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COURT OF APPEAL.

SEPTEMBER 27TH, 1912.

ZUFELT v. CANADIAN PACIFIC RW. CO.

4 O. W. N. 39.

Negligence—Railways—Level Crossing—Collision with Snow-plough—Insufficient Headlight—Excessive Speed—Absence of Statutory Signals—Evidence—Damages—Verdict of Ten Jurors—Special Jury.

Action for damages under the Fatal Accidents Act by a father and mother for the death of their son and daughter by reason of defendants' alleged negligence. The deceased were killed in the village of Beachville, when driving across defendants' railway, by collision with a snow-plough of defendants. The negligence complained of was want of sufficient head-light on the snow-plough, failure to sound whistle or bell, and unreasonable speed in a thickly populated locality. The Court of Appeal (19 O. W. R. 77; 23 O. L. R. 602; 2 O. W. N. 1063), set aside a judgment for plaintiffs for $3,000, upon the findings of a jury at a former trial, and directed a new trial, on the ground that some of the jury's findings were perverse, and others inconclusive. At the second trial, at defendants' instance, a special jury was summoned.

TEETZEL, J., on the findings of the jury at the second trial, entered judgment for plaintiffs for $2,000 and costs.

Court of Appeal (MEREDITH, J.A., dissenting), dismissed appeal from above judgment, with costs.

Per MEREDITH, J.A.:—"There was no evidence of any pecuniary damage to plaintiffs to go to jury."

An appeal by the defendants from a judgment of HON. MR. JUSTICE TEETZEL, in favour of the plaintiffs, for the recovery of $2,000, upon the findings of a jury, at the second trial of the action.

The facts of the case are reported in the judgment of the Court of Appeal, 23 O. L. R. 602; 19 O. W. R. 77; 2 O. W. N. 1063, directing a new trial.

The second appeal to the Court of Appeal was heard by HON. SIR CHARLES MOSS, C.J.O., HON. MR. JUSTICE GARROW, HON. MR. JUSTICE MACLAREN, and HON. MR. JUSTICE MEREDITH.

I. F. Hellmuth K.C., and Angus MacMurchy, K.C., for the defendants.

W. M. Douglas, K.C., and G. F. Mahon, for the plaintiffs.

HON. MR. JUSTICE GARROW:—The case was in this Court before, when a new trial was directed. It has now been tried again; and, for the second time, upon essentially the same evidence, a jury has found in favour of the plaintiffs, while reducing the damages awarded at the former trial.

The defendants still complain, saying that the verdict is contrary to the evidence and that the damages are excessive.

I do not see how we can properly interfere on either ground.

It cannot, I think, be said that there was no evidence to go to the jury; and while I may think—as I certainly do—that the preponderance of testimony is in favour of the defendants, I cannot substitute my opinion for that of the jury or interfere with its conclusion, except upon some error or other substantial ground, which, so far as I can see, does not appear.

No objection was taken to the learned Judge's charge; and from a perusal of it, I cannot say that the findings of the jury could in any proper sense be called perverse. That they are contrary to what I regard as the weight of evidence, is not alone, in my opinion, under the circumstances of the case, a sufficient justification for directing a third trial, which in all probability would afford the defendants no substantial relief.

Nor do I perceive any sufficient ground to interfere upon the question of damages. There was, I think, some evidence upon the subject; and the quantum—within reasonable limits of course, which I think have not been exceeded—was very much a question for the jury.

I would dismiss the appeal with costs.

HON. SIR CHARLES MOSS, C.J.O., and HON. MR. JUSTICE MACLAREN and HON. MR. JUSTICE MAGEE, concurred.

HON. MR. JUSTICE MEREDITH (*dissenting*):—The uncertainty which prevailed after the first trial of this action by reason of the jury not having been polled, or the facts as to how they were divided in their findings not otherwise ascertained, do not now prevail; the jury were polled at the last trial, and in that way it was made plain that the same ten

jurors were in favour of the plaintiffs in all things essential to a verdict in their favour; that is to say, that had the jury been composed of those ten jurors only these would have been unanimously in favour of the plaintiffs upon all the questions submitted to them; so nothing now stands in their way in that respect.

And in regard to negligence in respect of sounding the whistle and ringing the bell, of that negligence being the cause of the disastrous collision out of which this action arises and of absence of contributory negligence, this jury also found altogether in the plaintiffs' favour. It may be that such findings, some of them, do not commend themselves to some judicial minds; but that is not the question; the single question really is whether there was any evidence upon which reasonable men could have so found; and I am bound to say now, as on the former occasion, that there was. The fact that a second jury—a special jury summoned at the instance of the defendants—have so found may be far from conclusive upon the question; but when added to that is the learned trial Judge's view that the question was so difficult and one that he was glad that the onus of solving it did not rest upon him, as well as the unquestionable facts that upon the evidence for the plaintiffs alone it would be impossible to argue reasonably that there was no reasonable proof of these things, and equally so upon the evidence adduced for the defence upon these questions, if the testimony of the trainmen were to be excluded, so that it comes to this, that the charge of unreasonableness rests upon the evidence of men more or less interested, whom the jury after seeing and hearing them have discarded, with these things added, as I have said, I find it quite impossible to say that there was no case to go to the jury in these respects; or that the verdict is anything like a perverse one; or that it ought to be set aside and another trial directed, because against the weight of the evidence. The case was in my opinion one for the jury in these respects, and they, as the judges of fact chosen by the parties, having taken the responsibility of finding as they have found, in the plaintiffs' favour, for a second time, there would be, in my opinion, no legal justification for disturbing such findings now.

But upon the question of damages I am in favour of allowing this appeal. There was no reasonable evidence of any pecuniary loss to the plaintiffs by reason of the death of

either son or daughter killed in this lamentable accident. Two things are undisputable: (1) that recovery can be had, in such an action as this, for pecuniary loss only, and (2) that such loss must be proved so that reasonable men can, upon their oaths, say that the sum awarded is a fair measure of such loss. There was no such proof in this case. According to the evidence, the plaintiffs and their sons and daughters were living as one household upon a farm, which was owned by two of the sons, one who was killed, and one who yet lives. The death of the two children has not altered that state of affairs, hitherto, in any manner, and there is no evidence whatever, that it is likely to. It is said that the young man died intestate and unmarried; and, that being so, not only has the plaintiffs' position in the household not been prejudicially affected, but it has, in a legal sense, been very much strengthened, giving all of the family a legal interest in the farm when before all but the two sons, nominally at all events, had no interest whatever except in the bounty of such sons. And there is no evidence to indicate any less ability in the family to manage and work the farm than there was before.

On this ground the appeal should, I think, be allowed and the action dismissed; but there should be no order as to any costs. If this point had been raised and relied upon on the former appeal the action should then have been dismissed and subsequent costs saved; therefore, the defendants should pay all subsequent costs, and receive costs down to that appeal; and setting the one set of costs off against the other it is reasonable to make no order as to costs, and so save further costs.

Appeal dismissed with costs, MEREDITH, J.A., *dissenting.*

COURT OF APPEAL.

SEPTEMBER 27TH, 1912.

SMITH v. GRAND TRUNK RW. CO.

4 O. W. N. 42.

Negligence—Death of Engineer—Train Running into Open Canal—Disregard of Signals—Rules of Defendants—Negligence of Conductor—Engineer Bound by Orders of—Concurrent Negligence.

Action by widow and administratrix of an engineer in employ of defendants, to recover damages for his death, caused by his train running through an open drawbridge into the Welland Canal. On arriving at the canal semaphore the engineer had found it set against him. He thereupon stopped up, and after a pause, proceeded a short distance past the semaphore to the water tank and took on water. Thereupon, without looking again at the semaphore, which was still set against him, or for the signals of the bridge-tenders, he signalled to the conductor that he was going ahead, to which the conductor, who was in a much less favourable position to see the semaphore than the engineer, signalled "all right." Deceased then proceeded with his train and went into the open canal a short distance further on. The act of the conductor was the negligence relied on by plaintiff. The jury found the conductor guilty of negligence in giving the signal he did in place of a signal to back up, and the engineer guilty of contributory negligence in passing the semaphore without permission.

BRITTON, J. (20 O. W. R. 654; 3 O. W. N. 379), *held*, that, at the best, the engineer was guilty of concurrent negligence, causing the accident, and dismissed the action without costs.

DIVISIONAL COURT (21 O. W. R. 236; 3 O. W. N. 659), *held*, that the accident was caused by the negligence of the conductor, to whose orders deceased was bound to conform.

Appeal allowed, and judgment entered for plaintiff for $1,800 and costs.

COURT OF APPEAL restored judgment of trial Judge and dismissed action, costs of appeals to defendants, if demanded.

An appeal by the defendant from a judgment of Divisional Court, 21 O. W. R. 236; 3 O. W. N. 659, reversing a judgment of HON. MR. JUSTICE BRITTON, at trial, dismissing the action; 20 O. W. R. 654; 3 O. W. N. 379.

The action was brought by the plaintiff, the widow and administratrix of Charles Franklin Smith, to recover damages caused by his death under circumstances of alleged negligence while in the employment of the defendant as a locomotive engineer. The accident in which the deceased met his death, occurred about 10.30 p.m., on the 20th July, 1911, at Port Colborne, where the engine on which he was employed was by some one's fault thrown into the Welland Canal, through an open drawbridge, and he was killed.

A special, consisting of 35 freight cars, a caboose, and the engine and tender in charge of the deceased, left Fort Erie about 9.45 p.m., proceeding westerly. When it arrived near the drawbridge the signals were set against the train. The engineer blew the necessary blasts with the whistle, but did not get a signal to advance. He then said to his fireman—the semaphore remaining set against him—"We will fill the tank up;" and proceeded for that purpose to the stand pipe, which is situated between the semaphore and the bridge, thus passing the semaphore, which was still set against him. His duty, according to the printed instructions put in, was to detach the engine from the train when of over 15 cars, as this was, when about to take water. This he did not do, but, instead, advanced with the whole train until the engine was at the standpipe, about 70 feet in advance of the semaphore. While engaged in taking water, and apparently without again looking at the semaphore, he signalled to the conductor—who was some 1,200 feet away, at the rear of the train—"I am ready to proceed;" to which the conductor replied "All right." The train at once proceeded, and in less than five minutes the catastrophe had occurred.

The signals from the engine were given by whistling; those from the conductor by means of the lit-lantern which he carried.

The drawbridge was properly open for the purpose of passing a boat upon the canal.

The rules of the defendants were put in, and Nos. 22, 52, 59, 60, 213, 232, and 233, were specially referred to at the trial and before the Court of Appeal.

Rule 22, under the heading "Conductors, Baggagemen, and Brakemen," says: "The train is entirely under the control of the conductor, and his orders must be obtained except where they are in violation or conflict with the rules and regulations, or plainly involve any risk or hazard to life or property, in each of which cases all participating will be held alike accountable."

Upon the heading, "Engine Man," rule 62, says: " . . they must obey the orders of the conductor of the train in regard to starting, stopping, and switching cars, speed, and general management of the train, unless they endanger the safety of the train or require violation of the rules." Rule 59: "They must obey all signals given, even if they think such signals unnecessary. When in doubt as to the meaning of a signal they must stop and ascertain the cause, and

if a wrong signal is shewn, they must report the fact to the conductor." Rule 60: "They must always keep a sharp lookout ahead, noting carefully the position of switches, semaphores, and other signals" . . .

Under the heading "Movement of Trains," Rule 43 says: "All trains must approach stations, the end of double track, junctions, railroad crossings at grade, and drawbridges, prepared to stop, and must not proceed until the switches or signals are seen to be right, or the track is plainly seen to be clear."

Rule 232 says: "Conductors and engine men will be held equally responsible for the violation of any of the rules governing the safety of their train, and they must take every precaution for the protection of their trains, even if not provided for by the rules."

And 233 says: "In all cases of doubt or uncertainty take the safe course and run no risk."

The printed "special instruction," as to detaching the engine before taking water, reads as follows: "Freight trains of more than fifteen cars in taking water must stop before reaching the watertank or standpipe, and the engine must be cut off before water is taken. The brakes must not be released on train until the engine is again coupled on and ready to proceed."

At the trial, as appeared from the charge of the learned Judge, the plaintiff's case was rested entirely upon two acts of negligence, viz., the act of the conductor in giving the signal to go ahead and the acts of the bridge tenders after they saw that the train had passed the semaphore and was proceeding towards the bridge.

The learned Judge reserved the defendants' motion of non-suit, and submitted certain questions to the jury, which, with the answers, were as follows—

"1. Was the conductor, McNamara, who was in charge of the train on the engine of which the deceased C. F. Smith was engineer, guilty of any negligence by reason of which the engineer, C. F. Smith, lost his life? A. Yes.

2. What was that negligence; and answer that question fully. A. Having passed the semaphore, if the conductor had full authority in the running of the train he, McNamara, should have signalled the engineer to back up the train again until the semaphore was lowered.

3. Was the deceased the engineer guilty of contributory negligence; that is, could the engineer, by the exercise of reasonable care have avoided the accident? A. Yes.

4. In what respect was the engineer Smith so guilty? A. By passing the semaphore without permission.

5. Apart from what may be said of negligence on the part of the conductor or the engineer, was there any negligence on the part of the defendants, which occasioned the death of the engineer? (Referring to the bridge tender.) A. No.

6. If so, what negligence do you find these bridge tenders were guilty of? A. Nothing."

The jury upon the question of damages, said they were of the opinion that the amount of such damages would be $3,600, but they would only allow one-half of that sum, or $1,800.

Hon. Mr. Justice Britton, afterwards delivered judgment dismissing the action without costs, see 20 O. W. R. 654; 3 O. W. N. 379. The view taken by the learned Judge is expressed in the following extract from his judgment:—

"It is argued that the death of the engineer was caused by the negligence of the person in charge of the train within sec. 3, sub-sec. 5 of the Workmen's Compensation for Injuries Act. Defendants' rule 22 puts the train entirely under the control of the conductor, and his orders must be obeyed except where they are in conflict with the rules and regulations or plainly involve any risk or hazard to life or property, in either of which cases all participating will be held alike accountable. Rules 52, 60, 213, and 232, were also cited. In view of these, and inasmuch as the deceased knew that the semaphore was up, and not lowered for the train of deceased, he must be held equally responsible with the conductor, and so I must dismiss this action."

As appeared in the learned Judge's charge, he had presented to the jury for their consideration the contention of the plaintiff that the result was brought about solely by the negligent signal to advance given by the conductor, and that any negligence of the engineer in passing the semaphore had then ceased to be operative, and the opposing contention of the defendants', which is thus described by the learned Judge:—

"It is said in argument in reference to him that his signal only meant, and it would only be understood by the engineer, that it was all right at his end of the train. 'You

are on your engine drawing this train. It is for you to see that it is all right for you.' Using the wording of rule 213, 'It has to be plainly seen by you that the track is clear to go upon the bridge and to cross over the bridge, and assuming it is your duty and that that is all right, then it is all right for you to go ahead.' That is the meaning, it is said, so far as this conductor is concerned, in answering from the rear end of the train the signal that was given to him by the engineer. Now, it is for you to say whether this conductor, in your opinion, was guilty of the negligence which caused the engineer under those circumstances to go forward with his train."

Divisional Court adopted the plaintiff's contention, and allowed the appeal. See 21 O. W. R. 236; 3 O. W. N. 659.

The appeal to the Court of Appeal, was heard by HON. SIR CHARLES MOSS, C.J.O., HON. MR. JUSTICE GARROW, HON. MR. JUSTICE MACLAREN, HON. MR. JUSTICE MEREDITH, and HON. MR. JUSTICE MAGEE.

I. F. Hellmuth, K.C., and W. E. Foster, for the defendants.

J. R. Logan, for the plaintiff.

HON. MR. JUSTICE GARROW:—I am, with deference, of the opinion that the view taken by the learned trial Judge was correct. He might very well, in my opinion, even have granted the motion for non-suit made by the defendants at the close of the plaintiff's case; all the undisputed facts upon which his final judgment was based having then appeared.

But assuming that the case was one proper to be passed upon by a jury, I am quite unable to agree with the Divisional Court that it was permissible to ignore the finding of the jury as to the engineer's contributory negligence. There is no evidence that they did not fully understand and appreciate the exact situation. The charge had fully instructed them as to opposing contentions of the parties. Under that of the plaintiff there was no contributory negligence causing or helping to cause the accident. Under that of the defendants, the engineer's original negligence in passing and ignoring the semaphore continued, while the action of the conductor was a mere incident in bringing about the result.

It is, I think, impossible to regard the findings as a whole as having in any way attributed the advance to the signal of the conductor. On the contrary, the jury's idea of the conductor's negligence is not that he gave that signal, but that he should have given an order to the engineer to back up until the semaphore was lowered. And that the jury were convinced that the engineer was in fault is decisively evidenced by their very unusual method of dealing with the damages.

I would for these reasons allow the appeal and affirm the judgment of the trial Judge. And the defendants should have, if they ask, the costs of the appeal to the Divisional Court and to this Court.

HON. MR. JUSTICE MEREDITH:—The loss of life, and the injury to property of great value, out of which this action has arisen was caused directly by flagrant breaches of his plain orders and duty by the engineer of the locomotive, which he drove leisurely over the brink of, and into, the canal, causing the loss of his own life and great damage to his masters the defendants in this action: and yet it has been held in a Divisional Court, reversing the judgment of the trial Judge, that the defendants are liable in damages for the death of the engineer so caused. If such be the law of this province, to say the least of it, it is an extraordinary law.

The facts are simple and plain, and little if at all in dispute. The place where the accident, and the circumstances leading up to it, happened was one calling for great care; and that was well known to the engineer and emphasised in the working rules of the defendants under which he was employed and with which he was familiar; the most important, in this case, of the rules was the obvious one that no engineer should proceed to cross the draw-bridge until he had received the proper signal to do so from those in charge of the bridge and the signals connected with it: not only was that a thing which would be obvious without any rules; and not only was it a thing emphatically made plain in the rules; but it was also considered by Parliament to be of such importance that it was prohibited, in anyone, by positive enactment which also imposed a heavy penalty for every disregard of it: the Railway Act secs. 273, 389 and 390.

The engineer whistled in the usual manner for the signal to cross, the signal being set against him, as it always ought to be against all trains approaching: not receiving the signal to proceed across the bridge, and supposing doubtless that the bridge was being swung for the purpose of letting a vessel pass, navigation having the prior right of way, he brought his engine up to the water tower to take on some more water in the interval and proceeded to do so, although there was no need for water and would not be before the next water tower would be reached: but here, evidently getting the impression that the bridge was in position for him to proceed, hastily signalled to the conductor at the rear of the train that he desired to go on, and having received the usual signal of assent from the conductor, put the train in motion before the brakeman had had time enough safely to shut off and replace the water-spout by which the water was conveyed from the tower to the engine: and then proceeded slowly the short distance from the tower to the canal and drove his engine over its bank and into it, although at the time the bridge was wide open and a vessel just passing through and although the place was well lighted by electric lights, and although more than one bystander seeing the danger shouted to him to apprise him of it.

Now all this was also done by him in flagrant violation of his orders and of the statute against attempting to cross the bridge without first being signalled to do so. From first to last the signal was set against him, the danger signal, which he disregarded. It may be that when he stopped at the water tower the bridge was not open, the bridgeman had not quite commenced to open it to let the vessel go through that he could have seen from his engine on one side or other, no doubt I think on either, and seeing it in that position hurried to cross over not thinking that at the moment the men might be starting, as they were, relying upon their danger signal set against him and performing their duty towards the vessel demanding its right of passage, to swing the bridge open to let the vessel through. But whatever he thought and whatever he did he moved on to his death in violation of his duty to remain until he was signalled to from the bridge to proceed, and notwithstanding the undeniable fact that the signal was from first to last set against him indicating the danger into which he ran.

To say that the signal from the conductor was an order for him to proceed which he was bound to obey no matter how the signals might be is to say something which is obviously absurd and is plainly disproved. It is the first and most important of all the duties of the engineer to regard the signals and to be answerable for it that the engine does not proceed or remain stationary in violation of them; it is one of the necessary essentials of his position. After stopping he could not properly proceed as he did without a signal from the rear of the train giving—whether at a bridge or anywhere else it would have been the same—assent; but that assent did not absolve him from any of his duties; his signal to the conductor was an intimation that he desired to proceed and that so far as he was concerned he might safely do so; the answer of the conductor was but his assent, and intimation that all was right so far as he was concerned, as the evidence shews. The train had not been divided; he had seen that the orders signal at the station required no delay and that the rear end part of the crew were in place—the rear watchman, if there had been one, recalled—and all was ready so far as that end of the train was concerned; it in no sense relieved the engineer of any part of his duty to guard against all danger ahead.

It is quite true that the conductor admitted, in giving his evidence at the trial, that he saw the signal set against crossing at some time when the engine was taking water, but not after getting the engineer's signal of readiness to go ahead; and so I am unable to see how negligence on his part is proved in this respect, and it is not found by the jury. But even if it had been proved that it was his duty as well as the engineer's to observe the signal ahead, and if it were his duty to have also looked before assenting to the engineer's signal to proceed how could that relieve the engineer of his duty? Concurrent negligence would not legally lessen the responsibility of either. And in this respect it must be pointed out that the conductor was apparently nearly a quarter of a mile away from the signal post and light, whilst the engineer was quite close to them; that sometimes the signal was out of order and hand signals at the bridge were used, close to which the engineer was, whilst the conductor was far out of sight and hearing. The conductor's evidence in regard to his duty and signal is as follows:—

"Q. You knew he stopped there, and you knew that having passed the semaphore and having stopped at that place he gave you the signal that he was ready to go ahead. Then was not your signal an order to him to go ahead? A. My signal was an order for him to go ahead when it was all right to proceed.

"Q. Now then, your signal to the engineer in answer to the two whistles you say was that your train was all right as far as you were concerned? A. As far as I was concerned it was all right for him to proceed."

There is no evidence in contradiction of this, and it is affirmed by all the competent evidence given upon the subject.

The error in the reasoning and in the conclusions of the Divisional Court seem to me to be plain. The continuing breach of duty of the engineer up to the time of the disaster is overlooked; the case is treated as if his only breach of duty was in proceeding to the tank with the bridge signal set against him, but that really has little or nothing to do with the case. Notwithstanding that the bridge signal is set against a train or engine the engineer is guilty of no breach of duty in coming past the bridge signal—the bridge semaphore—to the water tower to take water; he is only guilty of a breach of duty if he came to the tower with more than 15 cars attached to his engine; and that breach of duty has nothing whatever to do with the swing-bridge, or any duty in connection with it: the duty is in connection with the crossing of the other railway on the level before reaching the water-tower: if more than fifteen cars are attached to an engine at the tower the train will overlap the other railway, an obviously improper thing to do: and it is only in regard to that danger that the duty of splitting the train and going back to unite it again is imposed; it has nothing whatever to do with the bridge or bridge signal. So that whether the conductor should, as the jury found or for all necessary and practical purposes need not, have compelled, if he could, the engineer to back up and obey the rule in that respect it has nothing to do with this case: it would have been, or might have been, a matter of great importance if an accident had happened at the level crossing.

