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NOVA SCOTIA.

COUNTY COURT, DISTRICT NO. 6. MAY 12TH, 1909.

GIRROIR v. RONAN.

Landlord and Tenant—Overholding—Deed—Loan—Security — Reconveyance — Possession of Tenant — Jurisdiction of County Court Judge.

Application by a landlord under the Overholding Tenants' Act.

D. C. Chisholm, for landlord.

C. E. Gregory, K.C., for tenant.

A. MACGILLIVRAY, CO. C.J.:—The tenant by deed bearing date the 4th day of December, 1908, and duly executed the same day, conveyed absolutely, with warranty of title and covenant for quiet possession, all her estate, title and interest in the lands and premises of which possession is sought under the proceedings herein. The negotiations for the purchase of the premises were conducted by and between the landlord and Dr. M. F. Ronan, tenant's brother, who had been authorized in that behalf by this tenant to sell the same. At the time of the bargain and sale the tenant's agent stated to the landlord that his sister was about leaving the premises the following week after the purchase, and going west to be married—leaving the province permanently, thereby vacating the premises. She did not, however, so leave nor get married. The landlord permitted her to remain on the premises. Her step-father and her mother

and also her brother, the agent, who then lived with her in the dwelling house on the premises, still continued to live with her.

The landlord permitted the tenant to remain in possession from the date of purchase until he wanted the premises; and on the 14th of April, 1909, served a notice of demand of possession on the tenant as well as on the step-father, Angus McFarlane, and the said M. F. Ronan. On the 23rd of the same month—the tenant not giving up possession—he served a further notice of demand forthwith to go out of possession of the premises, describing them in said notice—service of these notices was proved, and also admitted by counsel for the tenant. The tenant refused to go out of possession and give up the premises to the landlord. On affidavit of these facts made by the landlord, I appointed Saturday, the 1st day of May instant, to enquire and determine whether the tenant holds the possession against the right of the landlord, and whether the tenant does wrongfully refuse to go out of possession, having no right to continue therein.

On the day appointed the parties appeared by counsel.

The tenant alleges that the money paid by the landlord—the price of the lands described in the deed—was advanced by him by way of a loan to her, which was to be repaid during the coming summer; that the deed was given to secure such loan upon repayment of which the landlord was to reconvey to her the property described in the deed.

From the evidence adduced on this enquiry—indeed the fact was admitted by the tenant and her counsel—it appears that Dr. M. F. Ronan was agent of his sister, the tenant, to sell the property in question; but offers for the property were to be submitted to the tenant. Dr. Ronan, the agent, spoke to the landlord on the 3rd of December last, stating that his sister, the tenant who was going away, wanted $500, and if the landlord would give the money he would get a deed of the property—the property being encumbered. The landlord replied that he would look into the matter. He went over the property and concluded that he might give $400, plus the balances due on two mortgages on the property, which amounted to about $1,700. This would make the price of the property about $2,100. The landlord caused the title of the property to be examined, and so ascertained the encumbrances against it. He then offered $400, and to pay the mortgages, which offer was accepted.

A deed of the property was prepared by Mr. E. L. Girroir, barrister, who had to a certain extent been acting for both parties; and was duly executed in his presence by the tenant, the vendor; and upon executing the deed the solicitor paid the grantor $400, acting for the purchaser. He had the property at one time, shortly before this, for sale; he was asked by the agent to find a purchaser.

The tenant says in her evidence on this enquiry that she had been informed by her agent that the purchaser was lending the money, $400; and upon its being repaid he would reconvey the property to her; that she understood she was signing a mortgage when she signed the deed. Dr. Ronan, the agent, in his evidence says that the landlord agreed to lend his sister the $400 to be repaid during the coming summer; that the deed had been executed with that understanding. The landlord swears positively that there was no such understanding or agreement; that there was no mention made, during the negotiations, of a mortgage for the loan; that the money was not agreed to be given as a loan, and that there was no agreement to repay it; and that the deed was not taken by him by way of mortgage therefor. I believe the evidence of the landlord as to the contract or bargain and sale, namely, the offer to sell to the landlord by the tenant through her agent, properly authorized in that behalf, the lots of land and premises described in the deed thereof and produced in evidence herein; and that the offer was accepted by the landlord. He paid the consideration money agreed upon, $400, and has since paid the two mortgages and got releases of them, which releases were also produced in evidence. The amount paid by him on these mortgages was $1,709.05, which added to the $400, make the total amount of $2,109.05. He paid the Sweet mortgage ten days after he purchased the property. He paid the Canada Permanent Mortgage Corporation's mortgage, $994.66, and got a release of it on the 17th of April, 1909. Total, $2,109.05. The $9.05 may be counted as accruing interest, and expenses in remitting the money due on the latter mortgage; so that the price of the land may be put down at $2,100. This is in the vicinity of what the tenant would accept for the property—so far as I can gather from the evidence. The landlord went to the residence of the tenant to see her during the negotiations for purchase and before he got the deed. He was met by her agent, to whom he told that he wanted to see his sister about the

purchase. The agent said he need not see her as she understood all this. When the solicitor went to see her to have the deed executed, he asked if it was necessary to read the deed. Her agent, in her presence, said it was not necessary, as she understood it. The solicitor then asked her if she understood this was a conveyance of her property. She said she did; and then signed the deed in his presence. The landlord afterwards publicly advertised the property for sale. The agent, who was seen by the landlord several times after this advertisement, never mentioned that the property had only been given as security for a loan. The tenant never set up a claim that the deed was given by way of mortgage until after written demand of possession, notwithstanding that the landlord had in the meantime let the dwelling house and entered into a bargain and sale of it, on the lot secondly described in the deed; and had sold a lot adjoining the lot on which is situate the dwelling house now occupied by the tenant—part of the lands first described in the deed.

Assuming that the tenant was misled by her agent as to the nature of the contract, she had ample opportunity to state what she understood to be the nature of the transaction—whether it was in the nature of securing the repayment of a loan, or that it was an absolute sale. She had the opportunity of stating to the solicitor when asked "if she understood this was a conveyance of her property," if she expected that the property would be reconveyed to her on repayment of $400. If the agent perpetrated a fraud the tenant profited by it, and "he who profits by the fraud of one who is acting by his authority adopts the acts of the agent, and becomes responsible to the party who is imposed upon:" Broom's Leg. Maxs., 6th ed., p. 276, citing Cockburn, C.J., in Wier v. Barnett, 3 Ex. D. 32; and Wier v. Bell, 3 Ex. D. 238; 47 L. J. R. 704. I am convinced that the tenant when she executed the deed, knew, or ought to know, that she was conveying the property absolutely to the landlord—that the deed was not by way of mortgage to secure the repayment of the $400. Even if this was her understanding of the contract, it would also have to be the understanding of the purchaser before the deed could be held as a mortgage. The agent misled the purchaser as to the time of payment of the Sweet mortgage by representing that it would not be due for a year from that date. The mortgagee demanded payment of the purchaser shortly after

he had purchased, else the mortgage would be foreclosed. He did pay this mortgage, as already stated, within ten days after the purchase of the property. The principle is laid down that "the only safe criterion in deciding whether a transaction, prima facie a sale, is an absolute or conditional sale or mortgage, is the intention of the parties. And in order to establish the transaction as a mortgage it must be shewn that the intention and understanding of both parties concurred to that effect. The mere fact that the grantor intended and considered it to be a mortgage is not sufficient:" 20 Am. & Eng. Encyc. of Law, 937.—The party asserting that a deed purporting to be a sale was in reality a mortgage "has, in my opinion, wholly failed to establish her contention. I do not think it necessary to review the cases in which oral evidence has been received to qualify and cut down a deed of conveyance of land which is absolute in its terms, into a mortgage. In cases of this kind, as is laid down by the Privy Council in Holmes v. Mathews (9 Moore P. C. 413), the onus rests altogether on the appellant, not only to rebut the presumption that the title as appearing in the written instrument is in perfect accordance with the intention of the parties, but he must also establish to the satisfaction of the Appellate Court that the judgment of the court below, adverse to his contention, is erroneous. In Rose v. Hickey (Cassel's Dig. 292), decided in this Court in 1880, we held that the evidence necessary for this purpose must be of the clearest and most conclusive and unquestionable character"—Per Gwynne, J., in McMicken v. The Ont. Bank, 20 S. C. R. at p. 575. The evidence of Dr. Ronan, agent of the tenant, is the only evidence in support of the contention that the deed produced in evidence in this enquiry—a deed of conveyance absolute in terms—was given by way of mortgage. Taking into consideration the conduct of the agent, and the admission of the tenant that she was, when she executed the deed, conveying her property to the landlord, and the positive denial of the landlord that the deed was taken by him other than as a deed absolutely conveying to him the property, I believe the evidence of the landlord on this branch of the case; and as a question of fact, find in favour of the landlord. I, therefore, decide that the deed conveyed the property to the landlord in fee without any understanding by him that such was anything else but evidence of the absolute conveyance of the property, and was not cut down by any defeas-

ance or understanding, at least by him, that it was given to secure the repayment of a loan of $400, or any sum greater in consequence of his having to pay the encumbrances on the property. At the time when the agent asked for a statement of what he paid for the property he understood him to mean that he wanted to repurchase the property.

Having decided that the landlord is the owner in fee simple of the lands in question, the question now arises what relationship has existed between the vendor and purchaser since the purchase and conveyance of the property. I have come to the conclusion that she has been in possession ever since by the permission of the purchaser, and that she has been ever since a tenant at will of the vendee, which tenancy was put an end to by notice before these proceedings were commenced for the recovery of the premises. A permissive occupation of real estate without rent reserved or paid and without any time agreed upon to limit the occupation is a tenancy at will: vide Lynes v. Snaith (1899), 1 Q. B. 486; Braithwaite v. Hitchcock, 2 Dowl. P. C. N. S. 444. "A grantor or mortgagor continuing in possession of the premises after the conveyance or mortgage is not a tenant at will of the grantee or mortgagee": Doe d. Roby v. Maisey, 8 B. & C. 767 (32 R. R. 548). If not a tenant at will she is a tenant at sufferance, and in such case she was not entitled to notice to quit before action. She is certainly an occupant; and under the interpretation clause of the Act the expression "tenant" means and includes an occupant. I am of opinion that even were the deed given by way of a mortgage as contended by the tenant, the landlord should succeed in these proceedings in view of the covenant in it for possession and quiet enjoyment.

It therefore appears to me that this case is clearly one coming within the true intent and meaning of this chapter (the Overholding Tenants' Act), and that the tenant wrongfully holds against the rights of the landlord the premises sought to be recovered by him in this application. The proceedings under this Act are provided to enable a landlord to recover in a summary manner instead of the old tedious action of ejectment, lands wrongfully held by a tenant who has clearly no right to hold the same as against the legal owner entitled to immediate possession.

