possession of valuable interests in real property.

In 1905 the property in question and other property was acquired at a price much lower than it has since attained. Nothing was paid therefor by the defendants or either of them out of their own pockets, the financing of the purchase and of the erection of the buildings which later on were erected having been done by borrowing on mortgage upon the land and otherwise. The rapid and substantial increase in the value of real property which came about after the purchase, and the revenue derived from the property itself and the buildings when completed, not only made possible the purchase and the carrying on of the building operations, but has left to the owner a substantial margin of value in excess of the encumbrances still on the property. At the trial defendant W. S. Thompson put the value of this equity at a sum in the neighbourhood of $20,000.

The uncontradicted evidence of defendants is that the purchase was made for defendant Mary Stuart Thompson, and that her co-defendant acted only as her agent and attorney in the buying of the land and the erection of the buildings and looking after the property.

In the face of this direct testimony, much of which is corroborated by the evidence of the party from whom the land was purchased and who advanced the earlier moneys to carry on the building operations, and though it was W. S. Thompson who was actually engaged about these transactions, I am unable to hold that the property belongs to him or that his co-defendant is trustee thereof for him.

Reaching this conclusion, I, nevertheless, think there is something to be said about the attitude of W. S. Thompson towards the debt he contracted with plaintiff. Though I have not been able to find that his co-defendant is trustee for him, I still think that the relationship between them with respect to this property and the benefits to W. S. Thompson personally from his connection therewith, are such that there can be but little doubt that it was quite within his power, had he been so inclined, to make some satisfactory arrangement with plaintiff which would have avoided the bringing of this action. Under such circumstances I am not disposed to add to the plaintiff's loss the further burden of paying defendants' costs. The action will therefore be dismissed without costs.

HON. MR. JUSTICE KELLY. DECEMBER 30TH, 1913.

OTTER MUTUAL FIRE INSURANCE CO. v. RAND.

5 O. W. N. 653.

Insurance — Fire Insurance — Action Against Alleged Lunatic Incendiary—Evidence—Dismissal of Action

KELLY, J., *held*, in an action against a lunatic for indemnity against liability upon a fire insurance policy based upon the contention that the defendant was responsible for the fire in question, that the charge against the defendant had not been proven.

Action against D. Kingsley Rand for indemnity in respect of the plaintiff company's liability to Marshall Rand upon a policy of fire insurance on the latter's barn.

S. G. McKay, K.C., for the company.

A. S. Watts, K.C., for the defendant.

HON. MR. JUSTICE KELLY:—The company's claim against D. Kingsley Rand is in respect of its having been held liable to Marshall Rand upon a policy of fire insurance on the latter's barn. The company seeks indemnity against D. Kingsley Rand, by the official guardian *ad litem*, as insane—on the ground that the fire which caused the loss for which it has so been held liable was through his act. D. Kingsley Rand, by the official guardian *ad litem*, has appeared and submitted his rights to the Court.

The fire occurred about 11 o'clock on the forenoon of December 17th, 1912. A short time before that Marshall Rand, the insured, saw from his house his brother, D. Kingsley Rand, running past the barn and coming towards his house. He was not going towards the barn nor coming from it, but was passing over the approach (the bridge as it is called in the evidence) leading to the barn door. His course was southerly, coming from the house of his mother—with whom he lived and which was some distance to the north of the barn—towards his brother's house, which was south of the barn. The brother, thinking he was coming to his house, and apparently fearing he might be intent on some act of personal violence, left the house and thus lost sight of him. The fire was noticed very soon afterwards, and despite the efforts of the insured and others, the barn and contents were destroyed. Others had been in or near the barn a short time

prior to the fire, and the defendant's team of horses had been brought and put in the barn about twenty minutes earlier. I do not wish the inference to be drawn that any of these persons had anything to do with starting the fire; the evidence does not warrant any such inference. D. Kingsley Rand was not seen again by any person until a considerable time after the fire had started; he was then sitting on a fence about twenty-five rods from the barn and watching the fire. He had for some time shewn evidences of a weak mental condition, and following upon this occurrence he was placed in the asylum.

Whatever belief or opinion the insured had or has that the fire was the work of D. Kingsley Rand is based on the fact of his having been near the barn so short a time before the fire started; but as I have said there is nothing to indicate that he had been in the barn or that he went towards it, or that he did otherwise than pass the barn on his way from his mother's house towards his brother's. While there is no direct evidence of his having started the fire, or even of his having been in the barn, the evidence does not eliminate the possibilities of the fire having originated through other causes which can as readily be presumed as that it was his work, and this without going outside the possibility of its having been the result of accident or carelessness. To hold him responsible would be to found a judgment on a mere guess or supposition. Improper as it would be to arrive at a conclusion by any such means, it would be particularly so here where such a course would in effect charge this man with the commission of a criminal act when, owing to his unfortunate mental condition, he is unable to speak for himself.

The claim of the company will, therefore, be dismissed with costs.

HON. MR. JUSTICE LATCHFORD. DECEMBER 29TH, 1913.

RE GODCHERE ESTATE.

5 O. W. N. 625.

Executors and Administrators — Allowance to — Commission — Reasonable Amount—Appeal.

LATCHFORD, J., *held*, that the compensation payable to administrators was not necessarily limited to a commission on the amounts received and distributed by them.

Re McIntyre & London & Western Trusts Co., 7 O. W. R. 548, 556, and *Re Hughes*, 14 O. W. R. 630, considered.

Application by Official Guardian upon special leave granted by HON. SIR GLENHOLME FALCONBRIDGE, C.J.K.B., for an order setting aside the order of his Honour Judge O'Leary, of the Surrogate Court of the District of Thunder Bay, fixing the amount of compensation to which the administrators of the estate of the late Peter Godchere are entitled for their pains, care and trouble in connection with the estate, on the ground that the compensation should have been limited to commission on the amount collected and distributed by the administrators.

E. C. Cattanach, for motion.

C. A. Moss, contra.

HON. MR. JUSTICE LATCHFORD:—The real and personal estate, so far as realized upon, amounted to $21,234.17, and out of this there has been properly paid $3,560.93, leaving in the hands of the administrators when diminished by the compensation and costs fixed by the learned Judge $16,957.36.

One of the administrators was allowed $425 and the other $200. The costs were taxed at $90.88, including $20 costs of the Official Guardian.

The compensation is not fixed on the basis of commission, as in *Re McIntyre & London & Western Trusts Co.* (1904), 7 O. W. R. 548, 556, where the late Mr. Justice Street considered that, upon the facts there presented, commission should not have been allowed (as appeared to have been the case) upon the total amount realized, but only upon what was received and also distributed. See *Re Hughes* (1909), 14 O. W. R. 630, where the cases on the point are collected.

There is nothing before me to indicate that the learned Judge appealed from erred. The administrators were en-

titled to reasonable compensation. The learned Judge was in a position on the passing of the accounts to determine what labour, care, pains and trouble they were at in realizing as well as expending. The amounts allowed are not large; and that they are different indicates that more time and trouble were bestowed by one administrator than by the other, and the compensation awarded accordingly. The appeal is dismissed. Costs out of the estate.

HON. MR. JUSTICE KELLY. DECEMBER 30TH, 1913.

RAND v. OTTER MUTUAL FIRE INSURANCE CO.

5 O. W. N. 653.

Insurance — Fire Insurance — Policy — Loss Payable to Mortgagee —Right of Mortgagor to Bring Action—Payment of Mortgage.

KELLY, J., *held*, that the fact that under a policy of fire insurance a portion of the proceeds were payable to a mortgagee did not disentitle the mortgagor to bring an action upon the policy. *Prittie* v. *Connecticut Fire Insurance Co.*, 23 A. R. 449, followed.

Action on a policy of fire insurance.

J. Harley, K.C., for plaintiff.

S. G. McKay, K.C., for defendants.

HON MR. JUSTICE KELLY:—At the trial defendants admitted the application for the policy sued upon, the policy itself, and that it is in conformity with the application, the happening of the fire on the 17th December, 1912, and the receipt of proofs of loss.

The only evidence submitted was on behalf of the plaintiff, and it quite clearly shews that there was no act, neglect or default on his part which could in any way vitiate the claim or disentitle him to the benefit thereof.

The policy covered loss on dwelling-house and contents, on three barns and on the contents of the outbuildings; the amount on these contents being $850. The claim sued upon is for $700 upon barn No. 3, defendants before action having paid the $850 on the contents.

By the terms of the policy the loss was made payable to D. K. Rand to the amount of $1,000, he being the mortgagee

to that extent of the real property insured. Subsequent to the bringing of this action plaintiff paid off the mortgage.

The ground of defence that plaintiff is not entitled to maintain the action owing to the loss being so payable is not tenable. There is nothing to distinguish this case in that respect from *Prittie* v. *Connecticut Fire Insurance Co.*, 23 A. R. 449, and I know of no other ground disentitling plaintiff to bring the action.

Judgment will therefore be in favour of the plaintiff for $700 and interest claimed, with costs.

HON. SIR G. FALCONBRIDGE, C.J.K.B. DECEMBER 31ST, 1913.

MULHOLLAND v. BARLOW.

5 O. W. N. 654.

Trespass to Lands — Trifling Claim — Counterclaim — Fence — Right of Way — Injunction — Damages.

FALCONBRIDGE, C.J.K.B., dismissed plaintiff's action for trespass to lands and gave judgment in favour of defendant on his counter-claim for an injunction and damages.

Action for trespass. Counterclaim for a declaration of defendant's rights, an injunction and damages, tried at Hamilton.

J. L. Counsell, for plaintiff.

S. F. Washington, K.C., for defendant.

HON. SIR GLENHOLME FALCONBRIDGE, C.J.K.B.:—The value of the property involved and its superficial area are so small as to be almost incapable of description or estimation. I have never tried or heard of a case where the land involved was of such small value to the plaintiff. On the other hand the defendant would be seriously damaged and prejudiced if the plaintiff's contention were upheld by reason of his, defendant's, being deprived of reasonable access and user of a certain right-of-way.

Under these circumstances I do not condescend to assign reasons for my judgment. I dismiss the plaintiff's action with costs, and I give judgment for the defendant on his counterclaim, declaring that the fence torn down by the plaintiff was the defendant's property, and on his own lands.

(2) That the defendant is entitled to have a fence on the same land and in the same place as the fence that was torn down by the plaintiff.

(3) An injunction restraining the plaintiff from interfering with, tearing down, damaging or destroying defendant's fence, and from trespassing upon the defendant's lands.

(4) $5 damages for tearing down the fence and tearing up defendant's cement walk.

(5) The costs of this action and counterclaim.

Thirty days' stay.

HON. SIR JOHN BOYD, C. DECEMBER 23RD, 1913.

CROFT v. McKECHNIE.

5 O. W. N. 606.

Trial — Admission by Counsel — Mortgage Action — Right to Redeem — Settlement of Judgment — Right to Recede from Admission — Costs.

BOYD, C., *held*, that where counsel at the trial for the mortgagee in a mortgage action admitted defendant's right to redeem he could not later seek to be absolved from this admission.

Motion by the plaintiff to vary the minutes of a judgment as settled.

J. P. Ebbs, for the plaintiff.

J. I. MacCraken, for the defendant.

HON. SIR JOHN BOYD, C.:—I do not think that I should consider the cases put in in order to determine whether the plaintiff can recover on the covenants and refuse to be redeemed. When I looked at the record and my notes at the trial, I found that the defendant set up that the exercise of the power of sale by the first mortgagee was fraudulently procured by the plaintiff. But, on the opening examination of the plaintiff as his own witness, it was stated by his counsel that "the plaintiff admits the right to redeem as to the land and as to purchase by Croft," whereupon I ruled that the onus rested on the defendant to make out that he was not bound by his mortgage.

The course of the trial was stopped and changed by this admission, and I do not think that the plaintiff should be

allowed now to recede from it. It is no hardship for the plaintiff to give up the land on being paid the mortgage and all his outlay.

This direction will be without costs to either party. The endorsement as made at the time on the record will stand.

HON. SIR G. FALCONBRIDGE, C.J.K.B. DEC. 29TH, 1913.

TUCKER v. TITUS.

5 O. W. N. 651.

Mortgage — Exercise of Power of Sale — Irregularity — Notice of Sale — Amount Due not Specified — Advertising within One Month — Damages — Injunction — Costs.

FALCONBRIDGE, C.J.K.B., *held*, that a mortgagee's proceedings under his power of sale were irregular where the notice of sale did not state the exact amount due, and where the property was advertised for sale within one month of the giving of the notice.

Action for damages for wrongfully advertising the plaintiff's property for sale under the power of sale in a mortgage and for a declaration and injunction.

Tried at Belleville.

E. Gus Porter, K.C., for plaintiff.

A. Abbott (Trenton), for defendant.

HON. SIR GLENHOLME FALCONBRIDGE, C.J.K.B.:—Defendant's proceedings in endeavouring to exercise power of sale under the mortgage are irregular in two respects.

1st. The notice of exercising the power of sale does not state the amounts claimed to be due for principal, interest and costs respectively, as prescribed by 10 Edw. VII. ch. 51, sec. 27.

2nd. Defendant proceeded before the expiration of the month to put up posters and to advertise the sale in a newspaper.

This is a "further proceeding" under the statute.

Gibbons v. *McDougall* (1879), 26 Gr. 214; *Smith* v. *Brown* (1890), 20 O. R. 165.

The present provision is sec. 28 of the statute cited above.

The notice of exercising power of sale and subsequent proceedings by defendant are set aside and declared null and void.

Judgment for plaintiff for $5 damages.

Defendant opposed the motion for injunction and plaintiff had to go to trial and defendant must pay the costs on High Court scale.

Thirty days' stay.

HON. MR. JUSTICE LATCHFORD. DECEMBER 31ST, 1913.

BELL v. COLERIDGE.

5 O. W. N. 655.

Principal and Agent — Secret Profit — Purchase of Lands — Evidence — Fraud — Account — Counterclaim — Costs.

LATCHFORD, J., *held*, that an agent who purchased certain lands from a syndicate at $400 per acre and resold them to his principal at $450 per acre, representing to the latter that $450 per acre was the true purchase price, was liable to his principal for the secret profit so made by him.

Action for an accounting by the defendant Coleridge in respect of a purchase by him of certain lands as agent for the plaintiff, on which he was alleged to have made a secret profit, and for a declaration that such purchase was made for the benefit of the plaintiff.

D. L. McCarthy, K.C., for plaintiff.

Matthew Wilson, K.C., for defendant Coleridge.