So too in regard to the jury's finding that the engineer was negligent in passing the semaphore without permission. I can find no good reason for limiting it to the partial, and

the small part at that, passing up to the water-tower. The negligence was the same all through, up to the tower and on to the canal: the engineer was still passing with his train the signal set against him; and, as I have already pointed out, his partial passing up to the tower, to take water, was not breach of any duty in regard to safety at the bridge.

The engineer was flagrantly disregarding his duty in respect of safety at the bridge from the moment he put the train in motion at the water-tower until he drove his engine over the bank of the canal; and the jury's finding is not only wide enough to cover all such negligence, but would have no evidence to support it if it were to the contrary. To say that the engineer's duty ceased when he came to the tower because the bridge signal was then a short distance behind the engine is surely childish—that he was relieved from the paramount duty of seeing that he had the signal to cross, a duty fraught with such great danger if disregarded—simply because he would have to look back, while the engine was standing still, and look back a comparatively few feet only, instead of looking forward, to get his signal.

I would allow the appeal and restore the judgment of the trial Judge.

HON. SIR CHARLES MOSS, C.J.O., HON. MR. JUSTICE MACLAREN and HON. MR. JUSTICE MAGEE, concurred.

Appeal allowed.

HON. MR. JUSTICE RIDDELL. NOVEMBER 9TH, 1912.

RICKART v. BRITTON MFG. CO.

4 O. W. N. 258.

Action — Motion to Stay — Non-payment of Interlocutory Costs — Vexatious Proceedings—Principle Involved.

RIDDELL, J., on the application of defendants, stayed the action until payment of the costs of two interlocutory motions as ordered, holding that the motions had been of a vexatious character.

An action may be stayed in the discretion of the Court for non-payment of interlocutory costs where the action is vexatious or where plaintiff, in the course of it, acts vexatiously towards defendant. *In re Wickham*, 35 Ch. D. 272; *Graham* v. *Sutton* (1897), 2 Ch. 367; *Stewart* v. *Sullivan*, 11 P. R. 529; *Wright* v. *Wright*, 12 P. R. 42, referred to.

Motion by the defendants for an order staying the action until the costs of two former motions had been paid by the plaintiffs.

C. G. Jarvis, for the defendants.

J. G. O'Donoghoe, for the plaintiffs.

HON. MR. JUSTICE RIDDELL:—Rickart, president of the United Garment Workers of America, Larger their secretary, Waxmen their treasurer, certain other persons their "trustees," certain others members of the executive board on behalf of themselves and all other members of the United Garment Workers of America and the United Garment Workers of America sued W. A. Britton & Co., of London, Ontario, for an injunction restraining them from using the plaintiffs' trade mark and for damages, etc. The plaintiffs all resided outside Ontario; and the defendants took out a *præcipe* order for security for costs; the plaintiffs moved to discharge this order; on the return of the motion they were allowed to add as a plaintiff one Carroll, an organiser of the society who lived in London, Ont., as do several of its members. It then being urged that Carroll had no property in Ontario, it was urged by the defendants that the order should stand. The Master in Chambers, however, set it aside, 3 O. W. N. 1008, April 11th, 1912.

The plaintiffs moving for an interim injunction examined one Burgess as a witness on the motion; he declined to answer certain questions and the plaintiffs moved for an order against him. This motion was dismissed by Mr. Justice Middleton with costs payable to the defendants and to Burgess forthwith after taxation, 3 O. W. N. 1272. These costs were taxed at $76.40. Execution was issued but the sheriff cannot find goods of Carroll, the rest of the plaintiffs are out of the country.

Thereupon the defendants moved substantively for an order for security for costs. The Master in Chambers refused "without prejudice to a substantive application to the Court as in *Stewart* v. *Sullivan*," 11 P. R. 529; see 3 O. W. N. 1512. This was June 22nd. June 26th the motion for an interim injunction came on before Kelly, J., and he dismissed it the next day with costs. These costs were taxed at $161.25. September 6th a formal demand was made on the solicitors for the plaintiffs for this sum accompanied by a copy of the taxing officer's certificate. The solicitors re-

plied September 10th, "We have duly received the Taxing Officer's certificate and regret to report that at the present moment we haven't quite sufficient funds in hand to pay the amount mentioned in the same." This, counsel for the plaintiffs (one of the solicitors) admits as indeed would be fairly clear without an admission, was sarcasm, they did not intend to pay the costs or any part of the same. The letter was, and was intended to be, a humorous way of saying: "We do not intend to pay you; get the money if you can."

Thereupon registered letters were sent to the plaintiffs or at least some of them demanding payment of these costs but no answer has been received.

Carroll is clearly execution proof; it is not denied that the plaintiff organisation is in receipt of large sums of money. Probably Carroll can't pay without the help of the organisation—and the organisation refuse to pay. I have no doubt that if Carroll desired the help of the organisation he would get it without trouble.

A motion is now made for an order staying the action until these costs are paid.

In the case of *Re Wickham* (1887), 35 Ch. D. 272, it was pointed out that the mere non-payment of costs ordered placed a litigant in contempt and there was jurisdiction in the Court to stay all proceedings in the action until these costs were paid. It was said, however, that in the case of mere non-payment of costs an order would not or might not be made but where the party is acting vexatiously in withholding the costs of an interlocutory order such an order would or might be made. There the costs which should have been paid were the costs of an application for a receiver, and I cannot find any circumstance of vexatious refusal, except the refusal itself.

A subsequent case of *Graham* v. *Sutton*, [1897] 2 Ch. 367, in the Court of Appeal perhaps made the principle more clear. Lopes, L.J., puts it thus; p. 369: "If the application rested solely on the ground of non-payment of costs or on non-payment coupled with an inability to pay it could not succeed. . . . If the action is vexatious or if the plaintiff in the course of it acts vexatiously towards the defendant, the Court has jurisdiction to stay proceedings till the costs which the plaintiff has been ordered to pay are

paid. Whether the jurisdiction ought to be exercised depends on the circumstances of each case."

In our own Courts the common law rule seems to have been adopted but the result is much the same as in England.

Stewart v. *Sullivan* (1886), 11 P. R. 529; *Wright* v. *Wright* (1887), 12 P. R. 42, may be looked at. What is decided is that "while non-payment of interlocutory costs was not a ground for staying proceedings, yet if it appeared equitable to stay proceedings until they are paid, the Court in the exercise of its inherent discretion might direct a stay": head-note to *Stewart* v. *Sullivan* (1886), 11 P. R. 529.

I think that the test expressed by Lopes, L.J., is a fair one (while of course there may be other cases.) Mere non-payment is not enough even if accompanied by inability to pay. I should hesitate long before staying an action upon the ground of a plaintiff's impecuniosity. But if (1) the action is vexatious, or (2) if the plaintiff in the course of it acts vexatiously toward the defendant, then an order may go and in most if not all cases should go.

I cannot here hold that the action in itself is vexatious but the other alternative remains to be considered. Did the plaintiffs in the course of the action act vexatiously to-toward the defendants? It is impossible to read the judgment of Mr. Justice Middleton, as reported in 22 O. W. R. 81, without seeing that that learned Judge thought that the proceedings for an interim injunction were vexatious: "The Canadian union have registered a label under the statute and this alone would indicate that there is such an issue to be tried as to render it unreasonable to suppose that any interim injunction will be granted. Besides this, a very serious legal question arises at the threshold of the plaintiffs' case."

The learned Judge goes on to point out other difficulties: "A novel and difficult legal question ought not to be dealt with upon a motion for an interim injunction," p. 1274. I entirely concur with my learned brother in his views; and my brother Kelly when all the material was before him dismissed the motion for an interim receiver. I think the motion for an interim receiver from the beginning and especially when persisted in after the views of Mr. Justice Middleton was vexatious.

As regards the other costs, that is the costs of the motion to commit, the plaintiffs could not have supposed that the investigation they were desiring to make (as mentioned in 22 O. W. R. at p. 83), would be permitted if objected to. The proceedings to commit the witness for contempt were also vexatious in my view.

The defendants, in my opinion, have brought themselves within the rule even if we disregard the letter of plaintiffs' solicitors.

The order will go as asked; costs to the defendants only in the cause.

COURT OF APPEAL.

NOVEMBER 19TH, 1912.

BANK OF OTTAWA v. BRADFIELD.

4 O. W. N. 333.

Promissory Notes — Accommodation Endorsement — Endorser Weak Mentally—Inability to Appreciate Transaction — Knowledge of Holders of Notes—Fraud and Undue Influence of Maker of Notes—Counterclaim—Moneys Applied by Bank on Indebtedness of Maker—Evidence.

An action by plaintiffs to recover $1,425.45, balance claimed to be due plaintiffs on two promissory notes endorsed to them by defendant. Defendant, by his guardian *ad litem*, pleaded unsoundness of mind and incapacity for business when notes were endorsed, and counterclaimed for $5,533, moneys deposited by him in savings bank branch of plaintiffs at Morrisburg, claiming to have been wrongly applied by plaintiffs towards payment of notes of Bradfield & Co.

SUTHERLAND, J., *held*, 21 O. W. R. 360; 3 O. W. N. 688, that plaintiffs action should be dismissed with costs, and defendant to have judgment on his counterclaim to extent of $3,950.24, with costs, and the counterclaim to extent of $2,800 to be dismissed without costs.

COURT OF APPEAL, held, that the evidence did not sustain the finding of the learned trial Judge as to the mental incapacity of defendant, and that the appeal must be allowed.

Appeal allowed, judgment entered for plaintiffs for $1,425.45, and counterclaim of defendants dismissed, with costs.

An appeal by the plaintiffs from a judgment of HON. MR. JUSTICE SUTHERLAND, 21 O. W. R. 360; 3 O. W. N. 688

The appeal to the Court of Appeal, was heard by HON. MR. JUSTICE GARROW, HON. MR. JUSTICE MACLAREN, HON. MR. JUSTICE MEREDITH, and HON. MR. JUSTICE MAGEE.

F. F. Hodgins, K.C., for the plaintiff.

R. A. Pringle, K.C., for the defendant.

Their Lordships' judgment was delivered by

HON. MR. JUSTICE MEREDITH:—After several attempts to find evidence enough to support the findings of the trial Judge upon all material questions of fact, I am obliged to say, in the fullest appreciation of the advantages of a trial Judge, that the finding upon the question of knowledge, on the part of the plaintiffs, of mental incapacity of the defendant to transact business, when the notes were endorsed by him, cannot be sustained.

The case is not one of obvious, or commonly known, mental affliction; there is a sharp conflict of testimony as to whether there ever was any such incapacity, a conflict in which there is a good deal to be said on each side, so that if the finding upon that question had been the other way it might have been impossible to disturb it. The man was very old, but he he was in no way confined, or restrained, as one of unsound mind; indeed he seems to have been frequently, if not constantly, in and about the place of business, and so concerned in the business in which the debt in question was contracted, which was always carried on in his name.

The trial Judge found that the endorsement, by the defendant, of the first of the notes in question was obtained by the plaintiffs' manager—Graham—in person, and that at the time he obtained it he knew of the defendant's mental incapacity. Graham having testified that the endorsement was obtained by the intestate's son—the witness Bradfield; and that he—Graham—had nothing personally to do with obtaining, and that he never had any knowledge of any kind of incapacity of the defendant.

I cannot but say that the finding strikes me very forcibly as unreasonable. In the first place, it must be borne in mind that the note was taken in renewal of a note of the firm of R. H. Bradfield & Co., and so a note upon which the defendant—R. H. Bradfield—was liable; for there is no finding, nor any evidence upon which it could be well found, that the defendant was not a member of the firm thus prominently bearing his name; and it must also be borne in mind that this firm had for years before been indebted to the plaintiff, and that that note was but one of many renewals of notes given for that indebtedness; so that the proposition is that this astute business man, deliberately obtained from a man he knew to be of unsound mind, the note in question

in place of the one upon which that man was already liable; so deliberately doing a most discreditable act in order not to better, but to make much worse, the legal position of the plaintiffs, one of the incorporated banks of Canada, in which he held the honourable position of one of its managers. If the finding of the trial Judge be true, one may, not unfairly, suggest that, perhaps, the mental capacity of this manager might reasonably have been inquired into. This point seems to have wholly escaped consideration by the trial Judge.

In the conflict of testimony between these two witnesses, the credit which the trial Judge gave to the witness Bradfield is not general, but is plainly limited to this only, that Graham did obtain in person the endorsement of the note in question by the defendant, a finding which standing alone is, of course quite immaterial. But let me point out some things in connection with this question of credibility which ought to have had, great weight, but do not seem to have had much, if any, at the trial. The witness Graham is not now in any way connected with the plaintiffs; and so is removed from any personal interest in the result of this action, such as his position as an officer of the plaintiffs might be supposed to give rise to. The witness Bradfield is the man who has brought the firm of R. H. Bradfield & Co., and some other businesses carried on by him in other names, to hopeless insolvency; and who, after doing so, conveyed to his wife property which was in his own name; and also procured an action to be brought in her mother's name against the defendant for several thousands of dollars, and has caused judgment to be recovered, and executions to be placed in the sheriff's hands, in it; all of which, whether right or wrong, quite fails to prove excessive zeal in the creditors' interests, on the part of the witness, who has got them so deeply in the mire of bad debts. And again, notwithstanding his strong assertions under oath of his father's steadily increasing mental incapacity, he admits that he himself procured the endorsement, by his father, of the later note in question. So that, unless he is a very dishonest and unscrupulous man, his father was capable of duly endorsing a note long after the first of the notes in question was obtained, and even quite recently capable of defending the action brought against him in his wife's name. I would have had much difficulty in looking at this man as a credible or dependible witness; for either in the witness box, or else in these transactions, he was not truthful and honest. And again the testimony to which the trial Judge refers to

as "in part" corroborating the witness Bradfield is of the most inconclusive character; this witness—Hunter—was a clerk employed by Bradfield, and his whole story is that on one occasion he saw the witness Graham in the store talking to the younger Bradfield, and that he afterwards went into the office there with the elder Bradfield. He was quite unable to tell when, any more than he thought "it was before Mr. Graham left," as of course, it must have been, if it ever occurred. Another thing which seems to me to have weighed quite too much with the trial Judge is that the note in question was obtained before the note of which it was a renewal came due, and at a time shortly before Graham was removed from the managership there to managership at some other place; but the new note upon its face, as well as the testimony of the witness Graham, makes the reason for that quite plain. The firm name had been changed, ostensibly at all events the concern had ceased to be a co-partnership firm and had become an incorporated company—R. H. Bradfield & Co., Limited—and if so a note signed in that name would create no personal liability on the part of the defendant. The manager naturally wanted the same security which he had on the old notes the security of the business and of the defendant personally; and that he could only have, if a company now owned the business, in a note to which the company and the defendants were parties. Hence the new note; but the trial Judge seems to have ignored these things and found suspicion in a transaction that would have been useless except for them. I can find no ground of any kind for suspicion in that transaction.

Then upon what evidence can the finding of knowledge of mental incapacity be supported? Nothing that I can find except that the two men were near neighbours of one another; perhaps evidence enough if the man's incapacity was undeniable; but surely of no great weight when a man of the experience and capability of Dr. Hamilton, of Cornwall, testifies against any mental disease, and describes the man as being, shortly before the trial, a man very well preserved for his years; and a man who admittedly was going about as if capable of taking care of himself; and doing some business including the waiver of protest of a note.

It should be observed, too, that even the witness Bradfield does not assert that the witness Graham was ever informed by him, or by anyone else, of the defendant's incapacity. Let me read his own words:—

"Q. What did you say to Mr. Graham? A. I told him I could not ask father to endorse the note, that I didn't feel like it, and he asked me to do so in order to save his life and keep him from ruin, that if I didn't protect him that he would lose his position, and he went on and urged me to try and induce father to do this, and I made out the note as it was and as it had been made out before, and he took the note and went over to where father was standing and took him back in the office, into the back office, and he talked to him there for a while, but I couldn't hear the conversation, and finally he came out, and he said that the note was signed.

Q. He said what? A. He said that father had signed the note or endorsed the note. . . .

Q. Now, was that the only note that Mr. Graham got your father to endorse? A. That is the only one to my knowledge.

Q. The others, you got them endorsed? A. The others I procured the endorsations myself.

Q. Had Mr. Graham an opportunity of seeing your father and knowing his condition? A. Yes, I think he had.

Q. Do you know whether he had or not? A. Yes, I believe he had, because he was round there so frequently, he had every opportunity of seeing my father every day, for that matter, if he wished."

Let us consider for a moment the meaning of the first of these answers; a man occupying the position of a bank manager, and so presumably having some little knowledge of the business of banking, and business matters in general, was talking of losing his life and being ruined, if he did not get the signature of a man, and when he had that man already liable as the maker of a note for the same indebtedness, and which note was to be retired by the new one; if the trial Judge could swallow such a "cock and bull story" I cannot. There is no assertion of mental incapacity; the man's reluctance, if there be any truth in the story, may have been because of unwillingness to make his father liable.

So, too, attention should be called to the fact that not only was the defendant ostensibly the head of the firm of R. H. Bradfield & Co., but also the witness Bradfield informed both the manager Graham, and the subsequent manager Herring, that he was actually a member of the firm; it is true that the witness Bradfield eventually denied that, but can anyone upon the evidence of the other two witnesses and the fact that that name was always carried so prominently in the name of

the firm, doubt that he did make such representations to them?

The case is, I think, plainly one in which, in order to defeat this action on the ground of mental incapacity of the defendant, he was bound to prove not only such incapacity, but also that the plaintiffs had knowledge of it; and that the trial Judge's holding to the contrary is erroneous. There was no evidence of any such knowledge when the later note was endorsed; and it is not, I find, proved that there was when the earlier one was endorsed.

And I incline to the view that if there was incapacity when the notes in question were endorsed, which incapacity vitiated the endorsements, the plaintiffs might revert to any of the earlier notes for the same indebtedness and recover upon them, on the ground that the renewals were made under a mistake of fact.

The Act respecting the registration of co-partnerships does not in any way relieve the defendant from liability.

I would allow the appeal; and direct that judgment be entered upon the two notes, in the plaintiffs' favour.

HON. SIR JOHN BOYD, C. NOVEMBER 28TH, 1912.

CITY OF GUELPH v. JULES MOTOR CO.

4 O. W. N. 401.

Principal and Surety—Guarantee—Remedies given by Agreement—Right of Promisee to Choose Remedy—Alleged Variation of Contract—Release of Surety—Variation Permitted by Agreement—Materiality.

BOYD, C., *held*, in an action against guarantors that plaintiffs, a municipal corporation, were entitled to damages for breach of an agreement to purchase certain property and for failure to keep up an adequate manufacturing plant as agreed, and to enforce defendants' guarantee of the same, and also, to give notice of complete rescission of the agreement in question.

That the guarantors were not released by a slight deviation from the letter of the agreement as drawn, where such amendment was in contemplation at the time of entering into the agreement, and where the agreement, in express terms, provided for the possibility of the same.

Judgment for plaintiffs against defendant guarantors for $1,370 and costs.

Action upon a bond of United States Fidelity and Guarantee Co. for $4,000 for security for the due carrying out of a certain agreement between plaintiff corporation and the defendant, the Jules Motor Co. Ltd.

H. Guthrie, K.C., for the plaintiffs.

R. L. McKinnon, for the defendants.

HON. SIR JOHN BOYD, C.:—The written agreement contains promises by the Jules Motor Company to do a number of things, and the breach of the contract as to any of these gives rise to an appropriate action for relief. Then the company failed to make payment of the first instalment of purchase money, and the city of Guelph could sue to recover that, and not insist on a revocation of the whole under the special power conferred by the agreement. The company also failed to keep up and maintain in the manufacturing establishment purchased from the city, an adequate quantity and value of plant as provided for by the contract. This term was secured and guaranteed by the bond of the fidelity company; and it is open to the city to sue for the breach of this contract, independently of the other. The mere fact that the city determined to put an end to the purchase under clause 14 of the agreement and regain possession of the premises, and gave notice to this effect after this action was begun, does not interfere with the right to recover damages for breach of the bond or disqualify the city from seeking that method of relief from the Court in addition to the other method of relief as to the property provided for in the mutual written agreement. The one does in no way conflict with the other; the termination of the contract as to the land does not discharge the vested right of action for damages on the bond against the principal and the surety. These two terms of the contract are severable and the principal debtor has not attempted to defend, but lets the claim go by default.

The 14th paragraph of the contract provides that the effect of giving notice to terminate the agreement in 30 days declares that thereupon all rights and interests thereby created or then existing in favour of the company shall cease and terminate; but it does not follow that all right and interest in favour of the city of Guelph, *e.g.*, as to damages for breach shall also end.

The other defences raised I practically disposed of at the hearing. The application to amend by setting up that the bond was not executed by the Jules Motor should not be entertained in view of the admission on the record, that it

was so executed, and when the defect at best is of a most technical character.

The other question raised was that the contract between the principal and the city had been varied to the prejudice of the surety. This alleged variance was a matter contemplated and provided for in the original agreement of which the benefit is claimed by the fidelity company, and of which that company was cognizant.

The property had been mortgaged to the city and had come to its hands by reason of the liquidation of another manufacturing company; all the plant attached to the freehold passed under the mortgage, but there was "a claim" as to "disputed machinery," about some articles alleged to be chattels not important in value, but enough to wrangle about. There was mention in the writings about having the claim between the city and the liquidator "adjudged," but with good sense the parties adjusted the matter out of Court at an outlay of $250 paid by the city to the liquidator. The property was sold by the city to the Jules Motor Co., subject to this claim for "disputed machinery," which was then outstanding. The word "adjudged" used by the parties in the agreement and bond is loosely used as contemplating some friendly determination, for in one of the last paragraphs of the agreement it is said that the disputed machinery shall be kept in store for the liquidator until such times as "the dispute regarding the same has been settled or disposed of."

The settlement was that the liquidator was owner of the articles and they were bought by the city for $250 and turned over to the Jules Motor at the same price. This was no variation of the original agreement; without adjudication the claim was settled and the transaction is thus set out in the agreement of 23rd November, which is set up as a variation.

The extent of damages recoverable on the breach of the bond was fixed at the trial at $1,370. This is to be paid with costs of action by both defendants, and the fidelity company will have the right to recover as much as it can from the Jules Motor Co.—which has since gone into liquidation.

HON. MR. JUSTICE MIDDLETON. NOVEMBER 18TH, 1912.

BEER v. LEA.