It was contended in behalf of the tenant that the Judge of the County Court has no jurisdiction to determine the rights of the parties in an application under this Act; and

that a mortgagee is not permitted to proceed against the mortgagor under the Overholding Tenants' Act. Ontario cases were cited by counsel on these points. But in Moore v. Gillis, 28 Ont. R. 358, it was decided that since the amendment of this Act, striking out the words " without colour of right," the Judge of the County Court tries the right and finds whether the tenant wrongfully holds. The Ontario Act and our Act are identically the same as to this provision. I have already given my view that even as mortgagee the landlord should succeed in this application.

As I have already decided, the tenant wrongfully holds the lands described in the notice to quit herein; and an order will pass that a writ issue to place the landlord in possession of the premises in question.

The landlord will have the costs of this application, which costs shall be paid by the tenant.

NOVA SCOTIA.

SUPREME COURT.

BEFORE MACGILLIVRAY, CO. C.J., (AS MASTER.) AUGUST 7TH, 1909.

FRASER v. McCOLL.

Deed of Lands—Declaration of Trust—Injunction—Counterclaim—Striking out—Costs—Practice.

C. E. Gregory, K.C., for plaintiff.

R. H. Graham, for defendant.

The plaintiff in this action claims that the defendant, having taken the deed of certain lands described in the statement of claim herein, in his own name, is trustee of such lands for the plaintiff, having, as he alleges, paid the purchase money with funds furnished for the purpose by the plaintiff. He asks for a declaration,

1st. That the lands and premises described in said statement of claim are the plaintiff's, and that the title of the same is held by the defendant only in trust for the plaintiff.

2nd. A declaration that the plaintiff is the owner of said lands and premises.

3rd. An injunction to restrain the defendant from selling said lands and premises.

4th. An order to compel the defendant to execute a deed of said lands, etc.

5th. Such other and further relief as the nature of the case may require.

The defendant denies the plaintiff's allegations and counterclaims for a balance of $2,421.33 due him for moneys paid and advanced for the use of the plaintiff, and for commissions on purchases arising out of a business transaction or venture entered upon by the plaintiff and defendant.

The plaintiff moves to set aside paragraphs of the defendant's counterclaim dealing with such moneys and commissions on the ground that this action being an action for the recovery of land such claim is contrary to the provisions of order 18 of the rules of the Judicature Act.

Rule 2 of said order provides that, "No cause of action shall, unless by leave of the Court or a Judge, be joined with an action for the recovery of land, except claims in respect of mesne profits or arrears of rent in respect of the premises claimed, or any part thereof, and damages for breach of any contract under which the same or any part thereof is held, or for any wrong or injury to the premises claimed."

The plaintiff's solicitor contends that the counterclaim is against the spirit of this rule; that to an action for the recovery of land the defendant cannot plead a counterclaim except a counterclaim that is sui generis. I think that this view tends to push the rule so as to contravene the provisions of rule 3 of order 19.

"A counterclaim is the assertion of a separate and independent demand which does not answer or destroy the original claim of the plaintiff": Per Cockburn, C.J., in Stook v. Taylor, 5 Q. B. D. 569, 577. The modern counterclaim is the creation of the Judicature Act. The defendant now may set-off by way of counterclaim against the claims of the plaintiff any right or claim whether it sounds in damages or not. Such counterclaim will have the same effect as if it were a cross-action. (Vide notes to Or. 21, r. 21, Eng. Jud. Act, Annual Pr. 1909, at p. 301). Counsel for plaintiff cites Compton v. Preston, 51 L. J. Chy. 680, in support of his contention. In this case the counterclaim sought to set up two causes of action—the one to recover land, the other a right to recover damages. The counter-

claim being in the nature of an independent action the rule was held to apply, and the counterclaim was struck out. Fry, J., delivering judgment, however, says: "The first (object) is the recovery of land which is not in question in the plaintiff's action, and with which there is no attempt to shew a connection." On this ground the counsel for plaintiff contends that there is no connection in the counterclaim of defendant herein with the plaintiff's claim. But counsel for defendant states that the whole transaction of the purchase of the land, the payment of the purchase money by the defendant, and the claim arising out of the business transactions between himself and the plaintiff, as set forth in certain paragraphs of the counterclaim, are so connected with one another as to form one whole transaction. In view of this statement and examining the pleadings herein, I should hesitate to set aside the paragraph of the defendant's counterclaim sought to be struck out on the motion.

Were it not that the plaintiff's counsel urges that the counterclaim cannot be conveniently tried in this action, and ought not to be allowed (Ord. 19 v. 3), I would dismiss this motion on the ground that this is an action "to establish title to lands" and not an action "for the recovery of land," and is not therefore within the rule: Gledhill v. Hunter, 14 Ch. D. 492 (Arch. Q. B. Pr. 14th ed., p. 1,207).

As the plaintiff may succeed before the trial Judge in excluding the counterclaim herein, the order refusing this motion will make the costs of this application costs in the cause.

NOVA SCOTIA.

SUPREME COURT.

BEFORE MACGILLIVRAY, CO. C.J., (AS MASTER.) AUGUST 7TH, 1909.

BENOIT v. DELOREY.

Assault—Action for Damages—Counterclaim—Trespass to Lands—Plea of Justification—Payment into Court—Acceptance by Plaintiff—Costs—Practice.

C. E. Gregory, K.C., for plaintiff.

J. A. Wall, for defendant.

The plaintiff sued for damages for an assault. The defendant appeared but did not require a statement of claim. The plaintiff, however, delivered a statement of claim. The defendant delivered a defence and counterclaim. The defence puts in issue the allegations of the plaintiff as to the assault and justifies the assault, if any, in self-defence. With this defence he pays $15 into Court, and says that the same is enough to satisfy the plaintiff's claim, if any.

The defendant counterclaims for damages for an assault alleged to have been committed by the plaintiff upon the defendant and for trespass to his lands and for obstruction of a right of way.

The plaintiff gives notice under the provisions of Order 22, rule 6 (b), and accepts the money paid into Court in satisfaction of his cause of action, and seeks to have the costs of the action up to such payment taxed. The defendant's solicitor contends that as the plaintiff delivered a statement of claim without being required to do so, that such costs as are occasioned by the delivery of such statement should not be allowed, and cites Order 20, rule 1 (e) in support of his contention.

"(e) When the plaintiff delivers a statement of claim without being required to do so, or the defendant unnecessarily requires such statement, the Court or a Judge may make such order as to costs occasioned thereby as are just, if it appears that the delivery of a statement of claim was unnecessary or improper."

No application was made to me for an order as to costs; and even were such application made, I do not think I should make an order disallowing the costs occasioned by the delivery of such statement of claim, as I do not consider that the same was either unnecessary or improper. Even if the defendant did not appear I am of opinion that the plaintiff should deliver a statement of claim in his action before he could proceed to enter interlocutory judgment and assess damages. Vide Ord. 13, r. 13.

"In all actions not by the rules of this order otherwise specially provided, if the party served with the writ does not appear within the time limited for appearance, upon the filing by the plaintiff of a proper affidavit of service, and if the writ is not specially endorsed under Ord. 3, v. 5, of a statement of claim, the action may proceed as if such party had appeared, subject as to actions where an account is claimed to the provisions of Order XV."

This action comes within the general provisions of the rule. If the plaintiff is required to file a statement of claim in his action even where no appearance is entered, with greater reason should he file a statement of claim after entry of appearance in which the defendant does not state that he does not require a statement of claim.

I shall tax the items in the plaintiff's bill of costs that the defendant's solicitor contends should not be allowed were no statement of claim filed, or if filed the costs thereof should be disallowed.

As I have already stated, I do not think on a notice of taxation of costs I can make any order as to the costs occasioned by the delivery of such defence.

NEW BRUNSWICK.

FULL COURT. APRIL 23RD, 1909.

E. N. HENEY CO. LTD. v. BIRMINGHAM ET AL.

Sale of Goods—Contract—Condition Precedent to Property Passing—Possession—Principal and Agent.

Action tried at St. John Circuit Court on December 14th, 1908, before MR. JUSTICE MCLEOD without a jury. Verdict for plaintiff "for one thousand dollars principal, and fifty dollars interest, in all one thousand and fifty dollars." (Reported 6 E. L. R. 385).

Motion to set aside this verdict and enter a verdict for defendants, or for a new trial, argued on January 29th, 1909, before BARKER, C.J., LANDRY, MCLEOD and WHITE, JJ.

M. G. Teed, K.C., for plaintiff.

W. P. Jones, K.C. and F. B. Carvell, K.C., for defendants.

The judgment of the Court was delivered by

BARKER, C.J.:—I agree with the conclusions arrived at in this case by my brother McLeod and announced on the trial (see 6 E. L. R. 385). While I think the judgment entered for the plaintiff for one thousand dollars should

not be disturbed, there are one or two points upon which I desire to make a few observations. One of the conditions upon which the sale was made by the plaintiffs to the Woodstock Carriage Company, was that the title, ownership or right of possession should remain in the plaintiffs until the carriages should be paid for in money. The actual possession was in the Carriage Company as the goods were to be delivered on the cars at Montreal when the plaintiff's responsibility in reference to them ceased by the express terms of the contract. As between the plaintiffs and the Woodstock Carriage Company, while the actual possession was in the Carriage Company, the plaintiffs retained the right of property and a right to resume possession, pursuant to the terms of the contract, of any of the goods unsold. There seems to have been a clear understanding on all sides that the Carriage Company were free to sell the goods. In fact they were bought expressly for that purpose by the Carriage Company in the ordinary way of carrying on their business. There would, I think, have been an implied authority to sell arising necessarily from the nature of the transaction; but all parties agree that the Carriage Company had full authority to sell and to transfer the title and right of possession to the purchaser. To quote the language of the Court in Dedrick v. Ashdown, 15 S. C. R. 227, at page 243, as expressed by Gwynne, J., "it was the fact of the sale having been made in the ordinary course of the grantor's business that, although there was no express proviso in the instrument that he might continue to carry on his business, made the purchaser's title good although the vendor had not the property in the thing sold." It was because the Carriage Company had the power to transfer the title to the property when sold by them that it was contended by the defendants that the sale was really a sale by the plaintiffs through the Carriage Company, as their agent, and therefore a carrying on business by the plaintiffs in New Brunswick. The answer to that is that the Carriage Company were selling for themselves; they fixed the price and terms of sale, and the purchase money when received was theirs, and in no way the plaintiffs', or for their use. The authority to make a completed sale was a part of their purchase, and, so far as it depended upon the contract with the plaintiffs, it was under a contract made and completed by the plaintiffs in Montreal with which they had nothing further to do.