M. K. Cowan, K.C., for other defendants.

HON. MR. JUSTICE LATCHFORD:—The plaintiff, a young Englishman residing in Detroit, was induced early in 1913 by the defendant Coleridge, and by a friend of Coleridge, to invest in certain lands in Sandwich West, near Windsor, where there was at the time considerable speculation in lands owing to prospective esatblishment by the United States Steel Corporation of a large plant at Ojibway near by. Bell had himself no knowledge of the value of properties in the vicinity, and made his investment on the advice and with the co-operation of Coleridge. The instructions for the preparation of the conveyance to Bell were given by Cole-

ridge; the transaction was closed on the 12th May, 1913, and the deed registered on the 15th of the same month.

Lying beside the lands purchased by Bell was a strip owned by Coleridge and others, including Dr. Smith, the Collector of Customs at Windsor. By arrangement a common plan of subdivision was made of the two properties, and the management of the whole subdivision was entrusted to Coleridge, who, though a dental surgeon by profession, had for years devoted himself to the real estate business in the Great West and later in the vicinity of Windsor. His great natural shrewdness abundantly manifested at the trial, had not, however, been attended with success, at least up to the time of his association with the plaintiff. His friend Dr. Smith, I think—notwithstanding his denial—was well aware of Coleridge's lack of financial resources.

The plaintiff, on the other hand, to the knowledge of Coleridge had, or could procure, capital. He had in fact advanced certain sums to Coleridge in connection with the land referred to; and on the 6th of May, 1913, Coleridge had in his hands funds belonging to the plaintiff in excess of the sum of $100 which he on that day paid on a purchase of a farm at Sandwich West, known as the Pratt farm, containing 75 acres, at the price of $400 an acre.

I think that previous to the 6th there had been some talk between Coleridge and Bell in regard to the purchase of this farm, and an understanding arrived at that if the farm were purchased by Bell, Coleridge would have an interest in it. The evidence, however, on the point is vague and contradictory. What seems certain is that on the 6th May Coleridge knew that Bell could be induced to purchase the Pratt farm at $450 an acre.

The farm was owned at the time by a syndicate of Windsor gentlemen, one of whom, Mr. Kenning, a well-known and highly-respected solicitor, acted as trustee for the others. One Marcon, a real estate agent of Windsor, had the right to sell the property for $400 an acre under an agreement or option which expired at 4.30 p.m. on the 6th May. His commission on a sale at the price mentioned was to be $1,000—a sum which he was naturally anxious to earn. As the hour of 4.30 approached he met Dr. Smith, who had, as stated, been associated with Coleridge and Bell in the subdivision of the lands referred to. Smith brought Marcon to Coleridge. It was then arranged between the three that

Coleridge should buy at the $400 an acre if $100—all he could pay—would be accepted by Mr. Kenning until a substantial payment—$10,000—were made a week later.

Smith, Marcon and Coleridge unite in saying they did not know Bell in connection with the transaction, and there is no express contradiction of their testimony on the point. Indeed, no contradiction is possible. Notwithstanding, I incline strongly to believe that Coleridge certainly, and Smith probably, had Bell in mind as the person on whom they could unload the Pratt farm. Marcon was not acquainted with Bell, but must have known of his association with Smith and Coleridge. In any event the only possible loss, if Bell could not be induced to purchase at $450 an acre, was the $100 deposited. If the sale could be made to Bell, and the whole profit of $50 an acre collected when the next instalment of the purchase-money was paid, Marcon, in addition to the commission of $1,000 payable by the Kenning syndicate, would profit to the extent of $1,250, and Smith and Coleridge each in a like sum.

Smith, Marcon and Coleridge decided that the agreement for purchase should be taken in Coleridge's name. Mr. Kenning was willing, after consultation with some of his associates, to accept the $100 if it were followed within a short time by the substantial of the balance of $10,000. This was agreed to, and an agreement of sale from Mr. Kenning and his associates was prepared on the 6th May and executed by the necessary parties on the 7th and 8th May. Coleridge is named as the sole purchaser. The payments to be made are $9,900 on May 12th, $2,500 on June 1st, and $2,500 on August 1st—all in 1913; $7,500 on the 6th May, 1914, and $7,500 on the 6th May, 1915.

Before this agreement was executed by all the members of the Kenning syndicate, Coleridge sought out Bell, and, representing that the property was owned by the Kenning syndicate, urged Bell to "go in" with him in the purchase of it. The price, Coleridge told Bell, was low; the property could be turned over long before the payments of 1914 and 1915 became due; and if Bell would make the first payment of $13,750 Coleridge would pay the instalments of June 1st, and August 1st. Bell agreed to unite with Coleridge in the purchase, and set about procuring the funds necessary. He handed Coleridge $350, which, with some funds in the hands

of Coleridge and $1,500 borrowed on mortgage, made up $2,000.

On the 12th, Coleridge paid Mr. Kenning $1,500 out of Bell's moneys. There was some delay in procuring the balance of $11,750, but, good faith having been shewn by the payments made, the time for making the payment of the $11.750 was extended. On May 20th a cheque for $11,750 made by Bell and payable to Mr. Kenning was handed to Mr. Kenning by Coleridge and a receipt obtained which was subsequently shewn or delivered by Coleridge to Bell.

Previous to this, on the 13th May, Coleridge instructed Mr. Kenning, who had not previously acted for him or Bell, to prepare, under date the 7th May, an agreement for the sale of these lands at $450 an acre by Coleridge to Bell. Coleridge executed this agreement. He never, however, presented it for execution to Bell, nor indeed discovered it to him, until after Bell had taken this action. To do so would have been to expose to Bell that Coleridge was the vendor and not the Kenning syndicate as Coleridge had led Bell to believe. Its purposee, and its only purpose, was to mislead Mr. Kenning, and thus enable Coleridge to obtain the $3,750 which Mr. Kenning paid him on the 20th and 21st May in the belief that it was the profit on a sale by Coleridge to Bell, while in fact, as I find, Coleridge had all the time been representing to Bell that Bell was purchasing from the Kenning syndicate at $450 an acre.

Two days before the payment of the $11,750 was made, Coleridge and Smith met the plaintiff—by mere chance they say— outside his hotel, the Cadillac, in Detroit. They went up to Bell's room, and there arranged that the three should become jointly interested in the property; Bell to have a half and Smith and Coleridge each a one-quarter share. It was subsequently suggested that the shares were to be respectively three-fifths, one-fifth and one-fifth. No formal agreement was, however, made embodying what was talked over on either occasion. Smith accordingly acquired no interest in the purchase. I find it impossible, especially in view of what happened afterward, to accept Dr. Smith's statement as to his innocence regarding what Coleridge had done and proposed to do. He united with Coleridge in leading Bell to believe that he was buying from Kenning and at the rate of $450 an acre. Coleridge and Smith agreed to make the payments of June 1st, and August 1st. No intimation was given to Bell that Coleridge, Smith or Marcon

had any interest whatever in the purchase Bell was led to believe he was making from the Kenning syndicate.

Nor when, two days later, Coleridge upon handing Mr. Kenning Bell's cheque for $11,750, demanded the difference between the $8,000 payable and the amount of the cheque, did he pretend that anyone but himself was interested in the $3,750. Mr. Kenning, misled by the agreement of sale from Coleridge to Bell, which he had drawn upon Coleridge's instructions, handed over the excess. There is not the slightest reason to doubt the absolute good faith of Mr. Kenning, and it was with the greatest satisfaction to me that as the facts connected with the transaction were revealed, all the charges spread upon the pleadings against him and his associates in the ownership of the property were unreservedly withdrawn by counsel for the plaintiff. As against such defendants the action was accordingly dismissed with costs, except in so far as it was necessary to retain them before the Court in order that they should be subject to its direction in regard to the agreement of the 6th May.

Coleridge did not divide the $3,750 with his associates. By arrangement with them, he applied Smith's share and his own in payment of the $2,500 on June 1st and retained Marcon's share, with Marcon's concurrence, to be applied on the instalment due August 1st.

About the time the second instalment became due, Bell, while in Mr. Kenning's office, accidentally saw the agreement of the 6th covering the sale to Coleridge, and learned for the first time that the person who acted for him in what he thought to be a purchase from Mr. Kenning at $450 an acre was in fact himself the purchaser from Kenning at $400 an acre, and had induced Mr. Kenning to give up $3,750 out of Bell's cheque for $11,750. Bell at once sought legal advice and failing to obtain redress brought the present action.

He seeks as against Coleridge an accounting by Coleridge for the moneys received, a declaration that the purchase by Coleridge was for his benefit, a forfeiture of Coleridge's interest because of the fraud, and a declaration that the $2,500 paid in June was of the moneys of the plaintiff.

Coleridge by counterclaim seeks a declaration that the $13,750 paid by Bell is forfeited and that he (Coleridge) is entitled to the lands in question free from any claim of the plaintiff in regard thereto.

An account need not, in my opinion, be taken. There is no question that Coleridge received in connection with the Pratt deal but $3,750. The date of such receipt is fixed so that by a single computation the mere matter of interest may be readily determined.

The plaintiff is entitled to a declaration that the purchase of the 6th May was made for his benefit, as Coleridge represented; but at $400 an acre, and not, as Coleridge misrepresented, at $450 an acre.

Coleridge cannot, in my opinion, be permitted to derive any advantage from the fraud which he practised on Bell, nor from the payment of the $2,500 of Bell's moneys fraudulently obtained made to Kenning on June 2nd, 1913.

There will accordingly be a declaration that Coleridge has no interest in the purchase from the Kenning syndicate and that Bell is entitled to the benefit of the payment of $2,500 made out of his moneys by Coleridge to Mr. Kenning.

The defendants, other than Coleridge, were stated at the trial to be willing to carry out the sale, notwithstanding the default in payment of the instalment of purchase-money due August 1st, 1913. Upon payment by plaintiff of that instalment with interest, within a reasonable time (which I fix at one month from the entry of judgment) and the performance by Bell of the other terms of the agreement of sale of May 6th, Bell is to be entitled to a conveyance of the Pratt farm from the defendants, other than Coleridge, freed from any claim of Coleridge or of persons claiming under him.

There will in addition be judgment against Coleridge for $1,250, with interest from the 20th May, 1913, and for the costs of this action.

The counterclaim is dismissed with costs.

Stay of 30 days.

HON. MR. JUSTICE MIDDLETON. JANUARY 3RD, 1914.

DIXON v. TRUSTS & GUARANTEE CO.

5 O. W. N. 645.

Particulars — Statement of Claim — Action Against Trustee — Alleged Breaches of Trust—Facts not in Knowledge of Plaintiff — Necessity of Discovery — Order for Particulars Vacated — Leave to Renew After Discovery Reserved — Costs.

MIDDLETON, J., *held*, that in an action by a bondholder against the trustee for bondholders of a company alleging breaches of trust on the part of defendant it was improper to force plaintiff to give minute particulars of the specific breaches of trust complained of, especially as such facts were not within his own knowledge and were within the knowledge of the defendant.

Order of HOLMESTED, K.C., acting Master-in-Chambers, ordering particulars vacated. Liberty reserved to defendants to renew motion after discovery had.

Appeal by the plaintiff from an order made by the Senior Registrar, acting Master-in-Chambers, on the 17th December, 1913, directing delivery of particulars and in default striking out certain paragraphs of the statement of claim. Heard in Chambers on Tuesday, 23rd December.

Nathan Phillips, for plaintiff.

Grayson Smith, for defendant.

HON. MR. JUSTICE MIDDLETON:—In my view the order for particulars cannot stand. The plaintiff has spread his grievances at length upon the pleadings, which cover nearly thirty folios. He first sets out at length that he holds bonds issued by the Grand Valley Railway, the defendant company being trustee for the bond holders. The legislation under which the company was authorized to enter into an agreement with the Brantford Street Railway Company, and an agreement to which the plaintiff was a party for the consolidation of certain railways, the execution of a new mortgage upon the consolidated undertaking in lieu of three mortgages upon the three separate undertakings, and the exchange of the outstanding debenture bonds.

It is then said, in paragraph 16, that the Trusts & Guarantee Company knew of these agreements and became a party thereto and confirmed them. The plaintiff says that he consented to exchange his bonds and delivered his bonds to the defendant, to be held in suspense until the exchange

agreement had been carried out; that he afterwards received certain new substituted bonds which he believed were in accordance with the agreements and upon which interest was paid by the defendant for some time, but these bonds now falling in default he finds on inquiry from the defendant that the terms of the agreement upon which he gave up the bonds have not been complied with, in that two of the mortgages which were to be consolidated had not been released or discharged, but have priority over his new bonds. That a certain construction contract had been given priority over the new mortgage, yet the defendant company had issued bonds to a far greater extent than warranted by the original agreement. Other supposed grievances are set out in detail; and it is then alleged that the company defendants acted wrongfully in respect of the matters aforesaid and were guilty of breach of trust.

This, put shortly, is the complaint of the plaintiff. By the order in question he is required to give particulars shewing at what time and in what way the Trust Company became a party to the agreements, at what time, on what date and in what manner, and to whom, whether by writing or otherwise, it was agreed that the bonds should be held in suspense and so forth; and particulars of the want of proper care, skill and diligence in the administration of the trust, powers and duties charged, and particulars stating how and in what manner the company committed the wrongful and unlawful acts referred to. In default of complying with all this within one week the pleading is to be emasculated by striking out certain named paragraphs and the defendant is then to deliver its defence within ten days. If the paragraphs are struck out, the pleadings will be rather a sorry wreck, and manifestly the order has not been framed with artistic skill.

The more important point is that it is reasonably clear that no particulars are necessary, nor is it right that the plaintiff should be compelled, before he can ascertain exactly what has been done by the defendant, to state in the formal way which is prescribed, the details of every act of which he may complain when he learns exactly what the defendant has done in connection with its important duty under the trust mortgage.

Particulars should be ordered whenever necessary for the protection of the opposite party; but an order for par-

ticulars is not intended as a means to preclude a plaintiff from obtaining adequate discovery from the defendant. More particularly is this so when a relationship such as that suggested here exists. The plaintiff is necessarily ignorant of many details concerning the conduct of the defendant in connection with the carrying out of the trust; and what is really sought is so to tie him down by detailed particulars as to effectually preclude any due investigation with respect to the matters complained of in general terms.