4 O. W. N. 342.

Vendor and Purchaser—Specific Performance—Parol Option—Effect of—Hour of Expiry—Revocation of Offer—Option Taken by Agent—Resale—Full Disclosure as to Necessary—Tender by Cheque—Cash Tender Requisite.

Action by purchaser for specific performance of an alleged agreement to sell certain lands. One D., the medical adviser of defendant, obtained from him an option in writing, but without consideration, and not under seal, for the purchase of the lands in question for 30 days, and, in addition, the right to sell such lands as agent. The terms of payment provided for payment in cash of certain sums on account on acceptance. D. procured a purchaser, the plaintiff, to whom he proposed to sell the lands at a price $2,000 above the option price. He notified defendant that a purchaser had been obtained, relating, however, that the price at which the lands were to be sold was only $400 above the option price. Defendant promised to meet plaintiff and D. at 2.30 p.m. on the last day of the life of the option to close. Having decided not to sell, he did not keep the appointment, and, on being telephoned at 6.30 p.m., the same day, claimed that the option had expired at 4.30 p.m., the time of the day on which it had been given, and stated that he was no longer willing to sell. D. thereupon mailed an acceptance of the option and a marked cheque for $5,000 to defendant, and later in the evening, attended defendant and handed him a letter accepting the option, and an unmarked cheque for $10,500, the amount of the cash payment agreed on, which defendant refused to accept. This action was thereupon brought.

MIDDLETON, J., *held*, that the option in question was no more than a mere offer to sell, which was revoked by defendant by his telephone conversation with D.

That D. could not purchase until he had divested himself of his character as agent and disclosed honestly all the facts as to any contract of resale he may have made.

Bentley v. *Nasmith*, 46 S. C. R. 477, followed.

That the tenders by D. were of no effect, as a cash tender was necessary.

Cushing v. *Knight*, 46 S. C. R. 555, followed.

That the duration of the option was only until 4.30 p.m. on the last day thereof, and not until midnight.

Cornfoot v. *Royal Exchange* (1904), 1 K. B. 40, approved, and other cases referred to.

Action dismissed, without costs.

Action for specific performance, tried at Toronto on the 4th of November, 1912.

E. F. B. Johnston, K.C., and S. W. McKeown, for the plaintiff.

A. W. Anglin, K.C., and H. A. Reesor, for the defendant Lea.

Glyn Osler, for the defendant Ogilvie.

HON. MR. JUSTICE MIDDLETON:—The defendant Lea, who owns a block of some 17 acres of land near Leaside Junction, discussed with Dr. Perry E. Doolittle—his medical attendant—the sale of this land. Dr. Doolittle, having in mind some idea that the property might be advantageously used for a sanitarium, undertook to become Lea's agent for the sale of the property; and at the same time took an option upon the property in his own favour. This dual relationship is evidenced by two documents, dated February 1st; by one of which a ten days' option is given to purchase at $2,000 per acre, and by the other terms are arranged for the payment of the price "in the event of Dr. P. E. Doolittle disposing of my property." This document further provides: "If Dr. Doolitle succeeds in making the sale of my property I agree to give him a commission of two and a half per cent."

After the expiry of the time limited by this option—on the 12th February, 1912—a new arrangement was made, evidenced by a written memorandum in the words following:—

"In consideration of the sum of one dollar, the receipt of which is hereby acknowledged, I hereby grant to Dr. P. E. Doolittle a thirty days' option to purchase my property at Leaside, consisting of seventeen and three-tenths acres for the sum of $2,000 per acre, along with the further sum of $250 to be paid me by him in case this option is not exercised on or before the 22nd inst., and another added sum of $250 in the further event of this option not being exercised on or before the third day of March. All costs of searching title to be borne by you. Joseph N. Lea."

Contemporaneously another memorandum bearing the same date was signed, giving the terms of payment "in case the option on my property at Leaside is exercised by Dr. Doolittle." These terms called for payment of $10,000 if the option was exercised within the first ten days of its currency, $10,250 if exercised within the next ten days, and $10,500 if during the last ten days. Notwithstanding the argument of counsel, I think this is the meaning of the document. At the same time, the words "on completion of sale only," were added to the earlier document of February 1st, relating to the commission payable, thus shewing that the relationship of principal and agent still continued.

The option of the 13th of February purports to be in consideration of $1, but no money was actually paid.

The 13th of March was the thirteenth day after the giving of the option. The 13th fell on a Wednesday. Dr. Doolittle had interested the plaintiff Beer in the purchase. An interview had taken place on the Monday, when a draft agreement of purchase had been discussed. Many terms had been assented to, but no final agreement was concluded. It was then arranged that the parties should meet on Wednesday at 2.30 p.m., and that the transaction should be completed. For the purpose of avoiding any uncertainty as to this, Dr. Doolittle during Wednesday forenoon telephoned to the plaintiff advising him that he would be ready to close at the hour named, and the defendant promised to keep the appointment.

At the time stipulated Dr. Doolittle and Mr. Beer attended at the place appointed, but Lea did not put in an appearance. Not anticipating any difficulty in closing the matter in the ordinary mercantile way, by cheque, Dr. Doolittle and his purchaser Beer had not money with them for the purpose of making any formal payment or tender; but I find that if Lea had been present Mr. Beer was prepared to make the cash payment. He did not have the money standing to his credit in his bank, but he had securities deposited with the bank, entitling him to draw to an amount exceeding that required.

Lea had in the meantime learned of the plans of the Canadian Northern Railway, and was satisfied that he could sell the lands to the company at a much larger price. He had the view that the option expired at 4 p.m., it having been signed at that hour; and he deliberately refrained from attending at the place named, for the purpose of evading the receiving of any communication of the acceptance which he anticipated would then be made.

Doolittle was of the view that he had until midnight of the thirteenth to accept. He telephoned Lea at 6.30 p.m., asking an explanation of his failure to attend. Lea then told him that the option expired at 4 o'clock, and he would have nothing further to do with him.

What then took place, I think, amounts to a revocation of the offer, and an intimation by Lea that he would no longer sell.

Dr. Doolittle, for the purpose of accepting the offer within the time limited (in his view of the meaning of the option) wrote and mailed a letter to Lea enclosing a marked cheque for $5,000 and accepting the offer.

This was not an adequate acceptance, because the contract did not contemplate acceptance by mail. The letter did not reach Lea until after the expiry of the option, upon either theory. $5,000 was the amount of the marked cheque, because in course of the negotiations which took place on Monday, some willingness had been expressed on the part of Lea to assent to a variation of the terms of the sale by reducing the cash payment from $10,500 to $5,000. At the time the cheque was marked, Dr. Doolittle did not anticipate any attempt on the part of Lea to prevent the transaction being carried out, and anticipated that the $5,000 would be all that would be required.

Fearing that the mailing of this letter and cheque would not be sufficient, Dr. Doolittle went to Leaside and met Lea, well on in the evening, and then gave him a letter accepting the offer together with an unmarked cheque for $10,500. These were not accepted by Lea, who insisted that the option was at an end at 4 o'clock, and who further refused to regard the cheque as payment.

At this time Dr. Doolittle only had a very small sum in the bank to his credit; but I have no doubt that if the cheque had been accepted by Lea, Doolittle would have arranged for payment in some way. But, as a matter of substance (apart from form) the cheque was by no means the same as money.

Lea then sold the property to Mr. Ogilvie, representing the Canadian Northern Railway, for $60,000. It is admitted that Ogilvie took with notice and has no higher position than Lea himself.

Upon these facts I think the plaintiff fails. I do not think there was any acceptance of the offer before it was withdrawn. The option being in fact without consideration and not under seal was nothing more than a mere offer. The telephone conversation at 6.30 p.m. amounted to a withdrawal of the offer. Up to that time there had been no acceptance.

Beyond this, I think that the offer could only be accepted by a cash payment of the sum stipulated for, and that this was a condition precedent to the existence of any contractual relationship. *Cushing* v. *Knight*, 46 S. C. R. 555.

Mr. Johnston very forcibly contends that Lea ought to be precluded from denying that there was an acceptance of the offer because of his failure to attend at the place arranged when the contract was to be closed. I cannot follow this.

There can be no contract unless there is an offer and an acceptance of that offer. If there is a contract, then either party may—as in *Mackay* v. *Dick*, 6 A. C. 251—by his conduct dispense with the fulfilment of the contract, according to its terms, by the other; but so far as I can find it has nowhere been suggested that one who has made an offer can dispense with an acceptance to create a contractual relationship. There would obviously be no mutuality.

Upon a different ground I think also that the plaintiff fails. Dr. Doolittle was an agent for sale. He had also the option referred to. He was re-selling to Beer at an advance of $2,000. He falsely stated to Lea that he was selling at an advance of $400. In *Bently* v. *Nasmith*, 46 S. C. R. 477, it was held that where an agent had under the terms of his employment a right to himself become the purchaser, he could not purchase until he had divested himself of his character as agent, and that to do so he was bound to disclose all the knowledge he had acquired as to the probability of selling at an increased value; and, a fortiori, he must honestly disclose the facts with relation to any contract of re-sale which he may have already made.

The question as to the duration of the option is both important and interesting. In *Cornfoot* v. *Royal Exchange*, [1903] 2 K. B. 363, and [1904] 1 K. B. 40, the Court of Appeal determined that thirty days, in an insurance policy —whereby a ship was insured for thirty days in port after arrival—meant thirty consecutive periods of twenty-four hours, the first of which began to run upon the arrival of the ship in port.

I can see no reason why the same meaning should not be attributed to the expression in all contracts. Any attempt to give any other meaning would create difficulty. It is true that in most cases the law takes no notice of the fraction of a day; but this rule has been modified, and the true principle now seems to be that as between private litigants the exact time can be ascertained when necessary to determine the rights of the parties litigant. See *Clark* v. *Bradlaugh*, *L. R.* 7 Q. B. D. 151, and 8 Q. B. D. 63; *Barrett* v. *Merchants Bank*, 26 Gr. 409; *Broderick* v. *Broatch*, 12 P. R. 561.

The action, therefore fails; but I think the circumstances justify me in dismissing it without costs.

HON. MR. JUSTICE LEITCH. NOVEMBER 29TH, 1912.

WALLER v. CORPORATION OF SARNIA.

4 O. W. N. 403.

Negligence—Municipal Corporation—Repair of Pavement—Dangerous Material—Public Place—Lack of Safeguards—Improper Implement—Unskilled Workman—Independent Contractor — Liability of Corporation.

Action by father on behalf of himself and as next friend of his infant son, for damages for personal injuries sustained by the latter through the alleged negligence of defendants' servants. A street of the defendant corporation was being repaired by a contractor "to the satisfaction of and under the supervision of" defendants' engineer. The work of repair involved the ladling of melted asphalt out of a caldron which was set up on a street immediately off the street being repaired, which was one of defendants' principal streets. The ladle used had a wooden handle which gradually became charred, and broke, scattering the melted asphalt about and severely burning the infant plaintiff, a child under seven years of age. The evidence shewed that the work was not guarded in any way, and was calculated to and did, as a matter of fact, attract children. It was further shewn that a ladle with an iron handle in place of a wooden one should have been used.

LEITCH, J., *held* defendants guilty of negligence, in permitting dangerous material to be handled in a public place without some barrier to keep children away, and in allowing it to be handled by an unskilled workman with an improper implement.

Judgment for father for $200 damages, and for infant for $1,000 damages, with costs.

Action by William Waller for himself and as next friend of his son Reginald Waller for damages for personal injuries sustained by the latter through the alleged negligence of defendants' servants.

R. V. LeSeuer, for the plaintiffs.

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

HON. MR. JUSTICE LEITCH:—On the 30th December, 1908, the corporation of Sarnia entered into a contract under seal with Frank Gutteridge for paving Front street from the north limit of George street to the south limit of Wellington with three-inch creosote wood-block pavement on a concrete foundation.

The work was to be done to the satisfaction of and under the supervision of the town engineer.

The contractor, Gutteridge, covenanted with and guaranteed the corporation that the pavement would continue in perfect condition for five years from the date of completion. The contractor further agreed with the corporation that he

would repair and make good all settlements, defects or damage to any portion of the pavement occasioned by defective material or workmanship during the said period of five years, upon notification by the chairman of the board of works or by the town engineer. The contractor also agreed to give and did give the town a guarantee surety's bond to the satisfaction of the solicitor for the corporation guaranteeing the repair and condition of the work for five years.

On the 29th of November, 1909, the corporation passed a by-law under the local improvement clauses of the Consolidated Municipal Act to raise $24,405 for the payment for the pavement.

The pavement in the winter of 1909, by reason of defective workmanship and material, heaved and became out of repair to such an extent that the defective spots interfered with the street cars.

On the 11th March, 1910, the corporation notified Gutteridge of the defects in pavement and the necessity for repair. The corporation also notified the United States Wood Preserving Company who had furnished the blocks to Gutteridge, and who entered into a bond with the corporation of Sarnia, dated 20th February, 1909, guaranteeing the pavement for five years and that the blocks were made of good material and would be in good condition at the end of the five years as they were when the pavement was completed.

The United States Wood Preserving Company undertook the repairing of the pavement, and supplied the plant, labour and material necessary to do the work. A Mr. Suton was their foreman.

The work of repairing was being done on Front street near the corner of Lochiel street. Asphalt, which required to be heated anywhere from 212 to 300 degrees, was poured in the space between the blocks and between them. The pitch was heated in a large caldron which formed part of a furnace. The furnace was located on Lochiel street about eight or ten feet from Front street, and two or three feet from the sidewalk. The furnace was just such an object as would naturally attract the attention of a child and arouse his curiosity. Other children were attracted as well as the Waller boy.

The molten asphalt was essentially dangerous.

Byron Spark, the man who was handling the pitch, had had no experience in such work. No precaution was taken to prevent any one from going near the furnace and boiling pitch, or to protect children from accident.

The pitch was ladled out of the caldron and poured into pails with a ladle with a wooden handle which had been made out of a piece of pine board. When the ladle got partially filled with pitch, Sparks put it in the furnace to melt it out. This practice necessarily burned the handle of the ladle and weakened it.

The evidence is that the handle of the ladle should have been made of iron.

In pulling the ladle out of the fire the handle broke off, the ladle was dashed upon a heap of sand, and the boiling pitch was splashed on the child Reginald Waller, whose face was burned severely.

The accident took place on the 12th April, 1912. At that time the boy was under seven years of age.

Front street near where the furnace was placed and where the pavement was being repaired is a very busy street.

I think the corporation was guilty of negligence in allowing the furnace to be placed on Lochiel street so close to Front street with its busy traffic. The corporation should have seen that there was a fence or some barrier to prevent children from going near the furnace and the hot pitch. They should have seen that the ladle with which the pitch was ladled into the pails had an iron handle, so that it could not be burned off or weakened by fire, and that the handling of such dangerous material as boiling pitch was done with a proper implement and by a skilled man.

I do not think that the corporation can absolve themselves from liability by the contention that the work was being done by an independent contractor. They permitted a dangerous implement to be placed in the streets and permitted an essentially dangerous substance to be handled in the street without a proper ladle and without adopting any precaution to protect the public. Neither the city engineer nor the road commissioner nor any other official of the corporation paid any attention to the work, or did anything to guard the public.

The evidence is that the injury to the eye, mouth and nose of the boy, Reginald Waller, is permanent. The sight

of the eye is not affected, but the lid will not close, so that the eye, when the boy is asleep, remains open. The nose is injured so that his breathing is affected. The doctor did good work in repairing the boy; by skin-grafting he managed to give the face a fairly good appearance, considering the extent of the burn.

There being no injury to his sight or hearing or to his hands, or feet, the boy will be capable of making himself a useful man, even if his looks have been marred.

The father of the boy, William Waller, who sues on his own behalf and as next friend of his son, Reginald Waller, expended $128 for medical attendance and for medicine and hospital fees. In addition to this was the attention to the burns for a considerable time, while they were healing.

I think if the father, William Waller, recovers $200 and Reginald Waller, $1,000, the justice of the case will be met.

I therefore direct that judgment be entered for William Waller for $200, and for Reginald Waller for $1,000, with costs of suit. Thirty days' stay.

HON. MR. JUSTICE LENNOX. NOVEMBER 27TH, 1912.

CHAPMAN v. McWHINNEY.

4 O. W. N. 417.

Principal and Agent—Real Estate Broker—Action for Commission—Purchaser Agrees to Pay—Evidence.

LENNOX, J., in an action by a real estate broker against the purchaser of certain lands, for a commission agreed upon, found, as a fact, that defendant had expressly agreed to pay such commission upon being informed by the vendor that he would not pay the agent any sum by way of commission.

Judgment for plaintiff for $6,675, and costs.

Action by a real estate agent to recover a commission for procuring the sale of certain lands to defendant. See *ante* 3.

A. F. Lobb, for the plaintiff.

Jas. R. Roaf, and Gordon Waldron, for the defendant.

HON. MR. JUSTICE LENNOX:—R. J. Trethewey obtained an option on 157 acres, the property of Fred Mulholland, at $1,000 an acre; and, subject to the approval of the Official Guardian, an option on 150 acres, the property of the Mul-

holland estate, for $110,000; and he instructed the plaintiff to dispose of these options for him.

In pursuance of these instructions, and before tne 27th of March, 1912, the plaintiff had set to work to effect a sale, and had communicated with parties in London and Glasgow.

The plaintiff asserts that on the 27th or 28th of March last the defendant urged him to abandon the effort to sell in the old country, and said, that if he would put him in communication with the holder of the options, and he obtained control of them, he would make it worth a good deal more to the plaintiff than a mere commission.

The defendant gives an entirely different account of this initial meeting; but as the plaintiff is corroborated by his son, is in part corroborated by the defendant, and as the defendant's evidence is quite inconsistent with the second paragraph of the statement of defence,—and for other reasons—I am quite satisfied that the plaintiff's account of this first interview is substantially correct. I am satisfied that Arthur W. C. Chapman is truthful and accurate in what he states.

It is admitted that the plaintiff brought the parties together the next day; and it was clearly established that the options were then produced to, and read over, by the defendant, and that he understood them; that a price was discussed for the sale of each option; and that Trethewey expressly declared that if the defendant took the options at these figures Chapman, or Chapman's commissions, must be taken care of, as he would pay nothing by way of commission at the prices named—a total of $28,000. The plaintiff and defendant then retired to the hallway for private discussion.

There is practical agreement as to all this; but in any event the evidence of Trethewey covers it all.

At this point everything had been agreed upon except the commission. There is no great divergence of testimony as to what occurred in the hallway; but, where it conflicts, I accept the evidence of the plaintiff. The evidence satisfies me that the plaintiff and defendant retired to settle the question of the commission; and although when out together the defendant said that he did not see why he should pay the commission, this I think was a mere murmur of dissatisfaction with what he recognised he had to do, and he nevertheless acquiesced in the 2½% which the plaintiff

finally agreed to accept, during the discussion. It is not denied that the percentage claimed was two and a half per cent. on the optional price; and the fact of the admission of a liability for $3,000 in pleadings shews that it could not have been on the $28,000.

To all appearance these parties were at one when they returned to Trethewey; and, understanding this, Trethewey and the defendant closed their bargain. Subsequently Trethewey, as a matter of generosity, volunteered to pay the plaintiff one thousand dollars. The defendant knew this. Whether it was this knowledge that prompted the defendant to endeavour to limit his payment to two thousand dollars, I do not know; but this proposition was promptly refused.

I am therefore of opinion that the plaintiff had a valid claim for compensation from Trethewey and that the defendant knew this—in fact, it was recognised by the three actors in this transaction that the defendant requested the plaintiff to introduce him to the owner of the options which he did on the faith of compensation even beyond a commission—that the defendant, knowing the attitude of Trethewey and that the bargain could not otherwise be consummated, agreed to pay a commission of two and a half per cent., and that upon this understanding the plaintiff accepted the liability of the defendant for the liability of Trethewey; a liability which was in no way in dispute.

The defendant would not admit any liability at the trial. In weighing his evidence, generally, the second and third paragraphs of his defence should be looked at.

I do not think that the failure of the defendant to obtain the Mulholland estate property affects the question, or that I have any right to reduce the commission on that account.

No claim was made for interest either in the pleadings or upon the argument.

There will be judgment for the plaintiff for $6,675, with interest from this date, and costs.

DIVISIONAL COURT.

NOVEMBER 29TH, 1912.

SIMPSON v. PARKS.

PARKS v. SIMPSON.

4 O. W. N. 422.

Sale of Goods—Bees and Honey—Wrongful Seizure and Detention—Counterclaim — Findings of Trial Judge — Refusal to Interfere with.

DIVISIONAL COURT, in an action for the balance of the purchase price of certain bees and a counterclaim for alleged wrongful seizure and detention of such bees, refused to interfere with the judgment of the trial Judge awarding plaintiff $165, balance of purchase money, and defendant $25, damages for wrongful detention.

Judgment of Senior Judge, HASTINGS Co., affirmed with costs.

Appeal by Reuben Parks from a decision of the Senior Judge of the county of Hastings, pronounced 19th June, 1912.

The appeal to Divisional Court was heard by HON. SIR GLENHOLME FALCONBRIDGE, C.J.K.B., HON. MR. JUSTICE BRITTON and HON. MR. JUSTICE SUTHERLAND.

W. B. Northrup, K.C., and A. A. McDonald, for Parks.

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

HON. MR. JUSTICE BRITTON:—The action by Simpson was commenced on the 30th January, 1912, and may be styled the original action. It was brought for the recovery of the balance of the price of 53 hives or skips of bees which Simpson alleged he sold to Parks for $200.

The second action was brought by Parks against Simpson for damages for the alleged seizure and detention of these bees and of certain articles belonging to Parks and which with the bees, honey, etc., were upon Simpson's premises. This action was commenced on the 6th day of February, 1912.

George Simpson the vendor of the bees, has died since the commencement of these actions, and the actions have been revived and continued by Margaret Simpson, the executrix of the last will of her late husband George Simpson.

The actions were consolidated by order of His Honour the Junior Judge of the said county of Hastings on the 26th day of April last.

The learned trial Judge found that Parks purchased the bees for $200.

There was plenty of evidence to support that finding and we cannot interfere with it. The sum of $35 was paid on account. Nor can we interfere with the finding that the property passed to Parks and that Parks had complete possession as well. The question of vendor's lien is of no importance now. The lien if it attached in favour of the vendor was only as to the bees and any article with them, if any, included in the purchase by Parks. These things are of comparatively little value. The vendor had no lien upon the articles brought upon his premises by the purchaser. The learned Judge has found in favour of the purchaser against the vendor for the illegal detention and assessed the damages at $25. The purchaser in his appeal objects generally—and on all points to the decision—but particularly that the damages are assessed at only $25.