It is unnecessary in this case to express any opinion as to whether or not this contract of sale is subject to the provisions of the Conditional Sales Act (Cap. 143, Con. Stat. 1903), because there is no contract here between the plaintiffs and a purchaser, and so far as the defendants are concerned they have not been prejudiced in any way. Their position is precisely what it would have been had the instrument been filed as required, for the goods have all been sold and the Carriage Company got the benefit of the purchase. I do not, however, wish it to be thought that the instrument is in my opinion not subject to the Act, for, as at present advised, I should think it was. These defendants knew perfectly well that the Carriage Company were buying goods to sell and by the express terms of their guaranty they declare as follows: "As the Woodstock Carriage Company of Woodstock, N.B., desires to make purchases from you, therefore to open a line of credit with you we declare that in consideration of your complying with their request we hereby bind ourselves," &c. The defendants were willing to leave to the Carriage Company the precise terms upon which they were to purchase from the plaintiffs and for which they were willing to become guarantors; and the contract made was in no way unusual, and, so far as it protected the plaintiffs, it was beneficial to the defendants.

I think the judgment should be entered for the one thousand dollars, without interest.

NEW BRUNSWICK.

FULL COURT. APRIL 23RD, 1909.

SHAW v. CONNELL ET AL.

Promissory Note—Endorsement—Forgery—Notice of Dishonour—Laches of Endorser alleging Forgery—Estoppel.

Appeal from an order of the Judge of the Carleton County Court setting aside the verdict entered for the defendant, and ordering a new trial. Argued in Hilary Term last before BARKER, C.J., LANDRY, MCLEOD and WHITE, JJ.

W. P. Jones, K.C., for defendant, appellant.

A. B. Connell, K.C., for plaintiffs, respondents.

The judgment of the Court was delivered by

BARKER, C.J.:—This is an appeal from the County Court of Carleton. The action was brought by the plaintiffs (respondents in this Court) as executors of the estate of the late L. P. Fisher to recover the amount due on a promissory note made by one Grant in favour of the Woodstock Carriage Company and endorsed by them and the defendant, Shaw (the appellant in this Court). The note is dated June eleventh, 1907, and is for the sum of $175. The defence set up was that the defendant's name on the note was a forgery by Grant, the maker. The jury found that the signature had been forged and a verdict was accordingly entered for the defendant. On a motion for a new trial the Judge set aside the verdict on the ground of misdirection, and ordered a new trial, and this is an appeal from that judgment. The only question involved is whether or not this case is within the principle laid down in Ewing v. The Dominion Bank, 35 S. C. R. 133. The note fell due on Monday the 15th July, 1907, when a notice of dishonour was given. This action was commenced on the 14th of August, 1907, or rather the summons is dated at that time, but it was not issued until the 7th of October. The defendant did not repudiate his signature to the plaintiffs until the 26th of November. Grant, the maker of the note, who is said to have forged the endorsement, was ill on the 26th of November, when the plaintiffs first got notice of the forgery, and he continued ill until the 12th of December when he died.

I think this appeal should be allowed as there is no evidence whatever that the plaintiffs have been prejudiced by the defendant's silence, even assuming that he was under a duty to inform them of the forgery at an earlier date than he did. The foundation of the doctrine of estoppel lies in the fact that the party relying upon it has, as a result of the act, or conduct, or silence, or whatever it may be out of which the estoppel arises, sustained loss or been in some material way injured. In the case cited, Davies, J., at page 153, says: "Mere silence per se on the part of one who should speak is not I grant sufficient as an admission or adoption of liability, or as an estoppel to prevent him denying his signature. But such silence coupled with material loss, or prejudice to the person who should have been informed and which prompt and reasonable information

would have prevented, will so operate." It is admitted that the Woodstock Carriage Company, which is liable as an indorser on this note, is perfectly well able to pay it, so that the plaintiffs cannot lose their money. If that were not so, the remedy against that company or against Grant has in no way been prejudiced by the defendant's silence. The remedy against Grant is good against his representatives; and he lived for over a fortnight after the plaintiffs knew of the forgery, during which time they took no proceedings civil or criminal against him. The only prejudice suggested is that if the plaintiffs had known of the forgery before they brought this action they might not have brought it and incurred costs. That is a mere speculation which in this particular case is met by the fact that the most of the costs, including the trial, were incurred after they had notice of the forgery, in an endeavour to prove that the signature was genuine. Irrespective of that such a possible loss in costs is not a prejudice in the recovery of the debt or in the enforcement of a remedy for the purpose.

Appeal allowed with costs, verdict for appellant to be restored.

NEW BRUNSWICK.

FULL COURT. APRIL 23RD, 1909.

REX v. MURRAY.

EX PARTE DAMBOISE.

Liquor License Act—Convictions—Certiorari where Right of Appeal Exists—Practice.

Writs of certiorari and orders nisi to quash convictions were granted in these two cases on the following grounds:—

1. That the conviction varies from the minute of conviction.

2. That the said minute of conviction is not in accordance with the statute.

3. No evidence that the defendant had any reason to believe that the said minor William MacRae was a minor.

4. The magistrate had no authority to order fifty days imprisonment.

5. No distress awarded in the minute of conviction.

On the return of the writs the matters were argued before this Court on April 14th, 1909, before LANDRY, McLEOD and WHITE, JJ.

A. T. LeBlanc, supported the convictions.

W. A. Mott, K.C., contra.

The judgment of the Court was now delivered by

LANDRY, J.:—Two cases against Joseph Damboise, a licensed vendor under The Liquor License Act (Cap. 22, C. S. 1903), before William Murray, Justice of the Peace, Restigouche county; one for having on the 27th day of February, 1909, allowed to be supplied on his licensed premises in Campbellton liquor to a minor; the other for a similar offence on the 1st day of March, 1909. Both cases were made out by proof to the satisfaction of the magistrate, and in each he entered a conviction.

These cases are now before this Court on writs of certiorari and orders nisi to quash. There are several objections taken to the convictions, none of which, we believe, affect the jurisdiction of the magistrate.

Section 104 of the Liquor License Act (c. 22, C. S. 1903), gives the defendant a right of appeal or review to a judge of the County Court in cases of this kind, and this Court has already on several occasions refused to grant certiorari in cases where such a right exists, and no exceptional circumstances are shewn. In these two cases no exceptional circumstances are shewn to exist and I do not see why this Court should depart from the rule laid down in Ex parte Price, 23 N. B. R. 85.

Convictions confirmed; and orders nisi to quash, discharged.

NEW BRUNSWICK.

FULL COURT. APRIL 23RD, 1909.

OWENS v. UPHAM.

Costs—Review of Taxation—Rule Setting Aside Order with Costs—Items Properly Taxable Thereunder—Practice.

Motion on behalf of the petitioner Owens, for a review of a taxation of costs taxed under an order of this Court

made in this matter on February 12th, 1909 (reported 6 E. L. R. 554), and motion on behalf of respondent Upham, to so vary this order as to include the costs objected to. Argued on the 14th of April, 1909, before BARKER, C.J., LANDRY, MCLEOD and WHITE, JJ.

A. B. Connell, K.C., for petitioner Owens.

W. P. Jones, K.C., for respondent Upham.

The judgment of the Court was delivered by

BARKER, C.J.:—On the 12th of February last, this Court made an order setting aside with costs an order made by MCLEOD, J., setting down the election petition filed in this case for trial on the 16th of February. The defendants' attorney took out the rule in the ordinary form rescinding the order of McLeod, J., with costs, made up his costs, and on the taxation the clerk disallowed several items, but allowed the costs of subpoenas and serving witnesses for the trial as fixed by the order which was rescinded. This is a motion by the plaintiff to review that taxation. At the same time the defendant has given notice of motion to vary the order so as to include these costs.

I think the rule as taken out would not include these costs. A rule setting an order aside with costs only means the costs, if any, of the order set aside and of the application to set it aside: Christie v. Thompson, 1 Dowl. N. S., 592.

If there were other costs claimed I think there should have been a special order made. No such costs were applied for at the time; if they had been it might have been reasonable to have granted them. The attorney is, however, responsible for the rule he takes out.

But apart from this the rule in its present form is precisely what the Court intended it should be. If it did not carry out the Court's intention it might be varied; but when once made as this was, it is not the practice to vary it, especially when the matter is not an oversight or mistake but an afterthought altogether. In Glasier v. Rolls, 59 L. J. Ch. 63, Bowen, L.J., says: "It is quite a different thing to come after a judgment and ask that it should be amended so as to express the real intention of the Court, entertained by the Court at the time that judgment was given. If an intention so entertained by the Court is not expressed in the order, there has been a miscarriage, and you set it right as

a slip; but to seek to alter the judgment by asking that something may be embodied in it, the demand for which was not even thought of at the time, and was never brought to the attention of the Court, is really to ask us to make a different judgment from that which has already been perfected. It seems to me, therefore, that it is too late for the applicant to come with any part of his request." See Preston Banking Co. v. Allsup (1895), 1 Ch. 141.

The motion to review the taxation by disallowing the items objected to by the plaintiff will be granted; and the defendant's motion to vary the rule will be refused. Both cases without costs.

NEW BRUNSWICK.

FULL COURT. FEBRUARY 5TH, 1909.

FISHER v. TOWN OF WOODSTOCK.

Sale of Goods—Non-payment of Price—Removal from Possession of Vendor—Conversion—Estoppel—Verdict.

Appeal by plaintiff from Carleton County Court to set aside the verdict entered therein for the defendant and to enter a verdict for the plaintiff.

Argued in Michaelmas Term last.

F. B. Carvell, K.C., for plaintiff, appellant.

J. C. Hartley, for defendant, respondent.

The judgment of the Court (BARKER, C.J., LANDRY, MCLEOD and WHITE, JJ.), was now delivered by

WHITE, J.:—This is an appeal from the Carleton County Court. The action was brought by Mr. Fisher against the town of Woodstock for the conversion of one hundred and seventy-four feet of curbing stone, valued at $1.20 per foot, the plaintiff abandoning all of his claim in excess of two hundred dollars in order to bring the action within the jurisdiction of the County Court. The cause was tried without a jury in July last, and the verdict was rendered for the defendants. The appellant now seeks to have this finding set

aside, and that a verdict be entered for the plaintiff for two hundred dollars or such less sum as he shall appear to be entitled to, and, failing that, for a new trial.