It is impossible to enunciate any general principle applicable to all cases. Circumstances may indicate that an action is brought without any foundation and that it is merely of a fishing character; and in such cases it may sometimes be proper to tie the plaintiff down; but where the relation of trustee and *cestui que trust* exists, the plaintiff may well seek liberty to scrutinize with the greatest care the whole of the transactions of the trustee; and it seems to me an abuse of the process of the Court to hamper the fullest and freest inquiry. After discovery has been had it may be proper that the plaintiff should be directed to confine his attack to matters which he can then specifically enumerate. This will depend partly upon the frankness of the disclosure given by the defendant.

I think the appeal should be allowed and the order vacated, but that liberty should be reserved to apply for particulars to limit the issues at the trial after discovery has been had. I say nothing as to the probable fate of such a motion.

Costs here and below should be to the plaintiff in any event. The examinations were, I think, improper, and the plaintiff should pay the costs in any event.

The defendants may have ten days to plead.

HON. MR. JUSTICE BRITTON. DECEMBER 31ST, 1913.

LINAZUK v. CANADIAN NORTHERN COAL & ORE DOCK CO.

5 O. W. N. 642.

Negligence — Death of Workman — Breach of Statutory Duty — Contributory Negligence — Finding of Jury — Evidence — Dismissal of Action.

BRITTON, J, *held*, that contributory negligence is a defence to an action for negligence, even where the accident was occasioned by the neglect of the employer to perform a statutory duty.

Action by the widow and administratrix of Stef Linazuk to recover damages for his death caused by the alleged negligence of defendants, for whom he was working as a machine-oiler, tried at Port Arthur with a jury.

W. D. B. Turville, for plaintiff.

W. F. Langworthy, K.C., for defendant.

HON. MR. JUSTICE BRITTON:—The plaintiff is the widow and administratrix of the deceased Stef Linazuk, who at the time of his death was in the employ of the defendants as machine oiler in defendants' works at Port Arthur. He was accidentally killed while at work, under the circumstances set out in the statement of claim.

Questions were submitted to the jury, and the answers to all these, except the 8th, were such as to fix liability upon the defendants.

The 8th question was as follows: "Was the deceased guilty of contributory negligence, that is to say, could the deceased by the exercise of reasonable care have avoided the accident?" and the answer to that question was, "Yes." In addition to the formal answers, the jury wished to add that "in reference to the answer to the 8th question as to contributory negligence, that in their opinion the accident to the deceased was due to the joint negligence of the defendants and deceased."

The jury assessed the damages, if plaintiff entitled to recover, at $1,200.

There was evidence to go to the jury upon the question of contributory negligence.

It would not have been surprising, and I cannot say that the jury would have gone wrong, had they exonerated the deceased.

There was by the jury what amounts to a finding of a failure by the employer to perform a statutory duty, and the fact that such failure was on the part of a fellow workman with the deceased, would not prevent the defendants from being liable, but contributory negligence is a defence, even where accident occasioned by neglect of the employer to perform a statutory duty. Counsel for the plaintiff cited *Pressick* v. *Cordova*, 24 O. W. R. 631. That case was tried by Mr. Justice Latchford, and he held that there was no evidence to support a finding of contributory negligence. I cannot so say in the present case. There was here some evidence. The jury could upon it have well found that under all the circumstances the deceased was not guilty of contributory negligence, but as they have found otherwise I cannot assist the plaintiff.

Smith v. *Baker*, [1891] A. C. 325, and *McClemont* v. *Kilgour*, 27 O. L. R. 305, were also cited. I agree that there is nothing in the present case to enable the maxim "*volenti non fit injuria*" to be applied.

The *McClemont Case* decides that the maxim first quoted is not applicable in relief of a defendant guilty of violation of statutory duty, such as is imposed by the Factories Act.

The action will be dismissed, but it will be without costs.

Thirty days' stay.

HON. MR. JUSTICE MIDDLETON, IN CHRS. JAN. 2ND. 1914.

RE BRAMPTON LOCAL OPTION BY-LAW.

5 O. W. N. 644.

Elections and Voting — Voters' List for Local Option By-law — Municipal Act 1913, ss. 265, 266, 267 — Revision by County Judge—Scope of—Last Revised Voters' List — No Power to Add Names of Duly Qualified Persons—Prohibition.

MIDDLETON, J., *held*, that under ss. 266 and 267 of the Municipal Act the Judge has no power to add to a voters' list persons qualified to vote whose names are not to be found on the last revised voters' list, his function being solely one of elimination.

Motion by one Chantler for an order of prohibition to the Judge of the County Court of the County of Peel, prohibiting him from entertaining the application of one

Mitchell, or any other application, to add certain names to the list of those entitled to vote upon the submission of a proposed local option by-law.

B. F. Justin, K.C., for motion.

W. H. McFadden, K.C., for C. Judge.

No one appeared for others notified.

HON. MR. JUSTICE MIDDLETON:—This motion unavoidably made at a late hour must be determined at once or no good purpose can be served.

Under the new provisions found in the Municipal Act the intention is to give finality to the voters' lists and at the same time to allow the necessary amendments to be made up to the last possible moment, so that the exact list of those entitled to vote upon a by-law may be ascertained before the voting takes place.

The list to be certified is to be based upon the last revised voters' list "omitting . . . persons whose names are entered on such voters' list . . . but are not entitled as appears by such list . . . to vote on the by-law." (Municipal Act 1913, sec. 266 (2).

When the action of the clerk is complained of it may be reviewed by the Judge, sec. 267, who may strike out the name of any person wrongly entered on the list, i.e., which the clerk should not have included in it, or of any person who is shewn to be dead, but the whole question of the right to be on the revised voters' list is not opened up—the names of those "entitled as appears by" the last revised voters' list "to vote on the by-law must remain the test." The Judge may add "the name of any person whose name has been wrongly omitted from the list," i.e., the name of any person who by the revised voters' list appears entitled to vote on the by-law" and whose name ought to have been included by the clerk in the list. There is no warrant for the addition of names improperly omitted from the revised voters' list. The function of the Judge is in this respect limited to the correction of the clerk's action. In the case of tenants who have not shewn the right to vote under sec. 265 the right is wider and when the tenant's name is on the revised voters' list, but he has failed to file the evidence which is required under sec. 265 to give him the right to vote on the by-law, the Judge is empowered to allow him at

this later stage to establish his right. Save in the case of tenants and of nominee of corporations, the clerk may not go beyond the voters' list—his task is one of elimination and elimination only. Save as to the names of dead men and of tenants who have failed to comply with sec. 265, the function of the Judge is limited to the correction of the clerk's action. He is not making a new voters' list but is correcting a list—based on the revised voters' list—of those who may vote on the particular by-law.

The prohibition should therefore go restraining the Judge from including the names of any who do not appear by the last revised voters' list as entitled to vote. No costs.

In what I have said above I am speaking of the lists for voting on by-laws, when tenants and nominees of corporations have the right to vote. When as here the list is being prepared for a local option by-law and the tenants and nominees of corporations have no right to vote, the provisions of sec. 265 above referred to have no application.

HON. MR. JUSTICE MIDDLETON. JANUARY 6TH, 1914.

DELAP v. CANADIAN PACIFIC RW. ET AL.

5 O. W. N. 667.

Discovery — Further and Better Affidavit on Production — Motion for — Relevance — Evidence — Accidental — Inspection of Privileged Documents — Secondary Evidence of — Completion of Schedules — Further Discovery — Necessity of — Order for — Costs.

MIDDLETON, J., *held*, that where one of the main questions in issue in an action was as to the existence or non-existence of an alleged parol agreement, correspondence between the plaintiff and his solicitor about the time of the alleged making of the same was material as supplying cogent evidence as to the existence of such agreement.

That where by the inadvertence of the solicitor inspection was granted of certain correspondence for which privilege was claimed as being confidential communications between solicitor and client, and the inspecting party sought to establish by secondary evidence that privilege was improperly claimed, the Court on an interlocutory motion should not go behind the claim of privilege made in the affidavit.

Calcroft v. *Guest*, [1898] 1 Q. B. 759, referred to.

That where privilege is claimed the documents for which it is claimed should be fully scheduled.

Motion by the defendant for further and better affidavit on production and for the further examination of the plaintiff for discovery. Argued on the 6th December, 1913.

A. MacMurchy, K.C., and Stewart, for the defendant.
F. Arnoldi, K.C., for the plaintiff.

HON. MR. JUSTICE MIDDLETON:—This motion raises several questions of difficulty, which the parties regard as important. The statement of claim covers more than 150 folios, and as one of the main questions turns upon the relevancy of certain letters to the issues involved, I regret to say that it is necessary to understand to a certain extent at least, what the action is about.

The action is the offspring of the old action of *Delap* v. *Great North West Central Rw. Co.*, which was supposed to be settled for all time by an agreement of the 11th February, 1898.

Delap, the plaintiff, is an English gentleman of means, but of comparatively limited business ability. He had invested about $400,000 in this railway enterprise, and his investment had become involved in such a way as to make it absolutely impossible for him to grasp or handle the situation. He handed over the conduct of all negotiations in connection with this branch of his affairs to Mr. Frank Arnoldi, to whom he gave a general power of attorney. Mr. Arnoldi interested himself most actively and sedulously in his client's financial welfare, and became in truth his *alter ego* in connection therewith. Most of the negotiations were conducted on behalf of the defendants by their late general solicitor, Mr. Clarke, the Canadian Pacific Rw. Co. and the Great North West Central Rw. Co., having become in fact identified in interest.

At the time of the settlement Delap had in some way acquired control of ninety per cent. of the capital of the company, $500,000. The company had created bonds to the amount of £515,600 sterling, and Delap claimed to hold these as security for advances made for the company. Certain of the bonds, it was also claimed, were held as security for advances made by Mansfield and Stevens. The Supreme Court had held that there had not been a valid pledging of the bonds; but an appeal was standing for judgment before the Privy Council. The company was in addition entitled to a large land subsidy. Other litigation was pending with other parties concerning the title to the stock. Messrs. Angus and Shaughnessy, representing no doubt the Canadian Pacific Rw. Co., agreed to pay $550,000 for all

the stock and assets of the company except the ownership of so much as is represented by one-tenth of the subscribed capital stock, which Delap was not to transfer; this to be free of all debts, liabilities and charges, which Delap on his part was to get rid of out of the price paid to him. The price was to be advanced by the purchasers to enable him to get rid of these claims.

The written agreement, evidently prepared with the greatest care, shews nothing whatever concerning the purchase of the ten per cent. retained by Delap, but it is alleged that the effect of the agreement is to leave Delap the co-owner with the railway in the proportion of one to nine of the assets of the company, and that there was a parol agreement by which the Canadian Pacific Rw. Co. and Messrs. Angus and Shaughnessy would buy from the plaintiff his ten per cent. at a price to be ascertained on the basis of a tenancy in common or partnership with regard to the entire assets, so soon as all the claims against the railway should be extinguished and the agreement should be otherwise carried out. The claims have now all been got rid of, the $550,000 has all been paid, and the plaintiff accordingly makes his claim.

The matter is further obscured by the making of a leasing agreement between the railway and the Canadian Pacific Rw. Co., and by the fact that all the claims outstanding have not been discharged but are still held by virtue of certain assignments.

This possibly is a fair enough summary of the claim, although by no means exhaustive or complete.

The defendants on their part deny entirely the meaning attributed to the written document by the plaintiff, and altogether deny the making of any such parol agreement as that set up. So far as any one knows, the only living person who can testify in any way to the parol agreement set up is Mr. Arnoldi; the plaintiff himself being in England. Judge Clarke, with whom it is said the agreement was made, died before the present claim was in any way put forward. Manifestly, it is of the utmost importance that the defendants should be at liberty to see all the correspondence that took place between Mr. Arnoldi and the plaintiff, to ascertain whether in that correspondence there is any hint of the existence of such an agreement as that now set up.

An order to produce was issued, and in due course an affidavit on production was made by Mr. Delap. It may be taken for granted that in the making of this affidavit Mr. Delap was entirely in the hands of Mr. Arnoldi. Some fifty-eight documents are produced covering the agreement and many matters relating to the carrying out of it. These productions do not cover the correspondence between Mr. Arnoldi and his client. Only one letter of that description is produced, namely, a letter of March 8th, 1898, the same day as the agreement in question.

The correspondence between Mr. Arnoldi and his client is not scheduled in detail in the second part of the schedule comprising the documents which it is objected to produce. The affidavit in the second part does not contain a reference, in the schedule, to letters and documents subsequent to the 27th May, 1910, between the plaintiff and his solicitor. It is objected to produce these letters because it is said they are "letters and documents in confidence passing between me and Mr. Arnoldi, who has been throughout the transactions in this action my confidential legal adviser . . . giving me professional legal advice as to the matters in question in this action and in contemplation of the bringing of this action." This production was deemed to be inadequate and unsatisfactory, and a demand was made for the production of the entire correspondence. Mr. Arnoldi took the position that while the letters prior to the period for which privilege was claimed were not relevant, and contained nothing pertaining to the matters in issue, there was no reason why they should not be seen.

Mr. Arnoldi had prepared in his office a list of all the correspondence between himself and his client, intending that this list should terminate in May, 1910, when the correspondence began as to which privilege was expressly claimed. Unfortunately, when the representative of the defendants' solicitors attended to inspect the documents produced, he was given all the correspondence, including that in respect of which privilege was claimed, and made copies of certain of the letters and it is suggested that that correspondence contains matter going to shew that the claim is not made in good faith. Proceedings were instituted, but not prosecuted, to compel the return of the copies of these documents, and I am not now concerned with the question which will arise with respect to these. Suffice it to say that in *Calcraft*

v. *Guest*, [1898] 1 Q. B. 759, the use of copies of privileged documents, where the production of the original cannot be compelled by reason of privilege, is not prevented even by fraud in the obtaining of the copies—a much stronger case than this, where the copies were not obtained fraudulently but by the mere inadvertence of the solicitor.

Delap was examined for discovery in England after this, and necessarily his examination was most unsatisfying, owing to his entire lack of first-hand knowledge and his forgetfulness and in some respects his failure to appreciate the significance and importance of matters which the defendants naturally desired to investigate in their endeavour to meet this claim concerning which they are much handicapped by the death of Mr. Clarke.

It would perhaps be best to deal with the different matters discussed on this motion in the order in which they were presented by counsel, trusting that with reference at least to some of the matters counsel will see fit to make some satisfactory arrangement by which a complete series of correspondence may be built up from copies of letters where an original is mislaid.

It is said that the inspection of documents which has already taken place and which entirely fell through after the episode referred to by reason of the friction thereby engendered, has been entirely inadequate. There are it is said several hundred letters of which only a few have been inspected. A list of nineteen pages is produced covering these letters. Taken individually it is quite possible each letter might be said to be irrelevant. Taken collectively, the negative evidence which would be afforded by the complete absence of all reference to the alleged agreement may be of the greatest possible moment, particularly if a situation is developed in which such an agreement if it existed would naturally be mentioned. It seems to me clear that all these letters are subject to production.