The contention of the purchaser is that the amount of damages should be much larger: (1) because the property as the result of the detention became worthless; and (2) that the damages should be at least $200 that being the price of the bees which the learned Judge found the purchaser agreed to pay. It is by no means clear that the property became worthless as the result of the wrongful detention. After the purchase—when as found the property passed (and possession also) to the purchaser—everything was at the risk of the purchaser. Then the price of the bees is not the measure of damages for wrongful detention. I do not know how the learned Judge arrived at the sum of $25. We are not in a position to alter the amount unless prepared to accede to the contention of the purchaser that he is entitled to the price paid for the bees—I cannot do this.

Upon the whole case—the learned trial Judge has endeavoured to do substantial justice between the parties—and as there is no error in law, his decision should be affirmed.

The appeal should be dismissed with costs.

HON. SIR GLENHOLME FALCONBRIDGE, C.J.K.B.:—I concur.

HON. MR. JUSTICE SUTHERLAND:—I agree in the result.

MASTER IN CHAMBERS. DECEMBER 7TH, 1912.

HON. MR. JUSTICE RIDDELL. DECEMBER 26TH, 1912.

BERTHOLD & JENNINGS LUMBER CO. v. HOLTON LUMBER CO. (LTD.)

4 O. W. N. 458, 523.

Venue—Change of—Counterclaim—County Court Action—Judgment Given—Execution Stayed — Terms — Jurisdiction of Master-in-Chambers—Right to Vary Judgment Granting Indulgence—Costs.

MASTER-IN-CHAMBERS refused to transfer the trial of a counterclaim from the County Court of York to the County Court of Hastings, where judgment had been given in the action in favour of plaintiffs, but execution had been stayed until the trial of the counterclaim, on the grounds that the Master-in-Chambers had no jurisdiction to transfer a judgment obtained in one County Court to another, and that defendants, having accepted an indulgence under the judgment in the action, could not thereafter vary its terms.

RIDDELL, J., dismissed an appeal from the above judgment, reserving leave to defendants to move before the Judge of the County Court of York for leave to abandon their counterclaim.

Motion by defendants to transfer the trial of a counterclaim from the County Court of York to the County Court of Hastings.

The action was brought in the County Court of the county of York where the plaintiffs on 4th December inst. obtained judgment for $119.30 with a proviso that execution should not issue thereon without leave or until a counterclaim of defendants shall have been disposed of. The defendants were further ordered "forthwith to deliver a counterclaim and set same down for trial for the sittings of this Court commencing the 3rd day of December, 1912." In default of so setting down the plaintiffs were to be at liberty to issue execution "unless otherwise ordered by this Court." The defendants have not yet delivered any counterclaim, but moved to have action transferred to County Court of Hastings on the ground of that being the proper place for the trial of the counterclaim.

F. Aylesworth, for the motion.

R. W. Hart, contra.

CARTWRIGHT, K.C., MASTER (7th December, 1912):— It was not denied that if the whole case was going to trial the present motion would probably succeed.

It was contended, however, that under the facts and the terms of the judgment in plaintiffs' favour, no order could now be made.

I agree with this view for two reasons: (1) There is no power in the Master in Chambers to transfer a judgment obtained in one County Court to another, which would be the effect of acceding to defendants' motion; (2) The terms of that judgment preclude the defendant from doing otherwise than complying with its conditions unless the same were raised on an appeal, which cannot be heard here. It may further be urged that defendants having obtained an indulgence under that judgment cannot now seek to vary its terms. By indulgence I mean the stay of issue of execution until the counterclaim has been disposed of. No doubt this is usually directed. See H. & L. 3rd ed., 801. But C. R. 255 leaves this and other terms to the discretion of the Court or Judge. Here that discretion has been exercised and I at least have no power, even if I had the inclination, to interfere with it.

The motion will therefore be dismissed with costs to the Berthold Co. in the counterclaim in any event. If the costs of the counterclaim are increased by a trial at Toronto instead of at Belleville the Holton Co. if unsuccessful can ask the trial Judge to give a direction as to the taxation of the costs.

The defendants appealed to HON. MR. JUSTICE RIDDELL in Chambers from the above judgment.

The same counsel appeared.

HON. MR. JUSTICE RIDDELL (26th December, 1912):—A counterclaim for a very substantial sum has been filed by the defendants.

I think the appeal must be dismissed, the circumstances are simply these. The defendants being sued in the Court at Toronto for a claim to which they had no defence chose instead of paying the claim and bringing in the proper Court an action on a claim they had against the plaintiffs to bring that action also in the Toronto Court in the form of a counterclaim. They cannot complain if they are compelled to have the case tried in the Court of their choice.

That consideration would or might not be conclusive were there not difficulties in the way of working out the

rights of the parties in an action partly tried and in judgment in one Court and partly to be tried and judgment given in another. It is not like the case of two actions both in the same Court. I cannot remove the plaintiffs' judgment into the Belleville Court or the defendants' judgment if they get one into the Toronto Court.

The best I can do is to reserve to the defendants leave if so advised to move in the Toronto Court to withdraw their counterclaim. Upon such a motion it may be that the County Court Judge will find a way to preserve the interests of all parties, but I cannot dictate to him.

The appeal will be dismissed with costs payable by the defendants as costs of the judgment already had. If the counterclaim be not proceeded with to judgment in the Toronto Court, the costs before the M. C. will be paid in the same way, but if it be proceeded with to judgment in the Toronto Court to the Berthold Co. in any event in the counterclaim.

HON. MR. JUSTICE CLUTE. DECEMBER 17TH, 1912.

ALABASTINE COMPANY, PARIS, LIMITED v. CANADA PRODUCER AND GAS ENGINE CO. LIMITED.

4 O. W. N. 486.

Sale of Goods—Gas Engine—Implied Warranty—Express Contract—Reliance on Skill and Knowledge of Vendor—Fraud—Damages—Repairs—Loss of Business—Rescission of Contract.

Action to rescind a contract for the purchase of a certain gas engine, for return of the purchase moneys paid, and for damages sustained through loss of business, etc., by reason of the defective condition of the engine. The evidence shewed that plaintiffs had explained their needs to defendants, who had promised to furnish them with the engine they required.

CLUTE, J., held, that the engine in question was extremely defective to the knowledge of defendants, that it was wholly unsuitable for plaintiffs' purposes, and that defendants' conduct had amounted to fraud.

That the warranty that the engine was reasonably fit for the purposes to which it was intended to be put, implied by reason of the fact that plaintiffs had relied upon the knowledge and skill of defendants, was not displaced by reason of the fact that the contract of sale contained a clause providing for the replacement of defective parts.

Canadian Gas Power and Launches, Ltd. v. *Orr Bros., Ltd.*, 23 O. L. R. 616, followed.

Sawyer-Massey Co. v. *Ritchie*, 43 S. C. R. 614, distinguished.

That a claim for damages based on the profits which would have accrued from the fact that two firms competing with plaintiffs had gone out of business during the period the engine in question was installed, could not be allowed as it could not have been within the contemplation of the parties.

Judgment for plaintiffs for $7,372 with costs, defendants to be entitled to return of engine.

Action tried at Brantford, on the 25th of November and four following days, 1912, to recover $5,500 paid by plaintiffs for an engine bought from defendants alleged to be useless for the purpose intended, for $20,000 consequential damage and for rescission of the contract to purchase.

G. H. Watson, K.C., and Franklin Smoke, K.C., for the plaintiffs.

I. F. Hellmuth, K.C., and W. A. Boys, K.C., for the defendants.

HON. MR. JUSTICE CLUTE:—The plaintiffs manufacture gypsum products—plaster of paris, hard wall plaster, etc., at Paris and Caledonia, Ont. The defendants manufacture gasoline engines at Barrie.

The plaintiffs desired to increase their power, and Mr. Haire, their manager, got into communication with one, Cooper, who was acting as sales agent, (though in the employ of another company), for the defendants. The result of this was that the defendants' manager, Greaves, Haire and Cooper, negotiated for the sale of the engine and other appliances in question. It was fully made known to the defendants, through their manager, what was required. He visited the plaintiffs' works, and it was pointed out to him that it was necessary to have an engine that could be well-governed inasmuch as at one time there was a heavy load, and then the engine would run light. This and other special requirements were pointed out to him.

According to Cooper's evidence, Greaves impressed upon Haire that their engine was the one they ought to purchase. Greaves further stated that their engine would easily develop 250 h.p., and that they were prepared to guarantee the proper operation of the machine.

I do not mention this part of the evidence which was objected to as in any way varying the contract, but with a view of shewing, what was made manifest throughout the evidence, that the plaintiffs required and the defendants agreed to furnish a particular engine suitable for a particular purpose.

After a good deal of negotiation and after all parties understood what was required, an agreement was entered into on the 5th of May, of which the attached specifications together with a guarantee and special agreement mentioned in the specifications was made a part thereof. It provides

that the purchaser is to place the engine on the foundation and to furnish help to erect it, the vendors to furnish engineer to superintend the erecting and starting of the machinery and to give instructions for ten days after the plant is started.

I will refer later to some of its provisions.

The engine was delivered early in August, and set up by the defendants' engineer about the 8th of September, and started to run on the 10th. It was stopped owing to the pistons being too tight; they had to be filed down. This took some time, two or three weeks. After it was started again one of the bearings gave trouble and the engine would not govern properly. It would race without a load and with a heavy load would stop. The balance wheel also gave trouble, causing vibration. This was attributable, I think, to the weakness of the crank case, of which I will speak later.

I may mention here that a crack had been discovered by Parkhurst, superintendent of plaintiffs' mill, before the engine was removed from Barrie, but he was assured by the defendants' manager, Greaves, that it was a trivial matter and could be made perfectly secure; and castings were prepared and bolted on to that end. A second crack, however, appeared in October about a foot long opening and closing as the engine moved, with oil oozing out. The weakness of the crank case, according to the evidence, which I accept, caused the crank shaft to vibrate dangerously. This occurred early in October. The effect of this was to make the bearings run hot and melted out the babbitt; that is, the metal in which the shaft turns. The effect of this was to break the gear, which was found to be cast iron instead of steel as it should have been. This occurred about the middle of October. The engine had only run a few days during this period. About the 22nd October the air cylinder cracked, owing to an original flaw in the cylinder, which had been known to the defendants and had been drilled out and plugged before the engine was shipped. It was from this point of weakness that the cracks which caused the break started. I regard this as impugning the defendants' integrity in sending out the engine. The defect was in a vital part where the greatest pressure was applied and where the cylinder should have been perfect: yet, knowingly, a very defective cylinder was put in by the defendants. The effect

of this break of the cylinder and the gear caused a delay of some weeks.

The plaintiffs' manager says that the engine was practically out of business for two months, the new bearings and the cylinder not being obtained from the defendants until December.

After these parts were finally replaced and the engine started up again, it ran for a few days and another bearing gave out. The babbitt melted out. This is attributed by the plaintiffs' manager to the balance wheel not running true and the weakness of the crank case, causing the bearings to run hot. One Berg was sent down. He rebabbitted the bearing and put it in some kind of running order, and it was again started sometime early in January. The babbitt broke again and the engine worked very little until February. It would run part of the time and then stop. It operated at times fairly well during the early part of March, but on the 25th of that month it "went to smash" as the witnesses express it.

The crank case, forming the body of the engine, was broken beyond repair, and other parts of the engine were so broken and destroyed as to make the engine, in the opinion of a number of witnesses, whose evidence I accept, not worth repairing.

The evidence shews that an engine of this kind ought to be set up and running properly in about two weeks, possibly three. This engine after seven months from the time it was taken in hand by the defendants to install never was made to run properly, although the defendants had charge of the installation and repairs during the whole period.

The correspondence during all this period between the parties, upon which I lay great weight, shews clearly, I think, that from first to last the engine was never in proper running order. It never would properly govern, which was a very essential prerequisite for doing the plaintiffs' work. The castings were unfit for use, and this fact was either known or should have been known to the defendants before the engine was sent out. The crank case upon which the whole strain of the engine would come was so defective that the witnesses for both plaintiffs and defendants concurred in the view that it was not fit for the purposes for which it was intended. I find that the frequent breaks and final wreck of the engine was due to its inherent defects, and not owing to any

want of care on the part of the plaintiffs or their servants in charge of the engine. I find the crank case was not oil tight and was not so arranged as to lubricate all moving parts within it on the oilsplash principle. I find that it was defective in form and material, that there were cold shots through it; it was spongy, thicker upon one side than upon the other, and was unfit to be sent out and used for the purposes intended. I find that the governor did not comply with the guarantee and did not control the admission of gas and air proportionate to the load, and did not maintain a constant speed of the engine. I find that one of the pistons was defective to the knowledge of the defendants before it was sent out and was plugged, which had a tendency to weaken it and make it unfit for the use intended. I find that the engine was never capable of continuously carrying 250 h.p., or so adjusted as to start properly without the assistance of the smaller engine. I find that the material and workmanship was not of the very best class of their respective kinds, but on the contrary were such, having regard to the parts defective, as to render the engine wholly unfit for the work required of it as intended by both parties.

As to the defendants' witness Hindle, the erecting engineer, he was acting as selling agent for the defendants during the time of his erecting the engine in question, and was interested in speaking well of the engine. His evidence was unsatisfactory, and I do not give full credit to it.

Stanley Moore, who ran the engine for a time and then went to the defendants, was wholly discredited, so much so that Mr. Hellmuth very frankly stated that he would not rely upon his evidence.

I think it clearly made out in this case that this contract was entered upon by both parties with a distinct and clear understanding as to the purpose for which the engine was to be used, that it was to be applied to a particular purpose which required particular qualities, and the defendants represented to the plaintiffs that they could supply the engine required, and the plaintiffs trusted to their judgment and skill in doing so, and I think this is a case where there is an implied term or warranty that the article shall be reasonably fit and proper for the purpose for which it was designed. It was not, I think, within the contemplation of either party that where there was a wreck, such as occurred in this case, and the principal parts of the engine destroyed and smashed,

that that came within that part of the guarantee which limited the remedy to a replacement of the injured parts. Many injured parts during the six months were over and over again replaced, and every endeavour was made both by the plaintiffs and defendants to get the engine in running order. The result of six months' experiment was that the whole thing practically collapsed, and I am satisfied that this breakdown was from its inherent defects and weakness. I cannot but feel that the defendants were guilty of fraud in putting this engine off as they did, and so find. I think it was clear that defendants had knowledge of the defect in the crank case and did not bring it to the attention of the plaintiffs. The plaintiffs' manager having discovered it, he was assured that it was of no moment.

The defence did not see fit to call the defendants' manager, Greaves, although he was in Court, and no contradiction was offered as to what was said by the plaintiffs' witnesses in regard to the defect of the crank case.

There was certainly wilful concealment in regard to the plugged cylinder, the most important part of the engine. The defendants also withheld from the plaintiffs that they had never built an engine of this size before, but rather represented themselves as having full knowledge of what was required and of their capability to produce the article. I think the defendants knew, or should have known, that the engine was unfit for the purpose for which it was intended.

The defendants' counsel strongly relied upon the case of *Sawyer & Massey Co.* v. *Ritchie*, 43 S. C. R. 614, and that there could be no implied warranty that the engine should be fit for the purpose for which it was used because there were certain provisions in the contract for replacing defective parts. In my opinion the two things are quite distinct, and I think this case falls within the principle laid down in *Canadian Gas Power and Launches, Limited* v. *Orr Brothers Limited*, 23 O. L. R. 616. In that case there was a guarantee that the engine should be in perfect running order when shipped, and also that in the event of any part breaking within twelve months, by reason of material therein having been defective, the purchaser might return the same and be furnished free of charge with a duplicate part. It further provided that no agent was authorized to make any contract or promise differing in any way from that written and contracted in the order. In that case, as here, the vendors

had knowledge of that which the defendants desired and required of the engine. The question as to when an implied condition or warranty may arise is carefully considered in the *Orr Case,* and the cases referred to.

The Rule is thus laid down by the late lamented Chief Justice Sir Charles Moss, p. 621, where he is reported as saying:—

"But, in order to get at what was present to the minds of the parties, the circumstances connected with and surrounding the transaction may be looked at. If, for instance, a purchaser specifically describes the article he requires, or selectes what he wants, relying on his own judgment as to its fitness for the purpose to which he intends to apply it, the mere fact that the vendor is aware of the use for which it is designed will not raise an implied condition or stipulation or warranty on his part that it is fit for that purpose. An example of this class in *Chanter* v. *Hopkins,* 5 M. & W. 399. But many cases decided in the English Courts, both before and since the passing of sec. 14 (1) of the Sale of Goods Act, 1893 (of which it has been said that it only formulates the already existing law on the subject—per Collings, M.R., in *Clarke* v. *Army and Navy Co-Operative Society,* [1903] 1 K. B. 155, at p. 163, and in *Preist* v. *Last,* [1903] 2 K. B. 148 and in our own Courts, have clearly affirmed the rule that where a manufacturer or dealer contracts to supply an article which he manufactures or produces, or in which he deals, to be applied to a particular purpose, so that the buyer trusts to the judgment or skill of the manufacturer or dealer, there is in that case an implied term or warranty that it shall be reasonably fit and proper for the purpose for which it was designed."

In my opinion, this rule is applicable to the present case upon the facts and evidence disclosed, and there can be no doubt, in my mind, whatever that the engine was wholly unfit for the purpose for which it was designed and intended to be used by both parties.

The plaintiffs are entitled to recover back the $5,500 purchase money paid, with interest upon $1,000 from the 8th of August, 1911, and upon $4,500 from the 17th of January, 1912. They are also entitled to recover the expenses to which they were put in the installation, which amounts to $500, the expense in disbursements, repairs and changes, $272; and, also the expense incident to installing a tempor-

ary engine to keep the works running, less the present cost of such engine (the total cost of which amounts to $2,300), from which must be deducted the present value of the temporary engine, which was placed by the plaintiffs at $1,500, leaving $800 to be allowed on that item. This would make a total of $7,072.

There is also a claim for loss of business. There is no doubt that the plaintiffs suffered considerable loss directly traceable to the defective operation of the engine installed, but the greater part of this claim I do not think can be sustained. There was evidence that there was a loss of $75 a day for 200 days, making a claim of $15,000. The greater part of this, I think, cannot be sustained. It appeared from the evidence that the supposed profits which were said to have been lost would have accrued from the fact that two competing firms had gone out of business during the fall and winter of 1911 and 1912. This, of course, was not in the contemplation of either party when the engine was ordered, and cannot, therefore, be considered as forming any part of the damages to which plaintiffs would be entitled. As a matter of fact the plaintiffs' business and profits largely increased during this very period, owing to increased demands; I think, however, a certain amount of loss is properly traceable to the defective running of the engine. In addition to the allowances above made, I think $300 would be a fair allowance, making a total of $7,372, for which the plaintiffs are entitled to judgment.

As in *Canadian Gas Power* v. *Orr Brothers*, 22 O. W. R. 351, I think the order may provide that the defendants shall be entitled to a re-delivery of the engine, conditional on the repayment of the balance of the price.

Plaintiffs are entitled to costs.

Thirty days' stay.

HON. MR. JUSTICE LATCHFORD. DECEMBER 21ST, 1912.

RE STANTON.

4 O. W. N. 504.

Will — Construction — Absolute Gift to Widow — Later Codicil — Cutting down Gift—Reasonable use for Life—Precatory Trust—Dower—Election.

Motion for construction of a will and three codicils. By the will the testator bequeathed all his property to his wife, subject to certain legacies, and by his last codicil he directed that 60% thereof should go, at her death, to certain of his relatives, the remaining 40% to go as she should choose.

LATCHFORD, J., *held*, that the widow's absolute estate was cut down so that she should have the use of the *corpus* during her life, but of the balance remaining at her death, the right of disposition of three-fifths was taken from her.

Costs to all parties out of estate.

Motion in Weekly Court at Ottawa by the executors under Consolidated Rule 938, for the construction of the will and three codicils of the late Edmund Patrick Stanton.

The opinion of the Court was sought on the following points: "1. As to whether the interest granted the widow under the original will of the deceased is restricted to a life interest by the codicils to said will.

"2. As to whether the widow is entitled, after payment of the debts and legacy of $140 referred to in the codicil dated June 4th, 1903, to have an absolute transfer to her from the executors, of the corpus of the estate.

"3. In the event of it being decided that said entire corpus is not to be transferred to the said widow, what part of the said corpus, if any, are the executors and trustees authorized to transfer?"

E. P. Gleason, for the executor.

M. J. Gorman, K.C., for the widow.

D. O'Brien, for the other legatees.

HON. MR. JUSTICE LATCHFORD:—Mr. Stanton died May 24th, 1912, and probate of his will and three codicils was granted October 17th, 1912.

By his will, dated May 12th, 1897, the deceased devised and bequeathed all the real and personal estate to which he should be entitled at the time of his decease to his wife Sabina, whom he appointed his sole executrix.

The first codicil—June 8th, 1901—modified the will only to the extent of substituting as executor, in the place of his wife, the Trusts & Guarantee Company; and the second—June 4th, 1912—merely bequeathed a legacy of $140 to a sister of the testator.

By the third codicil, dated November 16th, 1911, the testator ratified his will, save in so far as any part of the will is inconsistent with the last codicil or with either of the two preceding codicils.

The codicil proceeds:—

"Whereas by my said will I have made my wife sole devisee and legatee thereunder, I now desire that this provision be also subject to the condition and proviso that upon her death sixty per centum of my property or estate remaining at the time of her death be divided, share and share alike as follows:—

Then come the names of a brother and two sisters, and a provision that in the event of the death of any such legatees the legacies are to inure to their heirs."

The codicil proceeds:—

"The balance or forty per centum of my remaining property or estate to be disposed of as my dear wife may please (this devise or bequest to be in lieu of her dower, should the latter not have been satisfied previously in the provisions of my will itself). Be it remembered, however, that it is not my intention by the present codicil to restrict in any way my dear wife's reasonable enjoyment of the provision made for her in my last will and testament which, of course, is subject to the three codicils now existing thereto, but only to secure that upon her death any real or personal estate remaining and traceable to said provision to her may be disposed of as direct in the present codicil. In the carrying out of this wish, I rely wholly in the sense of justice, as well as in the kindliness of heart, of my beloved wife."

The estate is sworn at a little over $25,000: all realty except about $300. The debts are about $1,000. To pay them it will be necessary to sell the real property.

It was stated upon the argument that Mrs. Stanton would elect to take the benefits under the will in lieu of her dower.

From the language of the codicil and the intention of the testator thereby manifested, I think that he clearly limits the absolute gift to his wife conferred by the will itself.

That devise is to be "subject to the condition and proviso," that upon her death sixty per cent. of the property of the deceased then remaining and traceable to the devise in her favour shall pass to the testator's brother and sisters. In impressive words he reiterates his intention that his wife's reasonable enjoyment of the provision made for her in the will—that is, the devise to her of all absolutely, less the $140 to a sister—is not to be restricted by the last codicil except to the extent that a fixed proportion of what, if any, of his estate may be in her hands at her death shall pass to his relatives, and not be in her power to dispose of. During her life all is hers. Upon her death forty per cent. of the testator's property remaining "at the time of her death" may be disposed of as Mrs. Stanton may direct; or, failing any testamentary disposition, will pass to her personal representatives.