The material facts are as follows. In the spring of 1906, one Price contracted with the defendants to sell and deliver to them 637 feet of curbing stone. After this contract had been in part performed, the defendants took, hauled away, and used in street constructions, a quantity of granite curbing stone belonging to the plaintiff. This was done with the plaintiff's knowledge, but without any authority or permission on his part, except such as can be implied from the fact that he saw the town's servants taking the stone, and made no protest or objection. The defendants, upon the trial, made some question as to the number of feet thus taken by them, but the learned Judge in his finding says: "If it were necessary for me to decide, I don't think I would have any hesitation in reaching the conclusion that 174 feet of that curbing was used." Sometime early in June, after the stone had been taken by the defendants, Price met the plaintiff, and as appears from the evidence given by Price in his direct examination as the defendants' witness, the following conversation between him and the plaintiff took place: "Q. What did you see him about? A. I told him I fell short in my contract, I was short about forty feet. I thought he had a little left and I would buy; if I could not buy I would have to go back and ship the balance. It would cost me $30. I had finished with my derrick, and it would be cheaper to buy this than to move my derrick. Q. What did he say? A. He said the town had got all his stone. Q. Did he say he had sold it to them? A. No, he did not say so. Q. Did he make arrangements to fill out the forty feet? A. Yes. Q. After that did you ever hear anything further from Fisher with reference to it? A. No more than each time I came up he asked about the bill; I was quite a while before I got my bill." And in Price's cross-examination the following appears: "Q. You never had any trade with Mr. Fisher about any stone except the forty feet? A. That is all. Q. You came to town and bought forty feet of stone from him. A. He agreed to let me have it. Q. He told you at that time that the town had taken it all? A. Yes, and he supposed they would pay him for it."

Still later, in June, the plaintiff wrote Price, enclosing a bill against him for the amount of stone taken by the town;

and, in July, he called upon the then mayor of the town, Mr. Munroe, and requested him to withhold payment of a balance due Price from the town, on his contract. The plaintiff and Mr. Munroe do not agree as to the terms of this conversation, but the learned Judge, in his finding, states that if he had to decide between the version of this conversation given by Munroe and that given by the plaintiff he would accept the mayor's version as correct. Mr. Munroe says, "Mr. Fisher came to my house to see me about the matter. He began by saying that Price, who had the contract to supply the town with some curbing, had bought from him some curbing that was left over at the armory; that he had not paid him and that the bill was going through the council, and he wanted me to hold the cheque passed in his favour till Mr. Price would settle with him. I told Mr. Fisher I would do so, or as much as I could, so that he would get his pay for the curbing that Mr. Price had got from him. Q. Do you remember what time of the year that was? A. That was in the early part of July, 1906. Q. What did you do in consequence of his request? A. The cheque and order were dated on the 7th July, 1906. After signing the cheque I pinned a slip on the cheque asking Mr. Bourne, the town treasurer, not to forward the cheque till he got orders. The cheque remained with Mr. Bourne from that time till early in August. After that I had a letter from a lawyer in St. Stephen threatening to proceed against the town if this claim of Mr. Price was not forwarded. I took that letter and shewed it to the chairman of the street committee, Mr. Henderson, and consulted with him, and we decided. After consulting with Mr. Henderson, I took that letter to Mr. Bourne and told him to forward the cheque to the party who had written the letter, which Mr. Bourne, I presume, did."

After this conversation with the mayor, the plaintiff continued to seek payment from Price for the stone taken by the town, but Price always refused to pay for more than forty feet, claiming that amount was all he had bought from the plaintiff.

In November, a meeting took place between Price, the plaintiff and Mr. Henderson, chairman of the street committee, having in charge the work in which the stone in question was used. These three made some measurements of the curbing laid by the town, with the view, apparently, of arriving if possible at some satisfactory basis of settlement. After the measurements, but before any settlement was

reached, Mr. Henderson left, and until the trial did not learn what settlement had been arrived at between Price and the plaintiff. Following these measurements Price refused to admit that he was liable to the plaintiff for any stone beyond the forty feet which he claimed was all he had bought or received. He then signed an order written by the plaintiff, in which he asked the town to "please pay to W. Fisher the sum of forty-eight dollars and charge to my account." Upon receipt of this order the town tendered the plaintiff with a cheque for $48, which the plaintiff refused to accept, for the reason, as he alleges, that it was offered to him upon condition that he would accept it in full of his claim. This $48 has never been paid to the plaintiff; nor as far as I can find from the evidence has the town paid it to Price. When this order was given by Price he had been paid by the town for the full 637 feet of curbing he had agreed to furnish them, but the town owed him for some other stone supplied by him under a contract separate and distinct from that for the curbing. The plaintiff's evidence is, that from the time the stone was taken, continuously down to the trial, he always regarded the town as the party primarily liable to him for the curbing taken, except that I take the effect of his evidence to be, that subsequent to the taking of the stone he had agreed with Price to look to him for the forty feet of curbing for which the order was given. That $1.20 per foot is a fair and reasonable price for the stone is not disputed.

The learned Judge, although he finds the town took and used 174 feet of curbing belonging to the plaintiff, comes to the conclusion that the plaintiff cannot recover because he subsequently demanded payment from Price. He says: "On the 10th September, 1906, Mr. Fisher in his own handwriting sits down and writes, 'Albert Price to W. Fisher, Debtor, To 190 feet of curbing at $1.20 per foot, $228.' He cannot expect that he can look to Price for his pay, and to the town at the same time; he must choose one or other of them. If he has elected to give the credit to Albert Price he cannot turn around and look to the town." In this view of the learned Judge I am unable to agree. When the town took this stone it was unquestionably the property of the plaintiff. It is not even suggested that when the stone was taken, the plaintiff had sold it either to the town or to Price, or had given any authority to the defendants or any person to take it. There was nothing at the time which

led the plaintiff, or which ought reasonably to have led him to infer that the town, in taking the stone, was under the impression it belonged to Price. True, the plaintiff then knew Price had contracted to supply the town with a quantity of curbing which he was getting from his own quarry near McAdam. But what is there in this which would necessarily, or even reasonably, lead the plaintiff to suppose that the town believed Price had bought this stone in question? He might well conclude that the town required more stone than Price was supplying, and therefore took, and intended to pay for this stone. Indeed there is nothing in the evidence to indicate that when the defendants took the stone they did in fact believe it belonged to Price. There can arise, therefore, no question of estoppel against the plaintiff from his merely standing by. The defendants in taking the stone were guilty of a conversion of the plaintiff's property. If afterwards the plaintiff had agreed with Price that the latter should pay him for all the stone taken, such agreement might possibly be construed as an authority to Price to settle with the town for the stone taken, and would therefore protect the defendants, after they had settled with Price, from being liable for the stone to the plaintiff. But there was no such contract. It is true, the plaintiff demanded payment for the stone from Price. But it requires the agreement of both parties to make a contract; and, though Price was willing to agree, and did ultimately agree, with the plaintiff, to pay for forty feet of the stone taken, he never agreed to pay for the remaining 134 feet. Nor could the plaintiff have recovered from him the value of this 134 feet under an implied contract, because it does not appear that Price ever took, or used, such 134 feet, or authorized the town to take or use it. Unless, therefore, the plaintiff can recover from the town, he is without remedy as to this 134 feet.

The learned Judge refers to the conversation above quoted, had by the plaintiff with the mayor, as an admission by the plaintiff that he had sold to Price all the stone taken by the town, and seems to think this would estop the plaintiff afterwards claiming from the town, though he does not expressly say so. But it is quite clear the defendants were in no degree induced by this conversation to pay Price. Indeed, but for it, they would have paid him earlier than they did. They paid him, because they recognised he was entitled to enforce payment by suit; and paid him, not through

the inducement, but against the express protest, of the plaintiff. They do not even claim that they were in the slightest degree induced to pay Price because of this conversation. What is necessary to constitute estoppel in cases of this character is settled by the well known and long established rule laid down in Pickard v. Sears, 6 A. & E. 469, as explained in Freeman v. Cooke, 2 Ex. 654; and for the reasons stated the plaintiff does not come within that rule.

As to the forty feet of curbing—parcel of the 174 feet taken—which it was agreed between the plaintiff and Price the latter should pay for, I think the plaintiff cannot recover in this action. For this 40 feet Price could enforce payment from the town by suit, because the defendants accepted it as part of the 637 feet he had contracted to supply, and by his agreement with the plaintiff this 40 feet became Price's property so that he was authorised to dispose of it to the town.

I think the verdict rendered should be set aside and a verdict be entered for the plaintiff for $160.80, that is to say, for 134 feet of curbing at $1.20 per foot.

NEW BRUNSWICK.

FULL COURT. FEBRUARY 5TH, 1909.

HARRIS v. JAMIESON.

Negligence—Fatal Injury to Workman—Fellow-servant—Action by Widow—Lord Campbell's Act—Trial—Jury—Misdirection—Practice—New Trial.

This action, which was founded on the alleged negligence of the defendant causing the death of an employee, the husband of the plaintiff, had its third trial at the St. John Circuit held in August, 1908, before LANDRY, J., and a special jury. Verdict for plaintiff, as had also been the result on both the former trials.

Motion for a new trial (that is that the cause be sent down for a fourth trial) was argued in Michaelmas Term last.

D. Mullin, K.C., for plaintiff.

M. G. Teed, K.C., for defendant.

The judgment of the Court (BARKER, LANDRY, MCLEOD and WHITE, JJ.), was delivered by

BARKER, C.J.:—This is the third trial of this case, and as the evidence, which has been substantially the same at each trial, has undergone so much discussion before this Court on appeal, the real points involved have been reduced to a comparatively few. The action is one under what is known as Lord Campbell's Act, and brought to recover damages sustained by the plaintiff by reason of the death of her husband who was killed while working in the employ of the defendant on the construction of the Intercolonial Railway grain elevator at St. John, which accident, it is alleged, was the result of the negligence of the defendant. It was first tried before Hanington, J., and resulted in a verdict for the plaintiff for $750. A new trial was granted; and at the second trial, which took place before Gregory, J., a verdict was entered for the plaintiff and the damages assessed at $1,250. On the motion for a new trial this Court was divided equally and so the verdict stood, but on appeal the Supreme Court of Canada ordered a new trial (35 S. C. R. 625). This trial took place before Landry, J., and again the verdict was entered for the plaintiff and the damages were assessed at $2,800.

After so protracted a litigation involving principally, if not altogether, a question of fact, this Court will not go out of its way to send the cause down for another trial, especially where three verdicts have already been given in favour of the plaintiff, and where the jury in the last trial was a special jury empanelled on the defendant's application.