Next, production is sought of the letters from January, 1910, prior to the bringing of the action, concerning which privilege is claimed. As to these, I think privilege is adequately claimed and that they are not now liable to production. It may be that at the trial the claim to privilege will be circumvented by the giving of secondary evidence, or it may be that the Judge will then be in a position to determine that the claim of privilege is not validly made; but I think

I am concluded by the affidavit. The affidavit, however, is not satisfactory, as I think in the circumstances of this case it would be better to have this correspondence duly scheduled. I do not think that the case already referred to justifies me in receiving secondary evidence on this motion as to the contents of the letters. The case is not brought within *R.* v. *Cox*, 14 Q. B. D. 153, as fraud is not charged.

Mr. Delap's replies to the letters which are directed to be produced ought also to be produced; and his replies to the letters which are privileged ought to be scheduled.

From the documents produced by the defendants in their affidavit, it is quite clear that much correspondence took place between the solicitors representing the adverse parties which has not been produced; for example, copies of many letters are produced referring to letters received, but the letters thus received are not produced. As already said, a little collaboration would complete the entire series.

The next item relates to correspondence with Mr. Castle Smith. Mr. Castle Smith is a friend and adviser of Mr. Delap in England; in fact he is his cousin. He is a solicitor, but does not appear to have acted in this transaction as a solicitor. I think that correspondence in this transaction between Mr. Arnoldi and Mr. Castle Smith, at any rate prior to the time at which privilege can be claimed, ought to be produced. It ought at any rate to be dealt with in the affidavit. It is clear there is some correspondence falling under this head which is not covered by the affidavit on production.

Then it is said that there are a number of particular documents referred to in different places in the examination. Attention has now been called to these particular documents, and there is no reason why they should not be mentioned and dealt with in the affidavit.

It is sought to have a further examination for discovery. I am not sure that any good purpose would be served by such an examination. If it is really desired, in view of the failure to produce, it will have to be ordered, but I think that the costs of this examination should be reserved. If it turns out that there was no real necessity for the further examination I should certainly not give the examining party the costs of it. If, on the other hand, in the result it appears that there was a real cause for the examination a totally different result should follow.

An order should, in my view, be made directing the filing of a further and better affidavit on production. If so desired, this order may contain specific directions concerning the matters specifically dealt with above. If it is thought better, the order may be general in its terms, and further examination. Costs of the motion will be to the defendants in any event of the cause. Costs of the examination reserved.

HON. MR. JUSTICE MIDDLETON. JANUARY 3RD, 1914.

MEXICAN NORTHERN POWER CO. LTD. v. S. PEARSON & SON.

5 O. W. N. 648.

Particulars—Statement of Claim — Former Order not Complied with — Ability to Furnish — Discovery not Substitute — Discussion of Function of Particulars — Appeal — Vacation of Order for Particulars — Leave to Apply after Discovery.

HOLMESTED, K.C., (25 O. W. R. 422) ordered particulars of certain paragraphs of the statement of claim as asked, stating that discovery is not a substitute for particulars.

MIDDLETON, J., vacated above order, holding that under the circumstances of the case, plaintiffs were entitled to full discovery from defendants before formulating their claim.

Leave reserved to apply further after discovery had.

Appeal from order of the Senior Registrar, acting Master in Chambers, dated 19th December, *ante* p. 422, directing delivery of further particulars with respect to certain items mentioned in the statement of claim, and in default that these portions of the statement of claim be struck out. Argued on the 23rd of December, 1913.

W. N. Tilley, for plaintiff.

G. Osler, for defendant.

HON. MR. JUSTICE MIDDLETON:—The plaintiff's statement of claim has already been the subject of attack, an order having been made by the Chief Justice of the King's Bench, 10th October, 1913, directing delivery of further particulars or the amendment of the pleading. The plaintiff adopted the latter course, making considerable amendments with respect to many of the matters set up.

I can find no record of any reasons given for the decision; and inasmuch as the order does not in any way

specify what particulars are required, I think the matter now falls to be dealt with upon a consideration of the pleading as it stands.

This case differs from many others in that I am entirely satisfied of the absolute good faith of both parties litigant; and the amount involved is so large, and the complications which will inevitably result upon the trial will be so great that factors are introduced not present in other cases.

Put shortly, the case is this: The plaintiff, a Canadian company, had acquired certain water privileges of great value on the Conchos River, Mexico, and, being desirous of having the necessary works located and constructed for the development of power, entered into a contract with the defendant, an English corporation, by which the latter undertook to act as consulting and managing engineer for the designing and construction of the works in question. The works have been partially completed but it is said that they were not in accordance with the requirements of the contract. They have been taken over by the plaintiff. The pleadings then set out some twenty-one heads of complaint. It is said that in August, 1912, the contractor abandoned work under the contract. Claim is made for damages, heads of damage are enumerated, but detailed sums are not given. The damage is said to amount in all to upwards of one million dollars.

The agreement between the parties is framed upon very simple lines. Specifications are not given. The contractor agrees to design and construct, checking surveys already made, making all necessary surveys required, going thoroughly into the question of water supply and storage, etc., submitting an estimate of the cost of construction and available power for the approval of the plaintiff. When these plans were approved the contractors had to supervise the construction of the entire works, furnishing the engineering staff and obtaining all materials and machinery necessary for construction purposes. The works to be constructed were mentioned in a general way, including twenty miles of railway, a dam sufficient to raise the level of the water 60 metres, another smaller dam to raise the water of another river to the same height, power houses, machinery, etc., and 210 miles double circuit transmission line on steel towers, with sub-stations, a distribution system, and subsidiary structures and buildings. For all this work the plaintiff was to pay cost price and a commission.

The disputes between the parties, as already indicated, are of the most extensive description; and in order to adequately prepare for trial, information will have to be obtained from men resident in different parts of the world, and to whom it is not easy to obtain access, owing to their being engaged on other engineering tasks of magnitude.

The plaintiff claims that the relationship which existed between the parties entitled them to obtain the fullest possible discovery from the defendant before being compelled to definitely and finally formulate the charges upon which it is intended to rely at the hearing.

With this I agree. At the same time, I think it will be essential for a fair trial of the action that some time before the hearing the precise matters which it is intended to bring in issue should be as definitely formulated as possible. In all cases of this description there cannot be a fair trial unless this takes place. One has only to read the evidence in an ordinary building contract case which has been referred to the Master for trial to see the great confusion that results, even in a small matter, where this course has not been adopted. Each succeeding witness proceeds to find further defects, and before the reference is closed the whole evidence is in a chaos, from which it is almost impossible to evolve order.

In this case the real difficulty is to get some scheme by which the respective rights of the parties will be adequately protected. Discovery is of necessity limited by the pleadings and by the particulars which may have been given under them. To order particulars at this stage would, I think, unfairly hamper the plaintiff. The plaintiff is entitled to search the conscience and the conduct of the defendant, its agent, to the utmost; and it is better that this should all be done before the final formulation of the particular charges to be investigated at the trial. If the particulars given in the pleadings turn out to be so vague and general as to be insufficient to direct the mind of the party to be examined for discovery to the real issues, this may create difficulty when the examination is on foot; but it seems to me to be better that this should be left to work itself out during the progress of examination than that an attempt should be made to unduly tie the hands of the plaintiff at this stage.

As has often been remarked, the true function of particulars is dual: to give the information necessary for intelligent pleading by the opposite party, and to define the issues to be dealt with at the hearing. Sometimes the one aspect completely overshadows the other. Sometimes the due conduct of the action indicates discrimination. In this case I think there can be no difficulty in pleading to the statement of claim as it now stands. No doubt the defendant intends to deny the charges made against it; in fact, its counsel said so, and intimated the intention to counterclaim for a large sum which is said to be due to the defendant upon the contract. When the plaintiff has had discovery, I think an order should then be made as I have already indicated, directing the issues to be more clearly raised by means of some supplementary particulars.

I have felt some difficulty in devising some means by which the rights of the defendant will be adequately protected so as to secure to it full and fair discovery from the plaintiff. I do not think these particulars should be ordered until after the plaintiff has exhausted its right of discovery, nor do I think that the defendant should be compelled to obtain from the plaintiff all the discovery it may have before such particulars are given.

I think the best course to pursue is simply to direct now that the order for particulars directed by the Master be vacated and that the defendant do plead within a limited time, reserving to the defendants the right to move for particulars for the purpose of the trial after the discovery is completed. The defendant should be at liberty to obtain such discovery as it may desire at the present time without restriction. If, as the result of the delivery of further particulars, new matter is raised upon which the defendant desires to have discovery, I think it should be understood that the defendant should have further discovery. This may involve delay in the trial if the plaintiff should substantially enlarge its claim or if the defendant fails to obtain satisfactory discovery by reason of the vagueness of the statements in the present pleading. No provisions should be made in the order with reference to these matters; they should be left to be worked out as the action may develop. To avoid any unnecessary or undue delay, the plaintiff would

be well advised if it delivers suplementary particulars from time to time as it may be able.

After much thought, I believe that the course indicated will lead to a satisfactory solution of the difficulties incident to a full and fair hearing, which it must not be forgotten is the true aim and object of all preliminary proceedings.

Costs here and below will be in the cause.

HON. SIR G. FALCONBRIDGE, C.J.K.B. JANUARY 5TH, 1914.

GEORGE WHITE & SONS CO. v. HOBBS.

5 O. W. N. 659.

Sale of Goods — Traction Engine — Contract of Sale — Warranties — Verbal Representations not Binding on Vendors — Complaint to be Made in Five Days—Non-Fulfilment of Warranties — Neglect to Complain — Binding Force of Contract — Neglect to Read Same No Excuse — Action for Purchase Price.

FALCONBRIDGE, C.J.K.B., *held* that where a contract for the sale of a traction engine provided that any complaint was to be made to the vendors within five days from the operation thereof, failing which the warranties in the contract were to be considered as fulfilled, and the engine did not fulfil the warranties but no complaint was made, that the purchaser was estopped from complaint by his contract.

Action for the price of a new White Traction Engine, tried at Toronto.

I. F. Hellmuth, K.C., for plaintiffs.

T. N. Phelan, for defendant.

HON. SIR GLENHOLME FALCONBRIDGE, C.J.K.B.:—I find that McIntyre, plaintiffs' agent, represented to defendant that the engine "would fire as easy as any engine ever made or sold." I find that the engine did not answer this representation. Lumley, plaintiffs' expert, said, in presence of defendant and G. Scott, she was the "worst . . . " (extremely vulgar word) "he ever saw to fire." This was a most important matter to defendant, whose business is that of thresher.

But the contract says: "There are no warranties, guaranties, or agreements, express or implied, other than those connected (*sic*) herein; and the company shall not be held responsible for any statements made at any time, in any

way, or by any person or agent or representative in connection with this matter, unless expressed in this contract. It is also understood that no money is to be paid on account herein to any person without the written order of an officer of the company at the head office."

I find also that the engine did not work properly and do good work—particularly in this regard that it consumed about 33% more fuel and water than defendant's old Waterloo engine. Also, as compared with the latter, it required an enormous amount of steam pressure to do the work.

The result of this was that there was a great loss of time to defendant, his men and his employers, the farmers. The farmers, too, who supplied fuel and water began as plaintiff says to "kick," and many of them said they would not have it on the place if they could get another engine.

I prefer the evidence of defendant and his witnesses to that of the experts called for the defence. These latter did not see it at work on the ground. The defendant and men who operated it there were practical men of long experience and fully competent to exercise good care, proper usage and skilful management so as to make it work properly and do good work—but it failed to do so.

It seems hard that the defendant should have to pay for the engine under these circumstances.

But here again the contract says: "The above machinery and goods are warranted to be well made, of good material, and with good care, proper usage and skilful management to work properly and do good work. Defects or failure in one or more parts of said machinery or goods shall not afford grounds for condemning or returning the whole or any other part. This warranty is good for five days only after starting, and written notice of any complaint must be given to the company, at its head office, and also to the agent through whom purchased, before the expiration of said five days, stating in detail wherein this warranty is not satisfied; and reasonable time thereafter shall be given to the company to send competent workmen to remedy the difficulty, the purchasers agreeing to render necessary and friendly assistance with men and horses gratuitously if requested, and the company to have the right to replace any part or parts within reasonable time after which if anything is not in accordance with this warranty, it is to be returned by the purchasers to the place of shipment free of charge without

delay, and the company shall then have the right to substitute other parts or machines therefor, within reasonable time, on the same conditions, and under and subject to the terms of this contract. Failure so to make such trial or give such notices within said five days shall be conclusive evidence of the due fulfilment of warranty by said company. When, at the request of the purchasers, men are sent to operate said machinery and find that it has been carelessly or ignorantly handled to its injury in doing good work, the expenses so incurred shall be paid by the purchasers and form part of the debt secured under or by virtue of this agreement. This warranty shall be operative only in case the purchasers perform fully all their obligations under this agreement, and it shall be void in the event of any representations or statements made by the purchasers being untrue. No remedy other than the return of the defective part or machine shall be had for any breach of warranty. This warranty does not apply to second-hand machinery."

There is no pretence that written notice or any notice was given within the 5 days. Defendant's only written complaint is more than a month later (Contract 18th September; letter 26th October).

It does not avail the defendant to say that he did not read the contract, copy or duplicate original of which was left with him. He is not a marksman nor entirely illiterate. His education and intelligence have been deemed sufficient to qualify him to be a county constable, which office he holds.

Again, on 26th November, when Lumley the expert came, he signed the following:—

Exhibit 7. "Date, 26th November.

The Geo. White & Sons Co. Ltd.,
London, Ont.

Dear Sirs:—This is to certify that your Mr. Lumley has been here and fixed my engine for me, and that same is now entirely to my satisfaction.

W. Hobbs."

He says he had not his glasses and he signed a paper "just to shew that he (Lumley) was there." That this paper does not express the attitude of his mind at any

time, I am sure, but what can be done for or with a man like this ?

The result will be judgment for plaintiffs with costs.

Thirty days' stay.

The exact form of the judgment can be settled when I am advised of the terms on which plaintiff took back this engine.

HON. MR. JUSTICE LENNOX. JANUARY 5TH, 1914.

RE COUNTY COURT JUDGES INCOME TAX.