That the estate shall be reasonably used and enjoyed, so that a substantial part may pass to his relatives, is manifested by the testator's words expressing that for the carrying out of his wishes he relies wholly on his wife's sense of justice and her kindliness of heart. The words, however, fall far short of imposing an obligation, and create no precatory trust.

After the executors shall have paid the debts of the deceased and the legacy of $140, and, if it should be necessary for such purpose, shall have sold the realty, Mrs. Stanton is entitled to the whole estate, provided she shall previously have elected to take under the will as against her right to dower. The property of her husband is hers to use as she may deem proper; but of any that may remain at her death, not consumed by use, three-fifths is not to be at her disposal, but will pass as directed by the codicil.

As has been often said, cases are of little use where the intention of the testator may be gathered from the will itself. The following, however, cited upon the argument, are to some extent in point: *Re Tuck*, 10 I. L. R. 309; *Re Davey*, 17 O. W. R. 1034.

I would also refer to *Re Rowland*, 86 L. T. R. 78; *Re Willatts*, [1905] 1 Ch. 378, as reversed, [1905] 2 Ch. 135; and especially *Fitzgibbon* v. *McNeil*, [1908] 1 Ir. R. 1.

Costs of all parties out of the estate.

HON. MR. JUSTICE MIDDLETON. DECEMBER 21ST, 1912.

RE STEWART, HOWE & MEEK LTD.

4 O. W. N. 506.

Company—Contributory—Misfeasance—Payment by Note—Assignment of Note by Company—Evidence—Estoppel by Government Returns—Preference Stock Issue.

Appeal by liquidator from decision of CAMERON, Official Referee, dismissing an application by the liquidator to place one Meek on the list of contributories of a company in liquidation and to make the said Meek liable in respect of certain alleged misfeasances as an officer of the company.

MIDDLETON, J., *held*, that Meek was not liable in respect of a subscription of 75 shares paid for by note, which note had been assigned to another company, this holding to be without prejudice to the liquidator's right to claim misfeasance on the part of the officers of the company in respect of such note.

That Meek was liable as a contributory in respect of 100 shares subscribed for and unpaid, where the record of the subscription appeared in the minutes and the annual returns to whose accuracy Meek himself swore.

Appeal from CAMERON, Official Referee, allowed in part, without costs.

Appeal by the liquidator from the decision of J. A. C. Cameron, Esq., Official Referee, dismissing the application of the liquidator to place Charles S. Meek upon the list of contributories of the company, and to make the said Charles S. Meek liable in respect of certain misfeasance and breach of trust in relation to the company.

W. N. Tilley, K.C., for the liquidator.

H. E. Rose, K.C., for Charles S. Meek.

HON. MR. JUSTICE MIDDLETON:—Three distinct questions arise. First, it is said that Meek is liable in respect of seventy-five shares, parcel of the original subscription; secondly, that he is liable in respect of a further subscription of 100 shares; thirdly, that he is liable in respect of certain moneys charged to him in the books of the company, of which he was at the time general manager.

Dealing with these in order:—

Meek subscribed for the 75 shares. He gave his promissory note for this amount, payable to the company. The company transferred the note to another company, known as the Stewart, Howe & May Company, and this company claims to be the holder of it.

I think the note is payment for the stock, and that the Referee was right in refusing to place Meek on the list of contributories in respect thereof.

The agreement entered into at the time of the organization of the company appears to be intelligible, and there is some ground for supposing that the facts connected with the organization of the company and the transfer of the note have not been adequately investigated. It may be that the officers of the company are liable for misfeasance in parting with this note, and it may be that the transfer of the note can be attacked. The liquidator has not attempted to assert liability on the part of Meek for misfeasance, except in respect of the one matter hereinafter mentioned; and the order should be modified so as to make it clear that the claim made against Meek for misfeasance, and which was dismissed by the Referee, is the only claim for misfeasance as yet adjudicated upon, and that the dismissal is without prejudice to any other claim open to the liquidator to make.

The second claim referred to arises out of a totally different set of circumstances. The company was originally incorporated with a capital of $100,000. An increase of the capital to $150,000 was afterwards desired. The amount of stock subscribed was less than ninety per cent. of the original capital. By the Companies Act, 7 Edw. VII., ch. 34, sec. 13, sub-sec. (a) it is provided "that the capital of a company shall not be increased until ninety per centum thereof has been subscribed and ten per centum paid thereon."

The stock that had already been subscribed in this company—except the 75 shares subscribed by Meek—had been paid for by the transfer of business assets from the Stewart, Howe & May Co. to the Stewart, Howe & Meek Co., and Meek had paid for his 75 shares by his note, which had been transferred to the Stewart, Howe & May Co.; so that not a dollar of cash had been put into the venture.

For the purpose of obtaining the supplementary letters patent, Meek subscribed for 100 shares of stock. On the 9th of December, a meeting of the shareholders of the company was held, at which all the shareholders were present or represented. At this meeting the 100 shares was allotted to Meek, and it was directed that a stock certificate should issue to him. See minutes of the meeting of that date, attested by Meek himself as president. The allotment is also recognized by the directors—see minutes of directors meeting of the same day.

Upon the strength of this subscription the application was made and the supplementary letters patent were issued; the

necessary affidavit proving the subscription for more than ninety per cent of the stock being made and lodged with the department.

Thereafter—on the 23rd of January, 1909, Meek transferred a patent for a skirt supporter and waist holder to the company, in consideration of the allotment to him of 260 shares of the stock of the company as paid-up stock.

It does not appear from the minutes that this 260 shares includes the 100 shares for which Meek had subscribed.

In September, 1909, the company determined to increase its capital stock from $150,000 to $200,000. It was again necessary that ninety per cent. of the capital should have been subscribed; that is, 90 per cent of $150,000. Meek treated himself, and his associates treated him, as a stockholder in respect of both sums, and application was made for the supplementary letters patent upon that basis. The papers deposited shewed that Meek was a stockholder in respect of this 100 shares, upon which nothing had been paid.

In making the annual returns to the Government as required by the statute, for the year 1908, Meek is shewn as a stockholder in respect of 891 shares, on which $10,000 is unpaid; and in the return made in February, 1910, he is shewn as a stockholder for 926 shares, on which $10,000 is unpaid. This proves conclusively that the $10,000 stock was not supposed to be part of the 260 shares alloted for the patent.

Meek himself verifies these returns, not merely by his signature, but by his oath; and his explanation that the amount was carried forward by a mere oversight cannot be accepted, as the returns were apparently prepared in typewriting, but a correction is made in ink, shewing the $10,000 as still due.

The learned Referee has exonerated Meek in respect of this sum, because he says there was no stock which could be issued. At the time the stock was allotted and the resolution was passed directing its issue, there was stock. What took place subsequently is what the Referee relies upon. I do not think it has any bearing upon the case. On the same day as the resolution allotting 260 shares—23rd January, 1909—more than six weeks after the 100 shares had been allotted on the 9th November, 1908—by-laws were passed for the purpose of converting some of the common stock into preference stock. 440 shares were directed to be sold, allotted, and issued as preference shares.

If Meek was already the holder of the 100 shares and also the holder of the 260 shares, there were not 440 shares capable of being so converted.

The Referee seems to regard this as in some way rescinding the previous allottment of a 100 shares. I cannot follow this reasoning. The 440 shares never were in fact allotted; the whole scheme of flotation of these preference shares seems to have been abortive; and it was after this date that the solemn application was made for the increase of stock, in which Meek was shewn as the holder of the shares in question, yet unpaid. I think that the Referee ought to have placed him upon the list of contributories in respect of this subscription.

There then remains the third matter. In the last agonies of the company it was proposed to transfer the assets to a new organization. For the purpose of adjusting the books in connection with this transfer, certain amounts appearing to be due by two concerns, were a matter of bookkeeping charged to Meek. It is impossible to understand what was in the mind of the instigator of this transfer; but the bookkeeping entry does not, I think, amount to misfeasance. The company was in no way worse off if the transaction were made; and I cannot see anything by reason of which it can be said that this amounted to misfeasance which would make Meek liable.

The report in review will, therefore, be amended by holding Meek liable in respect of the $10,000, and will be affirmed in respect of the other two matters, and will be modified as above indicated so as to leave the liquidator free to prosecute any other charge of misfeasance.

As success is divided, I do not give costs.

HON. MR. JUSTICE MIDDLETON. DECEMBER 24TH, 1912.

RE WISHART.

4 O. W. N. 519.

Will—Construction—Gift to Legatee on Death of Annuitant—Legatee Predeceasing Annuitant—Vesting of Legacy.

MIDDLETON, J., *held*, that a gift of a legacy to a legatee out of a fund charged with an annuity, upon the death of the annuitant, did not lapse when the legatee predeceased the annuitant, payment being postponed only for the convenience of the fund.

Jarman, 6th ed., 1904, followed.

Petition by executors for advice under Con. Rule 938.

R. L. McKinnon, for the executors, and appointed to represent those opposed in interest to the infants claiming under the legatees.

F. W. Harcourt, K.C., for infants claiming under legatees.

HON. MR. JUSTICE MIDDLETON:—At the time of the death of the testatrix in March, 1904, she owned a certain parcel of land charged with an annuity in favour of her brother John. She directed her executors to sell this land so soon after her death as convenient, should she survive John: if she predeceased her said brother, then as soon after his death as convenient. The executors were out of the proceeds of the sale to pay certain legacies, *inter alia*, $200 to Dick Lister, $100 to William Bowley.

The brother died on the 7th December, 1911. Lister survived the testatrix, and died on the 31st May, 1904. Bowley also survived her, and died on the 1st September, 1909. The question is, do these legacies lapse?

Jarman, 6th ed., 1904, thus states the law: "But even though there be no other gift than in the direction to pay or distribute *in futuro*, yet if such payment or distribution appear to be postponed for the convenience of the fund or property, vesting will not be deferred until the period in question."

This rule has on numerous occasions received judicial sanction. It is, however, contended that the case is governed by *Bolton* v. *Bailey*, 26 Grant 361. The will, though similar to the will in question here, is different: as there the wording is "After the sale of my said real estate I give," &c.

I do not think that the learned Vice-Chancellor intended to lay down any new exception to the well-established rules relating to the vesting of legacies. I think that, properly looked at, the case depended upon the particular words used and that in his view there was no gift until after the sale had taken place.

Here the postponement of payment was clearly for the convenience of the fund; and, to quote again from Jarman

(p. 1405), the words used "do not postpone the vesting of the gift to the posterior legatee until the death of 'A,' but merely shew that that is the period at which it will take effect in possession." This statement is based on *Benyon* v. *Maddison*, 2 Bro. C. C. 75—a decision of Lord Kenyon's—where the testator gave all the income to his mother for life, and after her decease "I then give to 'A,'" &c. The Master of the Rolls there thought that to multiply decisions of the kind suggested "seems reproachful to the law."

The amount of the legacies may be paid into Court, and the executors may be discharged. As the amounts are so small, upon an affidavit being filed that the legatees left no creditors, the money may be distributed among those now beneficially entitled.

Costs will be out of the estate.

DIVISIONAL COURT.

DECEMBER 26TH, 1912.

RE SEGUIN AND HAWKESBURY.

4 O. W. N. 521.

Way—Municipal By-law to Close a Street—Motion to Quash—Railway Act. sec. 238—Discretion to Refuse Motion—Municipal Act, sec. 632 (1)—Compensation to Parties Injured—Notice of Intention—Terms.

Motion to quash a by-law of the town of Hawkesbury, providing for the closing of a street. It was passed in pursuance of an arrangement made by the town with the C. N. Rw. Co., which arrangement was confirmed by the Dominion Railway Board. The order in question, however, did not provide for the closing of the street, but only for its diversion, and was, admittedly, within the competence of the Board.

MIDDLETON, J., *held* (23 O. W. R. 257; 4 O. W. N. 239), that, while the municipal proceedings had been taken under a misapprehension, no harm had accrued, and the application was useless and vexatious.

DIVISIONAL COURT, *held*, that the by-law was irregular on the grounds that (1) the notice had been a notice of intention to sell, not to close, the road in question; (2) no provision had been made for compensation to those damnified.

Order made that the by-law quashed, unless the town corporation agree to pay applicant any damages to which he may be found entitled by reason thereby.

Appeal allowed. Costs of motion and appeal to applicant.

An appeal by the applicant Seguin from an order of HON. MR. JUSTICE MIDDLETON, 23 O. W. R. 257.

The appeal to Divisional Court was heard by HON. SIR GLENHOLME FALCONBRIDGE, C.J.K.B., HON. MR. JUSTICE BRITTON and HON. MR. JUSTICE RIDDELL.

A. Lemieux, K.C., for the appeal.

H. W. Lawlor, and A. J. Reid, contra.

HON. MR. JUSTICE RIDDELL:—In and through the town of Hawkesbury runs a branch of the Canadian Northern Railway, practically north and south. It is carried on trestles at the northern part of the town adjoining the river Ottawa which it crosses.

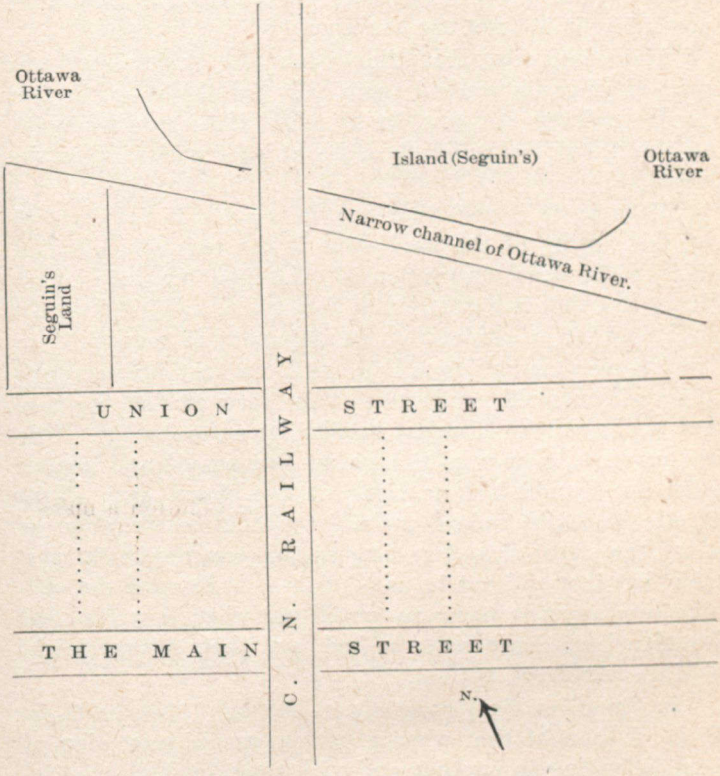
Recently the railway company determined to fill in making an embankment which is of course much safer than trestlework. This eminently proper scheme the town was willing to assist so far as reasonable and that willingness instead of being made as it was on this motion a matter of reproach to the town should rather receive commendation. The railway company instead of desiring to save money were to spend money to make their railway safer for passengers, etc.

The railway crossed Union street near the river and the company desired to fill in the street. The town at first intended to sell the street (or part of it) to the railway company: and gave the notices required by the Municipal Act, sec. 632, for that purpose. A change was made in the plan, and the by-law that was passed was not to sell the street but to close it.

I gave a plan of the *locus in quo*. Union street is a narrow and little-frequented street near the Ottawa: the applicant Seguin owns certain land north of Union street and west of the railway, and also an island on the river. What I have called the main street is one of the chief arteries of the town.

The by-law provided that the Canadian Northern Railway should open two streets of equal width with Union street, the one west and the other east of the railway and running from Union street to the main street. No provision was contained in the by-law for compensation to those injured. Seguin moved to quash the by-law: my brother

Middleton refused the application (November 7th, 1912), 23 O. W. R. 257, and this is an appeal from that decision.



In the Municipal Act, sec. 632 (1) provides for notice of proposed by-laws for closing roads it cannot be successfully contended that notice of an "intended by-law" to close a road is given by publishing a notice of an intended by-law to sell it. And after a great deal of backing and filling, counsel opposing the appeal admitted that the by-law was irregular.

The next argument in support of the by-law was that it was unnecessary. This argument seems to be based upon a misunderstanding of a remark of my learned brother in the course of his judgment. Mr. Justice Middleton of course did not state that the by-law was or might be unnecessary, making that fact a ground for refusing to quash it.

And my mind is wholly unable to understand why the fact of a by-law being unnecessary can help to support the by-law. If a by-law is necessary, there might be ground for sustaining it but not the converse.

The contention that the by-law was unnecessary was pricked when on counsel (nominally for the town, in fact for the railway company) being asked if he would consent to the by-law being quashed, he at once answered in the negative.

Then we were told that Seguin was not in fact injured by the closing of the road even if the town did close it. This is the usual contention of municipal lawyers and officers, but that is a question of fact which a Court does not decide either on affidavit or on statement of counsel.

The next contention is that any harm that can accrue to the applicant, will not be due to the town closing the road but to the railway filling it in with its embankment. I do not agree. As soon as the by-law was passed and became effective, Seguin had no right on the closed part of the street; he might indeed probably without interruption go along the street if and so long as this was physically possible, but it would not be as of right. If he sued the railway company the company would say that they had not interfered with any right he had, and their answer might well be considered perfect.

In *Canadian Pacific Rw. Co.* v. *Brown* (1908), 18 O. L. R. 85, I thought that when a person was in possession of land belonging to another and with some kind of expectation that a lease formerly held would be renewed, he might claim damages from a railway company who took the land; but the Court of Appeal did not agree nor the Supreme Court. All the railway company will do here, they will do with the consent of the municipality which now may exclude Seguin from the street. At all events, Seguin should have the right to test the question if so advised.

The town refused to agree that if Seguin should sue them for damages, they will not set up or rely upon sec. 468 of the Municipal Act—the by-law standing he could not succeed in an action at law. No provision is made for compensation to him as there should have been under sec. 629—and it would be grossly unjust to deprive him of all relief.

I do not think that the municipality can complain if we place them in the position they would have been in had they

proceeded regularly—had they proceeded regularly compensation would have been provided for. If this were done, the applicant will be in as good a position as if the by-law were quashed—his damages would be assessed by arbitration and not by a jury, that is all the difference. If, then, the town will undertake to proceed at once to determine the compensation which should be paid to Seguin and to pay it when determined, the by-law need not be set aside. In this case as the applicant has been fought on all grounds and at every point, the town should pay the costs here and below.

If this undertaking be not given in 14 days, the by-law will be quashed with costs here and below.

We give no opinion whatever on the validity of the order of the Railway Board. If the by-law is quashed, the applicant must take his chances as to any defence based on that order.

HON. SIR GLENHOLME FALCONBRIDGE, C.J.K.B.:—I agree in the result.

HON. MR. JUSTICE BRITTON:—I agree in the result.

HON. SIR G. FALCONBRIDGE, C.J.K.B. DEC. 30TH, 1912.

DALLONTANIA v. McCORMICK & CANADIAN PACIFIC RW. CO.

4 O. W. N. 547.

Negligence—Master and Servant—Fall of Rock—Notice—Knowledge—Independent Contractor—Supervision of Railway—Liability of Both—Refusal to Apportion Damages or give Relief over.

FALCONBRIDGE, C.J.K.B., awarded plaintiff $1,750 damages under Workmen's Compensation Act, without deciding adversely to his claim at common law, against both defendants, in an action for damages for personal injuries sustained through the alleged negligence of defendants.

Thirty days' stay.

An action for compensation for injuries suffered by plaintiff in consequence of the alleged negligence of defendants, or one of them, tried at Sudbury.

The plaintiff was working at the end of a tunnel beside the C. P. R. track, and a mass of rock and debris fell from the heights above where he was working, from which he received such injuries that his right leg had to be amputated.

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

W. R. White, K.C., for the C. P. R.

J. A. Mulligan, for McCormick.

HON. SIR GLENHOLME FALCONBRIDGE, C.J.K.B.:—I find that the plaintiff was not negligent or careless in any way, and that his injuries were caused by the negligence of both defendants. And I find, too, that defendant McCormick personally, and the C. P. R. by its engineers and servants, had abundant notice of the danger that existed in carrying on the work in the manner in which it was being carried on, and that the cause of the accident was the negligence of the defendants in either not guarding against the falling of the rocks which caused the accident, or first removing them before doing the work.

I find as a fact that McFadyen and Boughton are mistaken in thinking that "scaling" was done before the accident.

The work was being done originally under a contract, dated 30th December, 1911, and made between the defendants for the driving of a tunnel by McCormick and the excavation of approaches at a bridge on the Sudbury subdivision of the C. P. R.

On the 13th of March, 1912, McCormick wrote to the resident engineer of the C. P. R. as follows:— . . . "I find I am compelled to give this approach work up as it has been misrepresented entirely to me from the beginning. The material is all quicksand and some loose rock" . . .

To which the resident engineer replied on the 30th of March, 1912. . . . "After discussing the matter with the division engineer, I am advised that the tunnel approaches will be completed by force account plus ten per cent. I am also instructed to place an inspector on the job. He will keep track of the time and advise the division engineer's office weekly the progress being made."

McCormick contends that this new arrangement merely constituted him a hiring and purchasing agent with a profit of ten per cent., and is entirely a different proposition from the doing of extra work under sec. 17 of the contract.

On the other hand the C. P. R. contends that at the time of the injuries to the plaintiff, plaintiff was in the employ of the defendant Michael McCormick as an individual contractor, and not in the employ of the C. P. R. And the C. P. R. further contends that it had no control or supervision over the work or methods used by Michael McCormick.

As I have indicated before, I think, in the peculiar circumstances of the case both defendants are liable to this plaintiff, regards especially being had to sec. 4 of "The Workmen's Compensation for Injuries Act," R. S. O., ch. 160.

I observe that neither of the defendants in statement of defence claims any remedy over against the other; each one merely endeavours to avoid or evade responsibility to the plaintiff. While something was said on the subject in argument, I do not feel called on to apportion the damages or to give any remedy to one defendant over against the other.

The action is brought both at common law and under the statute. Without deciding that plaintiff's action does not lie at common law, I assess his damages at $1,750 as under the statute. Judgment accordingly against both defendants with costs. Thirty days' stay

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DIVISIONAL COURT.

DECEMBER 31ST, 1912.

CORDINER v. A. O. U. W.

4 O. W. N. 549.

Insurance — Fraternal and Benevolent Society — Constitution—Amendment by Grand Lodge—Increase of Insurance Rates—Notice of Proposed Amendment not Given Subordinate Lodges—Vote Improperly Taken — Injunction Restraining Enforcement of Increased Rates.

