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COURT OF APPEAL.

JANUARY 17TH, 1911.

*GOODALL v. CLARKE.

Damages—Sale of Unlisted Shares—Breach of Contract—Measure of Damages—Evidence as to Value—Price Actually Realised by Seller—Adoption by Person Entitled—Prices Realised by Others — Exceptional Circumstances — Assessment of Damages by Divisional Court—Appeal.

Appeal by the defendant from the order of a Divisional Court, 21 O.L.R. 614, 1 O.W.N. 1131, varying an order made by MEREDITH, C.J.C.P., upon the hearing of an appeal from the report of an Official Referee.

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

F. E. Hodgins, K.C., for the defendant.

R. S. Cassels, K.C., for the plaintiff.

MOSS, C.J.O.:—The whole question is as to what sum the defendant should pay the plaintiff as damages for breach of the contract the defendant made with the plaintiff for the sale to him of 20,000 shares in the capital stock of the Lawson Mine Limited. . . .

The circumstances in which the defendant committed his breach of contract were unusual. He had bound himself to the plaintiff to deliver or procure to be delivered to him 20,000 shares out of a much larger block of shares, the certificate for which had been issued to the defendant. The certificate was in the custody of the Court pending an appeal to the Judicial Committee of the Privy Council. The defendant, having been advised that the appeal could not succeed, entered into an agreement for the sale of his holding of shares, including the 20,000

*This case will be reported in the Ontario Law Reports.

to which the plaintiff was entitled. He then, without disclosing to the plaintiff what he had done, endeavoured to persuade the latter that they were worth only 25 cents a share, and sought to induce him to accept that price, and offered to pay him the amount. But the plaintiff took the position that he did not want the money—he wanted his shares. Failing in this, the defendant, still without informing the plaintiff of the sale, wrote him insisting that the transaction between them was only a loan, and sending him a cheque for $5,100 as in full of the plaintiff's claim.

A few days afterwards, the plaintiff, having in the meantime become aware of the defendant's purpose to transfer the certificate of the shares in pursuance of his agreement to that effect, commenced this action and obtained an interim injunction restraining the defendant . . . from alienating, selling, disposin of, or incumbering the shares or the certificate. Following this came an application to dissolve the injunction, upon which an order was made, by which, after reciting that it appeared from statements made by counsel that prior to the granting of the injunction the defendant had sold and transferred the shares of stock, or had purported so to do, and was desirous of carrying out the said sale, and that counsel for the defendant had in his hands $10,000 of the purchase-money, and counsel for the plaintiff consenting that, upon payment into Court by the defendant to the credit of this action of the sum of $5,000, to stand as a security to satisfy the plaintiff's claim in the event of his establishing his claim in this action, the injunction be dissolved, it was ordered that the sum of $5,000 be paid into Court by the defendant's counsel to stand as security as above mentioned, and that thereupon the injunction be dissolved. The money was paid into Court, and the defendant was freed from the injunction. But he was not freed from his contract nor the consequences of a breach of it.

The subject-matter of the contract being of the nature and character it was in this particular case, it was perhaps possible that relief in the form of specific performance might have been afforded to the plaintiff; but in all probability the action would have terminated, as it eventually did, in a judgment for damages for breach of the contract. In that view, and the plaintiff having in hand the $5,100 which the defendant had sent him, his counsel appears to have obtained favourable, though not unfair, terms for agreeing to the injunction being dissolved.

It was argued for the defendant that what took place amounted to an adoption by the plaintiff of the sale and that he was bound by the price obtained.

But the plaintiff was not consenting to anything but the dissolution of the injunction. By his action he was seeking a declaration that he was entitled to receive 20,000 shares from the defendant and an injunction pending the determination of that question. The defendant or his advisers desired the immediate removal of the injunction. The plaintiff's counsel resisted it except on terms which, with the $5,100 already in hand, would secure the plaintiff against any possible loss on the contract. The plaintiff was not concerned whether the defendant ever afterwards carried out the agreement he had made or whether he ever obtained payment from the purchaser. What the plaintiff had desired, as his evidence plainly shews, was to be put in a position to do his own dealing wtih his shares, to negotiate by himself for their sale to others, and to make the best bargain open to him and obtain the most he could get for them. His just rights were to be placed in this position. He had fully performed his part of the agreement, and the defendant had received the consideration upon which it was founded.

But the plaintiff was willing to forgo these rights provided he was placed substantially in the same position as if the shares had been handed over to him. There is nothing in what he did that can reasonably be construed into an acceptance of the sale made by the defendant or any recognition of the defendant's acts in relation to it. The sale should not be disregarded as an element in assisting to ascertain what should be allowed as damages, but no greater weight should be attached to it.

If this be the true position, the fact that by the defendant's breach of contract the plaintiff was deprived of his right to deal with these particular shares and to make his own bargain or bargains with respect to them, forms a most important factor in considering the damages to be allowed to him. All the tribunals concur in holding that the shares had no market value in the sense in which that term is ordinarily used. Their value to a holder depended almost entirely on the circumstances under which he was able to negotiate for their sale, and the manner in which he could affect the business sense of the only persons who apparently were seeking to purchase them. They were not wishing to sell what they had, but were desirous of purchasing any that had not come to their hands. There was no fixed or definite price. Each holder approached by the proposing purchasers was left to make such bargain as he could obtain. Some holders failed to obtain as much per share for theirs as the defendant did for his. On the other hand, other holders succeeded in obtaining a considerably higher price than the defendant did. It might not be fair to the defendant to hold him, as the Official

Referee did, to the highest price obtained. But, on the other hand, it would not be fair to the plaintiff to hold him to what the defendant was willing to sell for. The evidence shews that at least one holder was willing to take what would have amounted to about 31 cents per share of his holding, but, owing to the steadfastness of his co-owner, they ultimately obtained what amounted to 40 cents per share of their holdings.

Matters such as these which appear upon the evidence are not to be disregarded in dealing with shares occupying the exceptional position which these did at the time when the plaintiff was deprived of his right to deal with them. Looking at all the circumstances, the Divisional Court was of opinion that the price accepted by the defendant did not fix the selling value, and that the plaintiff was entitled to be allowed more than the price at which the defendant was willing to sell.

It may be difficult to ascertain the motives actuating him when he sold. It is not essential to inquire into them. In making the sale he was influenced by considerations in which neither the plaintiff nor his interests held part. What the plaintiff could or would have done was not taken into account.

It cannot be said that the sale by the defendant fixed in any degree the market value at 26 cents per share, any more than the sale by Millar and Bedell fixed the value at 40 cents per share. The damages must be got at as well as possible upon the whole evidence.

The matter being at large upon the evidence, the disposition of the damages by the Divisional Court cannot be said to be not warranted by the evidence. It seems fair and reasonable; certainly it is not so unfair or unreasonable as to justify an interference with it.

The appeal ought, therefore, to be dismissed.

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

MEREDITH, J.A., dissented, being of opinion, for reasons stated in writing, that the order of MEREDITH, C.J., should be restored.

JANUARY 17TH, 1911.

DODGE v. YORK FIRE INSURANCE CO.

Fire Insurance—Builder's Risk—Building in "Course of Construction"—"Vacant or Unoccupied"—Payment of Higher Premium — Knowledge — Estoppel — Insurable Interest — Questions of Fact—Reversal of Finding of Trial Judge.

Appeal by the plaintiff from the judgment of FALCONBRIDGE, C.J.K.B., 1 O.W.N. 1098, dismissing the action.

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

W. J. McWhinney, K.C., and E. P. Brown, for the plaintiff.

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

MACLAREN, J.A.:—The action was brought on an insurance policy for $2,000 issued by the defendants in favour of the plaintiff, as second and third mortgagee, on certain buildings, etc., at Sturgeon Falls, which were being erected for a smelter by the North Ontario Reduction and Refining Company.

The principal grounds of defence were: 1. That the buildings were not in course of construction, as represented by the plaintiff, but were really abandoned; (2) that the insurance was void under the 4th addition to the statutory conditions, which provided that, "if any building herein described be or become vacant or unoccupied, and so remain for the space of fifteen days, or, being a manufactory, shall cease to be operated for that length of time, this policy shall be void;" and (3) that the defendant had no insurable interest in the property, it not being worth more than the insurance in favour of the first mortgage.

The trial Judge gave effect to the first of these grounds and dismissed the plaintiff's action.

In effecting the insurance in question the plaintiff acted through A. M. Thompson . . . and the defendants through J. C. Wilgar, their assistant manager. . . . Negotiations . . . were begun by Thompson speaking to Wilgar over the telephone on the 24th June, 1909. He stated that the property was the same as that covered by a policy No. 035751, issued by the defendants in favour of the North Ontario Reduction and Refining Company on the 9th March, 1909; told him of the other insurance on the property, and that the plaintiff wanted $2,000 insurance on his interests as second and third mortgagee; that, on account of the watchman having been withdrawn since the issue of the defendant's previous policy, the rate had been

raised to three per cent.; that, on account of financial difficulties, the company had not been able to complete the buildings and plant; and that the plaintiff hoped before the expiry of the policy to have control of the premises and to complete and operate the smelter, when the insurance would be adjusted. The following day, Thompson called at the defendants' office and delivered to Wilgar a slip containg a detailed description of the property and particulars. This referred to the property as "buildings and additions now in course of construction," "machinery," etc., to be occupied when completed as a customs smelter, and contained a warranty by the plaintiff "that the premises will not go into operation during the currency of this insurance." The defendants issued a policy, dated the 25th, with the slip attached, to expire on the 2nd November, 1909. The property was burnt on the morning of the 1st November. . . . The buildings had not been completed nor the machinery and plant installed, on account of the financial difficulties of the company; the last of the workmen left at the end of February, and the watchman on the 18th May, when he fastened the doors and boarded up the lower windows, although he continued to live near-by and keep an eye on the property; the first mortgagee had taken steps to foreclose, and the plaintiff was making arrangements to acquire and complete the smelter, which were interrupted and put an end to by the fire.

Whether these buildings were properly described as being "in course of construction," as contended by the plaintiff, or whether they were really abandoned or vacant buildings, within the meaning of the 4th addition to the statutory conditions, as contended by the defendants, is really a question of fact, to be determined by the evidence and what passed between and was within the knowledge of the contracting parties. Recourse should be had to all the surrounding circumstances which may throw light upon the actual situation.

It is admitted that the work of constructing these buildings was not going on either at the time of the insurance or up to the time of the fire. But there are circumstances in which the description would be quite accurate, although no work was going on at the time. In most buildings there are intervals, longer or shorter, between the operations of the different trades. . . . Again, it is quite common in this climate that construction is suspended during the whole winter. . . .

Here we have buildings begun but not completed. During the early part of the period in question the company intended to complete them; during the latter part the plaintiff was making arrangements to do so. The defendants, having previously had insurance on them, issued a policy to the company on the

8th March, 1909, when the same language was used as in the present case, and the circumstances were the same, except that there was then a watchman. They were correctly informed on the 24th June of the condition of the premises and that the watchman had been withdrawn; and, in consequence of this change, they charged and were paid a higher premium. The time mentioned to them as that at which the plaintiff hoped to get the control of the premises and resume active construction and complete and operate the smelter had not arrived at the time of the fire.

In the circumstances, I am of opinion that the defendants accepted the risk on the understanding that the words in the application and the policy correctly described the premises as they stood; and the defendants, having accepted the higher premium with full knowledge and on this understanding, are now estopped from asserting the contrary.

It is also to be noted that the plaintiff gave a warranty that the smelter was not to go into operation during the currency of the insurance.