Acting on the suggestion made by the Supreme Court of Canada, (35 S. C. R. at page 636), Landry, J., asked the jury but two questions. In answer to the first, they found that the defendant was guilty of negligence which caused the death of deceased. The other question was this: "If yes, in what did such negligence consist? The answer is this: "Insufficient help on the tramway, causing careless handling of lumber on same. Dogs not secured to joists of staging to prevent falling out." There is no dispute as to the fact that the deceased was struck by a plank which fell from the tramway; and we have in the finding which I have just quoted, what was absent on the former trial, that is, that this falling of the plank, as it did, was due to the insufficient help on the tramway. When this case was before

the Supreme Court of Canada on appeal, Nesbitt, J., in delivering the opinion of the majority of the Court, said at page 631: "We also fully agree that answers by a jury to questions should be given the fullest possible effect, and if it is possible to support the same by any reasonable construction they should be supported." A reference to the evidence places beyond all doubt the true meaning of the jury when they speak of there being insufficient help on the tramway causing careless handling of the lumber. It was charged against the defendant that in the distribution of the lumber from the tramways not enough men were employed for the work. He employed in that part of his work, so to speak, two men to do three men's work; and the result was that they were obliged to work with so much haste that the care requisite to avoid accidents was impossible. It is not contended, or at all events it cannot be successfully contended, that there is not ample evidence to sustain this finding. The other juries had found the same negligence though they failed in saying that the accident was due to it. Besides this there is undisputed evidence that during the two or three weeks previous to the time when this accident happened, on two or three occasions, planks had fallen from the tramway precisely as this one did, though fortunately no one had been injured. Attention was therefore directed to the danger of the work as it was carried on, and the accident which caused the deceased's death was one which the defendant might well have foreseen and which it was therefore his duty to provide against. We have it therefore in the present case found as a fact that the falling of the plank which was the proximate cause of the injury was due to the negligence of the defendant. The latter part of the finding as to the dogs is immaterial, relating as it does to the staging. In the report of the case already referred to (35 S. C. R. 625), Nesbitt, J., at page 633, says: "The negligence, if any, must have consisted, under the circumstances, in the throwing off of planks in the immediate neighbourhood of the men engaged in the act of stage-raising; and the throwing off or falling off of the planks at that particular period of time, if found to be negligence, and the direct and immediate cause of the damage, would determine the defendant's liability." The verdict must therefore stand, unless there are other objections to it which can be sustained.

The only objection which seems of any importance is the question of misdirection or improper reception of evi-

dence, whichever it may be called, arising from the reading to the jury by the plaintiff's counsel of the whole or portions of the judgment of Hanington, J., in this Court, and of Idington, J., in the Court on appeal, delivered by these Judges when this case was before these respective Courts on the previous motion for a new trial. It appears by the return that the plaintiff's counsel claimed the right on going to the jury to read as part of his address passages from the two judgments I have mentioned, both of them being the opinions of dissenting Judges. This course was objected to as being an attempt to influence the jury as to questions of fact by giving them the views of two prominent Judges as expressed in the same case on the same state of facts. The trial Judge then said to the plaintiff's counsel: "If you feel it is going to make an impression on the jury you can go to the jury on that, and when I come to address the jury I will have to be guided by the majority and not by the minority. I have never known a case where the reading of the judgment of the Court, at Nisi Prius, has been shut out." Mr. Mullin then read from the judgment of Idington, J., as reported in 35 S. C. R. 636. He also read from the judgment of Hanington, J., subject to the objection of the defendant's counsel. Towards the close of the Judge's charge the plaintiff's counsel interrupted him to explain that on consideration he himself doubted the correctness of the course he had taken, and he asked the Judge to direct the jury in reference to it—that is, I suppose, as to what consideration they should give to the extracts which he had read. He did not suggest that they should be withdrawn. Landry, J., then directed the jury as follows: "I might say this to you, that so far as a judgment of the Court is concerned I believe counsel have a right to read the judgment of the Court to the Court and jury, even if it is a dissenting judgment, while the case is going on, and it is a privilege of counsel on the other side to point out that it is a dissenting judgment and was overruled by the Court. As to Mr. Mullin reading a part of Judge Hanington's judgment to you, I will say this:—I think not very much fault can be found with Judge Hanington's exposition of the law with relation to negligence. He has expressed it, I think, according to the authorities; but the expression of the opinion of a Judge in a judgment on facts ought not to sway you one bit because he is a Judge. If his argument commends itself to your judgment because you are convinced from the evidence

you have heard and what you have seen, why it is all right, as you coincide with him; but the fact that a Judge has said so and so should have no more weight with you than the opinion of any other man, because he is not supposed to find on the facts; and you are not to consider what other juries have found. You are supposed to judge from the evidence. You are not to be bound by what other Judges have said or other juries have found; but if you happen to fall in line with them it is simply because you are convinced the same as they were. Therefore Judge Hanington's finding on the facts is no more binding on you than the expression of counsel. It may be an honest finding and an honest belief; but you are the men to find, from what you have heard and seen."

If this could be regarded as a withdrawal of the extracts in question from the consideration of the jury, there would be no ground for a new trial, even if the reading of the extracts was equivalent to an improper reception of evidence: Wilmot v. VanWart, 17 N. B. R. 456; Stewart v. Snowball, 19 N. B. R. 597; Catlin v. Barker, 11 Jur. 1105.

The learned Judge's remarks, however, can scarcely be so regarded; neither do they seem to have been so intended. So far from this being the case, he distinctly told the jury that the plaintiff's counsel was quite within his rights in what he did; but as to the effect of these judicial opinions, so far as they related to the facts, no more weight was to be attached to them than to the opinions of other men. The opinions of other men would not be admissible at all. The evil which is involved in such a practice and which in the proper administration of justice it is desirable to avoid, is that the influence of such judicial opinions naturally operates, or is likely to operate, in the minds of jurors in coming to a conclusion,—an evil which to my mind is by no means necessarily met by telling the jury that they are to act on their own views of the evidence and only accept the Judge's views so far as they agree with their own. There is, however, no hard and fast rule that there must be a new trial simply because improper evidence has been admitted. It is largely a question of degree, especially in a case like the present where the obvious object is to bring the notice and knowledge of jurors, expressions of opinions, statements or facts which are not admissible as evidence, but nevertheless carry their weight.

In Case v. Benway, 18 U. C. Q. B. 476, it appeared that a verdict had been twice set aside as against the weight of evidence, and on the third trial counsel in addressing the jury urged them to take the same course that the other juries had done—in effect to disregard the Judge's charge. A new trial was granted on the ground that such an appeal was liable to prejudice the minds of the jurors unfairly, as it urged them to take their own course without attending to the right view of the evidence upon the legal rights of the parties.

In Moore v. Boyd et al., 15 U. C. C. P. 513, it appeared that the plaintiff's counsel in his closing address to the jury told them that on a former trial between the plaintiff and another plaintiff and the same defendants for the same cause of action as this, that the jury gave the plaintiffs a verdict, and he trusted that the jury would do the same as the former jury. This was put forward as a ground for a new trial on the ground that this reference to the former trial prejudiced the minds of the jury against the defendants. It appeared that on an objection being made to this reference by the plaintiff's counsel, he at once stated he had no wish to violate any rule of practice in the matter, and the jury were told that the case must be decided on its own merits and not by the verdict of a former jury. Robinson, C.J., in delivering the judgment of the Court, said (p. 519): "I have no doubt if the counsel for either party should persistently refer to the former verdicts in a case, with a view of influencing the verdict of the jury after it had been objected to, the Court would feel inclined to set aside a verdict gained under such improper influences. In Pool v. Whitcomb (12 C. B. N. S. 770), the Court seems to have acted on the principle that a verdict would be set aside when the jury acted under the influence of observations of the counsel, rather than from the evidence assessing damages. There the plaintiff's counsel in his general reply told the jury that unless they gave a verdict for more than £5 he would in all probability have to pay the costs. On this representation, the jury found for plaintiff for £5 5s. The Court set aside the verdict. I think, however, no case can be found where the verdict has been set aside merely because the counsel referred to the verdict on a former trial, unless the judge who tried the cause was satisfied that the matter was pressed unfairly, and with a view of exercising an improper influence on the jury. I do not understand the learned Judge

had that impression as to the conduct of plaintiff's counsel on this trial. In fact, he considered the matter of so little importance that he had not even made a note of the circumstance complained of." The rule for a new trial was refused.

In Powell v. Wark, 20 N. B. R. 15, it appeared that on the second trial the plaintiff's counsel read to the jury the judgment of the Court setting aside the former verdict, contrary to the warning of the Judge and the protest of the defendant's counsel, and discussed the judgment of the court in ordering a new trial, and alluded to the facts in the judgment as shewing the estate of Robert Wark to be worth $40,000. Among other grounds this was relied on for a new trial, and it was urged that this course had the effect of getting before the jury the very evidence which the Court held to be inadmissible on the former trial. The view of this Court on that question appears from the following passage, at page 24: "The reading the judgment of the Court, on granting a new trial in this case, for improper admission of evidence to the jury, is not, in my opinion, any ground for a new trial. Law is not generally read to a jury by counsel; it is for the Court. Judges have frequently expressed their disapprobation of such a course as wanting proper respect for the Court and forgetting the maxim—the jurors answer and decide as to the facts, the Judge as to the law."

These cases of course differ in some respects from the present as to their facts, but the same principle governs all. Conduct such as is here complained of does not necessarily entitle the party to a new trial. The Court must first be satisfied that the jury have been or may have been so unduly influenced by the passages read to them from the judgments of Idington, J., and Hanington, J., as to the material facts in dispute that the findings of the jury on the two questions submitted to them might fairly, in view of all the circumstances, be attributed rather to these judgments than to the independent opinion of the jurors on the sworn testimony. To put it sortly, that the verdict is the opinion of these two Judges adopted by the jury and not the independent opinion of the jurors themselves on the evidence before them.

Now what are the facts and circumstances in this particular case which can be said to point to such a conclusion? In the first place the return does not disclose what parts of these judgments were in fact read to the jury. They

dealt with a verdict based on the answers to twenty-five questions involving various charges of negligence, the answers to which were in some cases inconsistent, and in others unsatisfactory. These judgments were necessarily lengthy, and as the plaintiff on this trial was still relying on the same charges of negligence, or at least had abandoned none of them, it is quite possible that the extracts which were read had no reference to the one particular act of negligence to which this case has now been narrowed down, and upon which the verdict has been entered, as having been the proximate cause of the accident. In that case the comments of the judges would be immaterial. But, assuming otherwise, what have we to enable us to form an opinion? In the first place Landry, J., who was presiding and saw and heard all that took place, expresses his opinion that the jury could not have been biased or prejudiced in any way, and the same question as to this particular act of negligence had on the same evidence been answered in the same way by previous juries. We have also the fact that the evidence itself largely preponderates in favour of the finding of the jury as to the fact of negligence, and there is no dispute as to the accident being caused by the falling of the plank. We have also to remember that it is with reluctance this Court sends down a cause even to a third trial, and then it is usually on payment of costs: Hartley v. Fisher, 6 N. B. R. 694. There is, I think, no sufficient reason for concluding that these specially selected jurors, even with the latitude given them by the Judge, subordinated their own opinions to those of the two dissenting Judges, or that the unanimous verdict which they have given was not their own deliberate view of the evidence, but merely an echo of the views of these two gentlemen.