5 O. W. N. 657.

Assessment and Taxes—Income Tax—Dominion Officials—Salaries of Judges—Liability to Assessment—B. N. A. Act—Stare Decisis—Binding Force of Decisions of Judicial Committee of Privy Council.

LENNOX, J., held that the incomes of Dominion officials are liable to municipal assessment.

Webb v. *Outrim*, [1907] A. C. 81, and *Abbott* v. *St. John*, 40 S. C. R. 597, followed.

Leprohon v. *Ottawa*, 2 A. R. 522, disapproved.

That the Courts of Ontario are bound to follow decisions of the Judicial Committee of the Privy Council as being the ultimate Court of appeal for this province.

Henderson v. *Canada Atlantic Rw. Co.*, 25 A. R. 437, referred to. [See 33 C. L. T. 1143.—Ed.]

Appeal by the Judges of the County Court of the county of Lambton from the judgment of the Court of Revision for the town of Sarnia confirming an assessment of the appellants' official incomes by the assessor of Sarnia.

The appeal was heard by LENNOX, J., who was named by another Judge of the Supreme Court of Ontario under sec. 16 of the Statute Law Amendment Act, 1910, 10 Edw. VII. ch. 26, as a "disinterested person" to hear the appeal, which in the ordinary course would have come before one or the other of the appellants in his capacity as County Court Judge.

D. L. McCarthy, K.C., for Judges.

John Cowan, K.C., for Sarnia.

HON. MR. JUSTICE LENNOX:—Of the cases which may be binding upon me the most recent Canadian case is *Abbott* v. *City of St. John* (1908), 40 S. C. R. 597, holding that a civil or other officer of the Government of Canada may be

lawfully taxed in respect of his income as such by the municipality in which he resides. If I am at liberty to do so I am disposed to follow this judgment, for, although I say it with the very greatest respect for the eminent Judges who have expressed opinions to the contrary, I cannot find anything in the British North America Act which, in my opinion, exempts any Judicial income in Ontario from municipal taxation.

But it is argued that, inasmuch as an appeal from an assessment of this kind could not be carried beyond our Provincial Court of Appeal, I should follow, not the decision of the Supreme Court—where a case of this kind, it is said, could not be taken—but the decision in *Leprohon* v. *City of Ottawa*, 2 A. R. 522, in which it was held that a Provincial Legislature has no power to impose a tax upon the official income of an officer of the Dominion Government, or to confer such a power on the municipalities. The argument is not based on fact to begin with. New Brunswick is working under the same constitution as Ontario. The question of the legality of assessments of this kind may reach the Supreme Court from any province in the Dominion. But aside from this I cannot accept this view of my duty. I have indicated what I conceive to be the power of the Legislature, and in any case I am bound by the decision of the Supreme Court. *Victorian Rw. Comrs.* v. *Coultas & Coultas*, 13 A. C. 222, the Privy Council pronounced against damages occasioned by "nervous shock." In *Bell* v. *Great Northern Rw. Co. of Ireland*, 26 L. R. Ir. 428, and *Dulieu* v. *White & Sons*, [1901] 2 K. B. 669, the Judges refused to follow the *Coultas Case*, as they were not bound by it, and the Privy Council decision was severely criticised by eminent legal writers and in legal publications, but when subsequent to all this the question came up in *Henderson* v. *Canada Atlantic Rw. Co.*, 25 A. R. 437, our Court followed the Privy Council—although it was not a case which could be taken to the Privy Council— and the reason was given by Mr. Justice Moss, delivering the judgment of the Court at p. 445, as follows: "Whatever weight may or ought to be given to these views by other Courts it is incumbent on this Court to accept and follow that case, *Victorian Railways* v. *Coultas*, as a decision of the ultimate Court of Appeal for this country." I have nothing to do with where the case is carried—what I have to do is to

adopt the law as declared by the highest of our Courts—the Privy Council, if I can find a case—and so back through the Courts until I come to Judges of co-ordinate authority," in conformity with the principle of sec. 32 of the Judicature Act. Anything else would be a scandal. Could a Judge refuse to be governed by the decision of the Supreme Court or Privy Council because the case being tried was not appealable to these tribunals ?

Webb v. *Outrim*, [1907] A. C. 81, was a good deal relied upon in the *St. John Case* and I think might be said to be adopted by the judgment of Mr. Justice Davies. It was argued by Mr. McCarthy that it has no application to this case. That all depends upon whether the constitutions of Australia and Canada are upon this point, as contended, practically identical. If they are substantially the same then *Webb* v. *Outrim*, of course, is binding upon Canadian Courts.

Reference may be made to: *Bank of Toronto* v. *Lamb*, 12 A. C. 575; *Attorney-General of Quebec* v. *Reid* (1884), 10 App. Cas. 141; and as to the plenary powers of the legislatures, see Canada's Federal System (Lefroy) pp. 64-5-6, and cases referred to.

I find that the official incomes of Judge McWatt and Judge Taylor are subject to taxation. I make no order as to costs.

See written arguments of counsel on similar case of *Morrison* v. *Toronto*, 33 C. L. T. 1143-1168.

HON. MR. JUSTICE LENNOX. JANUARY 5TH, 1914.

McCALLUM v. PROCTOR.

ARMSTRONG v. PROCTOR.

5 O. W. N. 692.

Fraud and Misrepresentation—Action for Damages—Purchase of Interest in Western Lands—Evidence—Damages—Measure of.

LENNOX, J., *held*, that the measure of damages in an action for damages for false and fraudulent representations by which the plaintiffs were induced to purchase an interest in certain lands was the difference between the price paid and the actual value of such interest.

Stocks v. *Boulter*, 47 S. C. R. 440, referred to.

Actions for damages for false and fraudulent representations knowingly made by the defendant to induce the plaintiffs to each take a one-sixth interest in 7,808 acres of land

in Saskatchewan and to pay A. J. McPherson therefor at the rate of $10.25 an acre.

R. McKay, K.C., and R. T. Harding, for plaintiffs.

R. S. Robertson and J. J. Coughlin, for defendant.

HON. MR. JUSTICE LENNOX:—These actions were tried together and the evidence is almost identical. In the *McCallum Case* objection is taken because Duncan McCallum is not joined as a plaintiff. Duncan never had any real interest in the contract and has assigned to his brother the plaintiff. The objection has no merits and on the facts of this case I am not disposed and do not feel bound to give effect to the objection.

The defendant produced and presented a detailed printed description of each lot. He stated that he had personally examined every foot of the land and he found it to be even better than it was described to be in the printed particulars, that it was first-class wheat land and as good as the Indian Head wheatfields, clear open prairie, and you could plough from end to end of the sections without a break, also that he had put $3,000 into it himself. These and a lot of other representations all calculated to induce the plaintiffs to enter into the transaction are undisputed, and the plaintiffs believed these statements and acted upon them. To fortify his statements the defendant produced and read from a book containing what he represented as an accurate description of the land as determined by his personal examination. A book was produced at the trial and it was claimed to be the one the defendant had used, but I am not satisfied that it was. It matters very little however. The printed statement did not contain such a glowing description of the land as the book, but is quite sufficient for the purposes of this action. There is probably hardly a lot described honestly or with reasonable accuracy. There is no farming land in the sense or meaning of the printed particulars and the strongest evidence of the untruthfulness of the defendant's representations is to be found in the evidence of some of the witnesses for the defence. It is not shewn by any witness for the defence, who goes into specific description, that there is any section or quarter section above the grade of "mixed farming." The most important witnesses for the defence admit that the statements of the printed sheet are misleading, dishonest and untruthful. I find that these are not matters as to which the defendant could be merely mis-

taken. The statements were false and fraudulent to the knowledge of the defendant—they were important, they were made to induce and did induce the plaintiffs to contract, and the defendant knew at the time that they had this effect.

It is claimed that the plaintiffs should recover back the amounts they have paid with interest. I don't think so. They are getting the lands, they have to take them. They might have attacked McPherson, and rescinded the contract. Then they would get their money back. I think the difference between actual value and what they have to pay is the measure of their loss occasioned by the defendant.

Before discovery of the fraud the syndicate divided the lands. This does not affect the question.

There will be judgment for each plaintiff for $5,700 with costs.

Reference to *Redgrave* v. *Hurd*, L. R. 20 Ch. D. 1; *Rawlins* v. *Wickham*, 3 De G. & J. 304; *Smith* v. *Chadwick*, 9 A. C. 187; *Derry* v. *Peak*, 14 A. C. 337; *White* v. *Sage*, 19 A. R. 135; *McCabe* v. *Bell*, 15 O. W. R. 547; *Stocks* v. *Boulter*, 47 S. C. R. 440.

HON. MR. JUSTICE LENNOX. JANUARY 6TH, 1914.

RE JOSEPHINE & JOHN CULIN, INFANTS.

5 O. W. N. 663.

Infants—Custody of—Application by Half-brother—Habeas Corpus—Religion of Father to Govern—Children's Protection Act, 8 Edw. VII., c. 59—3 & 4 Geo. V., c. 62—"Neglected Children"—Meaning of—Strict Construction of Statute—Welfare of Child—Family to be Kept together—Compensation to Foster-parents—Principles on which Same Granted.

LENNOX, J., *held*, that the provisions of the Children's Protection Act of Ontario, 8 Edw. VII. c. 59, or 3 & 4 Geo. V. c. 62, must be strictly followed before a child is committed thereunder.

That a child if committed must be placed in a home of the religion of its father.

Re Newbury, L. R. 1 Eq. 431, and *Hawkesworth* v. *Hawkesworth*, L. R. 6 Ch. 539, followed.

That in considering a child's welfare it is important that if possible the family be kept together.

Re Foulds, 12 O. L. R. 245, referred to.

Motion by Emil Culin, a half-brother of the infants Josephine Culin and John Culin, for an order upon the return of a writ of habeas corpus for delivery of the infants to the custody of the applicant.

H. Ferguson, for the applicant.

J. R. Cartwright, K.C., for Children's Aid Society.

T. W. McGarry, K.C., for foster parents.

HON. MR. JUSTICE LENNOX:—Josephine Culin is about 11 years old and her brother about 13 months younger. Their father Angelo Culin was a Protestant, and died in June, 1907. Their mother, Elizabeth Culin, is a Roman Catholic, but she is not in her right mind and is not capable of looking after these children.

Emil Culin, who is applying for the custody of these children, is a son of Angelo Culin by a former marriage. He is 27 years old, and he and 9 other children of the first marriage were brought up in their father's faith. Angelo and Elizabeth Culin were married, and their children Josephine and John Culin, the infants, were baptized by a Protestant clergyman. The father of the infants made it a point that these infants should be educated in the Protestant faith and, so far as might be, for children of their age, they attended their father's church during his lifetime. By the father's will it was provided that his widow should have a home on the farm with the applicant. The widow and these children continued to live with the applicant until January, 1909, and it does not appear that he failed to afford them a comfortable home or to properly provide for them.

Rev. Father O'Leary was undoubtedly the means of getting this helpless woman to leave her home and take the children with her. That he was actuated by an honest desire to promote the best interests of these children, from his point of view, I am not disposed to question, although I am bound to say that his methods were not by any means commendable. I am only concerned, however, in the actions of Rev. Father O'Leary in so far as their scrutiny may assist me in determining whether these children were ever properly and legally committed to the custody of the Children's Aid Society. The Justices who committed them have been ordered to return the records and papers into Court. There are none. There was no record kept. The proceedings were instituted by Father O'Leary, or by Mr. Miller, an agent of the society, upon his instructions. Father O'Leary understood the situation fairly well. Months before the children were committed he wrote Mr. O'Connor, the inspector: "I

have 2 Catholic children in Trout Creek and I cannot get them off my hands. Their mother is insane at times and certainly not capable of managing them; the father of the children was a Protestant, and died a few years ago. He was married twice and the children of the first marriage are anxious to have the children brought up as Protestants." Mr. O'Connor replied on the 2nd of April, 1909. It is sufficient to quote one sentence, namely: "The guardianship of children is given to a children's aid society through a Judge or magistrate, and if there is any doubt regarding their religion it is then settled in accordance with the religion of the father."

As to how these children were committed, Mr. Miller, secretary and inspector of the Children's Aid Society, swears that he was instructed by Father O'Leary, and—

"2. That the said Father O'Leary stated before the 2 justices of the peace and in my presence, that the above-named infants Josephine and John Culin were entirely in his care and under his charge and control; that the parents were Roman Catholics, but that the father died and the mother was mentally incapable of looking after the children, and that the children are dependent; and requested that they both be made wards of the Children's Aid Society as Roman Catholics, being there is nobody to support and educate them, and on the said priest's statement, the order for the committal of the said children to the Children's Aid Society was made." The affidavit of Mr. Greene, one of the justices of the peace is to the same effect. On the other hand there are two affidavits to the effect that Elizabeth Culin, the mother of the infants, handed them over to the Rev. Father O'Leary before the commitment and signed a document to that effect, and that in the opinion of the deponents Mrs. Culin was then of sound mind. I am prepared to believe that this generally demented woman did purport to make over these children in the way stated. But take it all in all this thing should not have happened.

The Culin children were not "neglected children" within the meaning of 8 Edw. VII. ch. 59 or the present Act. The Children's Aid Society or persons acting in concert with them, must keep within the limits of the Act or they are trespassers—wrongdoers like any other person interfering with the liberty of the King's subjects. There is no provision as yet in the statute for the case of an insane parent.

These children had a home, a good home as I believe, and they were never rightfully away from it.

These children could only be committed after a proper judicial enquiry.

"A Judge" includes "two justices of the peace."

The Judge is to "investigate the facts of the case and ascertain whether the child is a neglected child and its age, and the name, residence and religion of its parents." He can compel the attendance of witnesses, and the parents, or the person having the actual custody of the child shall be notified of the investigation. The applicant should have been notified. It is idle to talk of the Rev. Father O'Leary taking his place, after reading his letters and the affidavit of Dr. Proctor as to the condition of the mother. A judicial enquiry there must be conducted by recognised methods, including evidence upon oath. See Powell, 9th ed., p. 216, referring to Prevention of Cruelty to Children Act, 1904, *R.* v. *Dent*, 7 J. P. 511; Phipson, 5th ed., pp. 441, 459. The order was improvident, improper, and provably illegal, and at all events the custody or control of the children was never lawfully committed to the Children's Aid Society.