I do not think that the insured premises were or became "vacant or unoccupied," within the meaning of the 4th addition above quoted. These words were clearly intended to apply to buildings that were finished or occupied or ready for occupation.

If the claim of the defendants is well founded, then the insurance never attached, as there would be no such buildings on the property of the company as those described in the policy. And yet it may be noted that the defendants have made no offer of a return of the premium.

On the question of value and insurable interest, it is proved that the buildings, machinery, etc., cost about $60,000, and there is evidence that they were worth at the time of the fire from $40,000 to $50,000. It is true that the president of the company said he would not give more for them than $25,000 or $30,000; but he does not say that they were not worth much more. The claim of the first mortgagee was only about $29,000, so that there is no evidence to sustain this . . . defence.

On the whole, I am obliged to come to the conclusion that the learned Chief Justice gave too narrow a construction to the words of the application and policy, and did not give sufficient weight to some of the proved facts and circumstances that shew what was within the knowledge and in the minds of the parties.

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

MEREDITH, J.A., dissented, agreeing with the view of the trial Judge, and stating reasons in writing.

JANUARY 17TH, 1911.

*RE DALE AND TOWNSHIP OF BLANCHARD.

Municipal Corporations—Money By-law—Voting on—Voters' List—Finality—Voters' Lists Act, sec. 24—List Prepared by Clerk from Assessment Roll—Persons Entitled to Vote—Freeholders—Leaseholders—Municipal Act, 1903, *secs.* 348, 349, 353, 354—*Unqualified Voters—Persons in Possession of Land under Agreements of Sale—Inquiry into Right to Vote of Persons Named on List—Motion to Quash By-law.*

Appeal by the township corporation from the order of a Divisional Court, 21 O.L.R. 497, 1 O.W.N. 1018, reversing the order of MULOCK, C.J.Ex.D., 1 O.W.N. 729, upon the application of William Dale, quashing a money by-law of the township granting aid to the St. Mary's and Western Ontario Railway Company.

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

C. A. Moss, for the appellants.

C. C. Robinson, for the respondent.

GARROW, J.A.:—What appears to me to be the main point of difference between the opposing conclusions arrived at by Mulock, C.J., and the Divisional Court, was with regard to the bearing upon the questions involved of sec. 24 of the Ontario Voters' Lists Act, 7 Edw. VII. ch. 4. Mulock, C.J., held that it applied to voting on such by-laws as the one in question, and was conclusive of the qualification of the voter whose name appeared upon the voters' list. The Divisional Court was of an opposite opinion, with which I agree.

In the Voters' Lists Act, sec. 2, sub-sec. 1, defines "voter" as meaning a person entitled to be a voter or to be named in the voters' list as qualified to be a voter either at an election of a member of the Assembly or at a municipal election. And sec. 24 provides that upon a scrutiny under the Ontario Election Act or the Municipal Act the certified list of voters shall be final and conclusive evidence that all persons named therein and no others were qualified to vote *at any election* at which such list was used or was the proper list to be used, subject to the exceptions set forth in sub-secs. 1, 2, and 3, which do not

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here concern us. But it is clear that the Act deals only with the case of an election to the Assembly or a municipal election, and to a scrutiny following upon such an election.

This, however, is not the case of an election or of a scrutiny following upon an election, so that I quite fail to see how sec. 24 of the Voters' Lists Act can or ought to have any application. Being on the voters' list is only a part, and indeed a minor part, of the necessary qualification prescribed by the Consolidated Municipal Act, 1903, secs. 353, 354, for the case of voters upon a by-law for contracting a debt—sometimes called a money by-law. The list upon which the vote is taken is not the voters' list as in an ordinary election, but a special list, to be prepared by the proper municipal officer, of those persons who appear by the then last revised assessment roll to be entitled to vote. And the persons entitled to vote are, as prescribed by sec. 353, ratepayers who *at the time of the tender of the vote* are freeholders of real property within the municipality of sufficient value to entitle them to vote at a municipal election, and who are rated on the last revised assessment roll as such freeholders, and named or intended to be named in the voters' list. Section 354 prescribes the qualification of leaseholders, a class not now in question, for none of the questioned voters are in that class.

The object of the vote to be taken is simply to obtain an expression of opinion for or against the creation of the proposed new burden upon the taxpayers of the municipality, and has little in common with an ordinary election, except that what may be called "the election machinery" is, for convenience, used to collect it: see sec. 351, which regulates the procedure and matters incidental thereto.

Section 72 of the Assessment Act, R.S.O. 1897 ch. 224, makes the assessment roll, as finally passed and certified, valid and binding upon all parties concerned except as afterwards amended on appeal to the County Court Judge. This, however, having regard to the nature and object of the roll as the foundation of taxation procedure, cannot reasonably be held to extend to give conclusively to a person improperly rated upon it as a freeholder, who is not in fact a freeholder, a status as such to affect by his vote the property of others. Nothing in the Act gives to the list of voters prepared by the clerk the character of conclusiveness; indeed, the language of secs. 353, 354, in prescribing not only the nature of the original qualification, but that such qualification shall continue down to the actual tender of the vote, indicates the contrary.

Section 372 confers the same powers upon a County Court Judge in the case of a by-law as of a municipal election. And

in the case of the latter as well as of the former, in a scrutiny before such a Judge, he would, no doubt, be bound by the terms of sec. 24 of the Voters' Lists Act, which, after all, does not seem to lay down an entirely new rule: see The Queen ex rel. St. Louis v. Reaume, 26 O.R. 460, 462; Regina ex rel. McKenzie v. Martin, 28 O.R. 523; In re Armour and Township of Onondaga, 14 O.L.R. 606—all decided upon facts arising before the Voters' Lists Act was passed.

This, however, is not a case of a scrutiny, or in the nature of a scrutiny, but a proceeding, under sec. 378 of the Municipal Act, to quash the by-law in question, upon the ground, among others, that it was not carried by the votes of a majority of those entitled to vote for it. And, the defence of a statutory estoppel failing, there seems to be nothing in the way of the Court exercising its long-unchallenged jurisdiction to inquire into questions of illegality, such as this, which are not apparent on the face of the by-law: see Re Fenton v. County of Simcoe, 10 O.R. 27; and per Gwynne, J., in Edwin v. Townsend, 21 C.P. 330, at p. 334.

I also agree with the reasoning and the conclusion expressed by Meredith, C.J., delivering the judgment of the Divisional Court, as to the lack of qualification of the five voters whom he names. Sawers v. City of Toronto, 4 O.L.R. 624, cited by the appellants, in which In re Flatt and United Counties of Prescott and Russell, 18 A.R. 1, was distinguished, presented a wholly different question.

The appeal should, in my opinion, be dismissed with costs.

MOSS, C.J.O., MACLAREN, MEREDITH, and MAGEE, JJ.A., concurred; MEREDITH, J.A., stating reasons in writing.

JANUARY 17TH, 1911.

SEAMAN v. CANADIAN STEWART CO.

Mechanics' Liens—Assignment of Part of Claim of Lien-holder—Rights of Assignee—Enforcement of Lien—Contract—Validity—Recovery According to Terms of—Payment into Court of Amount Claimed to Free Lands—Proceeding to Enforce Lien—Scope of—Enlargement by Consent of Parties—Quantum Meruit—Damages—Work Taken out of Lien-holder's Hands—Status of Referee—Conflict of Interests—Findings of Trial Judge—Reversal on Appeal—Costs.

Appeal by the defendants from the judgment of the Judge of the District Court of Thunder Bay in a proceeding to enforce the plaintiffs' lien under the Mechanics' and Wage Earners' Lien Act. The District Court Judge gave judgment in favour of the plaintiffs for $19,756.25, with interest and costs.

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

J. Bicknell, K.C., J. E. Swinburne, and M. Lockhart Gordon, for the defendants.

G. F. Shepley, K.C., and H. L. Drayton, K.C., for the plaintiffs.

MOSS, C.J.O.:— . . . A perusal of the claim of lien registered in the registry office seems to present a comparatively simple case of a claim for work done and materials furnished by the plaintiffs for the defendants in and about the construction by the latter of a grain elevator at Fort William. But, as it was presented at the trial, it developed into an action involving a number of complicated and difficult questions of fact and law, and resulted in a judgment setting aside or declaring not binding a contract between the plaintiffs and defendants, and awarding, among other allowances, considerable sums for what can only be treated as in the nature of damages against the latter; for all of which it is declared that the plaintiffs are entitled to a lien on the lands of the proprietor, or—which is the same thing—upon a sum of money paid into Court in lieu of the lien, under the provisions of the Mechanics' Lien Act. . . .

The Grand Trunk Pacific Railway Company, which apparently needs grain elevators at certain convenient points as part of its system, and had, among other points, decided upon the location of a grain elevator at the town of Fort William, took steps, through the Grand Trunk Pacific Terminal Elevator Company, for carrying out its design. The latter company, having acquired the lands needed for the location of the elevator at Fort William, the defendants entered into a contract with them to erect on the property a grain elevator of a specified storage capacity . . . and for the due execution of the work to furnish all the labour, material, and plant. . . . Thereafter the defendants and the plaintiffs entered into a contract in writing under seal, bearing date the 21st November, 1908, whereby . . . it was agreed that the plaintiffs should do all the excavating for the elevator, perform all the labour, supply all the material . . . and everything required for the purpose of the rapid performance of the work according to the terms and

conditions and within the time thereinafter stipulated, and that the work should be done according to plans and specifications governing the work, and applying thereto, set forth in the contract with the Grand Trunk Pacific Terminal Elevator Company, to the satisfaction of the latter's engineer and according to his directions and the stakes and marks furnished and set up by him. Then follow conditions and stipulations, none of which need be referred to at present, except the stipulations that the work should be commenced immediately and be begun at the south side by an excavation across the whole width of the south side of a strip 70 feet wide, which strip was to be completed within three weeks from the date of the agreement, and that the whole work should be fully completed within 60 days from the date of the agreement; and a provision appointing one James Whalen sole referee between the defendants and plaintiffs as to the progress of the work . . . with the right to the referee, should he deem it necessary in order to have the work done within the times thereinbefore specified, to take over the work absolutely from the plaintiffs, on giving them three days' notice in writing, and that the referee's . . . determination should, in every case therein provided for, be final.

The plaintiffs entered upon the work, and in the course thereof procured advances from the Union Bank of Canada to the extent of $5,371.79. On the 16th January the work was taken out of the plaintiffs' hands, and was thereafter continued to completion by and under the direction of Whalen. By an instrument dated the 10th February, 1909, signed and sealed by the plaintiffs, and setting forth that they claimed to be entitled to $21,834.87 from the defendants in respect of work done and materials supplied in the excavation, for which they claimed . . . a lien under the . . . Act, and were indebted to the bank for the advances, and were desirous of granting, assigning, and transferring to the bank the sum of $5,371.79 by way of a first charge out of the said money . . . the plaintiffs purported to . . . assign and set over unto the bank the . . . $5,371.79, "out of and by way of first charge on any moneys now due or which may or shall hereafter accrue due to us as aforesaid, together with all our right title and interest to a lien therefor under the Mechanics' and Wage Earners' Lien Act on the lands of the Grand Trunk Pacific Railway Company aforesaid. This is given and accepted as collateral security only."

Notice of this instrument was given, not only to the defendants, but also to the Grand Trunk Pacific Railway Company, the Grand Trunk Pacific Terminal Railway Elevator Company, and James Whalen. . . .

On the 12th February, 1909, the bank caused a claim of lien to be registered . . . against the lands and the interests therein of the railway and elevator companies, and on the 14th April, 1909, commenced proceedings under the Act . . . claiming a lien on the lands of the railway and elevator companies and judgment for payment by the Canadian Stewart Company.