Apart from what I have already said, I should be prepared in this particular case to refuse a new trial even if the reading of these judgments were to be considered as equivalent to misdirection or improper reception of evidence. Section 376 of chap. 111, Con. Stat. 1903, provides that a new trial shall not be granted on the ground of misdirection or of the improper admission or rejection of evidence unless in the opinion of the Court some substantial wrong or miscarriage has been thereby occasioned in the trial of the action. A similar section came under review in Bray v. Ford (1896), A. C. 44. That was an action of libel in which the Judge at

the trial misdirected the jury on a question which was material as to the amount of the damages. The House of Lords held that this amounted to a substantial wrong or miscarriage, as the question of damages was one entirely for the jury and that they should be correctly instructed on all matters bearing on that point. Lord Herschell says (at page 53): "The damages cannot be measured by any standard known to the law; they must be determined by a consideration of all the circumstances of the case, viewed in the light of the law applicable to them. The latitude is very wide. It would often be impossible to say that the verdict was a wrong one, whether the damages were assessed at £500 or £1,000. Where the Judge so directs the jury as to lead them to take an erroneous view of any material part of the alleged libel, and this view may have affected their minds in considering what damages they should award, I think there has been a substantial miscarriage within the meaning of the Rule." In another part of his judgment, at page 52, after speaking of the provision being a beneficial one, he says: "In cases in which the question is what are the facts, or the proper inference to be drawn from the facts, if the Court think the verdict of the jury is in accordance with the true view of the facts and of the inferences to be drawn from them, it may be that they would have done right in refusing to grant a new trial on the ground of misdirection, even where the parties had a right to claim that the action should be tried by a jury."

While for the reasons which we have given we think under the circumstances of this case a new trial should be refused, we do not wish to be understood as concurring in the opinion expressed by Landry, J., on the trial, that the reading to the jury the opinions of Judges as to facts, as was done in this case, is within the rights of either party or a practice which ought in any way to be encouraged. Jurors are more or less influenced by such statements; in fact, in most cases that is the sole object in view. In cases where counsel, after objection, persist in adopting such a course they can only escape a new trial by bringing themselves within the exception of which the present case is an illustration.

But one more question remains for determination. It was contended that the accident was due solely to the negligence of a fellow-servant of the deceased and in the common employment of the defendant, for which the defendant was

not liable. We think the evidence fails in shewing this. The defendant was himself on the work all the time, giving it his personal control and supervision. He knew exactly how it was being carried on. Whether or not at this trial he assumed all the responsibility for the method adopted in distributing these planks, as he did on a former trial, I do not know. But if he did not, the evidence is ample to answer the objection which has been made.

The new trial will be refused.

NEW BRUNSWICK..

FULL COURT. APRIL 23RD, 1909.

COLPITTS v. McKEEN.

Canada Temperance Act—Liquors Seized under Search Warrant—Replevin—Practice.

This is an appeal from the order of the Judge of the Carleton County Court made in the interlocutory trial in an action of replevin for the temporary possession of the goods replevied. The goods in question were certain barrels of liquor which had been seized by the defendant Colpitts under a search warrant issued under the C. T. A. The order of the County Court Judge was for the delivery of the goods to the plaintiff McKeen, and the defendant Colpitts now appeals from this order. The appeal was argued in Hilary Term last before BARKER, C.J., LANDRY, MCLEOD and WHITE, JJ.

W. P. Jones, K.C., for the defendant.

J. C. Hartley, for the plaintiff.

BARKER, C.J.:—This is an appeal from a judgment of the County Court of Carleton County on a claim of property tried before the Judge of that Court without a jury in an action of replevin against Colpitts, the present appellant, at the suit of McKeen, the present respondent. There is substantially no dispute as to the facts. On the 18th of August last there arrived by the Canadian Pacific Railway

at their freight shed in Woodstock two sugar barrels marked ⟨T⟩ without any other address. They in fact contained intoxicating liquors which had been shipped by C. N. Beal & Co., liquor merchants in St. John, deliverable at Woodstock to their own order. The defendant, who is liquor license inspector for the county of Carleton, seeing these barrels at the shed, became suspicious as to their contents, and accordingly applied to the Police Magistrate of Woodstock under the provisions of Part II. of the Canada Temperance Act, in force in Carleton County, for a search warrant. The warrant was issued, and under it the officer seized the two barrels and their contents, and then gave them into the custody of Colpitts, the present appellant, for safe keeping, until the magistrate should make some order in reference to them. McKeen, the respondent, is a legally qualified druggist doing business at Woodstock. On the arrival of the barrels at Woodstock, he sent his teamster with the necessary order to receive them from the railway company. He paid the freight charges and went into the shed to take the barrels away, when he discovered that the officer had a moment or two before seized them under the search warrant. The railway company's agent returned the freight charges, and McKeen, having demanded delivery of his goods, issued this writ of replevin. An information was laid against Charles W. Manzer, the railway company's agent, for a violation of section 117 of the Canada Temperance Act (cap. 152, Rev. Stat. Can. 1906), as amended by cap. 71 Statutes of Canada, 1908, which so far as the evidence shows had not been tried and was still pending when this inquiry took place. The sheriff seized the goods under the writ of replevin, and the appellant Colpitts put in a claim of property. After hearing the evidence the Judge of the County Court decided in favour of the respondent and ordered the sheriff to deliver the goods to him. The report of the reasons given by the County Court Judge for his decision is somewhat meagre, but if I understand him correctly he thought that as the respondent was a legally qualified druggist he was by section 125 of the Act free to purchase and sell spirituous liquors in the county for certain specified purposes and he therefore had the right to bring the barrels into the county; and that the onus was upon the appellant to show that the respondent brought the liquor into the county for the pur-

pose of selling it, as authorized by section 125, and not for an unlawful purpose, which onus he had not discharged.

The only question involved in this appeal is whether the judge was right in making the order he did, and I do not intend to discuss matters which are not directed to this one point in dispute. As the appellant did not apply to set aside the writ of replevin as being inapplicable to a case where the goods are in custodia legis, that point is not open to him. We are dealing with a replevin suit, and it must be governed by the rules and procedure applicable to ordinary proceedings of that nature: Hanington v. Girouard, 16 N. B. R., 151; Desbrisay v. Little, 11 N. B. R. 392. According to the present practice in replevin, when a claim of property is put in, the Judge fixes a time and place for the trial. If he finds the claim good the property is delivered to the defendant, and if he finds for the plaintiff it is ordered to be given over to him. The trial is only for the purpose of deciding as to the temporary possession of the goods. The present procedure by which such claims are tried by a Judge either with or without a jury, subject to appeal, instead of by the sheriff, as was the practice when most of the cases which have come before this Court were decided, has only substituted one tribunal for the other without, so far as I can discover, intending in any way to alter the object or effect of the trial itself. The object of this trial is simply to decide as to the immediate possession of the property and not in any way to determine as to its ownership, except so far as that would prove a right of present possession. In Rowe v. McEwan, 28 N. B. R. 86, Allen, C.J., delivering the judgment of the Court, said (p. 88): "The trial by the sheriff's jury under a writ de proprietate probanda is only for the purpose of determining the right to the possession of the goods. The plaintiff in the suit may be the absolute owner of them, but a right of possession for the time being may be in the defendant; and in such a case the latter has the right to put in a claim of special property as against the absolute owner . . . . What the defendant can or cannot plead in the suit has nothing to do with the present question." See also Russell v. Aiton, 32 N. B. R. 385. The Court further said in Rowe v. McEwan at page 87: "It has already been decided in the case of Lyman v. Shirreff, 26 N. B. R. 617, that if goods are replevied from a sheriff who has seized them under a fi. fa. execution,

he has a special property in them by virtue of which he can put in a claim under cap. 27, sec. 203. The claim of the defendant in this case rests upon the same principle." I do not understand that the learned Chief Justice when he uses the term "special property" and says that the two cases rest on the same principle, has any reference to the ownership of the goods. One was the case of a lien on goods of a common carrier for freight arising out of his contract to carry, while the other was the mere right of possession acquired by a sheriff by a seizure under a fi. fa. and which was necessary to enable him to discharge his duty as an officer of the Court under a process of the Court. There is a manifest distinction between the two cases as to the right of property in the goods, but the two are similar in this respect, that the lien holder in the one case and the sheriff in the other had a right to retain possession, which the real owner could not disturb, though the right in the one case rested upon a different principle from that upon which the other did. And it was this right to possession which the Court says can be put forward in a case like the present as a claim of special property to be tried by a Judge. The defendant, in whose custody the officer who made the seizure put the liquor for safe keeping, relies upon the search warrant as justifying the seizure and detention, until it shall be dealt with according to law as the warrant directs. The answer set up to this is that the police magistrate was not authorized on the information before him in issuing the warrant, and by reason thereof he acted without jurisdiction and therefore the seizure of the goods and their detention are unlawful.

A somewhat similar case to the present one occurred in Nova Scotia under this same Act. I refer to the Queen v. Hurlbert, 27 N. S. R. 62. The facts, which are fully set out in the report of the action of replevin, Hurlbert v. Sleeth, 27 N. S. R. 375, are these. On the 17th of December, 1891, Hurlbert, who kept an hotel at Yarmouth, was summoned before the stipendiary magistrate of that town to answer a charge of having unlawfully sold intoxicating liquor. On the same day, the magistrate, on an information laid before him, issued a warrant to search Hurlbert's premises for liquor kept there contrary to law; and under that warrant the liquor in question was seized and brought before the magistrate, who directed it to be placed in the county jail to await the result of the proceedings on the charge against Hurlbert.

Before that had been determined, Hurlbert replevied the liquor from Sleeth, the jailer, who, on giving the necessary bond, detained the liquor. On the 4th of January, 1892, Hurlbert was convicted on the complaint, fined $100, the liquor was forfeited, ordered to be destroyed, and was in fact destroyed. The action of replevin was tried in July, 1892, when judgment was given for the plaintiff, Hurlbert. A new trial was ordered and on the second trial, which took place in June, 1894, the plaintiff had judgment in his favour again. Between these two trials Hurlbert obtained a writ of certiorari under which the proceedings for the search warrant were removed into the Supreme Court, and on the 12th of May, 1894, an order was made quashing the warrant to search and also the warrant for the destruction of the liquor. The ground upon which these warrants were quashed was that the search warrant showed a want of jurisdiction on its face and was therefore illegal, and that the warrant of destruction which was based on it was also illegal. The trial Judge on the second trial acted on this judgment, and the Court on appeal sustained his ruling and sustained the judgment in the plaintiff's favour. On appeal to the Supreme Court of Canada this judgment was reversed: Sleeth v. Hurlbert, 25 S. C. R. 620. It was there held that the search warrant was not defective as the Court below had held; that as it followed the form given in the Act and had been issued by a competent authority and was valid on its face, it justified the officer in executing it, though it might have been bad in fact and been quashed. The appeal was therefore allowed and a judgment entered for the defendant. In the present case there is no question that the warrant was issued by the proper officer; it is in the form given by the statute and there is no suggestion that it is not regular and valid on its face. It may be that the information did not authorize its issue and that for this reason it might have been set aside; but that does not in a proceeding like this render the action of the officer unlawful. If the seizure was lawful the detention of the liquor by the officer under the warrant until it shall be dealt with according to law must be lawful also. The statute expressly provides that in cases like this where liquor has been brought into a county in violation of the Act the offender shall, on conviction, not only be liable to a penalty, but the liquor with respect to which the offence has been committed and

which has been seized under a search warrant shall be forfeited and may be destroyed.