Motion to continue until trial an injunction restraining defendant society from putting into force an amendment to defendant's constitution, passed by the Grand Lodge of defendant, providing for an increased tariff of insurance rates.

RIDDELL, J., *held* (23 O. W. R. 65; 4 O. W. N. 102), that, as notice of the amendment to the constitution had not been sent to each subordinate lodge prior to its consideration by Grand Lodge, as required by the constitution, the amendment was *prima facie* invalid.

Injunction continued to trial, costs in cause, unless otherwise ordered by trial Judge.

"The Court will not interfere unless and until all domestic remedies are exhausted."

Zilliax v. *I. O. O. F.*, 13 O. L. R. 155, referred to.

On appeal to Divisional Court, the motion was, by consent, turned into a motion for judgment.

DIVISIONAL COURT, *held*, that the amendment purporting to be passed by Grand Lodge was too great a variation of the notices sent to the subordinate lodges to be valid, and that, as the vote taken thereon was not taken in accordance with the requirements of the constitution, it was a nullity.

Arnet v. *United African Lands Co., Ltd.*, [1901] 1 Ch. 518, distinguished.

In re Caratel New Mines, Ltd., [1902] 1 Ch. 498, approved.

Appeal dismissed with costs, and permanent injunction granted, with costs.

An appeal from the judgment of HON. MR. JUSTICE RIDDELL, 23 O. W. R. 65; 4 O. W. N. 102, restraining defendants by interim injunction from taking any proceedings under an alleged amendment of sec. 63, sub-sec. 1 of the "Constitution" of the order, and was by consent changed into a motion for final judgment.

The appeal to Divisional Court was heard by HON. SIR WM. MULOCK, C.J.Ex.D., HON. MR. JUSTICE CLUTE and HON. MR. JUSTICE SUTHERLAND.

E. F. B. Johnston, K.C., and A. G. F. Lawrence, for the defendants, appellants.

I F. Hellmuth, K.C., contra.

HON. SIR WM. MULOCK, C.J.Ex.D.:—The defendants are a fraternal association, one of its objects being to provide for the payment of stipulated sums of money to the beneficiaries of deceased members, the moneys for such purpose being derived from monthly assessments upon the members, each member being required to contribute according to a certain table of rates which is set forth in sec. 63 of the "Constitution."

Recently the Grand Lodge purported to make material changes and increases in this table of rates, whereupon the plaintiffs brought this action, complaining that the procedure necessary in order to entitle the Grand Lodge to make such changes and increases had not been complied with, and that therefore they were invalid. The learned trial Judge sustained the plaintiffs' contention and granted the interim injunction appealed from.

Part of the material used on the motion is a book marked exhibit "A," which purports to declare the objects of the Order and to shew the "Constitution" of the Grand Lodge and its rules of order.

As set forth in this "Constitution" the Order consists of Grand Lodge and subordinate lodges. The Grand Lodge consists of certain grand officers and one representative from each subordinate lodge (sec. 2 and 5), and is to meet regularly on the third Wednesday of March in each year (sec. 11), and may hold special meetings (sec. 12), and when on any question before Grand Lodge the yeas and nays are called for, each representative shall be entitled to as many votes as there are members of the lodge represented by him at the

date of the last annual report made by his lodge to Grand Lodge.

Section 63 enacts as follows:—

"63. (1) Each and every present member of this Order, from and after the first day of May, A.D. 1905, and each and every new member of this Order, without notice, commencing with the month following the receiving of the Workman Degree, shall pay to the financier of the lodge a monthly assessment of the amount designated opposite the age of the member at the date of admission to the Order, according to the following graded plan." (Then follows the graded plan, shewing the table of rates payable by a member in respect of his beneficiary certificate, and then the section concludes as follows):—

"To be due and payable on the first day of each month, or within thirty days thereafter, as prescribed by statute in that behalf, and in addition to said regularly monthly assessments such extra assessments as may be required to pay and discharge all death claims upon the Order.

"(2) The date of such payment shall be kept by the financier, who shall credit the member with and give him a receipt for the amount so paid.

"(3) A member may pay his assessments in advance quarterly or otherwise."

Section 169 of the "Constitution" is as follows:—

"169. Alterations and amendments to this Constitution may be made at any annual meeting of Grand Lodge by vote of two-thirds of the entire number to which members present at such meeting are entitled, provided that all such alterations and amendments are forwarded to the Grand Recorder on or before the 31st day of October, in order that a copy thereof may be sent to each subordinate lodge, and to all members of the executive lodge and to all members of the executive committee and officers of Grand Lodge before the 15th day of November following."

Section 76 declares that the representative of each subordinate lodge to Grand Lodge "shall be elected annually at a regular meeting in December," etc.

Thus the scheme of the Order provided by the "Constitution," whereby any alterations or amendments may be made to the "Constitution," is as follows: The proposed alteration or amendment must be forwarded to the Grand Recorder on or

before the 31st October in order to enable that officer to transmit a copy to each subordinate lodge before the 15th November thereafter. Thus each subordinate lodge before electing at its December meeting its representative to Grand Lodge will have before it the proposed alteration or amendment, and be in a position to consider the same and to elect a suitable representative for the purpose of voicing the views of its members at the meeting of Grand Lodge to be held on the third Wednesday of March thereafter.

On the 21st of June, 1912, at its adjourned annual meeting, Grand Lodge purported to pass an amendment to the "Constitution" making material changes in the graded plan of table of rates established and set forth in sec. 63 of the "Constitution" as above referred to, and one contention of the plaintiffs is that no notice of this change was given to the subordinate lodges as required by sec. 169 of the "Constitution," and that, therefore, Grand Lodge had no power to pass such amendment.

It is admitted that no notice of the amendment complained of (called the Mills Amendment) was given to the subordinate lodges, but it is contended that notice having been given to them of another proposed amendment (called the Executive Committee's Amendment), it was competent for Grand Lodge to pass the Mills Amendment as an amendment of the executive committee's proposal, and in support of this view the defendants refer to sec. 171, sub-sec. 16 of the "Constitution" which is as follows: "When not otherwise provided for, Bourinet's Manual shall govern all parliamentary questions in Grand Lodge and subordinate lodges."

This section does not, in my opinion, qualify the plain meaning of sec. 169 that before Grand Lodge shall have jurisdiction to adopt any amendment to the "Constitution," notice of that particular amendment must have been given to the subordinate lodges.

Parliamentary practice permits an amendment to a main motion substantially differing therefrom, while even a proposed amendment may, as a matter of parliamentary practice, be in order and be the subject of debate and may be advanced through various stages, still Grand Lodge has no jurisdiction to finally pass it and thereby amend the "Constitution," until the requirement of sec. 169 as to previous notice to the subordinate lodges, shall have been complied with. Were it

otherwise the plain object of sec. 169, as to notice could be defeated. That section in substance creates a contract with the subordinate lodges and with those who were members on the 1st of May, 1905, when the graded plan of rates came into force and with all new members, that the graded plan fixed by sec. 63 should not be changed until notice of the proposed change was given to the subordinate lodges, and until they had an opportunity of passing upon it, and electing representatives to Grand Lodge to vote thereon. By that graded plan rates of assessment increased each year until the member attained the age of 49 years, but no longer; whilst the Mills Amendment proposed to increase the rate each year until the member attained the age of 65 years.

No notice of such proposed amendment was given to the subordinate lodges, and, in my opinion, it is no answer to say that although no such notice was given, yet notice of some other proposed change was given which, as a matter of parliamentary practice, might be amended to the effect set forth in the Mills Amendment.

As to the contention that under the provisions of sec. 14, above quoted, Grand Lodge could of its own motion enact, alter and amend the "Constitution" laws, rules, and regulations of the Order, without notice of the proposed amendments to the subordinate lodges; if Grand Lodge has such unrestricted right to alter its "Constitution" then the provision of section 169 as to notice would be meaningless. The two sections must be read together and then full effect can be given to both of them; that is, Grand Lodge may alter and amend the "Constitution" provided notice as required by sec. 169 has been given to the subordinate lodges.

Mr. Johnson further contended that the question of rates was a mere matter of detail and that a change therein was not, in a parliamentary sense, a constitutional change. A perusal of book "A" shews that the word "Constitution" there used is not used in its strict technical sense. The title of the document is "Constitution of the Grand Lodge of the Ancient Order of United Workmen of the Province of Ontario," and it deals with a variety of matters, such as the powers of Grand Lodge and of the subordinate lodges, the methods of carrying on business by the different branches of the Order, the powers and duties of their various officers, the rights and liabilities of the members, the creation and maintenance of a reserve fund and a beneficiary system,

and other matters. No distinction, in this document, is drawn between what might be considered constitutional principles and what, mere details; but all are dealt with in the one instrument in consecutive sections from 1 to sec. 172, and together represent the nature of the compact between the Order and its members, and the rights of its members between themselves.

The change proposed by the Mills Amendment is a most material change. In fact, it is difficult to imagine any alteration of this compact which might have more serious results than would one affecting the assessment rates, and I cannot assent to Mr. Johnson's contention that they may be changed at the mere will of Grand Lodge, without previous notice to the subordinate lodges as required by sec. 169.

For these reasons, I think, the judgment appealed from should be affirmed with costs here and below, and that the injunction should remain perpetually. Having reached the foregoing conclusion, it is not necessary to deal with other objections advanced by the plaintiffs.

HON. MR. JUSTICE SUTHERLAND:—I agree.

HON. MR. JUSTICE CLUTE:—Section 169 of the constitution upon which, in my opinion, the whole question turns, is as follows: "Alterations and amendments to this constitution may be made at any annual meeting of Grand Lodge by a vote of two-thirds of the number to which the members present at such meeting are entitled, provided that all such alterations and amendments are forwarded to the Grand Recorder on or before the 31st day of October in order that a copy thereof may be sent to each subordinate lodge, and to all members of the executive committee and officers of Grand Lodge before the 15th day of November following."

The executive committee had made a report recommending a change in the rate. Notice of this report had been sent down to the subordinate lodges. At the meeting of Grand Lodge this report, recommending that sec. 63 of the Constitution, which contained the tariff indicating the amount to be paid monthly, be amended in the way there suggested. This report was not adopted. A motion was brought in proposing to amend sec. 63, and this motion was declared carried. As to whether it was in fact ever properly voted upon or not, I will deal with later.

The motion had not in fact been forwarded to the Grand Recorder on or before the 31st of October preceding the meeting of the Grand Lodge, nor was a copy thereof sent to each subordinate lodge as required by sec. 169. This, in my opinion, was a prerequisite to the proposed amendment being passed by the Grand Lodge.

It was urged by Mr. Johnston that the amendment in question was not in fact an amendment of the Constitution. I cannot accede to this view.

The section in question which it is proposed to amend provides for the rate which each member has to pay. This formed the basis of the contract entered into with the defendant society. The proposed amendment in regard to those whom it affected, about doubled the rate, and was a most material change from that which existed at the date of membership. The section in question falls within the class of subjects dealt with under the head of "Constitution of the Grand Lodge of the Ancient Order of United Workman," and sec. 169 expressly provides how this constitution may be amended.

From the numerous amendments heretofore made, it is clear that the society always treated matters of equal or less importance as amendments to the Constitution. It is not, I think, governed by cases applicable to corporations, but forms a part of the basis upon which individuals entered into a contract and became members of the association, and when the Constitution itself declares the only manner in which the basis of the contract can be changed, it is a condition precedent to such change that such requirements should be complied with.

The case of *Bartram* v. *Supreme Council of the Royal Arcanum*, 6 O. W. R. 404, referred to by Mr. Johnson supports, I think, the plaintiff's contention. It was there held that the Grand Lodge had power to make changes in the by-law governing the plaintiff's contract, but it also expressly states that those changes had been made according to the rules governing the plaintiff and defendants. In the present case, the proposed change has not been made in accordance with the rules of the society in such case. Even in the case of a company it is very doubtful whether the amendment would have been in order. As pointed out the amendment was a proposal to increase the rate by nearly doubling the amount of that mentioned in the report which had been sent out to the local lodges. Had there been a general notice that

a change would have been made in the rate, leaving it entirely open, the delegates then might have been instructed what to do, but where the proposed increase was definitely stated and the amendment greatly enlarges the liability of the class affected, this was to spring a question upon the delegates for which they might be wholly unprepared and uninstructed, and as is said by the learned author, Palmer's Company Law, 9th ed., 174: "For it is not fair to call the members together for an apparently limited and small object, and then to spring on them a much larger proposal. Those who are absent may have stayed away because they are content with what is proposed in the notice, and those who are present by proxy, are presumed to have given proxy on the basis of the notice," citing *Teede and Bishop, Limited,* [1901] W. N. 52, and *Clind* v. *Financial Corporation,* 5 Eq. 461; *Wall* v. *London and Northern Assets Corporation* (No. 1), [1898] 2 Ch. 469, 484; *Stroud* v. *Royal Aquarium Society,* 89 L. T. 243."

I, therefore, think that the amendment was not legally passed by the Grand Lodge.

But there is another ground which I think equally fatal to the defendants' contention. The representative from each lodge represented a number of voters, and upon any question for decision by the Grand Lodge it was the number of voters as represented by the delegates from the local lodges that decided all questions there submitted. It is quite clear that no attempt was made to ascertain how the actual vote stood. When the amendment was put 94 of the members present stood up as against the amendment and 212 voted in favour of the amendment. There was no attempt to ascertain how many votes each of these individuals represented. It appears that in some cases the delegates of a single lodge represented 400 or more; in other cases it might be a score or less. So that the number of individual delegates who voted for or against the motion formed no criterion whatever as to the number of votes that should be cast for or against it.

There was a dispute as to whether it was carried or not. It was contended by Mr. Johnson that upon this point the action of the chairman in declaring it carried is conclusive and that in any case there was no call for a ballot, or if there was there should have been an appeal upon this question to the lodge.

I think upon the admitted facts that no vote was taken shewing or intending to shew or providing means of shewing what the real vote was for or against the amendment, and that while the chairman was empowered to give a decision as to vote; that applies only where a vote has in fact been cast. But in the present case as no such vote was cast there could be no such decision as to what it was, and that the amendment never was in fact passed by the Grand Lodge.

The case of *Arnet* against the *United African Lands Company, Limited*, [1901] 1 Ch. 518, relied on by Mr. Johnson, does not, I think, govern the present case. In that case it was expressly provided by the company's articles that the vote might be taken, as it there was taken, by a shew of hands, and that a declaration by the chairman that a resolution has been carried, and an entry to that effect in the books of the company should be sufficient evidence of its having been carried. The Companies Act under which incorporation was made, sec. 51, also expressly provides that a declaration of the chairman that a resolution has been carried is made conclusive evidence of the fact unless a poll is demanded. That case and *Re Hadley Castle Coal Mines Limited*, [1900], 2 Ch. 419, are commented upon and distinguished in *Re Caratel New Mines Limited*, [1902] 1 Ch. 498, where it was held that notwithstanding sec. 52 of the Companies Act, a declaration of the chairman of a meeting is not conclusive where the declaration shews on the face of it that the statutory majority has not voted in favour of the resolution.

There is no clause governing the present case as in the Companies Act and in the charters referred to, and there was no attempt to ascertain the actual vote taken, having regard to the number of votes which each representative had the right to give. There was, in truth, no vote in fact taken as required by the rules of the association, and there was no announcement, therefore, that could be made by the chairman. What took place was wholly nugatory, in my judgment, as to deciding the question one way or the other.

The injunction should, therefore, be made absolute with costs of action, including the costs here and below.

HON. MR. JUSTICE CLUTE. NOVEMBER, 14TH, 1912.

MACKAY v. MASON.

4 O. W. N. 354.

Company—Action for Declaration that Defendant not a Shareholder —Estoppel—Amalgamation—Exchange of Shares—Costs.

CLUTE, J., dismissed an action by a company claiming a declaration that one M. was not the holder of certain stock in the company, on the ground that plaintiff company was estopped from taking this position, having issued and registered the shares to M., and having brought an action to compel the registration of a transfer of stock in another company in exchange for the shares so issued to him.

Action by New Ontario Goldfields Limited for a declaration that defendant Mason is not and never was a shareholder in respect of 41,000 shares issued to him, and for the delivery up of the certificates for such shares, and in the alternative for damages, tried at Toronto on the 29th and 30th October, 1912.

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

W. A. MacMaster, for the defendant.

HON. MR. JUSTICE CLUTE:—This action grew out of certain mining transactions in which the majority of the shareholders of the Tournenie Mining Company Limited (which I will call the Tournenie Company), and the Harris Maxwell Larder Lake Gold Mining Company Limited (which I will call the Harris Maxwell Company), agreed to have incorporated a company to be known as the New Ontario Goldfields Limited (which I will call the Goldfields), which was called in the agreement the amalgamation company. It provided that the Goldfields should exchange one of its shares for each and every share of the Harris Maxwell and Tournenie Companies. There were many other provisions of the proposed amalgamation, if it may be called such, to which it is not at present necessary to refer.

The defendant, Homer Mason, was the first shareholder of the Harris Maxwell Company who signed the agreement in question. Circulars were issued to the shareholders of both of the old companies, inviting them to transfer their shares for an equal number of shares in the Goldfields. After a majority of the shareholders had signed, including the defendant Homer Mason, and after he had assigned his

shares to the Goldfields (but before the same were registered) and had received an equal number of registered shares in the Goldfields Company he intervened and by his influence as an officer of the Harris Maxwell Company, and by his vote passed a resolution to prevent the registration by the Harris Maxwell Company of the transfer of shares (41,000) from himself to the Goldfields. It required these shares to give the Goldfields control of the Harris Maxwell Company as the agreement provided. The result was that the Goldfields Company (now incorporated), had to purchase a large number of additional shares in order to give them the required control. The Harris Maxwell Company then brought an action against the Goldfields Limited, seeking to set aside the agrement for amalgamation and to set aside the transfer of shares from Homer Mason to the Goldfields Company and for an injunction and other relief. Thereupon Goldfields Limited and others brought an action against Harris Maxwell Company, Homer Mason and others, asking relief on various grounds and amongst others for an injunction to restrain Mason and Patterson from voting as shareholders at any meeting of the Harris Maxwell Company, and to restrain them from transferring to any person or corporation any of the shares standing in their names in the books of the company.

After numerous applications a settlement was agreed upon containing, however, this exception: "This is a settlement of differences between you, also any of the parties represented by you, except Patterson and Mason, and the companies above mentioned, or any of the officers thereof, and there shall be no further rights or claims against Goldfields, Harris Maxwell Company, or Dr. G. A. Mackay, or any litigation by you or any of the parties you represent other than Mason and Patterson."

Prior to the settlement, the plaintiffs were insisting upon the registration by the Harris Maxwell Company, of the shares transferred by defendant Homer Mason to Goldfields Company, and Homer Mason was resisting this claim.

Immediately the settlement was signed the interests of the parties shifted, and now the defendant Homer Mason insists upon the registration of his transfer of the shares to the Goldfields Company, which he had formerly prevented, and the plaintiffs seek to prevent the registration and offer a re-delivery to the Goldfields Company of the shares trans-

ferred by them to Homer Mason in lieu of his shares. The reason for this curious change of the parties in the relief asked for arises: (1) Out of the fact that Homer Mason had prevented the registration of his shares by the Harris Maxwell Company, which compelled the Goldfields Company to go in the market and buy shares to replace this stock; (2) It also appears that after Homer Mason had signed the agreement to amalgamate and on the faith of his signature had requested other shareholders to do as he had done, he then refused to transfer his shares, and finally entered into an agreement on the 14th February, 1910, with the plaintiff, George A. Mackay, whereby he agreed to transfer his stock in the Harris Maxwell Company, share for share, to the amalgamated company, and for his so doing the plaintiff Mackay agreed to give Mason 17,500 shares additional stock in the amalgamated company (afterwards the Goldfields), and to purchase from Mason 1,325 shares for $1,000. In other words, having signed the agreement and invited others to do as he had done and considerable progress having been made towards the amalgamation, the defendant Homer Mason held the whole negotiations up and that, after he was paid a special bonus by the shares mentioned in this agreement and by the payment of the $1,000. The $1,000 was in fact paid but Mackay never received the full number of the 1,325 shares.

In the present action Mackay joins the Goldfields Company, and asks relief on his own behalf, to have returned to him the 16,667 shares of the Goldfields Limited, and to be repaid the $1,000. I ruled that this was a distinct cause of action from that set forth by the Goldfields Company, and that the plaintiff must elect with which he would proceed. Election was made to proceed with the claim of the Goldfields Company against the defendants. This claim may be shortly stated to be as follows:—

To have it declared that Homer Mason is not and never was a shareholder of the Goldfields Limited in respect of the said 41,000 shares, and for an order for the delivery up by Homer Mason of the certificate of the shares of the plaintiff to the Goldfields Limited issued to him in respect of the 41,000 in the Harris Maxwell Company, and in the alternative damages occasioned by defendant Homer Mason in preventing the transfer of the shares of the Harris Maxwell Company to the Goldfields Company.

Upon the undisputed facts of the case, I do not think the plaintiff entitled to succeed. The Goldfields Company was neither a party to the original agreement for amalgamation nor to the alleged fraudulent agreement which was entered into by Mackay and Mason, whatever the rights of Mackay and others may be in respect of this agreement. The Goldfields Company was incorporated for the express purpose of purchasing the shares of the Harris Maxwell Company and the Tournenie Company and paying therefor by its own paid-up shares. The Goldfields Company in this respect performed its part of the exchange, having delivered to Homer Mason 42,000 shares of the Goldfields Company in payment for an equal number of shares transferred by Homer Mason to the company. The shares received by Homer Mason were duly registered by the Goldfields Company. From the time of the transfer down to the settlement the Goldfields Company insisted upon the completion of the exchange of shares. After the settlement and before the plaintiffs, the Goldfields Company, brought action or took any decisive step repudiating the transaction Homer Mason, who had previously sought to avoid it, now accepted the exchange and sought registration of the Harris Maxwell Company, the control of which has passed to the Goldfields Company. It was as between the parties a completed transaction, although for ulterior purposes under the Companies Act registration was necessary. There is no evidence that the Goldfields Company repudiated the transaction upon the ground that it had been induced by the benefits conferred upon Mason through the agreement between him and Mackay. On the contrary, it confirmed the exchange in the most solemn manner, by seeking the assistance of the Court to enforce the registration of the Harris Maxwell shares so transferred to it, and this at a time that the company, through its officer Mackay, had full knowledge of the inducement given to Mason to make the transfer.

The action should be dismissed, owing to the conduct of Mason as disclosed in the evidence and above referred to, without costs.

The costs have not been materially increased by the joinder of Mackay as a party plaintiff in the action as originally constituted, and under the circumstances I give no costs to the defendants, either of the action as originally constituted or after the amendment by striking out the name of George A. Mackay.