On the 11th February, 1909, the plaintiffs commenced this proceeding against the . . . Canadian Stewart Company and the railway and elevator companies, wherein claim was made for $21,834.87, and for a lien for that amount and for judgment against the defendants the Canadian Stewart Company for that amount, and that, in default of payment . . . the lands might be sold. On the following day the plaintiffs caused a claim of lien to be registered . . . against the lands for the whole sum of $21,834.87.

Neither in the statement of claim . . . nor in the registered claim of lien was any reference made to the assignment to the Union Bank, nor did either of them contain any offer to deduct or make any deduction in respect of the . . . $5,371.79. . . .

It is more than doubtful whether there can be an assignment of a part of a claim so as to entitle the assignee to maintain an action for the recovery of such part from the debtor, under sec. 58 (5) of the Judicature Act. There is no binding authority to that effect, and the better opinion seems opposed to such a conclusion. . . .

[Forster v. Baker, [1910] 2 K.B. 636, preferred to Skipper v. Holloway, ib. 630.]

But to extend the right of the holder of a part assignment of a claim, the nature of which entitles the assignor to assert a lien under the Mechanics' Lien Act so as to enable the assignee to register a lien and proceed under the Act, is a much further step. It is true that sec. 26 of the Act declares that the right of a lien-holder may be assigned. But what is referred to is obviously an absolute assignment of what the lien-holder has, not a part or parcel of it. . . .

Proceedings were necessary in order to free the lands. . . . Upon the 17th April, 1909, an order was made by the District Court Judge, in pursuance of which the defendants deposited the sum of $24,000 in a chartered bank to the credit of this action and of the action of the Union Bank . . ., and thereupon, by another order of the same date, it was ordered that the claims of the plaintiffs and the Union Bank to a lien upon the estate of the railway and elevator companies for . . .

$21,834.87 and $5,371.79, respectively, be vacated and discharged. The money being in this manner in the custody of the Court, the actions were on the 1st May, 1909, dismissed by consent as against the railway and elevator companies without costs, but without prejudice to the actions being proceeded with, tried, and disposed of, pursuant to the Mechanics' Lien Act, as against the remaining defendants, the Canadian Stewart Co. . .

But on the 5th May, 1909, the plaintiffs amended their statement of claim in a manner and to such a degree as to widen the scope and to a large extent change the whole complexion of the action. . . .

The learned District Court Judge came to the conclusion that no contract in writing ever existed between the plaintiffs and defendants; that the plaintiffs were not in default in any respect, and were entitled to be paid for their work upon a quantum meruit; and . . . he found them to be entitled to be paid by the defendants the sum of $20,265.04, with costs, and adjudged that the plaintiffs and the Union Bank were entitled to a lien upon the lands and premises in question, and upon the sum of $24,000 lodged in Court, for the amounts of their respective judgment debts and costs, and entitled to receive payment of the same out of the same; and the defendants' counterclaim was dismissed with costs. . . .

The first question is, whether the finding that there was never a contract in writing is correct. It is not disputed that the agreement of the 21st November, 1908, was duly executed by the parties. Upon its face it was a valid contract and binding upon the parties. But the learned Judge was of opinion that it did not express all the terms of the agreement between them, that their minds were not agreed upon the same thing and in the same sense, and that there was no contract. This conclusion does not appear to be supported by the evidence. . . . The contract must be considered as being an effectual one, binding all parties from the time of its execution. The plaintiffs were, therefore, bound to the execution of the work according to its terms and conditions, unless relieved from it by matters subsequently occurring. . . . The plaintiffs' attitude and conduct up to the time when they were notified that the work was to be taken out of their hands shew plainly that they considered the contract as still on foot, and that they were working under its terms. The remarks of Robinson, C.J., in Kesteven v. Gooderham, 20 U.C.R. 500, at p. 505, are instructive on this point.

If in respect of any of these matters the defendants had been guilty of deceit in inducing the plaintiffs to enter into a contract which, but for fraudulent representations made by the

defendants or any person for whose conduct and representations they were responsible, the plaintiffs would not have entered into, their remedy would be an action for damages, as in the case of S. Pearson and Sons v. Dublin, [1908] A.C. 351. But personal fraud or deceit is expressly disclaimed by the plaintiffs. Here the plaintiffs, if damnified at all, have been so as the result of the work being taken out of their hands by Whalen. But this furnishes no reason for their being allowed any greater price than the contract-price for what they had done under it—whatever other rights it may confer. . . . When the work was taken out of their hands on the 16th January, they had taken out not more than about 42 per cent. of the quantity to be excavated. . . . There can be no question that the plaintiffs had fallen far behind in performance of their contract. There appears to have been a lack of organisation and of the best kind of appliances and implements proper to be employed in the kind of work that this was. . . . Apart altogether from the provision in the contract, the defendants were but adopting a reasonable measure of self-protection in taking steps to secure the completion of the work within a reasonable time. . . . And, unless Whalen had become disqualified to act as referee and to exercise the powers vested in him by the contract, by reason of what had occurred between him and the defendants subsequent to his appointment, it cannot be said that he acted unreasonably in taking the work off the plaintiffs' hands, in the circumstances. . . . Whalen became interested in a way that placed him in a position in which his interests might prevent him from acting in an independent and unbiassed manner, and this was not disclosed to the plaintiffs. He held what in law may be said to be conflicting interests, and without the plaintiffs' assent was not qualified to perform the duties of referee.

The defendants are not entitled to rely upon his decision and action as conclusive against the plaintiffs and as entitling the defendants to claim all the benefits and advantages that an exercise of these powers by an independent referee would confer. The taking of the work out of the plaintiffs' hands must be treated as the defendants' act, necessary to be justified by them as reasonable and proper in view of all the circumstances. Two courses were open to them: one to permit the plaintiffs to proceed with the work under their contract; the other to take it from them and complete it themselves. In the latter case the plaintiffs would be entitled to recover damages, if they could shew them, for loss which they properly suffered by reason of being improperly deprived of the contract. But

obviously such damages could not be properly claimed in a proceeding under the Mechanics' Lien Act, nor could they, if found, be a lien on the lands.

The parties, however, seem to have tacitly agreed that the whole matter and all questions should be dealt with and disposed of in this proceeding. And, treating this part of the case as on a claim for damages, the evidence shews plainly that the plaintiffs could not possibly have completed the work after the 16th January, 1909, in such a way as to have made a profit out of it. . . . The cost of completing amounted to $27,000. Adding to this what the plaintiffs say they had expended up to the 16th January, 1909, viz., $18,423, the total cost of the work was about $45,423; while, taking 51,000 cubic yards at 42½ cents per cubic yard, the whole sum payable to the plaintiffs would be about $24,000. Even if there be added to this sum an allowance of $8,000 . . . for change of site, and all the allowances made by the learned Judge . . . making a grand total of $34,407.22, there is still a large margin of loss which the plaintiffs would have made. . . . It is not to be supposed that all the allowance are properly chargeable against the defendants. . . . The figures are merely used to shew the impossibility of any allowance to the plaintiffs for damages for being deprived of their contract. And in any case they would be fairly offset by the damages which the defendants incurred by reason of the delay in completing the work. The defendants would be entitled to claim damages for this delay, even though the work had remained in the plaintiffs' hands to completion.

Upon the whole, the only claim which the plaintiffs seem to have fairly established is to be paid for the amount of yardage taken out by them, at the contract-price. This yardage, as shewn by the evidence and found by the learned Judge, amounts to 19,423.8 cubic yards, which at 42½ cents per yard amounts to $9,028.85. And to this sum the judgment should be reduced. The Union Bank's claim may be dealt with by providing for its deduction from the sum awarded the plaintiffs.

There should be no costs to the Union Bank of its proceedings up to and inclusive of the trial, except a fee to counsel as upon a watching brief. The plaintiffs should be allowed their costs, save such as were incurred in respect of claims upon which they have failed.

The defendants are entitled to the costs of the appeal, and they should be set off against the plaintiffs' costs.

JANUARY 17TH, 1911.

*ROSS v. TOWNSHIP OF LONDON.

Public Health Act—Employment of Physician by Local Board of Health — Remuneration — Quantum Meruit — Action against Members of Local Board—Parties—Municipal Corporation—Local Board.

Appeal by the plaintiff from the judgment of MEREDITH, C.J.C.P., 20 O.L.R. 578, 1 O.W.N. 612, dismissing the action.

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

E. F. B. Johnston, K.C., and J. M. McEvoy, for the plaintiff.

T. G. Meredith, K.C., for the defendants.

GARROW, J.A.:—The action was for a mandatory injunction directing the defendants other than the Corporation of the Township of London, who are or were members of a Local Board of Health, to issue an order for $2,300 in favour of the plaintiff as payment for alleged medical services rendered by him in a smallpox outbreak in the township of London, and directing the township corporation to pay the same.

The Board did issue an order for $350, which the plaintiff declined to receive as in full of his demand.

The plaintiff claims the larger sum under an alleged agreement made by him with the Board before the services began. The defendants deny that such an agreement was made; and the learned Chief Justice so found, upon evidence at least to some extent conflicting, if not actually involving the question of credibility; and with his finding upon this question of fact we cannot, or at least ought not, in my opinion, to interfere.

That the plaintiff was employed and that he did render services, no one disputes. And, failing to establish an express contract, he must, if he is entitled to recover, do so upon a quantum meruit. But, unfortunately for the plaintiff, the Local Board of Health is not now upon the record, and I agree with the learned Chief Justice that it would be quite improper to make any order, in the circumstances, against the individual members who are defendants. One of them, the defendant Kennedy, is even, it said, dead; and every year a change of

*This case will be reported in the Ontario Law Reports.

some kind takes place, or at least may take place, under the provisions of the statute by a member retiring: R.S.O. 1897 ch. 248, sec. 48.

The Board is a quasi-corporation, and as such may be sued —sec. 62 seems to imply as much. See also Manchester, etc., R.W. Co. v. Worksop Board of Health, 23 Beav. 198. And, indeed, the plaintiff's only proper remedy, if he has one, must, it seems to me, be against the Board itself, for it was by the Board, and not by any individuals, that he was employed. The individual members are, it is true, all made by the statute health officers (see sec. 58), and as such are given certain individual powers. But no such powers would, I think, extend to giving an order under sec. 57 (now superseded by 9 Edw. VII. ch. 85, sec. 2) in settlement of a liability created, as this was, by the Board itself.

Then as to the township corporation, I entirely agree with what the learned Chief Justice has said. No relief can or ought to be granted on this record against it. It is in no default. It has not refused to pay or to permit the payment by its treasurer of the order for $350.

What I have said seems to me to be sufficient to dispose of the action against the only defendants now before us; and I therefore do not consider it desirable or necessary to express any opinion upon the application of sec. 93. . . .

I would, for the reasons I have given, dismiss the appeal with costs; such dismissal to be, of course, without prejudice to the plaintiff following such other remedy as he may be advised. Let us hope, however, that the parties may now be wise enough to come to a settlement, for which, as a basis, they have in the judgment of the learned Chief Justice what seems a very reasonable suggestion, based upon the evidence, that $25 a visit would be fair and just.

MOSS, C.J.O., MACLAREN, MEREDITH, and MAGEE, JJ.A., concurred; MEREDITH, J.A., giving reasons in writing.

MOSS, C.J.O., IN CHAMBERS. JANUARY 13TH, 1911.

BOLTON v. GILMOUR DOOR CO.