I have already referred to Rowe v. McEwen, 28 N. B. R. 86, in which the Court said that Lyman v. Shirreff, 26 N. B. R. 617, decided that a sheriff holding goods under a fi. fa. can put in a special claim of property in case the goods are replevied. It has also been held that replevin will lie against a sheriff for goods seized by him under an execution in all cases except where the claimant of the goods is the execution debtor: Flanagan v. Wheton, 31 N. B. R. 295; Hocken v. Doucett, 31 N. B. R. 369. In other words goods held under seizure by a sheriff under an execution are to be considered in custodia legis and not repleviable, only when the plaintiff in replevin is the execution debtor. In other cases the sheriff has a special property, or as I should call it, a right to retain possession in order to enable him to discharge his duty, which justifies him in putting in a claim of property in order that his possession should not be disturbed and taken from him as it otherwise would be. That a sheriff has no other right of property in goods so held by him except what is incident to his possession as an officer of the Court seems to me abundantly clear by Giles v. Grover, 9 Bing. 128. There is therefore to my mind no distinction between the present case and that of a sheriff holding under a fi. fa. In each the officer has a right of possession necessary to enable him to discharge a duty imposed upon him as a public officer acting under a valid warrant which he is bound to execute.

In Crowe v. Adams, 21 S. C. R. 342, it appears that a married woman brought replevin against a sheriff to recover goods which he had seized under a fi. fa. against her husband, and which she claimed as her separate property. It was held that the sheriff could justify under the writ without proving the judgment. The only distinction between the two cases lies in the fact that the sheriff is executing a final process, while the officer in the other case, holding the goods subject to the result of a proceeding which may fail altogether and in which the goods may neither be forfeited nor ordered to be destroyed. It is obvious, however, that if effect were to be given to any such distinction in all cases, the whole object of the statute so far as it involves a destruction of the liquor, would be defeated by issuing a writ of replevin and taking the goods out of the possession of the officer. He might, it is true, apply to set

aside the writ as was done in Breeze v. Stockford, 8 N. B. R. 329, but if he did not, but chose as this defendant has done, to file a claim of property, which must be disposed of as in any ordinary action of replevin, it seems to me that every reason for setting aside the writ can as well be urged against disturbing his possession where the point arises as it does here. The substantial question is the same in both cases, and that is whether the officer, under the search warrant, shall be prevented from doing what he has been lawfully commanded to do.

I think the appeal should be allowed with costs and an order made for the delivery of the goods to the defendant.

NEW BRUNSWICK.

FULL COURT. APRIL 23RD, 1909.

JONES ET. AL. v. CUSHING.

Contract—Sale of Goods—Option to Extend Contract—Breach—Damages.

Action tried before LANDRY, J., without a jury, at the St. John Circuit in August last. Judgment for the defendant.

Motion was made in Michaelmas Term last to set aside this verdict for the defendant and to enter a verdict for the plaintiffs, or for a new trial. Argued before BARKER, C.J., LANDRY, MCLEOD, GREGORY and WHITE, JJ.

F. R. Taylor and H. A. Powell, K.C., for plaintiffs.

W. A. Ewing and M. G. Teed, K.C., for defendant.

The judgment of the Court was delivered by

BARKER, C.J.:—On the 30th of May, 1902, the plaintiff, who are a firm carrying on business at Liverpool under the name of Robert Jones & Co., entered into a written contract with the defendant who carries on business at St. John under the name of Andre Cushing & Co., by which the defendant was to ship to the plaintiffs 20,000 box shooks of a specified quality and dimensions, as quickly as possible after receipt of specifications. The contract was

signed at St. John by J. William Jones on behalf of the plaintiffs, of whose firm he is a member. He communicated the nature of the contract to the plaintiffs at Liverpool and they sent out specifications which the defendant received at St. John on the 10th of June. The letter accompanying these specifications asked for 25,000 boxes instead of 20,000. The defendant shipped the 25,000 boxes in two cargoes; one arrived at Liverpool on the 9th of September, and the other on the 3rd or 4th of October. These boxes were intended as a sample lot of various sizes designed for the use of merchants in packing soap and similar articles for sale, and it was the plaintiffs' intention, if the boxes proved suitable for the purpose and would, therefore, command a ready sale, to give the defendant a larger order. With a view to this the following clause was inserted in the contract: "Buyers to have the option to extend the contract for 12 monthly shipments of 20/30,000 boxes after receipt of this sample shipment." The 25,000 boxes sent forward were paid for, and no further reference to that part of the transaction need be made. The plaintiffs finding the boxes saleable to their customers in England, concluded to take up the option in the contract for the twelve monthly shipments. Accordingly Mr. J. W. Jones, who was then in St. John, acting for his firm, addressed the following letter to the defendant:—

"St. John, N.B., Nov. 8th, 1902.

"Messrs. Andre Cushing & Co., St. John, N.B.,

"Dear Sirs,—Referring to the contract for A, B, C, D boxes, we beg to inform you that our buyers have decided to take twelve monthly shipments from us (say 250,000 boxes or thereabouts). We accordingly avail ourselves of the option under the contract and shall be glad if you will arrange to commence shipping on the 1st December next. Pending the arrival of exact quantities by mail you can take the figures of the sample order as basis for the first shipment.

"Yours truly,

"Robert Jones & Co."

To this letter the defendant replied as follows:—

"St. John, N.B., Nov. 10th, 1902.

"Messrs. Robert Jones & Co., 2 Breeze Hill, Bootle, Liverpool,

"Dear Sirs,—We beg to state that we consider your option of increasing order dated May 30th, 1902, has been

forfeited owing to the unreasonable amount of time allowed to pass before notifying us of your acceptance; we therefore decline to fill same.

"Yours respectfully,

"Andre Cushing & Co."

Although addressed to the plaintiffs at Liverpool, this letter was sent to Mr. J. W. Jones, at his hotel at St. Jahn. Mr. Jones replied by letter dated 13th November at St John, in which he points out that the contract contained no specific date previous to which the option was to be declared. He also refers to various circumstances which I need not mention, designed as they were to meet the question of unreasonable delay put forward by the defendant, but which in my view is not really involved in this case at all. The plaintiffs claim to have been damaged to the extent of some £900, by reason of the defendant's refusal to carry out his contract, and this action was brought accordingly. The case was tried before Landry, J., without a jury. He held that it was an implied provision of the contract that the option must be exercised within a reasonable time after the 4th of October, when the last of the sample shipments was received at Liverpool, and that the period between that date and the 8th of November—say 36 days—was, under all the circumstances and the nature of the transaction, an unreasonable time. He therefore gave judgment for the defendant for $238.32, the amount of some set-off or counterclaim about which there does not seem to have been much discussion. When I say that the learned Judge construed the contract as I have mentioned, it is but right to point out that so far as appears by the official record of the trial, no different construction seems to have been suggested to him. If the sole question involved in this case was whether or not the time which elapsed between the 4th October and the 8th November was a reasonable time, I should not have felt at liberty to disagree with the learned Judge's conclusion. It seems to me, however, that the case involves other and more important questions.

This is not a case where there has been a mere offer to supply goods, from which the party might withdraw at any time before acceptance. It is an absolute contract by the defendant to deliver the goods in question if requested to do so. For that contract there has been valuable consideration paid, and the defendant was not at liberty to with-

draw from it at his own will. There was no limit of time specified in the contract itself within which the request to deliver must be made; time was not of the essence of the contract in any way. In addition to this the plaintiffs were under no obligation to request the additional deliveries or extend the contract, though the defendant was bound to supply the shooks if requested. And the question here is whether the defendant who has so bound himself can sua sponte rescind the contract because he has not been requested to execute it within a reasonable time. And in determining that question it is said that the same consideration is to be given to the surrounding circumstances and the nature of the transaction as if the contract itself provided a time within which the option was to be exercised. I can find no case, and certainly none was cited, where in a contract like the present the holder of the option was, in the absence of all notice or action by the other party, bound to exercise it within a reasonable time or never. I am, of course, not speaking of cases where great delay or inaction for a long period might be held to amount to an abandonment. That is an entirely different question and does not arise here. It will be said that any such construction as that suggested would bind the defendant for an indefinite period, though the plaintiffs would never be under any liability whatever. If that were so, it would only be another instance of a man embarrassing himself by a foolish contract. But is it so? In the first place let us see how such contracts are treated by Courts of Equity, not forgetting that contracts are construed there the same as in Courts of Law. In Taylor v. Brown, 2 Beav. 180, the M. R. says (p. 183): "Now, as I have before stated, where the contract and the circumstances are such that time is not, in this Court, considered to be of the essence of the contract, in such case, if any unnecessary delay is created by one party, the other has a right to limit a reasonable time within which the contract shall be perfected by the other. It has been repeatedly so considered by this Court; and where the time has thus been fairly limited, by a notice stating that within such a period that which is required must be done or otherwise the contract will be treated as at an end, this Court has very frequently supported that proceeding."

In Green v. Sevin, 13 Ch. D. 589, a question arose over a contract for the purchase of an estate where no time was

limited for its completion, and, according to the English rule, both vendor and vendee were entitled to a reasonable time to do what they had to do in completing the sale. Fry, J., says (p. 599): "It has been argued that there is a right in either party to a contract by notice so to engraft time as to make it of the essence of the contract where it has not originally been of the essence, independently of delay on the part of him to whom the notice is given. In my view there is no such right. It is plain upon principle, as it appears to me, that there can be no such right. That which is not of the essence of the original contract is not to be made so by the volition of one of the parties, unless the other has done something which gives a right to the other to make it so. You cannot make a new contract at the will of one of the contracting parties. There must have been such improper conduct on the part of the other as to justify the rescission of the contract sub modo, that is, if a reasonable notice be not complied with. That this is the law appears to me abundantly plain."