DIVISIONAL COURT.

NOVEMBER 23RD, 1912.

SCULLY v. MADIGAN.

4 O. W. N. 394.

Conspiracy—Civil Action for—Bookmaker—Exclusion from Race-track — Powers of Voluntary Association — Right of Club to Exclude—Is Agreement to Procure Another to do a Harmful Legal Act Actionable?—Discussion of Cases.

Action by a bookmaker against defendants, certain officers and members of the Canadian Racing Association, for wrongful exclusion from the race-tracks controlled by them and for conspiracy by reason of which plaintiff was precluded from following his vocation. Plaintiff claimed an injunction and damages. The Canadian Racing Association is a voluntary unincorporated association composed of representatives from various racing clubs, and has for its object the raising of the standard of racing in Canada. A complaint was laid before the executive of this Association that plaintiff had been violently abusive, in public, to the officials of the Fort Erie track, a track under the control of the Association; the same was investigated and found correct, and as plaintiff refused to apologize, he was declared ruled off all tracks within the jurisdiction of the Association. Subsequently he was ejected, during a race-meet, from the grounds of the Hamilton Jockey Club, an incorporated body and a member of the Canadian Racing Association, and his entrance money returned him. It was not contended for plaintiff that the Hamilton Jockey Club had not the right to exclude plaintiff from their grounds, but it was urged that the exclusion was not the result of plaintiff's conduct at Hamilton, but the result of the illegal and improper resolution of the Canadian Racing Association.

KELLY, J., dismissed action, with costs.

DIVISIONAL COURT, *held*, that the action of the Canadian Racing Association was justified and devoid of malice towards plaintiff, and that the Hamilton Jockey Club were within their legal rights in excluding plaintiff.

Wood v. *Leadbitter*, 13 M. & W. 838, followed and discussed.

Semble, that, "It cannot be an actionable conspiracy for two or more persons, by lawful means, to induce another or others to do what they are by law free to do, or to abstain from doing what they are not bound by law to do."

Quinn v. *Leathem*, [1901] A. C. 495, distinguished.

Sweeney v. *Coote*, [1906] 1 Ir. R. 51, approved.

Appeal dismissed, with costs.

Appeal by plaintiff from a judgment of HON. MR. JUSTICE KELLY., dismissing his action against certain officers of the Canadian Racing Associations for conspiracy and for wrongfully causing his expulsion from certain race tracks, and for an injunction and damages in respect of the acts complained of.

The appeal to Divisional Court was heard by HON. MR. JUSTICE CLUTE, HON. MR. JUSTICE RIDDELL and HON. MR. JUSTICE SUTHERLAND.

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

M. H. Ludwig, K.C., for the defendant.

HON. MR. JUSTICE RIDDELL:—The plaintiff has "been making a living for the last number of years bookmaking and playing the horses on the race tracks in Canada," as he says. This was explained to mean that he made his money betting at the race tracks. He was plying his vocation in August, 1911, at the Fort Erie race track when he became dissatisfied with the manner certain races were run; he seems to have suspected—certainly he expressel a conviction—that there was crooked work going on. The defendant Madigan was apparently the managing steward, and after speaking to Nelson, one of the judges the plaintiff approached Madigan. To my mind there is no manner of doubt that the plaintiff had a perfect right—to put the case no higher—to speak in a proper way at the proper time to both judge and steward—but in addressing Madigan he was loud and abusive, gesticulating and angry; he referred to the races as being run by robbers and thieves. All this was in presence of others, and the learned trial Judge is wholly justified in finding as he did "that plaintiff in the presence of persons in attendance at the meeting used abusive and offensive language and conducted himself in an objectionable manner towards those who were in charge of the course."

It must be perfectly plain that conduct of this kind could not be tolerated at a race-meet which made any pretensions to respectability.

The plaintiff and Nelson were in the same car coming home from the meet—the statement of Nelson as to what took place shews that the plaintiff was much excited and used language better left unsaid. I do not copy it—but it is plain that again he was claiming that foul work had been done at the races, and that the officials in charge were parties thereto to the extent at least that they had not protected the public. Again I say that the plaintiff at a proper time and in a proper way had a perfect right to make such a charge if he believed it; but I venture to think the place was not a crowded race car or the way "a menacing attitude and . . much excited, talking very loud and using strong language . . . in a public place . . . in very great excitement . . . he did not appear to have control of himself."

There is an organization—I use the indefinite word advisedly—called "The Canadian Racing Association," formed amongst other things "for the purpose of elevating racing

to a higher plane"—it is composed of five jockey clubs or racing associations, the O. J. C., Toronto; Hamilton J. C., Hamilton; Niagara Racing Association, Fort Erie, and the Windsor Fair Grounds and Driving Park, Windsor; these four in Ontario—and the Montreal J. C., Montreal. The recognized meetings are held under the sanction of this organization. The rules of this association are rather indefinite—while there does not seem to be any provision for the appointment of a committee, it is obvious that the business of the association must be carried on by a committee of some kind—and a committee was in fact in existence, consisting of a representative, president or otherwise, of the five jockey club: there is also a secretary Mr. F., who with the chairman and vice-chairman (both representives of jockey clubs) constitutes the "officers."

Amongst the rules of the association is found the following:—

"8. (1) The committee of the Canadian Racing Association shall have power at their discretion to grant and withdram licenses to race courses, trainers, jockeys and others.

2. They shall have power to make enquiry into and deal with any matter relating to racing, and to rule off any person concerned in any fraudulent practices on the turf.

3. They shall hear cases on appeal as provided for in these rules, and their decision shall be final."

At the first meeting after the Fort Erie meet there were present Madigan, and the representatives of the Hamilton and Windsor clubs—Madigan reported—truly—that the plaintiff had abused him and some of the officers publicly on the lawn of their track in the hearing of a lot of people. Nelson also reported "that the plaintiff approached him in an unfriendly way at the track, and that again on his way home to Toronto that evening in the car the plaintiff attacked him in a loud voice, abused him to such an extent that he asked the porter to remove the plaintiff from the car."

The committee thereupon passed the following resolution: "Pending an explanation of his conduct on the closing day of the Fort Erie meeting and his abuse of officials, J. Scully, bookmaker, is suspended and denied all privileges of race courses under the jurisdiction of the Canadian Racing Association."

It should be said here that there are very many racing associations apart from this organization—the organization is a perfectly voluntary one, not incorporated and not having

any board of directors, property, etc., etc. After this meeting the plaintiff and his counsel asked for a hearing—and that was granted—a day was fixed and counsel notified, and this is apparently what took place.

"Mr. Counsell appeared first alone, and after hearing what we had to say, and the reports on which we had acted, the effect of the reports, he was quite content to ask his client to apologize and be reinstated.

Q. Was Mr. Scully there on that occasion? A. Later in the day—I understand he was coming from Toronto, and his train was late, but I think later in the day or at another meeting, I am not sure from memory, I think it was later that day, he appeared."

At that time before the plaintiff arrived it was that the following resolution was passed—I set out the minute in full: "J. L. Counsell appeared for John Scully, bookmaker, to apologize for using abusive language to officials at Fort Erie race track, Mr. Scully having been personally here for the meeting called for yesterday. It was resolved that upon his apologizing to the offended officials and filing such apology with the secretary of the associations that he be reinstated."

On the arrival of the plaintiff—the narrative continues:—

"Q. At this time had Mr. Nelson made his statement as to what had transpired? A. Yes, sir.

Q. What was Mr. Nelson's statement, if you remember the substance of it? A. That the plaintiff had been abusive to him, making charges and that kind of thing publicly such as would bring racing into disrepute.

Q. Such as what? A. Such as might bring racing into disrepute.

Q. Then when Mr. Scully appeared what took place, was he told? A. We told him what the charges were, and he denied them.

Q. Did he ask to have the case reopened? A. No, it was then reopened he came there for that purpose; he never asked for any other hearing than that which he got; he never asked to have any witnesses heard."

The plaintiff proved immovable: he maintained the attitude of *mens conscia recti*.

He bought a daily ticket for the Hamilton races and went on the race-course; Monck, who had been the representative of the Hamilton Jockey Club at the committee, and who was chairman of the executive of the Hamilton J. C.,

saw the plaintiff on the course, and ordered him removed. This was on the authority of the Hamilton Jockey Club. No communication was sent by the Canadian Racing Association (so far as appears) of their action to the Hamilton J. C. but (notwithstanding an ambiguous answer of Monck's) it is clear I think that had it not been for the action of the committee, the plaintiff would not have been removed as he was from the race course.

The plaintiff sues Madigan, Monck, Fraser and Hendrie (the Windsor representative on the committee). The statement of claim charges Madigan, Monck, and Hendrie in that they "met together and agreed among themselves to exclude the plaintiff from every race track in Canada over which they had jurisdiction and they communicated this decision . . . to . . . Fraser, who in turn communicated it to the officer in charge of the . . . detective force employed . . . to police the grounds of the Hamilton Jockey Club . . ."—that the plaintiff paid his entry fee and was admitted, but put out by the detective force—that afterwards the three defendants, *i.e.*, those other than Fraser adopted the action of the detectives, all this as the result of a conspiracy. He complains that this was a violation of "their own rules," and the procedure was not fair, reasonable or just or in good faith—and claims damages, and other relief.

At the trial Mr. Justice Kelly dismissed the action with costs; the plaintiff now appeals.

The learned Judge finds that the defendants were "not acting maliciously, but in the exercise of whatever powers were conferred upon them in protecting the racing associations and the race track interests in their jurisdiction."

In this I entirely agree with him—there is nothing which can be tortured into malice or anything else than an honest desire to prevent unseemly disturbances. Some kind of security against a repetition of the offensive conduct would have been had by an apology from the plaintiff; but even that he resolutely refused. It is plain that he was contending and still contends that he had a right to assail in public, officers of the meet in the manner he had done. A man of that kind could not be permitted to come on any well conducted race track.

A complaint is made that the committee went beyond their powers in dealing with the plaintiff's case—I do not think so; they can "deal with any matter relating to rac-

ing"—and I do not read this as referring to the actual racing of the horses, but to all matters relating to racing in the broad sense in which it is used in stating the purpose of the organization "for the purpose of elevating racing to a higher plane."

But if they had no such power under the Rule, I cannot see how the plaintiff can complain. There was an action by three gentlemen interested in racing, which one of the jockey clubs saw fit to give effect to. The plaintiff is not a party to the rules; these are drawn up by the association for its own purposes and guidance. It may be that any of the constituent clubs might disregard this action; but they are the only members of the association, and they are the only persons who can complain of any irregularity in the proceedings. I could understand an action against the Hamilton J. C., for acting in accordance of an *ultra vires* resolution if the act they did were justifiable, only if a valid resolution had been passed—but further than that I cannot follow the proposition.

The case is precisely as though a person who knows that his recommendation will be followed were to recommend a jockey club to remove a man from its track. If he acted in good faith without malice how could it be contended that an action lay?

Were the case otherwise it might be necessary to consider whether in any even an action would lie, as all the Hamilton J. C. did, they had a legal right to do.

Since *Wood* v. *Leadbitter*, 13 M. & W. 837, it is not doubtful that no action would lie against the Hamilton J. C.—that they had a legal right to act as they did: *Connor-Ruddy* v. *Robinson* (1909), 19 O. L. R. 133. Whether an action will lie against A. for inducing B. to sever his relationship, etc., with C., if at the same time B. does nothing but what he has the legal right to do is a curious question; but I do not enter upon the enquiry. I content myself with referring to Pollock on Torts, 8th ed., pp. 283, 323, Addison on Torts, p. 7, note (a); Clark & Lindsell on Torts, p. 3, note (d).

Rice v. *Albee* (1895), 164 Mass. 88.

I think the appeal must be dismissed with costs.

HON. MR. JUSTICE SUTHERLAND, agreed.

HON. MR. JUSTICE CLUTE:—The plaintiff is a bookmaker and the defendants are officers and members of the Canadian Racing Association and are also officers and representatives of the various racing clubs which control the race tracks at Fort Erie, Windsor, Hamilton, and Toronto.

The plaintiff charges that Hendrie and Monck having agreed to exclude the plaintiff from every race track in Canada, over which they claimed jurisdiction, communicated this decision to Fraser, secretary of the association, who, in turn, communicated it to the officer in charge of the private detective force employed to police the grounds of the Hamilton Jockey Club during race meets held there in August. The plaintiff went to the Hamilton Jockey Club, paid $1.50 for his entrance thereto, and was admitted to the grounds. He further claims that while there and conducting himself in a proper manner, he was taken into custody by the officer in charge of the detective force, taken to the gate of the race track where his entrance fee of $1.50 was returned to him, and he was put out of the premises and warned not to return, the plaintiff in no way consenting to such expulsion; that on the 19th August after such expulsion the defendants, other than Fraser, had a meeting in Hamilton at which they invited the plaintiff to be present, and at that meeting the defendants adopted the action of the other defendants in excluding the plaintiff from the jockey club grounds on the 15th of August as their own act. They further stated that the plaintiff had been abusive to judge Nelson, the judge in charge of the racing at Fort Erie, a few weeks previously, and asked the plaintiff to sign an apology to judge Nelson. The plaintiff asked for a copy of the charges made against him by judge Nelson, which it is alleged the defendants refused to furnish. The plaintiff then refused to sign an apology. The plaintiff was then notified that he would be excluded by the defendants from all the race tracks over which they had jurisdiction, that is to say, the Ontario Jockey Club, at Toronto; the Montreal Jockey Club, at Montreal; the Hamilton Jockey Club, at Hamilton; the Niagara Jockey Club, at Fort Erie, and the Windsor Fair Grounds and Driving Park, at Windsor.

The plaintiff charges the defendants with conspiracy to injure him in his business as bookmaker, and that by reason of the action of the defendants the plaintiff is not only debarred from exercising his business on the Canadian

tracks, but also from the race tracks in the United States, over which the American Jockey Club has control.

He further charges that if the defendants had any jurisdiction to exclude him from the race track in a proper case, there was no justification for their so doing in this case; that he was not given a hearing; that he had no notice of the meeting at which the order for his exclusion was passed, nor was he properly acquainted with the charges made against him, and that such exclusion was neither in accordance with their own rules, nor was it fair, reasonable, or just, nor exercised in good faith; that by reason of the action of the defendants the plaintiff is debarred from carrying on his business as bookmaker and wholly deprived of his profits therefrom. The plaintiff asks a declaration that the action of the defendants in excluding him was unlawful, for an injunction and damages.

The defendants while denying the plaintiff's statement of claim, say that if any action was taken by them as alleged, such action was taken with a *bona fide* object of protecting and furthering the interests of the Canadian Racing Associations and horse-racing generally in Canada, and not for the purpose of injuring the plaintiff in his trade or calling, and object that even if the allegations contained in the plaintiff's statement of claim are true they are not sufficient in point of law to sustain the action.

The trial Judge finds that at the Fort Erie racing track and during the racing meets there, the plaintiff complained to the defendant Madigan, charging improper conduct of the races. There is evidence also that the plaintiff in the presence of persons in attendance at the meeting used abusive and offensive language and conducted himself in an objectionable manner towards those who were in charge of the course. This language was followed up by the plaintiff on the train, where the plaintiff again used abusive and insulting language towards Nelson and again charging improper conduct of the races. The evidence satisfied the trial Judge that the "plaintiff at the race track used in the presence of others, such language as called for interference on the part of those having to do with the conduct and control of the track; both Madigan and Nelson having had something to do with the conduct of that race meeting," and he was "of opinion that this language and plaintiff's conduct called for some action on the part of the defendants for the

protection of those lawfully attending these race meetings." He further finds that "reports of these happenings reached the other defendants, and they without any other notion than to prevent the recurrence of what had happened, and to insure the carrying out of the race meeting without offence to the patrons, and in the exercise of whatever authority they had as representing the Canadian Racing Association, and as delegates from the club composing it, did assume to deal with this plaintiff, and I believe did deal with him in a fair, impartial way and without any intent to do any wrong to the plaintiff."

With respect to the complaint that the plainttiff did not have a fair hearing the trial Judge finds that on his own evidence he had Mr. Counsell appear at his request and on his behalf at the meeting of the association. His complaint about having been excluded from the race track was made in time to be dealt with at the meeting of the committee in Hamilton, on 12th August, and the matter was on that date adjourned until August 17th, and again until August 18th. Mr. Counsell, representing plaintiff, attended that meeting, the plaintiff not being there in the beginning because of the train on which he was travelling from Toronto being late. Mr. Counsell heard the charges that were made, discussed the matter with those present, and the evidence is, and it is not contradicted, that he said he thought the proper thing for plaintiff to do was to apologize, and that would have been the end of it. Plaintiff reached the meeting before it was adjourned, heard what took place, and refused to apologize, stating that he had not made use of the language charged, and so the matter rested."

These findings of the trial Judge are fully borne out by the evidence, and upon these facts it is plain, I think, the plaintiff cannot succeed.

It was very frankly admitted by Mr. McCarthy that the officers of the Hamilton Jockey Club acting in their own interest had the authority to exclude the plaintiff from their own track, but he strongly urged that the plaintiff's ejection from the track was not by reason of any misconduct on the part of the plaintiff at the Hamilton meeting, but was in pursuance of an illegal and improper agreement on the part of the Canadian Racing Association, who acted improperly and illegally in causing the plaintiff's ejection from the Hamilton track.

It appears that the Canadian Racing Association is not an incorporated company, but is composed of the following jockey clubs in Ontario, viz., The Ontario Jockey Club, Toronto, the Hamilton Jockey Club, Hamilton, the Niagara Racing Association, Fort Erie, the Windsor Fair Grounds and Driving Park, Windsor, and in the Province of Quebec, the Montreal Jockey Club, Montreal, and such others as may be granted membership in the Dominion of Canada.

Their jurisdiction over the above racing clubs is stated in Part I, rule (iii): "A recognized meeting is a meeting held under the sanction of the Canadian Racing Association in the Provinces of Ontario and Quebec, but this Association may assume jurisdiction over such Clubs and Associations as place themselves under its government, race under its rules and regulations, collect forfeits and impose penalties in the Dominion of Canada. A meeting held in the United Kingdom under the auspices of the English Jockey Club, and all others having a reciprocal agreement with it or with this Association."

There are further provisions containing regulations for race meetings, and in Part IV, 8 (i) it says: "The Committee of the Canadian Racing Association shall have power at their discretion to grant and withdraw licenses to race courses, trainers, jockeys and others.

"(ii). They shall have power to make enquiry into, and deal with any matter relating to racing, and to rule of any person concerned in any fraudulent practices on the turf.

(iii). They shall hear cases on appeal as provided for in those rules, and their decision shall be final."

The rules further provide: Part XXIV, "163. Every person ruled off the course of a recognized Club or Association is ruled off wherever these rules have force.

"Part XXV, 165. When there is no specified penalty for violation of the Rules of Racing, or of the regulations of the course, the committee of the Canadian Racing Association have power to disqualify, fine, suspend, expel from or rule off.

"166. If any case occur which is not, or which is alleged not to be, provided for by these rules, or where these rules may seemingly conflict, it shall be determined by the committee of the Canadian Racing Associations, in such manner as they think just, and conformable to the usages of the turf."

The defendant Monck is vice-president of the Hamilton Jockey Club, and their representative on the Canadian Racing Association. It appears from his, and other evidence that the representatives of the various racing clubs constitute the Canadian Racing Association, and have agreed to be, and are bound by the rules of such Association at the race meetings of the clubs forming the Association; that there was a proper meeting of the Association, when the Scully matter came up, in which Hendrie represented the Windsor Club, Madigan represented the Fort Erie Club, Monck the Hamilton Club, and Fraser was Secretary of the association.

There can be no doubt upon the evidence that the action taken by the association was binding upon the various clubs so represented at the association; that the Hamilton Club through their vice-president approved of the action of the association in respect of Scully, and that the officer acting directly under the direction of Monck, as vice-president of the Hamilton Jockey Club, ejected the plaintiff from the track in the manner above described.

In the well known case of *Wood* v. *Leadbitter*, 13 M. & W. 838, it appears that "Lord E. was steward of the Doncaster races; that tickets of admission to the grand stand were issued, with his sanction, and sold for a guinea each, entitling the holders to come into the stand, and the inclosure round it, during the races; that the plaintiff bought one of the tickets, and was in the inclosure during the races; that the defendant, by the order of Lord E., desired him to leave it, and, on his refusing to do so, the defendant, after a reasonable time had elapsed for his quitting it, put him out, using no unnecessary violence, but not returning the guinea." Held in an action of trespass for assault, and false imprisonment, that on this evidence the jury were properly directed to find the issue for the defendant, holding that a right to come and remain for a certain time on the land of another can be granted only by deed; and a parol license to do so, though money be paid for it, is revocable at any time, and without paying back the money.

Mr. McCarthy, while admitting the force of this case, urged that the evidence in the present case disclosed an illegal agreement among the defendants to induce the Hamilton Jockey Club to break a contract made with the plaintiff, and referred to *Quinn* v. *Leathem*, [1901] A. C. 495, but

in that case there was no question of a license to enter upon lands. In *Kerrison* v. *Smith* (1897), 2 Q. B., *Wood* v. *Leadbitter* is distinguished. In that case the plaintiff and defendant agreed orally that defendant should let his wall to plaintiff, for bill-posting at £2 10s. a year, plaintiff to erect a hoarding, on which the bills were to be posted. Plaintiff erected the hoarding, posted bills, and made several payments. Defendants gave notice to plaintiff that the hoarding must be removed, and nearly a month later defendant took it down. In an action to recover damages for breach of contract, held, that, although the permission to post bills was a license, and therefore, not being by deed, was revocable, the action was maintainable for breach of contract, and therefore plaintiff was wrongly non-suited.

In distinguishing that case from *Wood* v. *Leadbitter*, Collins, J., points out "The contract did not relate to the possession or enjoyment of the land or any right over it, but only to the use of it under very stringent regulations, the defendants retaining themselves complete possession of and all rights over it." And the Court was of opinion that the *Wood* v. *Leadbitter* case was not applicable to the case of such a contract as was disclosed in the case before them.

The present case is very much stronger in favour of the defendants, I think than *Wood* v. *Leadbitter*. Here, on the finding of the trial Judge, the defendants acted *bona fide* in the interests of their society, and not out of any ill-will towards the plaintiff, and returned the price of the ticket, when the plaintiff was ejected. It could not be successfully contended that the officer having authority for that purpose would not have had the right to eject plaintiff under the circumstances in which he was ejected. In other words, the act was lawful, and the plaintiff had no right of action against the Hamilton Jockey Club, even had the defendants acted maliciously. An act lawful in itself, is not converted by a malicious or bad motive into an unlawful act, so as to make a doer of the act liable to a civil action. *Allen* v. *Flood* [1898] A. C. 1. In Pollock on Torts, 9th ed., p. 332, it is said: "It would seem to follow that it cannot be an actionable conspiracy for two or more persons, by lawful means, to induce another, or others, to do what they are by law, free to do or to abstain from doing what they are not bound by law to do; and this opinion has been distinctly expressed in

the Court of Appeal, in Ireland, *Sweeney* v. *Coote*, [1906] 1 I. R. 51: At p. 109: "but I can find no authority, or principle to support the proposition that an act may be done by each of two people without incurring any legal liability for loss consequent thereon, and yet that the same act, done in the same way, with the same intent, and with the same consequences, will be actionable, if it is done in pursuance of an agreement made between them before they do it."