Appeal—Court of Appeal—Extension of Time for Appealing—Long Delay—Discretion—Refusal of Motion—Costs.

Motion by the plaintiff in person for an order extending the time for appealing from a judgment of a Divisional Court

and giving leave to appeal, notwithstanding the lapse of time, and dispensing with the printing of appeal books.

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

Moss, C.J.O.:—I have read all the papers submitted, including the proceedings at the trial, not, of course, for the purpose of determining the merits, but with a view to better understanding the broad substantial issues and the manner in which they were dealt with at the trial and in the judgment then pronounced.

Upon the facts and under the circumstances as they now appear, I am unable to see my way to allowing this application.

The action was commenced on the 18th June, 1906. It was not brought to trial until March, 1909, when judgment was given against the plaintiff. After several changes of solicitor and various futile proceedings towards an appeal, leave to appeal to a Divisional Court, notwithstanding the lapse of time, was given in January, 1910. The appeal was heard by a Divisional Court in April, 1910, and on the 12th of that month judgment was pronounced dismissing it.

Nothing more appears to have been done until the service of notice of this application returnable on the 10th January, 1911.

The plaintiff attributes the delay to his former solicitors, but the affidavit of one of them, put in by the plaintiff, seems to shew that he was made fully aware that they would not undertake to attend to it. They were not then the plaintiff's solicitors, there having been a change. I am unable to say that the delay has been satisfactorily explained or accounted for. The position of the defendants must be considered as well as that of the plaintiff. Two sittings of this Court have taken place since the judgment of the Divisional Court, and, if this motion were allowed, the appeal could not be heard until the April sittings of the Court. The defendants have not been in any manner responsible for any of the delays that have taken place, and they ought not to be prejudiced by further prolongation of the litigation.

The plaintiff says, and no doubt truly, that the case is an important one to him. He was represented by able counsel at the trial and before the Divisional Court, but, as far as appears, the opinion of all the Judges was against him. The Divisional Court gave no costs against the plaintiff, but not because of any misconduct or wrong-doing on the part of the defendants.

Under the circumstances, it is not a case for exercising a

discretion in such manner as to expose the defendants to further litigation, delay, and expense.

The motion is refused, but, having regard to the plaintiff's circumstances, I trust that costs will not be asked against him.

HIGH COURT OF JUSTICE.

BOYD, C. JANUARY 12TH, 1911.

PARKES v. SANDERSON.

Vendor and Purchaser—Contract for Sale of Land—Failure of Title—Time—Objection Made before Title Acquired by Vendor—"Completion"—Repudiation—Return of Deposit—Counterclaim—Specific Performance—Costs—Husband and Wife Severing in Defence.

Action to recover $200, the amount paid by the plaintiff as a deposit upon an agreement for the sale to him of a certain lot upon Dundonald street, in the city of Toronto.

A. R. Cochrane, for the plaintiff.
A. W. Burk, for the defendant Thomas Sanderson.
R. J. Gibson, for the defendant Isabella Sanderson.

BOYD, C.:—On the 18th May the plaintiff agreed to purchase lot 28 on Dundonald street from the defendant Thomas Sanderson, and paid a deposit of $200. By the terms of the plaintiff's offer, which was accepted by the defendant, the purchaser was to be allowed five days to examine the title; all objections to title to be made within that time; any valid objection which the vendor is unable or unwilling to remove should in effect forfeit the agreement. The sale was to be completed on or before the 25th May, on which date possession was to be given to the purchaser. Time to be of the essence of the offer. Objection was made within the time that the register shewed no title in the vendor, and on the facts it appears that the wife of the vendor (and his co-defendant) was then the owner of lot 30 on Dundonald street. Lots 28 and 30, which adjoin each other, were both owned by one Reynolds, and by common mistake the general description in the conveyance to Mrs. Sanderson from Reynolds applied to lot 30, and not to 28, which was the lot that Mrs. Sanderson intended to obtain from Reynolds.

The completion of the sale was blocked by the discovery of this error; the vendor procured a conveyance from Mrs. Sander-

son, his wife, to the plaintiff, which was objected to, on the ground that its description applied only to lot 30, which he had not in view, and, as he had specifically agreed that he was to have the sale completed and possession delivered of lot 28 by the 25th May, he declared the deal off and asked for a return of the deposit.

The vendor offered to let him take possession as a tenant until a proper deed could be obtained from the registered owner to Mrs. Sanderson, which he said could be procured. Such a conveyance has since been obtained from Reynolds, who was out of the country, which was executed on the 1st July and registered on the 25th July, 1910. There is no evidence in writing to shew that such a document could be obtained when the plaintiff repudiated the contract, and at that time the title stood in Reynolds, and not in Mrs. Sanderson or her husband (the vendor).

The "time-clause" controls all the terms of the offer or contract after acceptance: Foster v. Anderson, 16 O.L.R. 565, affirmed by the Supreme Court, 42 S.C.R. 251. The "title" was not accepted; in fact, there was no "title" in the vendor; the vendor could not convey; and for this reason the sale could not be completed and possession (as purchaser) given by the date fixed.

Now, in this contract "completion" implies delivery of the proper conveyance, and not merely a promise to get it in the uncertain future, from some one who is the owner. The plaintiff was not called upon to enter as a tenant and run the risk of not getting a proper deed, or of any hitch or delay that might arise. He was not required to take chances when there had been express stipulations as to possession and completion within fixed time-limits. He was going to move into the house as a residence, and had made his arrangements accordingly, and he was justified in declining to change these to suit the convenience of the vendor.

In brief, "completion" quoad the vendor means the delivery of the conveyance which carries title to the purchaser, and this the vendor could not give on the day agreed on; and the parties acted on this understanding by the submission of the draft conveyance.

The same result is arrived at in the other aspect of the case argued, viz., that the title was not in the vendor, and there was no evidence that he could control the title at the date fixed for completion (or even since then beyond the bare fact that a conveyance was made in July, 1910): Robinson v. Harris, 21 S.C.R. 390; Lee v. Soames, 38 W.R. 884.

The plaintiff is entitled, therefore, to recover his deposit of $200, with interest from its demand by the letter of the 27th May, 1910, and should get the costs of action against the vendor. I see no reason for the wife severing in defence from the husband; he was evidently acting in her interest; she was the owner, and he was getting her to convey and would hold the deposit in her interest. She receives and pays no costs. The defendant, having asked specific performance of the contract by counterclaim, has justified action in the High Court.

Counterclaim dismissed without costs.

DIVISIONAL COURT. JANUARY 13TH, 1911.

*NEW HAMBURG MANUFACTURING CO. v. WEBB.

Sale of Goods—Action for Price—Counterclaim for Breach of Contract—Terms of Contract—Property not Passing—Right of Purchaser to Damages—General Damages—Special Damages—Warranty—Traction Engine—"Rebuilt"—Evidence—Findings of Jury—Damages.

Appeal by the plaintiffs from the judgment of the County Court of Waterloo, in an action upon a promissory note for $260, with a counterclaim for $600 damages for breach of contract. The action was tried with a jury, and upon the jury's findings judgment was entered for the plaintiffs for $260 and interest and for the defendant upon his counterclaim for $600. The appeal was as to the $600 only.

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

G. M. Clark, for the plaintiffs.

W. Proudfoot, K.C., for the defendant.

RIDDELL, J.:—The defendant . . . bought on the 28th May, 1907, from the plaintiffs, a manufacturing company of New Hamburg, a traction engine. The transaction was evidenced by a printed and written contract signed by the defendant, but not by the plaintiffs, purporting to be an agreement made in duplicate. It recited that the plaintiffs agreed to sell and the defendant to buy "one rebuilt 14 h.p. traction engine, Waterous make, that was got from Hewitt." . . . It is clear that a

*This case will be reported in the Ontario Law Reports.

certain specific engine was in contemplation of both parties. The plaintiffs, through their agent Watson, knew what the engine was wanted for—sawing shingles, cutting corn, sawing wood, cutting straw, etc., and Watson represented the engine as a rebuilt Waterous of 14 horse power.

The defendant, by the agreement, was to give for the engine and belt which he received with it, two notes, one due in December, 1908, for $30, and another due in January, 1909, for $520, and also to give an old engine to the company, which was valued at $200. The old engine was given to the company, but the arrangement as to the notes was changed, and in June, 1907, the defendant gave his cheque for $290 (which was cashed after a mistake had been cleared away) and his note for $260, payable on or before the 1st January, 1909. The defendant took the engine home and operated it for some time—it did not work to his satisfaction, and he did not pay his note. Some negotiations were had for a settlement—these fell to the ground, and at length in October, 1909, the plaintiffs began this action . . . for the amount of the note. By the (amended) statement of defence and counterclaim the defendant sets up: (1) fraudulent representation that the engine was comparatively new and had been in use only six months in all; (2) representation and warranty that the engine was a 14 h.p. engine and capable of doing the work the defendant intended it for; (3) representation and warranty that the engine was a rebuilt engine (no fraud is charged as to 2 or 3); (4) that after discovery of the fraud he had disaffirmed the contract; and by way of counterclaim says "that he . . . lost the engine . . . he delivered to the plaintiffs . . . and the . . . sum of $290 paid on account of the purchase-price . . . and was put to large expense in repairing and testing the . . . traction engine and lost the profits . . . he should have made . . ." He then claims $600 damages and that the note should be delivered up to be cancelled, etc.

The plaintiffs filed a simple rejoinder. . . .

The following questions were submitted to the jury, to which the jury gave the answers following, as appears from the notes of evidence.

"Is the verdict for the plaintiffs for $260 and interest at 10 per cent. thereon from the 1st January, 1909?

"Was the engine in question a rebuilt engine?

"If it was not, what damages do you give the defendant for the breach of contract?

"Judgment for the plaintiffs for $260 and interest at 10 per cent. from the 1st January, 1909.

"Damages for the defendant $600 on account of breach of contract herein."

The notes of evidence do not shew that any answer was given to the second question (the paper given to the jury by the Judge is not itself forthcoming, as it should be), but we were told that the answer was in the negative—and, considering the frame of the third question and the answer thereto, such an answer must have been made by the jury. Judgment was entered for the parties with costs according to the finding of the jury.

The plaintiffs now appeal so far as the judgment on the counterclaim is concerned.

It is contended that no action lies on the counterclaim by reason of the effect of the provision contained in the contract of sale—"the property in said machinery . . . shall not pass to the purchaser but shall remain in the company absolutely till full payment of the purchase-price and of all moneys and interest due . . . notwithstanding any partial payment or the giving of notes . . . or any other matter or thing . . ."

[Reference to Frye v. Milligan, 10 O.R. 509; Tomlinson v. Morris, 12 O.R. 311; Copeland v. Hamilton, 9 Man. L.R. 143; Cull v. Roberts, 28 O.R. 591; Crompton and Knowles Loom Works v. Hoffman, 5 O.L.R. 554.]

In Ontario the law as laid down in the cases seems to be that in the case of a sale of this character the purchaser cannot, before paying the full price, sue for general damage, but may set up a breach of warranty in reduction of the price, if that be sued for.

If, in the present case, the damages claimed were general damage, which, to repeat the definition, is "the difference between the value of the article contracted for and that supplied," the present pleading by way of counterclaim could be amended and the amount made effective as a set-off to an amount at all events sufficient to meet the plaintiffs' claim. And apparently that would be the only way to give any effect to the jury's findings in this action. The point will be further considered later.

But the damages are not put in that way either in the pleadings or in the evidence—and the claim is, if anything, for special damages. It is, therefore, necessary to consider the right of a purchaser under a conditional agreement before he has paid his full purchase-price, in respect of special damages.