The next consideration is should the custody be changed? I am quite satisfied that it should be. The children have been placed with Roman Catholic foster parents and the evidence satisfies me that both the children are well treated and that they are with respectable, kindly people. But these children should not have been placed in Roman Catholic homes, because according to our law they should be brought up in the religious faith of their father. Mr. O'Connor was the person who found foster homes for them. He claims he acted in good faith. I regret it, but I feel it my duty to say distinctly that I cannot accept that statement. The correspondence between him and the Rev. Father O'Leary is quite inconsistent with any idea of that kind. Not to particularise further, the first letter from Rev. Father O'Leary points out that the father was a Protestant and the reply shews that he clearly apprehended the effect of this. I dwell upon this so that in future officers of the society will realise that it is distinctly improper and contrary to law to send a Roman Catholic child to a Protestant institution or foster home and *vice versa*. Section 28 is specific upon this question. I have, therefore, come to the conclusion that these children should be removed from their present foster homes.

I now come to the question of compensation. I have decided not to direct payment of anything to the foster parents because, amongst other reasons, I do not think they will be out of pocket at all. I was requested to have a talk with the children and I reluctantly consented. I did not ask them any questions as to their religious views or preferences or as to where they prefer to live. I did not think it proper to discuss the religious feature of the case with children of this age. Nor would I be much influenced by what they might say under such circumstances. It is unfortunate that this delicate and supremely important matter will probably have to become a debated and controversial question to each of these children sooner or later. I am quite satisfied that they are satisfied with their present homes and have no desire to get away, but, all the same, they both made it perfectly clear to me that they have been very busy and useful —working hard in the time they have been at home—but not too hard. The boy, for instance, had his arm in splints and this led to him giving me a pretty full account of the work he has been in the habit of doing, and Josephine seems to have been very usefully employed in all kinds of house work including scrubbing; and out-door work too of certain kinds, including throwing down hay, and, I think, perhaps milking cows, although I am not sure as to this. I do not think compensation should be ordered, particularly as both the statute and the contracts provide for termination at any time by the society.

I have referred to the statute shewing that the religion of the child is to determine its foster home. It remains to be pointed out how the religion is to be determined. The religion of the child is the religion of the father and in determining the home or custody of a child, side by side with the religious question, must be the enquiry, what is really in the best interest of a child? It is considered of importance to keep the members of a family together. This was emphasized by Hon. Mr. Justice Anglin as to a brother and sister in *Re Foulds*, 12 O. L. R. 245. In this case the learned Judge points out that whilst the welfare of the child is in a sense paramount, the parental right of control and custody is supreme, and it is the duty of the Court to enforce the wishes of the father as to the religious education of his children unless there is some very strong reason for disregarding them.

In *Re Newbery*, L. R. 1 Eq. 431, one of the Judges expressed his regret that a boy of 13 had been allowed to make an affidavit as to his religious views and preferences and the Court ordered that the family should be educated according to the doctrines of the Established Church of England to which their father belonged.

In *Hawkesworth* v. *Hawkesworth*, L. R. 6 Ch. Apps. 539, the father was a Roman Catholic and died leaving an infant daughter 6 months old. He left no directions. The child was brought up by her mother as a Protestant until she was 8 years old, and the Vice-Chancellor of the Duchy of Lancaster, very much against his will, felt compelled by the authorities to make an order that the child be brought up in the Roman Catholic faith; and this was unhesitatingly affirmed upon appeal.

It was the father's wish that these children should be brought up in the home of the applicant. It is shewn by a number of affidavits that he is a respectable and worthy man—has a comfortable home and is a proper person to have the custody of children. Mr. Gunton, on behalf of the society, went up to Arnstein and visited Emil Culin's home, to ascertain and report as to his fitness to have charge and custody of these children. He says on oath:—

"Well, I would say that Mr. Culin's reputation is the very best in the community, and from conversation I had with him I was confirmed in that opinion.

Q. "And he appeared to be a fairly prosperous farmer, did he? A. Yes, for that part of the country rather above the average, I should think." And asked as to his fitness, he says: "I have no doubt whatever about his fitness."

Q. "You think he would be a competent person? A. I think so."

I therefore order and direct that the infant children above named be forthwith delivered into the custody and control of Emil Culin their half-brother and that he have charge and control of them as members of his family and the direction and supervision of their education, secular and religious, for so long as he remains within the jurisdiction of this Court and until the infants respectively attain the age of 21 years; but subject to such order as this Court may hereafter see fit to make.

I make no order as to costs.

HON. MR. JUSTICE KELLY. JANUARY 8TH, 1914.

McNALLY v. HALTON BRICK CO. LTD.

5 O. W. N. 693.

Negligence—Master and Servants—Death of Employee — Defective Floor of Brick Kiln—Findings of Jury—Evidence — Common Law Liability—Knowledge of Superintendent—Workmen's Compensation for Injuries Act—Damages.

KELLY, J., *held* that where defendants, a brick company, permitted the floor of one of their kilns to fall into disrepair whereby an employee was killed, that they were liable at common law for such negligence.

Smith v. *Baker*, [1891] A. C. 325, referred to.

H. Guthrie, K.C., and W. I. Dick, for plaintiff.

E. E. A. DuVernet, K.C., and B. H. Ardagh, for defendants.

Action by the administratrix of the estate of her husband Louis McNally, to recover damages by reason of his death, he having been killed on June 27th, 1913, while in defendants' employ.

HON. MR. JUSTICE KELLY:—Deceased was engaged wheeling brick into kiln No. 4 at the defendants' brick manufacturing works, where the bricks were being built up or set by two setters preparatory to the process of burning. On the afternoon of that day, and when all the floor space of the kiln had been built upon except about 8 feet square just inside the door, a large quantity of the bricks so built fell over upon McNally and another man who was engaged with him in wheeling, and McNally was killed.

The kiln is a circular one with a diameter (inside) of from 32 to 35 feet and a height of 25 feet or more from the floor to the roof. The floor was constructed of what is known as dogtoothed brick which left openings through the floor for the purpose of creating a draft. Beneath the floor were flues running crosswise and also in a circle. The capacity of the kiln was from 140,000 to 145,000 bricks. The system of building or setting the bricks in the kiln was to erect them in what is termed benches, the first bench being 19 bricks high, the next 13, and the total height of bricks being 36.

Defendants' counsel at the close of the plaintiff's case contended for a non-suit on the ground of want of evidence of anything constituting negligence on the part of the defendants. I have not been able to agree with that contention for reasons that will be apparent from what is said later on.

There was evidence that this kiln was erected in the latter part of 1911, and that it was first made use of before the end of that year; that in May, 1912, the floor of it had become so out of repair and irregular and uneven on the surface as to necessitate its being taken up and relaid; that this work was done, not by an experienced bricklayer or builder of kilns, but by one of the defendants' workmen who had entered their employ in April, 1911, and who later became a setter and general repairman; that following these repairs the floor again began to become uneven; that it was becoming worse all the time, its condition being described by one witness as very bad, undulating and dipping all over, the depressions or dips varying in depth from 5 to 6 inches; that in February and March, 1913, its condition was about as bad as it had been before the repairs in May, 1912, and that it was not repaired again before the accident; that the bricks at the time were being properly set and that the setters could not make a good safe job of their work, owing to the amount of packing that was necessary on the floor beneath the bricks; that the practice in defendants' operations (a similar practice prevailing in some other brick works) was to level over as far as possible the unevenness of the kiln floor with brick dust; this is called packing. There was evidence too, that in this kiln the brick dust would escape through the openings between the dogtoothed brick, thus causing the bricks to go over. There was also evidence by Lycett, who had been a setter for 7 years and had had experience in that line in England, Quebec, Alberta, and other places, that in no other place had he seen a floor such as this, and that he had never seen depressions or unevenness in kiln floors such as he had observed in this one; also the evidence of Charles E. Hill, whose experience in the brick business has extended over about 25 years and who holds the position of superintendent of the Milton Pressed Brick Company which has a plant of 15 kilns and and 8 presses, that the kilns in use by his company are differently constructed from that now under consideration, that he has

not had much trouble with the setting, and that he did not approve of the style of this kiln (kiln No. 4). A condition which the evidence also revealed was that bricks set in preparation for burning, especially in warm weather, have a tendency through shrinkage to come forward in the pile. This tendency is guarded against by putting props against the tiers of brick at night to hold them in position, and usually those props are removed on the resumption of work the following morning. Such props were in use on the night preceding the accident but were removed during the following day so as to make room for the work of setting.

To my mind, all this was evidence of such a character as should be submitted to the jury on the question of defendants' liability. The jury's finding on the whole evidence was that McNally met his death through negligence on the part of the defendants in that the floor was not kept in proper repair by them and was not in proper condition at the time of the accident, and that there was an act of omission on the part of defendants' officials in not ordering the props to be left in position. They also found that there was no contributory negligence on the part of the deceased and that he may have had a knowledge of danger but not an appreciation or apprehension of the risk he ran.

The master's duty at common law to superintend and properly control his work or industry in the interest of safety, and his liability for neglect of such duty, is stated in Halsbury's Laws of England, vol. 20 p. 129, sec. 252, as consisting of, (1) the provision of proper and suitable plant, (2) the selection of fit and competent fellow servants, (3) a proper system and control of the work, and (4) the observance of regulations imposed by statute; and it is stated as the result of many leading decisions that if the system upon which the work is carried on is defective and the system has been devised or approved by the master, or where, a proper system having been laid down, it is negligently departed from and the departure is known or (it may be) ought to be known to the master, he is liable to a servant who thereby suffers injury.

The principle laid down by Lord Chancellor Cairns in *Wilson* v. *Merry*, L. R. 1 H. L. (sc.) 326, (at p. 332) is that what the master is bound to his servant to do in the event of his not personally superintending and directing the work, is to select proper and competent persons to do so,

and to furnish them with adequate material and resources for the work.

The duty of the master does not end with his providing suitable premises and appliances; it extends also to maintaining them. That duty is thus set forth by Lord Herschell in *Smith* v. *Baker*, [1891] A. C. 325 (at p. 362): "It is quite clear that the contract between employer and employed involves on the part of the former the duty of taking reasonable care to provide proper appliances and to maintain them in a proper condition, and so to carry on his operations as not to subject those employed by him to unnecessary risk."

Failure to maintain proper plant and equipment is equally a breach of the master's duty at common law as is failure to provide them in the first instance. Even where the master has delegated to another the duty of seeing that the plant is fit and proper he is liable, if, knowing of the condition, he fails to remedy it or to have it remedied; it may be that he is relieved from that common law liability where he takes no active part in the management of the work and deputes it to competent persons and is in fact ignorant of the failure to maintain. That being so, can it be said that the negligence which the jury found in this case was not such as to render defendants liable? Kennedy was defendants' managing director, and according to his own evidence he acted as superintendent, except that in his absence Townsend, the foreman, performed the superintendent's duties. Kennedy's only experience with brick kilns was what he acquired with the defendants, and he admits that he knew of the condition of the floor and that there was danger.

In the light of the jury's findings upon the condition of the kiln floor, it cannot be said that defendants had fulfilled the duty cast upon them; nor can they relieve themselves from liability on the ground of their having delegated their duties to another, especially when it is borne in mind that there was evidence that the unsatisfactory condition of the floor continued practically from the time it was built, evidence also from which the deduction might readily have been made that Kennedy, with his limited experience, was not a proved or sufficiently capable person to be entrusted with the carrying on of the works; and also the further evidence of Kennedy's knowledge of the condition of the

floor and of the danger; and the absence of evidence of any system of inspection.

On the question of defendants' knowledge of the condition of the floor and of the consequent danger to the workmen—if such knowledge were essential to fixing them with liability—it is not difficult under the circumstances revealed in the evidence to arrive at the conclusion that such knowledge can readily be imputed to them, and particularly in view of the uncontradicted evidence of the length of time that that condition was apparent.

I entertain no doubt that the negligence found by the jury in defendants' not keeping the floor in repair and of its improper condition at the time of the accident was negligence which, in view of the evidence on which that finding is based, renders defendants liable at common law.

They are, in my opinion, also liable under the Workmen's Compensation for Injuries Act, it having been in effect found that there was a defect in the condition of the building or premises, and Kennedy, the managing director and superintendent, having admitted his knowledge of that condition; with which may also be considered the evidence—not contradicted—that Lycett, a workman, complained on that morning to Townsend of the condition of the floor. Kennedy says Townsend was "on the job" that morning, meaning, as I take it, that he was superintending. All this brings this case within the class of cases intended to be met by the Act.

Having before them these facts and Kennedy's admission that he knew there was danger and that he did not warn the men against taking out the props, the finding of the jury that there was on defendant's part an omission contributing to McNally's death in not ordering the props to be left in position can well be taken as a declaration of negligence for the consequences of which defendants are liable.

The jury assessed the damages at common law at $3,000, for which amount there will be judgment in favour of plaintiff with costs.

HON. MR. JUSTICE LENNOX. JANUARY 7TH, 1914.

CLAREY v. CITY OF OTTAWA.

5 O. W. N. 673.

Municipal Corporations—By-law Establishing Water Works System —Motion to Quash—Special Act, 3 & 4 Geo. V., c. 109—Order of Provincial Board of Health—Public Health Act — Detailed Plans not Prepared—Statute to be Strictly Construed—Exceeding of Powers—Necessity of Submission to Ratepayers—Works in Quebec Province—Provincial Rights—Dominion Legislation—Territorial Jurisdiction—Former By-law Quashed—Res Judicata —Costs.

LENNOX, J., *held*, that the city of Ottawa has no power, even with the sanction of legislation of the Province of Ontario, to pass a by-law providing for works to be carried out in the Province of Quebec without the consent of the legislature of the latter Province.

That the provisions of the Public Health Act providing that the Provincial Board of Health may order a municipality to establish waterworks must be strictly construed, and such order cannot be given until definite plans and specifications are submitted to it.

Motion to quash by-law No. 3678 of the City of Ottawa. See ante p. 340.

T. McVeity, for applicant.

G. F. Henderson, K.C., for defendants.

HON. MR. JUSTICE LENNOX:—It is not for me to pronounce upon whether the proposed expenditure is wise or unwise, but to determine and declare whether, as a matter of law, there was on the 1st of December last, vested in anybody, or in any body of men, other than the duly qualified ratepayers of the city of Ottawa, a power to compel the municipal council to commit the city irrevocably to the Binnie waterworks scheme, pass the by-law, borrow the money, invade a sister province, and enter at once upon this gigantic work; and this without profiles, drawings, plans, specifications, or specific information of any kind. I say "a power in anybody to compel the council to pass this by-law" because it is not suggested that it can be upheld as the voluntary act of the council. On the contrary, upon the argument of this motion, it was frankly admitted that the right of the council, of their own motion, to withdraw the decision of this matter from the ratepayers was conclusively negatived and set at rest by the proceedings against the former by-law (see ante p. 340); and the sole ground upon which it is urged

that this by-law is valid is that the chief officer of health for Ontario has power to order, and has ordered, this thing to be done. I pass over the strenuous effort of Mayor Ellis to make sure of being "Compelled to pass the by-law," as, whatever opinion I may have of the propriety of tactics of this kind, I require no argument to convince me that in this, as in all cases, Dr. McCullough was actuated solely by what he conceived to be in the public interest.