It appears then, from the evidence, and the findings of the trial Judge, that the defendants were authorized by the various jockey clubs, to represent them in the Canadian Racing Association; that the action taken by them which resulted in the expulsion of the plaintiff from the Hamilton racing course was reasonable, proper, and necessary for the good government of the race course during its meeting; that the action of Monck was in his representative capacity as vice-president of the Hamilton Jockey Club, which he had a right to do as he did, and that the defendants, so far from doing any wrong simply discharged their duty in the representations which they made in regard to the plaintiff's conduct at the Fort Erie races.

Upon the facts and authorities it is clear, I think, that the action of the plaintiff fails, and this appeal should be dismissed with costs.

MASTER IN CHAMBERS. NOVEMBER 25TH, 1912.

DAVISON v. THOMPSON.

4 O. W. N. 396.

Discovery — Further Production — Similar Transactions — Lack of Relevancy.

MASTER-IN-CHAMBERS dismissed motion for further discovery and further production, on the ground that defendant had no right to discovery as to transactions of plaintiff with others similar to those with him.

Motion by defendant for further production by plaintiff and further examination for discovery.

W. M. Hall, for the motion.

J. T. White, contra.

CARTWRIGHT, K.C., MASTER:—The statement of claim alleges that defendant is liable to plaintiff for the amount of $1,100 and interest, the amount of two notes of $500

and $600 respectively which became due on 23rd and 31st of January, 1912.

The statement of defence admits the making of the notes but says they are renewals of other notes which were without consideration and given for the plaintiff's accommodation. It then gives a partial statement of the transactions between the parties leading up to the giving of the notes in question, which does not, however, make it clear how or why defendant gave the notes to plaintiff when apparently in his view plaintiff was indebted to him.

There is no counterclaim. But it is alleged that plaintiff agreed to give defendant a commission and bonus as a consideration for his getting plaintiff a loan of $10,000 to secure an option on some mining property in Alaska. It would appear from the material that the only written agreement between the parties is that of 9th June, 1911. By this it appears that defendant had advanced plaintiff $10,000 to buy such option and that in the event of a sale being afterwards made by plaintiff, defendant was to share equally in the profits. Whether there were any does not appear.

Cheques are received for following amounts and dates:—

24th June, 1911	$ 100
8th August, 1911	300
19th August, 1911	700
	$1,100

making up the amounts of the two notes sued on.

The plaintiff has been examined at very considerable length with a view of shewing that defendant was to have a bonus and commission in respect of the advance of $10,000 in addition to what is stated in the written agreement.

In questions 105 and 106 plaintiff was asked if he had been negotiating with any one else and if he had not offered them a bonus. He admits having had negotiations but declines to say what were the terms offered.

This he cannot be obliged to do. What terms he might offer to some one else would not be any evidence of what he offered to defendant. Then defendant wants to go into all the transactions of the plaintiff from 9th June, 1911, and have production of all his cheques entered in his bank book

(exhibit 9) which was produced on the examination. I am unable to see now what is asked for is relevant to the issues on the pleadings, or how it can advance defendants' case or destroy plaintiff's to see how plaintiff disposed of the $10,000. If that sum was given to plaintiff on the terms of the agreement of 9th June, 1911, then it is conceivable that plaintiff loaned $1,100 of it to defendant as he says, though it may look strange in view of the dates. Perhaps at the trial the matter may be more clearly explained.

At present the motion, in my opinion, fails and must be dismissed with costs to plaintiff in the cause.

MASTER IN CHAMBERS. DECEMBER 21ST, 1912.

NIAGARA NAVIGATION CO. v. TOWN OF NIAGARA-ON-THE-LAKE.

4 O. W. N. 554.

Venue—Change—Toronto to St. Catharines—Alleged Trespass—Not a Claim for Recovery of Land—Con. Rule 529 (c)—Convenience—Promptness of Trial—Uselessness of Motions.

MASTER-IN-CHAMBERS refused to re-open his former order herein (23 O. W. R. 687), refusing to change the venue of an action from Toronto to St. Catharines on the ground that no sufficient answer to the objections there taken had been made.

After the dismissal of the motion in this case on 10th December inst. (reported 23 O. W. R. 687), the defendants have renewed it on the ground of preponderance of convenience.

R. H. Parmenter, for the motion.

T. L. Monahan, contra.

CARTWRIGHT, K.C., MASTER:—The previous application was dismissed because on the pleadings I was of opinion that the action was not one coming under C. R. 529 (c). The pleadings have not since been varied, and I must therefore abide by my judgment on that motion from which no appeal was taken.

The present motion must share the fate of its predecessor. There is no preponderance of convenience shewn where, as here, the defendants' mayor admits that they will require an official of the Crown lands who would be resident here, and as to any others says: "I cannot say exactly at the present time how many witnesses it will be necessary

for the town to call to prove their case but there will be at least in my opinion, as far as I can ascertain at the present time, six, all of whom reside in the said county of Lincoln."

This is met by an affidavit of plaintiffs' assistant secretary that plaintiffs will require at least three witnesses all resident in Toronto, one from Port Hope and perhaps one from Ottawa.

The defendants on the previous motion professed to desire a speedy trial. There are no sittings at St. Catharines before 10th March, whereas the case can be tried here next month if defendants so desire. This is a factor in deciding these motions. It may not be out of place to observe that the costs of these two applications will far exceed the whole costs of defendants' witnesses even if 7 in number coming to attend the trial at Toronto.

The present motion will be dismissed with costs to plaintiffs in any event. Most applications to change the venue are useless and should not be encouraged.

HON. MR. JUSTICE MIDDLETON. DECEMBER 27TH, 1912.

WALLBERG v. JENCKES MACHINE CO., LIMITED.

4 O. W. N. 555.

Contract—Place of Delivery of Goods—"Site of Work"—Meaning of—Reformation of Contract.

MIDDLETON, J., *held*, that the phrase the "site of the work" in a contract for the installation of two certain large steel pipes for use in a power installation, was the immediate vicinity of the line of location of the pipes and not a dock a quarter of a mile away therefrom.

Action to recover $3,895, and interest from the 20th July, 1911, paid by the plaintiff under protest for the purpose of securing the discharge of a mechanics' lien registered against the power plant and premises in question.

I. F. Hellmuth, K.C., and M. L. Gordon, for the plaintiff.

G. H. Kilmer, K.C., and J. A. Rowland, for the defendants.

HON. MR. JUSTICE MIDDLETON:—The plaintiff's right to recover in the first place depends upon the construction of a contract for the construction, and erection of two

large steel pipes, used as penstocks at the works of the "Matabitchouan Power Development," in the district of Nipissing.

By the contract, dated June 16th, 1909, but not in fact executed until some time in September, of that year, the defendant company agreed to furnish, deliver and erect the pipes in question; the plaintiff—called in the agreement the purchaser—agreeing to make the necessary excavations, and to prepare the line of location of the pipe and also "to move all apparatus from Montreal River landing to the site of the work," and "to provide a standard gauge track along the right-of-way, with cars and Lidgerwood hoist for moving the same, for the distribution of material along the line of location close to the points at which it is to be finally installed."

Both parties concede that the term "right-of-way" is practically synonymous with the term "line of location," and indicates the place where the penstock was to be installed.

By the specifications, which were made part of the contract, it is provided "the material comprised shall be delivered by the contractor free on shore at Montreal River landing. The purchaser, under the direction of the contractor, will move all material from Montreal River landing to the site of the work, and will provide a standard gauge track adjacent to pipe line, with cars and Lidgerwood hoist, for moving the same for the distribution of material along the line of location."

The two parallel pipes are about twelve hundred feet in length, and run from the power house at the lower end to the dam upon the river, up an elevation of about three hundred feet.

The material was landed, after being brought from Montreal river, at a dock some four hundred yards from the power house. A tramway had been constructed by the plaintiff from the power house to the foot of this hill. The tram then ran up the hill at some little distance from the line of location. The cars were drawn to the foot of the hill by horse power, and were then taken up the hill by a Lidgerwood hoist.

Another tramway was constructed along the line of location. It also was operated by a Lidgerwood hoist. This is the tram referred to in the contract and specification.

The pipes in question were taken to the dock, there placed upon a tramcar and carried thence, well towards the top of the hill by the hoist. At a flat place upon the hill they were then unloaded from the tramcar, placed upon skids, and rolled along the skids a distance of some 180 feet to the second line of tramway on the pipe line, which was used for distributing them to the points where they were to be finally installed.

The controversy concerns the cost of moving the pipes from the dock to the place where they were transferred from the one tramway to the other. The plaintiff contends that his obligation to transport, under the clause of the specifications referred to, ended when the material was brought to the dock. This he regards as "the site of the work." The defendant, on the other hand, contends that the "site of the work" must be regarded as the immediate vicinity of the line in question, and he claims to be entitled to the cost of loading the pipes upon the smaller tram line adjacent to the line of location.

The view that I take of this contract is that the "site of the work" means some place immediately adjacent to the line of location, and that its true interpretation is indicated in the fact that the purchaser is to provide "a standard gauge track adjacent to pipe line . . . "for the distribution of material along the line of location." I think the intention of the parties was that the purchaser was to bring the pipes to such a place that they could be conveniently distributed along the line of location by this tramway, which he was called upon to provide, and that his obligation was not at an end when he deposited the material upon a dock some quarter of a mile away.

Applying this view to the facts of the case, I think his duty ended when the pipes were placed upon the skidway near the top of the hill.

I arrive at this conclusion from the contract itself; but I am fortified in it by the fact that Mr. Wallberg, evidently so interpreted his own obligation in the first instance; for, when the pipe arrived, in supposed pursuance of his contractual obligation he carried the pipes for the first pipe line to this precise point. The reason for his refusal to do so with the remaining pipes, is by no means clear.

At the trial I allowed an amendment to be made by the defendants, by which they set up, that if this is not the true

construction of the contract, it ought to be reformed. As I construe the contract, no reformation is necessary; and as practically the whole evidence upon this alternative branch of the case is documentary, I refrain from expressing any opinion upon it.

The claim put forward by the contractor was, however, I think, very much exaggerated. The entries in the time book, said to have been made contemporaneously by the engineer and timekeeper, are I think entirely discredited by the admittedly genuine entries made contemporaneously in the diary, and weekly report.

When the entries in this diary are compared with the entries made by Mr. Waldron, they are found to substantially agree.

Thus discrediting the claim as put forward by the contractor, I have to arrive at the amount to be allowed to them as best I can. On the whole evidence, I think it would be fair to assume that about half the pipes were moved by the defendants, say one hundred. Mr. Judson R. Nichols, who impressed me as not only competent, but fair, thought that it would cost about three dollars to move each pipe. This would be a total of $300.

I cannot follow the actual figures given by the defendants, because they have plainly included the cost of re-loading upon the distributing cars, for which I do not think they are entitled to claim. As I understand Mr. Dunsmore, there would not be more than twelve men engaged upon the work for which I think allowance should be made; and, taking an hour as the time for moving each pipe, the time given by Mr. Nichols—not as being necessary, but as the time actually taken, owing to the congested condition of the railway—this would make a total of $270 for wages, at 22-½ cents per hour; to which would have to be added $120 for board; a total of $390.

I am impressed with the difficulty of making an allowance of this kind on the basis of theoretical calculations, as against the test of actual work; but if the defendants suffer, it is as the result of the misconduct of those for whom they are responsible, and of the exaggerated claim put forward.

Bearing all this in mind, I think I am doing them no injustice in allowing them five hundred dollars, plus the fifteen per cent. profit, which it was admitted was properly allowable. This is a total of $575. Deducting this from

the amount paid, $3,895, the plaintiff would be entitled to recover $3,320, with interest at five per cent. from the 30th July, 1911.

The question of costs has occasioned me some difficulty. The conclusion at which I have arrived, is, that no costs shall be awarded to either party.

HON. MR. JUSTICE KELLY. DECEMBER 28TH, 1912.

DEEVY v. DEEVY.

4 O. W. N. 555.

Deed—Action to Set Aside—Forgery—Evidence.

KELLY, J., dismissed action to set aside a deed from plaintiffs to their deceased son, on the ground that it was a forgery, holding that all the evidence tended to shew the unreliability of plaintiff's claim.

T. D'A. McGee, for the plaintiffs.

F. A. Magee, for the defendant.

HON. MR. JUSTICE KELLY:—The plaintiffs are the father and mother of W. J. Deevy, who died on August 16th, 1912, at the age of twenty-six years.

The defendant is the widow and sole devisee of W. J. Deevy, and the sole executrix of his will.

What plaintiffs ask is judgment setting aside as fraudulent a deed, dated September 21st, 1909, from them to their son, W. J. Deevy, of lot 1, on the east side of Concord street, as shewn on plan of sub-division of part of lot lettered F., concession D., Rideau Front, of the township of Nepean, now in the city of Ottawa, which plan is dated 17th November, 1872, and is registered; and cancelling the registration of that deed; and a declaration that these lands are the property of the plaintiffs, and not of their deceased son, his heirs and assigns.

To establish their claim, the plaintiffs set up that the deed mentioned was not signed by them or with their authority, and, in effect, that what appears to be their signatures thereto are forgeries.

The affidavit of execution of the deed by the plaintiffs was made by Henry Purdy, on September 24th, 1909, before Charles L. Bray, a commissioner. Henry Purdy is the father of the plaintiff, Martha Deevy, and is now eighty-five years of age.

The plaintiff, Martha Deevy, is unable to write, and her name on the deed was not written by her personally.

The son, William James Deevy, was a locomotive fireman, and later on, and at the time of his death a locomotive engineer, and his earnings for some time prior to his death averaged from $75 to $80 per month. He married the defendant in April, 1911. His will is dated on the day of his death, and probate of it was granted to the defendant on September 21st, 1912.

The house on the lands in question, and which William J. Deevy, and the defendant occupied from about the time of their marriage until his death, was in course of erection for about two years prior to the marriage. There is considerable conflict of testimony as to who it was who bore the cost of the erection of the house.

On September 21st, 1909, the day of the date of the deed, which is now attacked, William J. Deevy made a mortgage of the property to the Huron & Erie Loan and Savings Company, for $800, and both plaintiffs admit that about the time the first payment became due on that mortgage,—now more than two years ago,—they were aware that the mortgage had been made by their son, and some moneys were paid on that mortgage by the plaintiff, James Deevy, as he says at the request of his son.

Both plaintiffs say that the first they heard about the deed to the son was after his death; and this statement they both make in the face of their admission of knowledge of the mortgage having been made by the son.

We are confronted with the regrettable fact that these plaintiffs are seeking a remedy, which if they prove themselves entitled to it,—will brand their deceased son as a forger, and the father of the female plaintiff as a perjurer, if the evidence of his having made the affidavit of execution on the deed is accepted.

The evidence is far from satisfying me that their denial of the making of the deed is correct.

Notwithstanding the plaintiffs positive statement that they did not sign that document, I am not prepared to accept their testimony. The plaintiff, James Deevy, has undertaken to contradict a large number of witnesses on one point of evidence and another, wherever they disagree with him; a number of these witnesses being persons who have no

interest whatever in the subject of the litigation, and whose evidence I consider as impartial and worthy of belief.

The credibility of the plaintiff, Martha Deevy, is also affected by many of the circumstances of the case, and by contradictions by other witnesses, and the most charitable view I can take of plaintiff's evidence, is that they must have forgotten the making of the deed, although it is not easy to understand why they could have forgotten an occurrence of such importance.

Harry Purdy, the witness to the deed, was examined *de bene esse,* on October 3rd, 1912, and denied all knowledge of the deed, or that he was a witness to its execution, or that he signed or made the affidavit of execution. He said, however, that his memory is not good, and that he forgets things that happened some time ago, and that he did not remember happenings of a month prior to his examination.

Then there is the evidence of Mr. Bray, the commissioner, before whom the affidavit of execution was sworn, which I accept; he details the whole circumstances of Henry Purdy having come before him, his signing the two copies of the deed as witness, and signing and swearing to the affidavits of execution thereon; he also tells of conversations he had with the witness at the time.

When Purdy was being examined, in October last, Mr. Bray again saw him, and identified him as the person who made the affidavits of execution on the deed in duplicate.

I have no doubt whatever, notwithstanding the old gentleman's denials, which may well be attributed to his admitted forgetfulness, that he it was who signed as witness, and as witness made these affidavits.

Added to all this is the evidence of the experts called to speak of the signatures of James Deevy and Henry Purdy, and who unhesitatingly stated that the signature of James Deevy to the deed was written by the same person who wrote other signatures produced at the trial, and which are admittedly his.

There is evidence, too, which I accept, that the plaintiffs expressed to others their intention of giving this property to their son.

Not a little evidence was directed towards shewing that some of the accounts for the building of the house were paid by plaintiffs or one of them, and that other accounts were paid by the son, now deceased. This was accepted as tending to shew where the probabilities lay.

The evidence of the defendant I accept in full, as I am quite convinced that what she said, was said from a belief in its truth, and without any attempt to exaggerate or overstate her case.

I think, too, that the deceased was an industrious young man, of good habits,—as he must have been to have attained the position which he held at his age,—working with a desire to build up a home, and that his earnings, outside of what was necessary for the reasonable support of himself and his wife, and of himself for some time prior to his marriage, were used towards payment for the building of the house in question, and this with the plaintiffs' knowledge and approval; for I must hold on the evidence that the plaintiffs intended that the property—that is, the land and such improvements as were on it at the time of the deed,—should be the son's and that it was given by them to him.

Without going over all the evidence, I have no doubt that the plaintiffs are not entitled to succeed. The action is therefore dismissed with costs.

HON. MR. JUSTICE MIDDLETON. DECEMBER 4TH, 1912.

CHARLEBOIS v. MARTIN.

4 O. W. N. 412.

Debtor and Creditor — Motion to Commit Debtor — Unsatisfactory Answers on Examination—Suspicion of Making Way with Assets —Discovery—Discussion of Purposes of Examination.

MIDDLETON, J., dismissed, without costs, the motion of a judgment creditor to commit the judgment debtor, on the ground that he had concealed and made way with his assets with intent to defraud his creditors, holding that on his examinations as a judgment debtor full disclosure had been made and that while there was good ground for reasonable ssupicion that he had made way with his property to defeat his creditors, there was not irresistible proof of the same, and much more than reasonable suspicion was required on a motion to commit.

Re Caulfield, 5 O. L. R. 356, referred to.

"An examination of a judgment debtor is given for the sole purpose of discovery."

Motion by the judgment creditor to commit the debtor, or for a writ of attachment or *ca. sa.* against him, upon the ground that on his examination as a judgment debtor, he refused to disclose his property, and his transactions, and did not make satisfactory answers, and that it appears that he had concealed, or made away with his property in order to defeat and defraud his creditors in general, and the plaintiff in particular.

Harcourt Ferguson, for the judgment creditor.

A. J. R. Snow, K.C., for the judgment debtor.

HON. MR. JUSTICE MIDDLETON:—The defendant was examined; and upon the first return of this motion it was admitted on his behalf that his examination was unsatisfactory. The matter stood, with the direction that the defendant should in the meantime submit to further examination. The further examination has now been had, and the motion is renewed; the judgment creditor contending that satisfactory answers have not yet been made, and that from the examination it appears that the debtor has concealed, or made away with his property.

The examination is in one sense not satisfactory. This is accounted for partly by the fact that the debtor is a foreigner, partly by the fact that he is an old man and garrulous, partly because he is suspicious of the examining counsel, and is not over-candid, and partly by the fact that he does not appear to have the details of his transactions clearly in his mind.

One cannot read the examination without being impressed by the idea that it is quite probable that Richardson was not a creditor, and that Richardson holds the money paid to him in trust for the debtor. Nevertheless, the judgment debtor has sworn to his indebtedness, and that the payment made to Richardson was in satisfaction of that indebtedness; and whatever suspicions one may entertain, and whatever view one might be inclined to give effect to if this evidence were the sole evidence upon the trial of an issue, I do not think it would be safe to say that from the statements made by the debtor it appears that a fraudulent disposition had been made of this property.

In the written argument handed in by counsel for the judgment creditor he says that what appears is "at least sufficient to raise a reasonable ground for the suspicion that the debtor has concealed his property or made away with it in order to defeat or defraud his creditors." This is fully as far as the evidence goes, and is not what the rule requires. I cannot commit because I have a reasonable suspicion; I must be prepared to find the fact.

The Richardson transaction appears to me to go beyond the others. Upon the examination I cannot find enough to lead me to a reasonable suspicion of the Douglas transaction.

I have a good deal more doubt as to the payment on the chattel mortgage; and this falls in my mind in the same category as the Richardson transaction.

In reference to the two other transactions I am not able to say—adopting the words in *Re Caulfield*, 5 I. L. R. 356—that "the statements are of such a nature that no reasonable man could believe them."

The only case cited which goes to indicate a different rule is *Wallis* v. *Harper*, 7 U. C. L. J., O. S. 72. This case was decided at a time when imprisonment was a common method of enforcing payment of a debt; and the line of interpretation there suggested has long since been departed from. Robinson, C.J., states the object of the statute as being "not to punish as for a contempt, but to place in the power of the creditor such means of coercion as an execution against the person may confer."

The rule as it now stands is for the purpose of discovery; and when discovery is refused, or where as the result of the discovery a fraudulent disposition of the property is disclosed, then the imprisonment follows as a means of punishing contempt.

Then, are the answers satisfactory within the meaning of the rule? Certain answers clearly are not; but when the defendant falls into the hands of his own counsel he does give—it is true with the aid of leading questions, and with the aid of a statement which had been prepared for him—a fairly clear account of what has become of his money. Taking the examination as a whole, there is no difficulty in ascertaining what the debtor has done with his property.

I am not prepared to accede to the proposition of the judgment creditor that he is entitled to have a full explanation, in answer to his questions. This is the normal course; but if as the result of the whole examination one is able to glean the history of what has been done, that appears to me to suffice. As is said by more than one authority, no arbitrary rule can be laid down, and each case must be determined upon its own circumstances. I think, as was said in *Graham* v. *Devlin*, 13 P. D. 245, a full disclosure has been made, which is the thing to be aimed at. Whether the transactions disclosed can be successfully impeached is not the test.

I dismiss the motion, but give no costs.