In Frye v. Milligan, 10 O.R. at p. 513, it is said that "in Northwood v. Rennie, 28 C.P. 202, 3 A.R. 37, it was held that special damages could be recovered for breach of warranty on a conditional sale." But it will be seen, by a reference to the

report in 3 A.R. at p. 42, that the Court would not allow the defendant to insist that no action would lie on the warranty because there was no sale, holding him estopped by what took place at the trial. This case, therefore, does not much assist.

But the Divisional Court in Crompton and Knowles Loom Works v. Hoffman, 5 O.L.R. 554 (see especially at p. 558), expressly held that damages such as loss of profits may be recovered although the property has not passed.

As we are not bound by these decisions (Mercier v. Campbell, 14 O.L.R. 639), it becomes necessary to examine into the law upon principle. Upon such an examination it will, I think, appear that the distinction as to general and special damages is logically sound. When a purchaser sues a vendor for breach of warranty and claims general damages he says in effect—"My chattel is less valuable than it would have been had it been as you warranted it." It surely must be a complete answer for the vendor to say: "It is not your chattel; it is mine." If the purchaser should reply, "It will be mine shortly," an unanswerable retort would be: "Perhaps so, perhaps not; you may pay, but you may not: anyway it is time for you to cry out when you are hurt." Consequently there can be no action for general damage before the property passes.

Leaving aside for the moment the question of setting up general damage by way of set-off in an action for the price, let us see how the case stands as to special damages. The purchaser says to the vendor: "You furnished me a machine to do a certain kind of work, and with a warranty, the implementing of which implied the capacity of the machine to do the work. The machine will not do the work, and I have lost money thereby." It would be no answer for the vendor to say, "It is not your machine, it is mine." The purchaser would say: "What of that? You furnished me with the machine and warranted it to do my work—it is of no importance whose machine it is, yours, mine, or any third person's." And he would be right.

In Jones v. Page, 15 L.J.N.S. 619; Fowler v. Lock, L.R. 7 C.P. 272, L.R. 9 C.P. 751, L.R. 10 C.P. 90, and many other cases, the property did not pass—the transactions were simply hiring—and yet a warranty was held enforceable. No reason can, I think, be shewn on principle why this should not be so. It was from not observing the distinction between the two kinds of damage that the Manitoba Court in Copeland v. Hamilton, 9 Man. L.R. 143, thought that Frye v. Milligan was opposed to the authorities cited at p. 145 of the report. No one, in short, can be injured by a diminution in value simply of a chattel until he owns it; but he may be injured by the failure of

a machine to do the work he wants it for, no matter who owns the machine. If this be the correct principle, Frye v. Milligan and Tomlinson v. Morris were rightly decided on the one hand and Crompton v. Hoffman on the other.

The suggestion as to set-off made in the two first named cases, and given effect to in Cull v. Roberts and Copeland v. Hamilton, is, no doubt, based upon the following consideration. While, until the article is wholly paid for, no action will lie for general damage, and therefore in strictness there can be no set-off of such general damage in an action for the price, the purchaser might have brought an action for a declaration that he would be upon paying for the article entitled to be paid the amount of his general damage and for a declaration as to the amount of his general damage. That no further relief could be given in such an action is immaterial: Ontario Judicature Act, sec. 57 (5). The purchaser consequently would be allowed to set up such a case by way of counterclaim; and upon obtaining his declaration would set off his general damage so declared against the claim of the vendor. While technically and logically this would be the right procedure, the practical result would be the same as allowing a plea of set-off in the first instance.

The warranty relied upon in this case is that said to be contained in the word "rebuilt" in the description of the engine. It is first objected that there is an express warranty in the document, and that, consequently, there can be no implied warranty. But, even if there were rules of law to this effect, they would not be applicable to the present case, as it is provided in the contract that "this warranty does not apply to second-hand machinery." As will be apparent later, this was "second-hand machinery."

Then it is argued that any warranty in the use of the word "rebuilt" is excluded by the clause, "There are no warranties, guarantees or agreements express or implied, other than those contained herein . . ." The answer is, that the word, used as it is, contains a warranty—and the word being contained in the document, the operation of the clause in question is excluded.

A very great many cases were cited to support an argument that the word as used does not contain a warranty. . . .

Much argument was made as to the meaning of "rebuilt engine" and it was argued that a "rebuilt" engine is as distinct from another engine as a steam engine from an electric engine. But there is no conflict in the evidence, or very little. . . .

It is quite clear that a "rebuilt" engine is a second-hand engine which has been made as good as possible and practically as good as new—there can be no pretence that a rebuilt engine is a particular species of engine, even though that should be material.

In the present case the bargain was about the one engine which the plaintiffs had got from Hewitt. It had been represented by the vendors' agent as rebuilt, and was bought on that representation. There is a great deal of law in respect of the proper interpretation of statements in a contract descriptive of the subject-matter thereof; but the leading case of Behn v. Burness, 3 B. & S. 751, Cam. Scacc., contains all that need here be referred to at any length—the case has frequently been followed but never questioned or overruled. . . .

[Quotation from the judgment in that case at p. 755; and reference to Ellen v. Topp, 6 Ex. 424-441; Graves v. Legg, 9 Ex. 709-716; Oppenheim v. Fraser, 34 L.T.N.S. 524; Conkling v. Massey, L.R. 8 C.P. 395; Bentsen v. Taylor Sons & Co., [1893] 2 Q.B. 274.]

While there was no ruling in terms by the learned County Court Judge, it is manifest that he must have considered that the statement of the engine being rebuilt was intended to be a substantive part of the contract. And I agree with him; it to me savours of absurdity to suppose that the word was used simply to point out the particular engine, and not to describe its condition as stated by the vendor and warranted by him. Both parties knew what engine it was, viz., the second-hand Waterous engine got from Hewitt, and there was no need of a further description that it was rebuilt, i.e., as a description merely of the particular engine to be sold, but this was of great value in setting out the condition of the engine both parties had in mind. . . .

[Reference to Varley v. Whipp, 69 L.J.N.S. 333, [1900] 1 Q.B. 313, 334.]

Although the defendant attempted to repudiate the contract altogether, the plaintiffs would not consent, and the conduct of the defendant afterwards deprived him of all right to insist upon the repudiation.

He is now in the position spoken of in Behn v. Burness; the representation is not a condition but "a warranty in the narrower sense of the word—viz., a stipulation by way of agreement, for the breach of which a compensation must be sought in damages."

On the evidence it is quite clear that the engine did not satisfy the warranty that it was rebuilt, and the jury have so found. . . .

The defendant is the only person to give evidence of the amount of profits lost, and it is sought to cast discredit upon his testimony. But, although he produced a statement at the trial, the plaintiffs' counsel did not cross-examine—no doubt satisfied as to both his honesty and his intelligence. . . .

[Reference to Browne v. Dunn (1894), 6 R. 67, 71.]

There is no suggestion in the course of this case that the plaintiffs were not accepting the evidence of the defendant, and I can find no reason whatever for doubting his honesty or capacity. . . .

There was no objection to the Judge's charge, and, from the view-point of the plaintiffs, it was unexceptionable, being in some respects more favourable to the plaintiffs than we should have made it. There is nothing to indicate that the jury have not faithfully done their duty; and I am of opinion that the appeal must be dismissed and with costs.

FALCONBRIDGE, C.J.:—I agree in thinking that this appeal should be dismissed with costs.

LATCHFORD, J.:—I concur.

MIDDLETON, J., IN CHAMBERS. JANUARY 14TH, 1911.

RE MEDORA SCHOOL SECTION NO. 4.

Public Schools—Two School Buildings in one Section—Public Schools Act, secs. 31, 44(1), 72*g*, 76*d*—*Discretion of Trustees—Township Corporation—By-law—Mandamus.*

Motion by the trustees of the school section for a mandamus, directed to the Corporation of the Township of Medora, compelling the township council to pass a by-law and issue debentures payable out of the taxable property of the public school supporters of the section.

W. C. Chisholm, K.C., for the trustees.

A. J. Thomson, for the township corporation.

MIDDLETON, J.:—This right is claimed under sec. 44(1) of the Public Schools Act, and it is shewn that the proposed loan has been submitted to and sanctioned at a special meeting of the ratepayers called for the purpose (see sec. 76*d*).

The only substantial matter urged in answer to the motion is the contention that the Public Schools Act does not contemplate more than one school in each section. The express provision of sec. 72*g* answers this. The Board has power, inter alia, "to determine the number . . . of schools to be opened and maintained."

This discretion, otherwise absolute, is, in the cases mentioned in sec. 31, subject to the right of the Minister to require a second school when necessary. The circumstances justifying the action of the Board are not properly the subject of discussion upon this motion, but I may say that the material shews that the Board is quite justified in its view that two buildings are necessary in this section.

The mandamus must issue, and the township corporation must pay the costs.

MIDDLETON, J., IN CHAMBERS. JANUARY 14TH, 1911.

REX v. SUTHERLAND.

Liquor License Act—Conviction for Selling without License—General Selling during Defined Period Treated as one Offence—Prejudice.

Motion to quash the conviction of the defendant "for that he, the said William Sutherland, from and including the 5th day of November, 1910, to and including the 4th day of December, 1910 . . . did unlawfully sell intoxicating liquor without," etc.

J. Haverson, K.C., for the defendant.
J. R. Cartwright, K.C., for the Crown.

MIDDLETON, J.:—It is admitted that a conviction in this form cannot be attacked. The offence is selling liquor without a license, and this is well described.

The contention upon the part of the defendant is, that the Crown has shewn several sales upon different days to different persons, and that these constitute several offences, and that the Crown, though the information was well laid in the general language of the conviction, could only shew one offence. The defendant may have been prejudiced by this course, it is said, as a denial by him of one offence might have been accepted by the magis-

trates, but a denial of all the offences by which he placed his oath in conflict with that not only of the one purchaser but of several, may have affected the magistrates' view of his credibility.

I think the objection fails. When the hotel-man keeps open bar and sells liquor to all comers, the Crown may either treat this selling as one offence and lay the information, as here, in general terms, or may treat each sale as an offence and may prosecute for it. The selling is the offence, and selling can be shewn by shewing a number of sales just as well as by shewing one sale.

In one aspect of the case this is in ease of the defendant, as the conviction will prevent any prosecution for offences committed within the time named in the conviction.

Appeal dismissed with costs.

MIDDLETON, J. JANUARY 14TH, 1911.

RE SOLICITORS.

Solicitor—Bill of Costs—Taxation between Solicitor and Client—Lump Charge Covering Many Items—Ruling of Taxing Officer—Appeal.

Appeal by clients from the taxation of the solicitors' costs by the Senior Taxing Officer at Toronto.

W. M. Douglas, K.C., for the clients.
J. T. White, for the solicitors.

MIDDLETON, J.:—The only question argued upon this appeal calling for consideration is the important one, whether the facts bring the case within the principle of Re Johnston, 3 O.L.R. 1. The learned taxing officer has considered that they do; and, after the best thought I can give the matter, I agree with him. Re Johnston does not in any way define the class of cases in which the solicitor is justified in making a lump charge covering many items. Manifestly many cases arise in which there are a series of consultations and interviews in the course of negotiation, and it is quite impossible to divide and allocate the sum proper to be paid between the different "items" of work done. The work in its nature is an "entire" thing, incapable of intelligent subdivision.