When it was proposed a few years ago by a Federal Government, strongly entrenched in the confidence of the Canadian people, to inaugurate a great national work, at an estimated cost to the country (I do not mean a total expenditure) of about $13,000,000, it was not for one moment pretended that this could be done without the sanction of the people's representatives in Parliament, and weeks and months were consumed in investigation and discussion before the expenditure was approved. It is a startling proposition then that although the administration of the Dominion is controlled in the expenditure of money in the way I have intimated, yet one man, the chief officer of health for Ontario, despite the protest it may be, of any majority of her citizens, has the power to compel a small community like Ottawa to assume a burden of $8,000,000 or for that matter, of $13,000,000 or more, and yet I have no doubt at all that if the proper steps and proceedings are taken to this end, this officer has this power; and further, although it may be said that this is a long step from government of the people by the people, yet, in view of the criminal negligence of some municipalities, it cannot be said that the provisions of the Public Health Act are too arbitrary or drastic in this regard.

But being an exceptional and drastic power, it is obviously imperative that the conditions of its exercise must unquestionably exist, and be scrupulously observed.

About the 9th of October last, Sir Alexander R. Binnie reported to the municipal council of Ottawa in favour of obtaining a water supply from Thirty-one Mile and other Lakes in the Province of Quebec, and, in a very general way, indicated the course of the pipe line and some of the outstanding features of the scheme; but as the proposition might or might not be entertained, and it would occasion a delay of many months and an additional outlay of scores of thousands of dollars, the report was, of course, without

designs, drawings, maps, plans, specifications or detailed information of any kind. This report was sent to Dr. McCullough, Executive Officer, Chief Health Officer, and Secretary of the Provincial Board of Health. Immediately before the passing of By-law 3649 of the City of Ottawa, relating to this waterworks question, the council received a communication from Dr. McCullough, reporting the necessity for a new waterworks system for Ottawa and containing the following paragraph:—

"Under the authority of sub-sec. 1 of sec. 95, of the aforesaid Act (the Public Health Act) the Board hereby approves of the source of supply and of the establishment of the said works in accordance with the report thereupon made by Sir Alexander Binnie, dated October, 1913, and submitted to the Board for approval." The report of the necessity for new waterworks is clearly covered by the statute and nothing turns upon it except that a failure to appreciate the difference between the Board reporting the need of new waterworks of some kind and the Board approving of a matured and definite waterworks scheme after examination of all plans, specifications, &c., is what probably led the Council into the error of passing a second By-law. In the document forwarded on the 1st of December, Dr. McCullough incorporates the one already quoted from and directed the council to pass a by-law and proceed at once with the establishment of works "in accordance with the Binnie Report."

With great respect I am of opinion that until plans and information of the character above indicated are submitted and dealt with the Board has no power to approve of a waterworks system, that the Binnie system has not been approved of in fact or in law, that as yet there is no authority vested anywhere to order the council to proceed with the works in question, and that the council was not compelled to pass, or justified in passing, By-law number 3678.

The policy of the Statute is clear and its provisions are specific that whether the council proceeds voluntarily or under the compulsion of a report (see secs. 89 and 95, sub-sec. (2) of sec. 96—a sub-section evidently overlooked)—no matter what the other conditions are—there must be plans, drawings, and specifications submitted to, and examined, weighed and passed upon, by the Board before the Municipal Council is at liberty—much less compelled—to finally

pass a by-law either to raise the money or proceed with the work. The statute is complied with so far as an engineer's report is concerned and this and the source of supply has been approved. It may be that if left to Sir Alexander Bennie the scheme will in the end work out satisfactorily in detail, and that the plans and the rest of it will be all right, but this is not the question: the Board is a special tribunal, there can be no delegation of authority, no substitution, or evasion—the statutory conditions must be scrupulously, nay rigidly, observed.

But aside from the mere question of approval, the by-law is clearly an illegal and improper one. The order set up is an order to proceed and to proceed at once with a specific work—the Binnie Waterworks scheme—a work to be executed mainly in the Province of Quebec. The operation of the Dominion Act—necessary to authorize the crossing of the inter-provincial boundary and the Gatineau River—is made conditional upon the authorization of the work by the Legislature of the Province of Quebec. This has not been and may never be obtained. What right has anybody to order the council to proceed now? Provincial rights and autonomy are not less sacred because the proposed invasion comes from a province instead of the Dominion. It is simply idle to talk of being forced into action by a Board of Health or anybody in such a case. Until Quebec has spoken the Ontario Act only runs to the boundary line and the Dominion Act remains in suspense. What by-laws the council might, of its own motion, tentatively pass is another matter, but this phase of the case was disposed of upon the former motion. Indeed, if I were disposed to do so it might be sufficient for me to treat this whole question as *res judicata*. Dr. McCullough's letter, as was admitted on argument, effects no change in the situation—there is no change in the circumstances in any way, and the present by-law is identical with the one quashed on the 29th of November, except as to amount and currency of the debentures, and the omission of recitals—all of them changes which tell against this by-law.

Many arguments were used which I cannot refer to. When all is said the outstanding objection is the same as before. The council has no power to finally deal with this question in their council chamber. It was argued that the special Act gives power to build outside the province and

that for the limitation of $5,000,000 I should substitute the order of the Board. I cannot divorce what the legislature has so solemnly joined together. Neither covertly, by borrowing $5,000,000 for an $8,000,000 work nor in any way can the Ontario Special Act be stretched or distorted to embrace the present scheme.

I was asked to withhold judgment in case I formed an opinion adverse to the by-law until application could be made to the legislature. I will not do this. The only thing that would induce me to delay judgment would be if it would result in the saving of time. It would not have that effect and in my opinion it is better that the decks should be cleared for the unhampered action of the legislature, if legislative action is to be invoked.

There are no two opinions about the crying need of good water for the City of Ottawa, no doubt about the duty of the council to act with vigilance, there is no insuperable obstacle in the way. There should not be an hour wasted—there need not be. There is an open straight and narrow path. Go direct to the ratepayers and take their ballots, or go to them, indirectly, through the legislature; and in view of the stringent provisions, as to approval of plans, the latter course is, perhaps, to be preferred. Side-stepping will inevitably make for loss of time.

The by-law will be quashed with costs. The applicant will be entitled to take the deposit out of Court.

HON. MR. JUSTICE MIDDLETON. JANUARY 7TH, 1914.

RE SOLICITORS.

5 O. W. N. 671.

Solicitors—Application for Accounting—Retention of Clients' Moneys in Satisfaction of Costs—Non-Delivery of Bills of Costs—Lapse of Fifteen Years—Alleged Negligence—Statute of Limitations—Vexatious Application.

MIDDLETON, J., dismissed an application of a client for an accounting of moneys received by solicitors over fifteen years before, and for delivery of a bill of costs where it appeared that the applicant had been treated with generosity and the application was patently vexatious.

Motion by Kate M. Jordan for an order for an account of $233 paid to the solicitors in 1898 and of other moneys received by them from her or as her solicitors, and for de-

livery of a bill of costs in connection with certain litigation, and taxation thereof, and payment of the balance. Heard 2nd January, 1914.

HON. MR. JUSTICE MIDDLETON:—In and prior to 1898 Mrs. Jordan was a client of the solicitors. She had brought three actions; an action against her husband for alimony, an action against her husband for false imprisonment, and an action for false imprisonment against one Stone, her husband's solicitor. The false imprisonment actions were stayed upon the argument of a legal question, namely, the right of the wife to maintain an action against her husband for the tort alleged under the law as it then stood; and after the determination of this question the actions were discontinued. The alimony action was taken to trial and was there settled. In addition, the solicitors acted for the client in other litigation, in connection with the custody of the child.

In settlement of the alimony action, in October, 1898, the husband paid $500 partly secured by notes, and the wife was allowed to retain the $233 which had been paid for interim alimony and disbursements; her solicitors being by the judgment discharged from the accounting therefor to the defendant. She had paid $25 to the solicitors on account of costs or as a retaining fee—it makes no difference which. Some adjustment took place at the time by which the solicitors allowed Mrs. Jordan to receive the whole $500 they retaining the money they had already received.

As set forth in Mr. Boland's affidavit, the solicitors had disbursed the greater portion of this money, and had advanced considerable money to the client; so that it is clear that the money remaining in their hands would be only a small fraction of the amount which they would be entitled to against the client for costs. The papers were handed over to the client at any rate by 1902, and from that time on the matter has been regarded as closed between them. Now, after the lapse of more than 15 years from the settlement and 12 years from the time the papers were handed over in 1902, when this lady sought and secured independent advice from other solicitors, and became emancipated from any control the other solicitors could possibly have over her, she seeks an accounting. She bases her motion in the first place upon the undertaking contained in the order for interim alimony. This undertaking was not an undertaking to her but an undertaking in favour of the defendant, who

was advancing the money, and that undertaking was discharged by the judgment of 1898.

At first I was impressed with the difficulty arising from the fact that no bill had ever been delivered. While it is true that in general there cannot be a settlement to preclude taxation without the delivery of a bill; and while it is equally true that the Court in the exercise of its jurisdiction over solicitors as officers of the Court would never allow a solicitor to set up any lapse of time where it was apparent that injustice was being done, I cannot think that there is not an exception where, as here, it is not only perfectly plain that no injustice has been done by the solicitors but that to rid themselves of a troublesome and perhaps an unfortunate client they accepted in satisfaction of their claims must less than what was due to them.

In reality, this is not what is sought. In an indirect way it is sought to put forward claims against the solicitors based on a suggested misconduct or negligence on their part 16 years ago. Of course any such claim is absolutely barred by the Statute of Limitations; and although the solicitors occupied a fiduciary relationship towards the client, I think our present statute protects them; because by the arrangement made with the client in 1898 the money then in their hands became their own, and they then ceased to hold it for the client.

A similar application for relief was made before the acting Master-in-Chambers in September last. This application was refused and probably operates as a bar to the present application. I do not think it necessary to deal with this at length, as the present application appears to me to be entirely devoid of merit and purely vexatious.

The whole conduct of the applicant suggests that this is a case of *paranoia querulans,* aptly and forcibly described in the Encyclopedia Britannica, vol. 20, p. 769, and suggests very forcibly the desirability of legislation preventing litigious individuals from making the Courts an instrument of oppression. In England power is given by statute to prevent this abuse, and it is to be hoped that our Legislature may soon give to our Courts a like power.

HON. MR. JUSTICE MIDDLETON. JANUARY 9TH, 1914.

BANK OF BRITISH NORTH AMERICA v. HASLIP.

BANK OF BRITISH NORTH AMERICA v. ELLIOTT.

5 O. W. N. 684.

Bills of Exchange—Cheque on Bank—Cashed by Bank in Same City—Three Days Delay in Presentation held Unreasonable—Bank Act, sec. 86—Notice of Dishonour—Delay in Giving—Clearing House Rules—Effect of—Action against Endorsers—Dismissal of.

MIDDLETON, J., *held* that where a cheque upon a Toronto branch bank was cashed at another Toronto branch bank on October 1st, and, no legal holiday intervening, was not presented until October 4th, that presentation was unreasonably late.

That a notice of dishonour which reached the endorsers on October 8th was also unreasonably late.

That the rules and regulations of the Clearing House cannot modify the provisions of the Bank Act.

Actions tried at Toronto, 29th December, 1913.

Actions to recover the amounts of two cheques drawn in favour of the two defendants respectively by Maybee and Wilson upon the Standard Bank of Canada, endorsed by the defendants, cashed by the plaintiffs and dishonoured.

G. L. Smith, for plaintiff.

E. G. Porter, K.C., and E. N. Armour, for defendants.

HON. MR. JUSTICE MIDDLETON:—Messrs. Maybee and Wilson were cattle dealers carrying on business in the city of Toronto. They purchased cattle from the defendants Elliott and Haslip; and on the 30th September, 1913, gave to Haslip a cheque drawn upon the Standard Bank at its branch, King and West Market streets, Toronto, for $1,864.49. On the 1st of October they gave to Elliott a cheque drawn upon the same branch of the Standard Bank for $1,041.03.

On the morning of the 1st of October Elliott and Haslip, who were friends, met at the Western Cattle Market at West Toronto and went into the office of the branch of the Bank of British North America at the cattle market, this branch being a sub-branch of the West Toronto branch, opened at the market for the convenience of drovers there. They asked the manager in charge if he would cash the cheques. As Messrs. Maybee and Wilson were then regarded

as a firm of substance, and their credit was perfectly good, he replied "Certainly; the cheques are perfectly good."

It was not convenient for the bank at the time to give currency for the cheques, as they had not much currency in this sub-branch office. The manager suggested that he would issue to them what is described as "a drover's cheque," that is to say, he allowed the defendants to deposit Maybee and Wilson's cheques and to draw against this deposit cheques for identically the same amount, which he accepted and marked as good and payable at par at any branch of the Bank of British North America. The defendants, of course, endorsed the respective cheques which they deposited. No account was opened for them individually; but the deposit of the cheques and the cross-entry representing the issue of the drover's cheque appeared in a special account kept for that purpose.

Having received these drover's cheques, the defendants left for home, Haslip living in Belleville and Elliott at a village a few miles from Belleville. The drover's cheques were in due course deposited in their respective bank accounts and honoured.

The Maybee and Wilson cheques were taken from the sub-branch at the market to the West Toronto branch of the Bank of British North America. The manager of the West Toronto branch put these cheques, with others drawn upon the Standard Bank, in an envelope, summing up the total of the cheques so enclosed, upon the envelope, and transmitting it to the head office of the Bank of British North America at Toronto.

At 10 o'clock on the 2nd of October this bundle was taken by the representatives of the Bank of British North America to the clearing house, and formed part of the claim there presented by the Bank of British North America against the Standard Bank, and this entered into the clearing that then took place; the balance due from one bank to the other being paid in legal tender.

The officer of the Standard Bank took these cheques to his own head office and in due course transmitted them, with any other cheques drawn upon the market branch of the Standard Bank, to that branch office. They were received at the branch office during the forenoon of the 2nd October. The manager of that branch office conceived that his course

of action was to be governed by rule 12 of clearing house regulations and that it became his duty to present the cheque at his own bank "not later than the following banking day."