These and numerous other cases may be cited, where in suits between vendor and purchaser for specific performance of contracts for the sale and purchase of land, time was not of the essence of the contract either by its express terms nor made so by the nature of the property or other circumstances. Courts of Equity have held that either party was entitled to rescind the contract if the other had neglected within a reasonable time to do some act which he had undertaken to do, and had, after receiving notice requiring performance within a reasonable time still continued in default. These were cases between vendor and purchaser, where each had assumed obligations to the other, and where each was entitled, as it is said the present plaintiffs were, to a reasonable time for doing what he had agreed. Precisely the same rule prevails in the case of unilateral contracts. In Hersey v. Giblett, 18 Beav. 174, it appeared that an agreement had been made in April, 1845, by one Hughes, to let, and one Hersey (the plaintiff) to take a house "as a yearly tenant thereof," at a rent of £36, and the agreement proceeded thus: "And should William Hersey wish for a lease of the said premises, H. Hughes will grant the same for seven, fourteen or twenty-one years, at the same rent," etc. The plaintiff, that is the tenant, filed a bill for the specific performance of this agreement for a lease. The evidence shewed that

the plaintiff remained in possession to August, 1852—over seven years—paying rent. Then, the defendant (who had purchased in 1851, with notice of the agreement) gave notice to quit. In April following the plaintiff applied to take up his lease, was refused, and thereupon filed this bill. Among other defences set up was that the plaintiff had been guilty of laches in declaring his option, and that he had not done so within a reasonable time. And counsel pointed out the importance of having the option declared promptly, because the landlord remained bound by the contract to the end of the term, while the tenant was free. The M. R. made a decree in favour of the plaintiff. He said (p. 177): "I am clearly of opinion that it was, at any time, competent to Mr. Hughes, or the defendant, to call upon the plaintiff to exercise his option, and to say, 'If you do not exercise your option, the tenancy will be at an end.'"

Moss v. Barton, 1 Eq. 474, was a similar case. It was a suit for specific performance of an agreement for the lease of a house entered into on November 30th, 1857, in which the landlord agreed, at the request of the plaintiff, to grant him a lease for five, seven, etc., years. The plaintiff never exercised his option until 1864, after the landlord had died and rent had been paid to the defendants, his executors. The M. R. made a decree in the plaintiff's favour. He says (p. 476): "Under the original document, which was an agreement for a lease, the plaintiff is entitled to call on the defendants for specific performance, unless he has done something to bar his rights, at any time afterwards. There was nothing to prevent his continuing as tenant from year to year after the three years had expired, and the right to require a lease still existed. The defendants say that they did not know of the original document; but they had notice of it by the plaintiff's application. Why did they not, at the end of 1862, call on the plaintiff to exercise his option? They allowed him to continue in occupation, though they knew that the option continued till the agreement was carried into effect or waived. The case of Hersey v. Giblet, 18 Beav. 174, shews that a person entering into an agreement of that description may execute it at any time, if no time is stipulated for within which it is to be exercised, unless the landlord calls upon him to do so and he makes default, in which case the landlord may determine the tenancy."

In Buckland v. Papillon, 1 Eq. 477, it appears that the defendant owned some offices which by an agreement dated September 27th, 1856, he agreed to let to one Bloxam for a term of three years. The memorandum also contained a provision by which the defendant agreed that he would, whenever called upon so to do by Bloxam, grant a lease of the offices to him for a period of three, seven, etc., years. Bloxam went into possession and occupied the offices until October, 1864—over eight years—without applying for a lease. On the 13th October he was declared a bankrupt, and his interest in the agreement was sold by the assignee in bankruptcy to the plaintiff, who went into possession. Soon afterwards the defendant gave him notice to quit, whereupon he filed a bill for specific performance. The defendant demurred for want of equity. The M. R. says (p. 480): "The proviso to grant a new lease at the option of the lessee forms part of the agreement of the 27th of September, 1856, which is entered into for a valuable consideration. It is therefore, in my opinion, a contract made with Bloxam by the defendant, and the performance of which Bloxam might have enforced at any time before his bankruptcy unless he had waived or abandoned it, which, as I have already stated, in my opinion he did not on the facts stated in this bill." The demurrer was overruled, and it was held that the option was property which passed to the plaintiff as purchaser from the assignee in bankruptcy, and that it was enforceable by him.

In Macbryde v. Weekes, 22 Beav. 533, the M. R. points out a distinction between the principles of law and equity as applied to cases like the present. That was also a suit for specific performance of contract by the plaintiff to grant a lease of certain mineral lands and a mining plant to the defendant. There was no time mentioned for the completion of the contract. The agreement was dated October 4th, 1855, and on the 10th of December following, the defendant gave the plaintiff notice requiring performance of the contract within a month and that in default of his doing so he, the defendant, would consider the agreement at an end. The plaintiff did not complete his part of the contract until after the month had expired, and he then filed this bill for specific performance. The M. R. says, p. 539: "The absence from the contract of any specific mention of time within which it was to be completed, which would probably be conclusive against the defendant at law,

I consider unimportant in equity." After pointing out the necessity there was for a prompt performance of the contract arising out of the nature of the property, and that in equity the purchaser, when no time is mentioned in the contract for its completion, was at liberty to fix a time by giving a reasonable notice for that purpose, the M. R. proceeds thus (p. 540): "No doubt this (the notice) would have no operation in law, the difference being very marked between law and quity, so far as regards this question; law only considering time as of the essence of the contract, when it is expressly specified, whatever may be the condition of the parties and the property, but equity considering time essential in those cases only in which injury would be inflicted upon one party by disregarding it."

See also Tilley v. Thomas, L.R. 3 Ch. 61, at p. 69.

In none of these cases, with one exception, does it seem to have been suggested that the contract was rescinded by an unreasonable delay in acting under it. Courts of Equity are not in the habit of making decrees for the enforcement of contracts which have altogether ceased to be operative. And if the defence set up in this case can be sustained there was a complete answer to the suits to which I have referred. Having more special reference to the cases in which options were under consideration, I am unable to see what distinction can be suggested between them and the present case. As I have already pointed out this is not a case of a mere offer to deliver goods which might be withdrawn at any time before acceptance. The defendant entered into this contract on the 30th May, 1902, and there was valuable consideration for it. In that respect the circumstances are the same as in Buckland v. Papillon, 1 Eq. 477, already cited, where the M. R. says that the contract can be enforced at any time unless the plaintiff waived or abandoned it. The exception to which I have referred is the case of Hersey v. Giblett, 18 Beav. 174, already cited, where laches and unreasonable delay were set up as a defence. It was not pretended that the laches or delay operated so as to determine the contract, but it was put forward that there had been such laches as would disentitle the plaintiff to the assistance of the Court. There was a delay there of some seven years, and the M. R. held, that in the absence of any demand by the defendant upon the plaintiff to exercise his option the contract was operative and specific performance would be decreed.

In Jones v. Gibbons, 8 Ex. 920, mentioned by Mr. Taylor on the argument, the plaintiff was seeking to recover damages from the defendant for non-delivery of a quantity of iron which he had agreed to deliver as required. There was a plea that the plaintiff did not, within a reasonable time after the making of the contract, request the defendant to deliver the iron, but after a reasonable time had elapsed. The plaintiff replied that so soon as he required the iron he requested the defendant to deliver it. There was a demurrer; and on the argument it was contended—just as the present defendant contends—that in contracts silent as to time the law implied a condition that they should be performed in a reasonable time, without any regard altogether to any request to do so. Alderson, B., says (p. 922): "So soon as a reasonable time elapsed, it was competent for the defendant to say, 'I desire you to ask me to deliver the iron now or never.'" Pollock, C.B., says: "The defendant reads the contract as if the condition which the law implies were part of it. No doubt, where a contract is silent as to time, the law implies that it is to be performed within a reasonable time; but there is another maxim of law, viz., that every reasonable condition is also implied; and it seems to me reasonable that the party who seeks to put an end to the contract, because the other party has not, within a reasonable time, required him to deliver the goods, should in the first instance inquire of the latter whether he means to have them." The plea was held bad by the whole Court.

Even in the case of mere offers without consideration, so soon as they are accepted they become binding contracts for value. If the party wishes to avoid liability he must withdraw his offer.

Great Northern Railway v. Witham, L. R. 9 C. P. 16; Carlill v. Carbolic Smoke Ball Co. (1893), 1 Q. B. 256; Dunham v. St. Croix Soap Mfg. Co., 34 N. B. R. 243.

Assuming that the learned Judge was correct in holding that the time which elapsed before the plaintiffs exercised their option was unnecessarily long, that would not in my opinion of itself afford an answer to this action. It may be that the defendant might in consequence of such delay have acquired a right in some way to limit his liability on the contract in point of time. But as nothing of that kind was done it is unnecessary to consider the question.

The verdict should have been entered for the plaintiffs, but as the damages were not assessed there must be a new trial.

Verdict set aside, and new trial granted.

NOVA SCOTIA.

COUNTY COURT FOR DISTRICT NO. 7. AUGUST 17TH, 1909.

DOMINION COAL COMPANY v. TAYLOR.

Landlord and Tenant—Overholding Lease—Breach of Condition—Notice—Waiver.

L. A. Lovett, for landlord.

G. S. Harrington, for tenant.

FINLAYSON, Co.C.J.:—This is an action under the Overholding Tenants' Act; all the objections taken in the McLeod case (see post, p. 201) against the papers and notices, and the same were taken in this case and overruled for the same reason.

The same defence of waiver of forfeiture by acceptance of rent was pleaded. The tenant holds under a lease dated the 27th day of April, 1909, for one month certain, and thence from month to month. His term was for two months at least ending the 26th of June: Woodfall L. & T. 17th ed., 250, 164. His case differs somewhat from the others inasmuch as the breach took place in the term in which the notice to quit was given, I mean taking it from the time contended for by the defence, the 6th of July; and had this tenant given the notice required by rule 81 of the regulations (14 days' notice to quit work or discontinue work) and the landlord had accepted rent from him on the 17th of July, I would certainly hold there was a waiver of forfeiture. But there is no evidence to shew that he has done so. The landlord says that he had no notice at the time of the payment of rent that in this case, as in all the cases, there was a breach of the proviso, and for that reason he cannot be held to have waived forfeiture, and lost his right to enter for a breach of condition. In this case the landlord waited for 14 days at least

to see if this tenant had ceased or discontinued to work or to be on his works, and when he found that he had, and there was a breach of clause F, he declared the forfeiture and gave notice to quit, as he had a right to do so. I have no doubt rent was owed in this case, which accrued due after the 6th, but there is no evidence that the landlord knew that there was a breach on the 6th, and in fact there is evidence to show that he did not; for that reason the defence of waiver must fail. The landlord is entitled to re-entry and an order of possession will be granted accordingly. As in the other cases the fact that the tenant was in possession at the date of the inquiry is sufficient evidence that he is an overholding tenant within the provisions of this Act.