If a counsel fee is taken as an example of the kind of service which does not admit of this kind of analysis, it may serve to make the situation clearer. The amount of fee charged can only be based upon the nature of the case and the skill and ability brought to bear upon it. When a solicitor is employed to adjust a matter of difficulty, nothing more injurious to the client could be suggested than that the solicitor's remuneration must depend upon the length of time taken and the number of interviews had. One may grasp a situation with great rapidity, and his skill and experience may lead to its satisfactory solution in a way that after the event appears easy. Another, lacking the necessary skill and experience, may plod away at great length and in the end fail to reach as satisfactory a result, but an itemised bill would give him greater remuneration. While for ordinary routine work small items may, and under our system must, be given, there is no good reason why a whole transaction of this kind should not be regarded as one item and be dealt with as a whole.

Regarding the matter now in question in this way, I cannot interfere with the discretion of an experienced Taxing Officer upon the question of quantum. His assessment is entitled to as much respect as the verdict of a jury, and, while I might not have arrived at the same amount in the first instance, I cannot substitute my own judgment for his. I can only say that I am not satisfied that his conclusion was wrong.

Appeal dismissed. I do not think it is a case for costs.

BRITTON, J. JANUARY 14TH, 1911.

RE FRASER.

FRASER v. ROBERTSON.

McCORMICK v. FRASER.

Costs—Proceedings against Supposed Lunatic—Lunacy Act, sec. 35—Grounds for Action and Petition—Issue as to Sanity Found in Favour of Supposed Lunatic—Other Proceedings.

By order of SUTHERLAND, J., in Re Fraser, 1 O.W.N. 1105, the trial of an issue as to the sanity of Michael Fraser was directed.

The trial took place before BRITTON, J., without a jury, and he gave judgment on the 12th November, 1910, finding that

Michael Fraser was not, at the time of the injury, of unsound mind or incapable of managing himself or his own affairs: McCormick v. Fraser, ante 241.

The question of costs was reserved, and was argued on the 3rd December, 1910.

A. McLean Macdonell, K.C., for Catharine McCormick, the petitioner for a declaration of lunacy, who was the plaintiff in the issue.

John King, K.C., for Michael McCormick, the alleged lunatic, the defendant in the issue.

BRITTON, J.:—Mr. Macdonell asks to have the costs paid by Michael Fraser. Mr. King contends that this is not a case for payment of costs by Fraser, but, on the contrary, the petitioner, Catharine McCormick, should pay them.

As to the costs of the action of Fraser v. Robertson, I do not assume to decide as to other costs than the costs of an appeal to a Divisional Court. In Fraser v. Robertson the application to stay proceedings or to dismiss the action came before Mr. Justice Riddell, and the order he proposed to make and intended to make will be found reported in 1 O.W.N. 800. The order actually made will be found in same volume at p. 843, and was to stay all proceedings in that case until further order, on an undertaking by Catharine McCormick, the next friend, to take proceedings to have Fraser declared a person of unsound mind. Costs were reserved until further order. I take that to mean further order in the case of Fraser v. Robertson. There was an appeal to a Divisional Court from that decision, and, by consent of counsel, that Court (1 O.W.N. 894) varied the order of Mr. Justice Riddell by directing that the next friend of the plaintiff could have medical experts examine the plaintiff, etc., "the proceedings under the Lunacy Act, 1909, if any, are to be launched by the respondent" (the respondent meaning the next friend) "within four days after the medical examination; the costs of this appeal will be costs in the proposed application for a declaration of lunacy as between the appellants and respondent." I will, therefore, deal with the costs of the appeal.

The application under the Lunacy Act came before Mr. Justice Sutherland on the 23rd July, 1910: Re Fraser, 1 O.W.N. 1105. Upon that application an order was made directing the trial of an issue as to Fraser's sanity, and the order directed that the trial Judge should dispose of the costs of the application. This order was the subject of an appeal to a Divisional

Court, which appeal was dismissed, "costs of appeal to be disposed of by the trial Judge:" ante 26. Then an order was made permitting an examination of Fraser by medical men, three to be named by the applicant and three on behalf of Fraser.

There was also an application to stay proceedings as to the trial, pending an appeal to a Divisional Court.

My jurisdiction as to costs in the lunacy proceedings is conferred by the Lunacy Act, 9 Edw. VII. ch. 37, sec. 35.

The case In re Wyndham, 4 De G.F. & J. 53, is one entirely in favour of my not awarding costs against the petitioner, but it does not go farther. There the inquiry was ordered upon the application of a number of the relations of a young man, a person of large means, and alleged to be of unsound mind. The result of the inquiry was a verdict of sanity, and he asked that the applicants pay his costs, which were very heavy. The Court refused. In that case the application was bona fide, without any personal motives, and with a view to the best interest of the young man. In that case costs were not given to the applicants. It does not appear that they asked for costs.

Costs were not awarded to the petitioner in the case Re Milne, 11 Gr. 153, nor were the costs ordered to be paid to Milne.

The case In re E. S., a Supposed Lunatic, 4 Ch.D. 301, was one where a medical visitor was asked by the Court to make a report. He did so, saying that the case was one calling for inquiry. E. S. was found to be sane. As the petitioner had not presented the petition of his own accord, but the proceedings originated with the solicitor of the petitioner, it was held that costs should not be given to the petitioner, but, as the case was really one calling for inquiry, costs should not be given against the petitioner. In that case James, L.J., said: "It is very important, in dealing with this question, that we should not lay down any rule or establish any precedent which on the other hand should discourage proper applications to the Court for the protection of unfortunate persons . . . and on the other hand we ought not to give too much encouragement to speculative petitions. . . ."

Palmer v. Walesby, L.R. 3 Ch. 732, is a strong case in the direction of compelling unsuccessful petitioners to pay costs, especially in view of the commencement of proceedings by action, the petitioner suing as next friend.

The cases most favourable to the petitioner's application

for costs are: In re C., an Alleged Lunatic, L.R. 10 Ch. 75; and In re Cathcart, [1892] 1 Ch. 549. In the former case the inquiry was based upon the report of the Commissioners in Lunacy. The supposed lunatic had been admitted to an asylum, under an order of two Justices of the Peace. The Commissioners reported, inquiry proceeded, and the man was found to be sane. That case compelled inquiry. In the Cathcart case, which was upheld in appeal, [1893] 1 Ch. 466, the facts were different from the present, but the judgments both on the application and in appeal are instructive.

An essential difference between the present case and any one cited is, that here the commencement of proceedings was by action not merely to declare Michael Fraser a lunatic, or incapable of taking care of himself, or of managing his affairs, but to annul his marriage with Miss Robertson. His insanity was assumed. Any inquiry was deemed necessary only for the purpose of setting aside the marriage. It cannot be fairly said that the petitioner's motive was solely to protect Fraser.

In dealing with the question of costs in any of the proceedings above mentioned to be disposed of by me, I have considered the sufficiency of the petitioner's reasons for believing Fraser to be insane, if she did so believe, her reasons for thinking him incapable of managing his affairs, her reasons for commencing an action, the object she sought to attain, and the relation in which she and her brother stood to Fraser; and my conclusion is, that the petitioner's costs in any of these proceedings should not be paid by Fraser or out of his estate. As intimated, my decision does not apply to the costs in the action of Fraser v. Robertson, other than as stated above.

RIDDELL, J. JANUARY 16TH, 1911.

McGAFFIGAN v. NATIONAL HUSKER CO.

Company—Shares—Subscription and Allotment—Action to Rescind—Misrepresentations Inducing Contract—Fraud.

Action to set aside a subscription for and allotment of stock in the defendant company to the plaintiff.

J. E. Day, for the plaintiff.

W. E. Raney, K.C., for the defendant company and defendant Gray.

W. A. Proudfoot, for the defendants A. W. Adams and Keily.

L. C. Smith, for the defendant J. A. Adams.

RIDDELL, J.:—In this action, tried before me without a jury at Toronto, the defendant J. A. Adams was discharged at the trial and the action dismissed without costs as against him.

As to the other defendants I gave counsel an opportunity of putting in authorities; and, these now having been furnished, I proceed to dispose of the matter.

The question was raised and has been much discussed whether an innocent misrepresentation will avoid a subscription for stock made upon the faith of such misrepresentation, when followed by an allotment of stock and acceptance of the stock so allotted. The following and other cases may be looked at: Reese River Mining Co. v. Smith, L.R. 4 H.L. 64; Re London and South Staffordshire R.W. Co., 24 Ch.D. 149; Smith's Case, L.R. 2 Ch. 604, at p. 615; Mathias v. Yetts, 46 L.T. 502; Kennedy v. Panamer, L.R. 2 Q.B. 580; Sedden's Case, [1905] 1 Ch. 326; Derry v. Peek, 14 App. Cas. 359; etc., etc.

I think, upon this evidence, there was fraud—the misrepresentations were not innocent, and the claim for rescission must be given effect to. That there were misrepresentations as alleged by the plaintiff is clear beyond any doubt, and I so find—as also that the misrepresentations induced the contract.

There is nothing in the allegation of laches or any of the other grounds of defence of the company.

The subscription for and allotment of the shares will be set aside with costs—and the money paid therefor returned with interest.

I retain the action in respect of the individual defendants until the cancellation of the stock and payment of the costs of the action or until further application.

It is probable that the plaintiff, upon the stock being cancelled, his money returned, and his costs paid, will not seek further relief.

DIVISIONAL COURT. JANUARY 18TH, 1911.

*RE McCRACKEN AND TOWNSHIP OF SHERBORNE.

Municipal Corporations—By-law Limiting Number of Tavern Licenses in Township to One—Liquor License Act, secs. 18, 20—*Municipal Act, sec.* 330—*Trade—Monopoly—Bona Fides.*

Appeal by the Corporation of the United Townships of Sherborne, McClintock, Livingstone, Lawrence, and Nightingale, from

*This case will be reported in the Ontario Law Reports.

the order of SUTHERLAND, J., 1 O.W.N. 1091, quashing their by-law limiting the number of tavern licenses in the united townships for the year beginning the 1st of May, 1910, to one.

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

W. E. Raney, K.C., for the appellants.

J. Haverson, K.C., for John McCracken, the original applicant, respondent.

BRITTON, J.:— . . . All Judges "look benevolently" upon any legislation by municipal corporations when the members of the council acted in good faith and within their jurisdiction. There is no question in this case as to good faith. I think the members of the council acted in perfect good faith and with a sincere desire to legislate for the general good of the electors and inhabitants of these townships; and for this reason I would prefer not interfering with the township by-law; but, so far as in my power, I must give effect to my own interpretation of the law which is said to give jurisdiction to the council to pass the by-law in question. It is not always easy to satisfy one's self as to the correct interpretation of a statute so often amended and dealing with such intricacies as are to be found in the Liquor License Act; but, having reached a conclusion in this matter, I must give effect to it. . . .

The questions for our determination are purely questions of law. The answers depend upon the construction and interpretation of secs. 18 and 20 of the Liquor License Act and of sec. 330 of the Municipality Act, and of the controlling effect of the last-mentioned section.

Section 20 of the Liquor License Act, R.S.O. 1897 ch. 245, is an authority invoked by the appellants for passing the by-law in question. There has been no amendment of that section since it was first introduced. . . .

[The learned Judge then set out the words of sec. 20.]

This Act, when limiting the number of tavern licenses does not, except in this sec. 20, use the word "township." . . .

[Section 18 quoted.]

This does not provide for reduction in townships.

I am of opinion that "any municipality," as used in that section, means any one of the three, viz., cities, towns, and incorporated villages. But suppose it applies to townships as well, it only enacts that any attempted increase in the township shall not be permitted if such increase would make the number of tavern licenses therein in excess of the licenses issued for the year ending 1st May, 1897.