It is not clear what was done by way of formal presentment, but Maybee and Wilson's account was not in a position to permit payment of the cheque. Maybee and Wilson were notified, and it was expected that a deposit would be made which would protect the cheques. The manager says the cheques were then presented and dishonoured. This was on the 3rd.

Under the same regulation, the next day being Saturday, the cheque "must be returned to the depositing bank not later than . . . 12 o'clock noon," (as the 4th was a Saturday). The manager, still expecting Maybee and Wilson to make a deposit, held the cheques, and only returned them on the 4th at 11.45 a.m., when he sent them to the West Toronto branch of the Bank of British North America. On that day the bank handed the cheques to its notary, who again presented them, and there not being sufficient funds he protested them. The notice of protest was not signed until the following Monday, the 6th; and owing to some bungling on the part of the notary it was not properly addressed and was insufficient as a notice of protest. The cheques were dated at Toronto, no address was given by the endorsers, the notice of protest was sent to the endorser, "care Bank of British North America, Union Stock Yards, West Toronto"—an address which was manifestly entirely improper under the circumstances.

When the protest notice reached the manager of the Bank of British North America he ascertained the probable residences of the defendants from the endorsements upon the drover's cheques. Haslip had deposited his cheque with the Merchants Bank at Belleville, and Elliott had deposited his with the Standard Bank at Belleville. The manager had the notices readdressed and forwarded to the defendants, care of their respective banks at Belleville. Communications took place by wire, and every endeavour was made to get in touch with the defendants; but they did not learn of the dishonour of the cheques until the 8th. Action is now brought against Haslip and Elliott upon their endorsements of the cheques.

It is admitted that the protest and notice of protest are of no avail to the bank. The bank presents its case thus:

It is said "The cheques were dishonoured on the 4th. Notice of dishonour was then given in sufficient time." The defendants resist payment, putting their contentions in alternative ways. They first say that the cheques were in fact dishonoured on the 3rd, and if so clearly there was insufficient notice of dishonour. In the second place they say that even if the dishonour was on the 4th the notice of dishonour was not adequate; and lastly, if the cheques were not presented until the 4th, they were not presented within reasonable time, and the defendants are discharged.

In the result I think the plaintiff fails. I do not think I am called upon to criticize the circumlocution incident to the clearing house. It is an institution created for the benefit of the bankers, and its rules and regulations cannot modify the provisions of the Bank Act. I am, therefore, compelled to face the problem apart from the regulations in question and to ascertain first whether a presentation on the 4th is a presentment "within a reasonable time" (sec. 86) of a cheque endorsed to the bank on the 1st.

I think it is not. Bear in mind the situation. On the morning of the 1st these cheques were cashed at West Toronto early in the forenoon. They were not presented at the branch bank upon which they were drawn until the 4th. These two branch banks are both in the city of Toronto, a few miles apart. I can see no reason why the presentment should not have been made either the same day or the next day. It seems to me altogether too lax to hold that a presentment on the 4th was sufficient.

Moreover, I think that when the cheques were presented on the 3rd they were dishonoured, and that notice of dishonour should have been given in time reckoned from that date. I do not think the bank could extend the time for giving notice of dishonour by holding the cheques until the next day and again presenting them. They were dishonoured on the first presentment.

It would be a great hardship to hold these men liable on their endorsement of these cheques when they cashed them on the morning of the 1st and until the 8th heard nothing to indicate that the cheques had not been paid. That the change of position which may have taken place in the interval probably did take place is demonstrated by the fact that

even after the 8th such proceedings were taken as resulted in intercepting a great portion of the amount of the smaller cheque, so that fortunately the amount involved in the litigation, so far as this is concerned, is now less than $100.

This case was argued by both counsel upon the assumption that the by-laws, rules and regulations of the Toronto clearing house had some effect other than as an agreement between the banks.

The Canadian Bankers' Association, by its Act of Incorporation, 63 & 64 Vict. ch. 93, assented to on the 7th July, 1900, is given power from time to time to establish a clearing house for banks and to make rules and regulations for the operation of the clearing house; but no such rule or regulation is to have any force or effect unless and until approved by the treasury board. Pursuant to this power, certain rules and regulations were passed and approved. These are set forth in the pamphlet, commencing at p. 7. Rule 12, above mentioned, forms no part of these regulations, but appears to be a mere domestic rule of the Bankers' Association, not having any validity save as forming part of the conventional agreement between the bankers.

The action fails, and must be dismissed with costs.

HON. MR. JUSTICE BRITTON. JANUARY 8TH, 1914.

McGREGOR v. WHALEN, ET AL.

5 O. W. N. 680.

Contract—Sale of Goods—Timber on Land—Unilateral Contract—Lack of Consideration — Removal and Payment in Reasonable Time—Implied Terms—Resale—Notice — Action for Trover—Third Party—Costs.

BRITTON, J., *held* that a unilateral contract for the sale of certain piling upon vendor's land to be paid for before removal contemplated, removal and payment within a reasonable time, and where the purchaser made no effort to remove the piling within a reasonable time, the vendor had a right to treat the contract as at an end.

Brown v. *Dulmage*, 10 O. W. R. 451, referred to.

Action in trover brought by the plaintiff against the defendants Whalen and the Burrill Construction Co. for the wrongful conversion of 91 pieces of timber, of which plain-

tiff claimed to be the owner in possession. Tried at Port Arthur.

D. R. Byers, for plaintiff.

A. J. McComber, for defendant Whalen.

W. D. B. Turville, for third party.

HON. MR. JUSTICE BRITTON:—The trial was commenced with a jury, but after proceeding a little way, I withdrew the case from the jury except as to two questions which I submitted to them, and which, with their answers, I will mention later. The facts as found are that on the 16th November, 1912, the plaintiff and one Niemi, now the third party in this action, entered into an agreement and the following writing was signed by Niemi:—

"Whitefish, Ont., Nov. 16, 1912.

"To whom it may concern:

I hereby agree to sell to A. McGregor, of Stanley, 350 pieces of piling, cut, and standing, in bush as they are on lot 8, concession 2, township of Strange, for $2 per stick, same to be suitable to the requirements of the Canadian Stewart Co.; about 60 feet long, 12 inches, 2 feet from butt, and 6 inches top. The piling are to be paid for, before loading or leaving Whitefish siding."

Sgd. Nicolas Niemi."

The plaintiff cut 9 pieces and assisted in the cutting of 82 pieces more, making the 91 pieces for which this action is brought.

The plaintiff had contracted with the Stewart Company to sell to them at least as large or larger quantity than the quantity Niemi agreed to sell to the plaintiff. The piling in question was upon Niemi's land, and the plaintiff did not pay to Niemi any part of the price, viz., $2 per piece, which plaintiff was to pay before the piling was removed from Whitefish siding.

The plaintiff did pay to Niemi $4.50, but that was for the board of one man, working for the plaintiff. That payment was quite apart from any part of the purchase-money. The plaintiff himself marked, or allowed the Stewart Company to mark, many of the 91 pieces, with their hammer mark—C. S. No doubt people in that vicinity and engaged

in lumbering operations, knew the mark, and a fair inference is that the men employed by Whalen knew that part of this piling was marked as I have stated.

The plaintiff did nothing more until in March, 1913, when he took men to break roads preparatory to getting the piling out, but a snow storm came on, and plaintiff and his men desisted. Later on plaintiff was again on the ground, but no steps were taken to get out piling from the bush or to pay for or remove the 91 pieces. Later on and in 1913, piling was badly wanted by the defendant Whalen to assist in filling his contract with Burrill Company, and Whalen by his agent Dolan, endeavoured to make a contract with the plaintiff for the delivery of piling, but they could not agree upon terms. Whalen ascertained that piling, was upon Niemi's land and he, Whalen, supplied his agent Gardiner with $100 in money and sent him to Niemi to close a bargain. Gardiner did not conclude a bargain, but Niemi was induced to go to Whalen's office where a bargain was made by Whalen for the piling, and it was taken away and turned in to Burrill & Co. The agreement of sale by Niemi to Whalen's firm or company was made on the 28th August, 1913. In September, the plaintiff's solicitor wrote to Whalen and also to Burrill & Co. demanding the money. Burrill & Co. paid the money into Court. The defendant Whalen fights, and upon his application an order was made by the local Judge on the 14th November, 1913, bringing in Nicolas Niemi as a third party.

The questions submitted to the jury, and the answers were:—

(1) Did the defendant Whalen before the purchase by him from Niemi have notice of the agreement between McGregor, and Niemi? A. Yes.

(2) Did the plaintiff McGregor leave the piling beyond what was a reasonable time for taking it away under the contract? A. Yes.

In the view I now take of the case it was not necessary that I should find, or set out all of my findings upon the facts, but they are for the Court, should the case go further. The alleged contract is unilateral. It is a document addressed "To whom it may concern," signed by Niemi, which states that he agrees to sell to McGregor, the plaintiff. Mcgregor has not signed. It is objected by counsel for Niemi

that this is void as against Niemi for want of consideration. Apart from that and assuming that it is a contract on which the plaintiff may rely, what is the true construction of it? It was not a contract of actual sale, by which the property immediately passed to the plaintiff. It was at most an agreement to sell, and the conditions precedent to the plaintiff becoming entitled to the property, were that the plaintiff would remove it within a reasonable time, and that before removing it, the plaintiff would pay the price agreed upon. The plaintiff did not pay, nor did he tender the amount required. He did not attempt or offer to remove the property within a reasonable time from the day of the date of the agreement. The plaintiff had not the actual possession, nor had the right of property or possession in the piling at the time of the sale to Whalen. There was no tender. What took place between Ray Short & Co. and plaintiff, by which plaintiff could have got the money, even if that was communicated to Niemi by any messenger sent by Ray Short & Co. could not amount to a tender, and there was no waiver by Niemi of the payment, or of any of the conditions in his agreement to sell. Upon the construction I am obliged to put upon the agreement the plaintiff fails in this action.

Many cases were cited by counsel for the respective parties, not only upon the question of plaintiff's right to succeed in this action of trover, but upon the many points discussed at bar. No useful purpose will be served by referring to the great majority of these. *Lord* v. *Price,* L. R. 9 Ex. 54; *Milgate* v. *Kebble,* 3 M. & G. 100, and *Brown* v. *Dulmage,* 10 O. W. R. 451, establish defendant's contention.

The defendant Whalen had notice of plaintiff's claim and after such notice and after an unsuccessful attempt to buy from plaintiff, bought from Niemi. It would be with great reluctance that I would hold, if I found myself bound by authority so to do, that a purchaser under such circumstances would be a purchaser in good faith within the meaning of the Bills of Sale and Chattel Mortgage Act.

The third party, up to the time of the sale by him to Whalen, was a consenting party to the plaintiff's delay in removing the piling. So far as appears he made no demand upon the plaintiff, nor did he give any notice requiring payment for, or removal of, the piling. A tempting offer was made to Niemi—to break what he thought was a binding obligation on him to sell to plaintiff.

The action will be dismissed but without costs. The claim of the defendant Whalen against the third party will be dismissed without costs. There will be no costs payable by plaintiff to Burrill Construction Co., but that company should be paid their costs, which I fix at $20, out of the money in Court; $10 out of the money belonging to the third party Niemi, and $10 out of the money belonging to defendant Whalen. There will be no costs paid to or by the third party by reason of the application for, or third party order, or of the trial.

As the action is framed, I cannot deal with any claim by plaintiff against Niemi, but the judgment will be without prejudice to any action or proceeding by plaintiff against the third party, in reference to the piling, or any of it, mentioned in the alleged contract.

As to the $819, money in Court, $453 belonged to Niemi and the balance to defendant Whalen. Assuming that to be so, $10, part of Burrill Construction costs should be deducted from each and $443 paid out to Niemi, and $356 paid out to defendant Whalen. If any dispute as to amount belonging to Niemi, the matter can be spoken to and determined on settling the minutes.

Thirty days' stay.

HON. MR. JUSTICE MIDDLETON. JANUARY 6TH, 1914.

REX v. DAVEY.

5 O. W. N. 666.

Appeal—Leave to Appeal—Order Quashing Conviction — Amount Involved Trivial—Carelessness of Parties—Refusal of Application.

MIDDLETON, J., refused leave to appeal from an order quashing a conviction where the amount involved was trivial and the questions in dispute arose from the carelessness of the magistrate in neglecting to commit the terms of an understanding between the parties to writing.

Motion for leave to appeal from judgment of HON. MR. JUSTICE LENNOX, quashing a conviction, reported 25 O. W. R. 464. Argued 2nd January, 1914.

Hugh E. Rose, K.C., for the prosecutor.

E. E. A. DuVernet, K.C., for the accused.

HON. MR. JUSTICE MIDDLETON:—I am by no means satisfied with the conclusion at which my learned brother has arrived; but this alone is not sufficient to justify granting leave to appeal. The matter involved is trivial: the payment of a small fine. The difficulty arises from the carelessness of the magistrate and the prosecutor in failing to see that the agreement as to the admission of evidence taken in the other prosecution (if in fact made) was properly recorded. If such an agreement was made—and I am inclined to think that the defendant's and other evidence, notwithstanding denial by the accused, shew that it was—then the miscarriage, if miscarriage there was, is the result of the carelessness of those charged with the conduct of the prosecution and the trial; and if the result is to impress the necessity of care in having understandings of the kind in question reduced to writing, much will be gained.

I therefore refuse the application, but give no costs.

Having taken this view of the merits of the application, I have not considered the question raised by Mr. DuVernet as to whether there is now any right to appeal even by leave.

HON. MR. JUSTICE MIDDLETON. JANUARY 6TH, 1914.

LEONARD v. CUSHING.

5 O. W. N. 692.

Appeal—Leave to Appeal—Service out of Jurisdiction—Conflicting Authorities—Application Granted.

MIDDLETON, J., granted leave to appeal from the order herein of Lennox, J., 25 O. W. R. 471.

Motion for leave to appeal from the order of HON MR. JUSTICE LENNOX dated 10th December, 1913, 25 O. W. R. 471, refusing to set aside an order permitting service out of the jurisdiction. Argued 2nd January, 1914.

G. Osler, for defendants.

Featherston Aylesworth, for plaintiff.

HON. MR. JUSTICE MIDDLETON:—The question raised is of importance to the parties. The case is very near the border line and the authorities are not easy to be reconciled, if indeed reconciliation is possible. The case is one in which I think leave should be granted, and, as I entertain this view, I do not think I should discuss the merits of the application.