This sec. 20 did not either expressly or by implication override or repeal sec. 330 of R.S.O. 1897 ch. 223, which was in force when sec. 20 was enacted. Section 330 has been re-enacted by the same number in 3 Edw. VII. ch. 19. This section . . . prohibits any council from giving to any person an exclusive right of exercising within the municipality any trade or calling and from imposing a special tax on any person exercising the same. . . .

By the Interpretation Act, sec. 8, clause 13, "the word 'person' shall include any body corporate or politic or party . . . to whom the contract can apply according to law." Section 8, clause 24, "Words importing the singular number . . shall include more . . ."

It is not necessary to name a person who, under a by-law such as this, is to get the exclusive right. He is sufficiently designated as the one person or firm or corporation who may be qualified by license and otherwise to carry on, to exercise, the trade or calling. "Trade" in sec. 330 means an engaging in a traffic or in business transactions of bargain and sale for profit or for subsistence. Selling liquor is a trade. Tavern-keeping is a calling, an occupation. . . .

[Reference to sec 2, sub-sec. 2, of R.S.O. 1897 ch. 245.]

The tavern-keeper, having the tavern license and otherwise complying with the regulations to which he is properly subject, supplying travellers and customers, is a person engaged in a trade or calling. The council has no right, unless authorised or required by statute, to give to such a person the exclusive right to exercise that trade. He is given the exclusive right if he is designated as the only one who can carry on the trade in these townships. . . .

The point involved in this case in no way touches the power of License Commissioners or of Inspectors. The qualification of license-holders, the equipment of taverns, their locality within the limits of municipal corporations, are dealt with in the Act, and authorised by the Legislature of Ontario.

For the above reasons, as well as for reasons given by the learned Judge from whose decision this appeal has been taken, I am of opinion that the appeal should be dismissed and with costs.

FALCONBRIDGE, C.J., concurred.

RIDDELL, J., dissented, for reasons stated in writing.

DIVISIONAL COURT. JANUARY 18TH, 1910.

*MAY v. CONN.

Sale of Horse—Warranty—Condition—Return if Horse not as Warranted—Death of Horse from Accidental Cause—Title —Risk of Loss—Evidence as to Compliance with Warranty.

An appeal by the defendant from the judgment of DENTON, one of the Junior Judges of the County Court of York, in favour of the plaintiff in an action in that Court to recover $165, the price of a horse sold by the agents of the plaintiff to the defendant. The horse died almost immediately after the sale, and before it left the sale stables of the plaintiff's agents.

DENTON, Co.C.J., found that the horse was sold with a warranty that it was "serviceably sound;" and that it died from accidental causes, and not from any illness or defect which would render it not "serviceably sound." The learned Judge also held that there was a memorandum in writing and a receipt of the goods to satisfy the Statute of Frauds. He then stated the other question arising in the action, in these words: "Who must bear the loss where a horse is sold subject to a warranty and with a right of return within a limited time if not found to comply with the warranty, and the horse dies while in the possession of the purchaser and before the time limited for return without any negligence on the purchaser's part, there being no evidence that the horse did not comply with the warranty, but, on the contrary, there being evidence that he did so comply?" He then referred to Head v. Tattersall, L.R. 7 Ex. 7; Gunby v. Hamilton, 12 O.W.R. 489; and concluded, with some doubt, that the purchaser, the defendant, must bear the loss. Judgment was, therefore, given for the plaintiff for $165 and costs.

The appeal was heard by BOYD, C., LATCHFORD and MIDDLETON, JJ.

G. M. Clark, for the defendant.

J. D. Falconbridge, for the plaintiff.

THE COURT, at the close of the argument, dismissed the appeal, referring specially to Taylor v. Tillotson, 16 Wend. 494, as indicating that the title (and with it the risk of loss) was in the purchaser from the time of sale, subject to be divested by the return of the horse.

*This case will be reported in the Ontario Law Reports.

MIDDLETON, J. JANUARY 18TH, 1911.

RE MACDONALD.

Will—Construction—Residuary Clause—"Allot the Distribution of What can be Spared"—Gift of Capital—Effect of Former Judgment Construing the same Will—Declaration against Intestacy—Vested Estates in Distributees—Representatives of Daughter Dying before Realisation of Estate—Capital Invested to Produce Annuity—Death of Annuitant—Accretion to Residue.

Motion by two daughters of the Hon. John Sandfield Macdonald, deceased, for an order determining certain questions arising in the administration of the estate of the deceased as to the proper construction of his will.

R. L. Defries, for the applicants.

E. D. Armour, K.C., and R. Smith, K.C., for two beneficiaries.

E. G. Long, for the Toronto General Trusts Corporation.

M. C. Cameron, for Elias F. Shauer.

MIDDLETON, J.:—The testator died on the 1st June, 1872. The material clauses of the will now in question are as follows:—

"Eighthly, I give, devise and bequeath all the rest, residue and remainder of my real and personal estate of which I may die seised, possessed of, or entitled to, to my said brother, Alexander F. Macdonald, my said daughter, Lilla Macdonald, and the said Donald B. McLennan upon the following trusts, that is to say: to continue to pay to each of my daughters, Josephine and Louise, for life, the annual allowance of eight hundred dollars each, which they are now receiving; to pay my daughter, Lilla, an annual allowance for life of eight hundred dollars and to my daughter, Adele, an annual allowance of six hundred dollars up to and until her marriage, and after her marriage for life the annual allowance of eight hundred dollars; and to pay to my son, Henry, for three years the annual allowance of six hundred dollars; and to pay to my said wife the annual sum or payment of twelve hundred dollars, during her natural life, and to pay for the education, maintenance and ordinary requirements of my son, George; and I direct my trustees, in their discretion, if they find my son, George, deserving of the same, to make such annual allowance to him as to them may seem warranted by the proceeds of the income of my estate,

and if my said trustees are satisfied as to his steadiness they are to treat my said son, George, in respect to the said allowance in the same manner as my said daughters, Josephine and Louise. I direct that the said annual allowances hereinbefore directed to be paid to my wife and my said sons and daughters shall be paid semi-annually, on the first days of January and July, in each and every year. It is my will that in the case of each of my said daughters the capital sum necessary to produce the allowance made to her be paid after her death to such person or persons as she may by will direct. It is further my will that the provision hereinbefore made for my wife be accepted by her in lieu of dower in all my lands, and that upon her refusal to assign her dower in all my said lands to my said trustees the devisees and bequests hereinbefore made to and for the benefit of my said wife shall be null and void. I direct that if the estate hereinbefore devised and bequeathed to my said trustees upon the trusts aforesaid prove sufficiently productive from the investment of the proceeds of sales of real estate and the income derived from my personal estate, my said trustees shall from time to time, and at least every two years, allot to my daughters and my son, George, the pro-rata distribution of what can be spared. It is my will and desire that the said annual allowance of six hundred dollars for three years to my said son, Henry, shall only be made as and provided he continues to practise the profession of the law, and that if my said son, Henry, should, before the expiration of the said period, discontinue the practice of the said profession, the said allowance shall cease to be made.

"Ninthly, I will and order that my said trustees, or any two of them, do, at their discretion, sell, lease, dispose of and convey all or any such portion of my real estate as shall at the time command a reasonable price, accepting as to them may seem fit a cash payment in full, or partly a cash payment and a mortgage to secure the final payment of the balance of the purchase-money, and that my said trustees shall, in their discretion, invest in provincial or other public stocks, or in such private or other investments as they may deem expedient, the proceeds of any such sales and all such sums of money as may be derived from personal debts due to me or from the sale of personal property."

Upon these clauses two questions now arise:—

Lilla, one of the daughters of the testator, died in 1884. By her will she gave all her estate, subject to some small legacies to the Revd. Joseph Helmpraecht, under whom Elias F. Schauer now claims.

The widow of the testator died in 1910.

The will in question was construed in 1875 by Vice-Chancellor Blake, and by his decree (8th June, 1875) it was declared to be the duty of the executors to invest in stock of the Dominion of Canada sufficient of the assets of the estate to meet the payments of the annuities to the widow and children of the testator. It was also declared that the testator did not die intestate as to any portion of his estate, and that the whole remaining estate not required to pay the annuities was distributable under the words found in clause 8, directing the executors "from time to time, and at least every two years, (to) allot to my daughters and my son, George, the pro-rata distribution of what can be spared," i.e., "spared" after the payment of the annuities has been provided for.

Pursuant to this decree, the executors, upon realisation under clause 9, have made from time to time distribution of the money in their hands, or such portion as they, in their discretion, thought could be spared. Lilla shared in all distributions made in her lifetime, but her representatives have not received any part of the allotments made since her death. Some $57,700 was distributed between 1884 and 1903, when new trustees were appointed; and $12,000 has been distributed since that date.

The first question is: Should the representatives of Lilla have participated in these allotments?

The second question is: Is the capital invested to answer the widow's annuity distributable under the clause in question? . .

The decree of 1875 has determined that the words quoted from clause 8 constitute a residuary devise. Clause 9, directing a conversion of the estate, imposes upon the executors the duty of converting; and the gift in clause 8 is of the proceeds of sales of real estate and personal estate. The judgment of 1875 precludes me from confining its operation to income, though there are expressions in the judgment of Proudfoot, V.-C., upon another application relating to the same will (Macdonald v. McLennan, 8 O.R. 176), looking the other way.

The declaration against intestacy also compels me to hold that the reversion in the fund set apart to answer the widow's annuity falls under this clause. . . .

[Reference to Gaskell v. Hannan, 4 Ves. 159, 11 Ves. 489.]

I can find nothing in this will against the intention of the testator that the estate should vest. This is a residuary clause, and, though there is no gift except in the direction to pay and divide ("allot," as the will says), the postponement is on account of the position of the property and of the interests given the annuitants. The unproductive investments in real estate made in the testator's lifetime are not yet fully realised after the

lapse of nearly forty years, and the executors are given an uncontrolled discretion as to realisation. The cases shew, I think, that the testator cannot have meant to leave the estate in such a situation as to make the interest of his children dependent upon the accident of the date of realisation; to make it "a race between the lives of the legatees" and realisation. See cases in Jarman, 5th ed., p. 796.

I am not certain that, in view of the judgment of 1875, this question is now open; it may mean that the interest of the children is vested; but as, in this respect at any rate, I agree in the result, it is not necessary to discuss this question.

The questions submitted will, therefore, be answered by declaring:—

(1) That the representatives of the testator's daughter Lilla were, according to the construction of the will, entitled to share in the distribution made by the executors subsequent to her death.

(2) That the capital invested to produce the annuity payable to the widow, upon her death fell into the residue and became divisible under the 8th clause among the testator's daughters and son George.

Costs out of the estate.

DIVISIONAL COURT. JANUARY 18TH, 1911.

RE GRAHAM.

Will—Construction—Trust—Absolute Interest—Vested Estate to be in Part Divested in the Event of Marriage.

Appeal by Mary Ann Graham from the order of FALCONBRIDGE, C.J.K.B., ante 329.

The appeal was heard by BOYD, C., LATCHFORD and MIDDLETON, JJ.

F. Denton, K.C., for Mary Ann Graham.

B. N. Davis, for George Henry Graham.

S. W. Field, for the executor Timothy Barber.

The judgment of the Court was delivered by BOYD, C.:—The will is to be construed according to its words, unless some rule of legal construction interferes. Here there is no need to frustrate the intentions of the testator. I have looked at the cases, but all are distinguishable: e.g., In re Jones, [1898] 1 Ch. 438, gave the

property to the wife absolutely, with the fullest power to sell and dispose of it. Though the object was declared to be for her support and maintenance, Byrne, J., read the will as one giving her unlimited control, and held that she had the absolute interest. This is clearly distinguishable from the present case, where the testator does not give to her absolutely, but in trust, and gives it only for her support and maintenance while she remains unmarried.

In re Jones was also distinguished, and the Irish case cited by Mr. Denton, in Osterhout v. Osterhout, 7 O.L.R. 409, in the same way as I now distinguish from the present will. All the cases relied on proceed upon the consideration that an absolute gift is bestowed, which is not to be reduced by ambiguous words, or that the scope of user is unlimited.

The wife of the testator predeceased him, and, leaving her out, the scheme of the will is to benefit his two children, Mary and George. She gets the Phoebe street land as a home, and, by an absolute devise, all the residue of his property she gets in trust for herself and her brother on these conditions:—

She is to have the sole use and benefit of it, both as to capital and interest, for her support and maintenance as long as she remains unmarried, without consulting with the executors.

If she marries during the life of George, one half of the residue is to go to her absolutely and the other half to George absolutely.

If George dies before the daughter marries, then the whole is to go to Mary absolutely.

The legal effect is, that the residue vests in the daughter as trustee, to expend thereout, as shall seem fit to her, what is required for her support and maintenance while she remains unmarried: upon trust, if she marries during the life of George, to hold it in moieties for herself and George as tenants in common absolutely; and upon further trust, if George dies before she marries, for herself absolutely.

The trust vested in her is required only for the purpose of her support and maintenance while unmarried, and, subject to that, the whole is to divided between brother and sister as directed in the case of her marrying in George's life, or to go to her alone in the case of George dying before she marries.

It is not needful to pursue other possibilities in order to construe this will.

The judgment in appeal is right, as far as it goes, with the exception of the clause that the executors may not pay nor hand

over the residue to Mary.* That is contrary to the terms of the will: the executors, as such, are to be discharged when the testator's wife is dead, and the residue is then to be transferred by the executors to Mary as trustee for the purposes and on the trusts hereinbefore specified and in the will defined.

The costs of appeal may come out of the estate.

CLUTE, J. JANUARY 19TH, 1911.

CANADIAN PACIFIC R.W. CO. v. ROSIN.

Vendor and Purchaser—Contract for Sale of Land—Option—Authority of Agent of Vendor—Ratification—Time—Acceptance by Assignee of Person Named in Option—"Assigns" not Mentioned—Undisclosed Principal.

Action for specific performance or for damages for the refusal of the defendant to convey land pursuant to an option signed by one Brisson, assuming to act as agent for the defendant, and afterwards accepted, not by John C. Murray, to whom it was given, but by the plaintiffs' solicitors. Murray assigned the option to the plaintiffs on the same day that it was given. No consideration was mentioned in the assignment.

W. L. Scott, for the plaintiffs.
A. T. Thompson, for the defendant.

CLUTE, J.:—The defendant had purchased the lands in question on the 28th May, 1910, for $1,500. The transaction was mainly conducted by the defendant's wife, who seems to have had knowledge of what was being done, and authority to act on behalf of her husband. At the time the land was purchased, she, acting on behalf of her husband, gave a limited authority to the agent to sell, the instructions being that he should sell the property within a couple of weeks. The property was not sold within a couple of weeks; but afterwards the option in question was given; and, before the option had been accepted, Mr. Brisson met the defendant and his wife and informed them that he had sold the property, and that they would get their money within ten days. He did not have the option with him at the time. He

*The words used by FALCONBRIDGE, C.J.K.B., in his reasons for judgment, ante 331—"The executor may not, therefore, pay or hand over to Mary all the rest and residue of the estate"—were meant to express the opinion that the executor could not pay over to her to hold in her own right absolutely, which was the only matter argued before the Chief Justice. If counsel had spoken to the minutes before the Chief Justice, the appeal would probably have been unnecessary.

said, in substance: "You will get your money in ten days, and, if you do not . . , you can keep the $15 which has been paid on the option." And Brisson then handed the $15 to the defendant. . . . I find that the defendant accepted the $15 upon the understanding . . . that he was to have his money within ten days. As a matter of fact, the money was not paid within ten days; but, on the last day that the option ran, the plaintiffs' solicitors wrote a letter which they placed under the door of the office of Brisson, the defendant's agent. . . . On the following day . . . he communicated the result to the defendant. The defendant and his wife, apparently, were satisfied to take the money within the time, but not . . . after the ten days had expired. . . .

The first question to be considered is, whether what took place between the defendant's wife and Brisson authorised him to enter into a binding contract for the sale of the land. . . .

[Reference to Hamer v. Sharp, L.R. 19 Eq. 108; Rosenbaum v. Belson, [1900] 2 Ch. 267; Goodwin v. Brind, L.R. 5 C.P. 299; Chabburn v. Moore, 61 L.J. Ch. 674; Prior v. Moore, 3 Times L.R. 624; Wild v. Watson, 1 L.R. Ir. 402; Saunders v. Deuce, 52 L.T.R. 644, 646.]

It would appear from a perusal of these cases that it is largely a question of fact whether the agent's instructions are "to find a purchaser" or "to sell"—from which latter instructions it may be implied that he is also to make a binding bargain.

Verbal assent would seem to be sufficient. See Rosenbaum v. Belson, [1900] 2 Ch. at p. 271.

In the present case the purchase was for speculation, and the verbal authority to the agent by the wife was to sell within a couple of weeks, intimating that $200 in advance would be satisfactory. The sale was not made within the time. When the defendant accepted the $15, there was no sale, as there was no acceptance. If, however, the defendant had been offered the balance of the purchase-money within the ten days, he would, I think, have been bound to accept it, not because he had authorised the option—which he had not—but because he then confirmed what he understood to be a sale for cash to be paid within ten days.

The agent exceeded his authority in giving the option, and the defendant was bound only to the extent of his assent, which was given upon the understanding that he was to receive the balance of the purchase-money within ten days. The money not having been paid, the bargain was off. There was no authority to sell except for cash. See Tibbs v. Zirkle, 55 W. Va. 49; Field v. Small, 17 Colo. 386.

There is a further difficulty in the plaintiffs' way. The option was not accepted by Murray, the person to whom it was given. He transferred it to the plaintiffs on the same day, and their solicitors signed the acceptance. Assuming that the solicitors had authority to accept, is an option assignable, where, as here, it does not purport to be made to "his assigns?" And does it make any difference that the proposed purchaser was acting for an undisclosed principal? . . .

[Reference to Dart on Vendors and Purchasers, 7th ed. (1905), p. 271, referring to Holland v. King, 6 Q.B. 727; Friary Brewery Co. v. Langdon, [1899] 1 Ch. 86, [1899] 2 Ch. 261; Dubbins v. Dubbins, [1896] 2 Ch. 348.]

The present case differs materially from those referred to by the learned author.

No doubt, an assignment by a purchaser of his interest under a contract to purchase is an assignment of a legal chose in action, and the assignee can sue the vendor for damages for breach of contract: Lockington v. Magee, [1902] 2 K.B. 427; Bohman v. Aunt, [1904] 2 K.B. 530. So where the contract, not being under seal, has been entered into by an agent, the principal may sue upon it in his own name: Dart, p. 985. But here, at the time of the transfer of the option, there was no contract nor acceptance by the agent. . . .

[Reference to Am. & Eng. Encyc. of Law, 2nd ed., vol. 21, p. 934; vol. 2, p. 1017; Sutherland v. Parkins, 75 Ill. 338; Vanderlip v. Patterson, 16 Man. L.R. 341; Fulton v. Messenger, 61 W. Va. 477; Dyer v. Duffy, 38 W. Va. 148; Reece v. Kittle, 56 W. Va. 269; Fry on Specific Performance, 4th ed., p. 97, sec. 237; Meynell v. Surtees, 3 Sm. & G. 101, 117; Boulton v. Jones, 2 H. & N. 564.]

In my opinion, an option given to a person, not naming his assigns, is a personal option, and not assignable before acceptance. The vendor might well be willing to sell to an individual named, when he would not be willing to sell to an unknown purchaser. Nor does it, I think, make any difference, in such a case, that the person to whom an option is given is acting for an undisclosed purchaser. It may be that, if such person or corporation was disclosed, he would refuse to give the option. In the view I take, it is unnecessary to determine whether the solicitors were authorised to act for the plaintiffs in accepting, or whether what was done by placing the letter of acceptance under the door of the agent was a sufficient acceptance within the time. The plaintiffs have not, I think, made out a case for specific performance or damages.

The action is dismissed with costs.

HOLMES v. MOWERY—MASTER IN CHAMBERS—JAN. 12.

Pleading—Third Parties—Service of Notice—Statement of Defence of Third Parties—Reply of Defendant—Departure—Amendment—Costs.]—Motion by third parties to vary or set aside an order for directions as to the trial of a third party issue or for leave to amend their statement of defence or for other relief. The writ of summons was issued on the 21st April, 1909, and served on the 15th May. The statement of claim was not delivered until the 15th February, 1910. The third party notice was issued on the 7th April, 1910, and the order for directions made on the 16th November, 1910. The third parties on the 21st November, 1910, delivered a statement of defence both to the claim of the plaintiff and that of the defendant as stated in the notice; and the defendant on the 29th November, 1910, delivered a pleading which was a defence to the plaintiff's statement of claim and a reply to the defence of the third parties. By this the defendant admitted the allegations of the statement of claim, and made his claim against the third parties on a different ground from that taken in the notice. The Master said that the defendant must rely on the ground taken in his statement of defence and reply, and must be taken to have substituted the ground there taken, on which he rested the liability of the third parties, for that set up in the notice, which must be considered as amended accordingly. Then, seeing that this was delivered after the third parties had pleaded, they must have leave to amend and to deliver a fresh statement of defence to the defendant's claim. Costs to the plaintiff and to the third parties against the defendant in any event. Featherston Aylesworth, for the third parties. M. J. O'Connor, K.C., for the defendant. E. Meek, K.C., for the plaintiff.

MCVEITY V. OTTAWA FREE PRESS CO.—MASTER IN CHAMBERS—JAN. 12.

Security for Costs—Libel—Property of Plaintiff Available to Answer Costs.]—Motion by the defendants for security for costs in an action for libel. The Master was satisfied that the motion was entitled to prevail, for the reasons given in the similar case of Mansell v. Robertson, ante 337, 380. Reference to the authorities there cited, and to Park v. Hale, 2 O.W.R. 1172. With unsatisfied executions against the plaintiff and a balance due on the chattel mortgage on his household furniture and effects (his only available property), it cannot be said that

these are assets, presently exigible, to the value of $800 or even of $400. Costs of this motion to the defendants in the cause. H. M. Mowat, K.C., for the defendants. J. T. White, for the plaintiff.

STEWART v. DICKSON—DIVISIONAL COURT—JAN. 12.

Contract—Action to Set aside for Misrepresentations—Absence of Fraud—Reformation of Contract—Terms—Costs.]—Appeal by the defendant from the judgment of SUTHERLAND, J., 1 O.W.N. 1083, in favour of the plaintiffs, in an action to set aside an agreement, dated the 5th March, 1909, for the transfer of the plaintiff's interest in certain lands to the defendant. The appeal was heard by FALCONBRIDGE, C.J.K.B., BRITTON and RIDDELL, JJ. The Court was of opinion, for reasons stated at length by BRITTON and RIDDELL, JJ., dealing with the facts and evidence, that the agreement could not be set aside except for fraud; that no fraud had been shewn; that, as both the plaintiff and defendant believed that the defendant was to assume the liability of the plaintiffs, under the agreement, the instrument should be reformed accordingly, if so desired; and, the defendant consenting to the reformation, that the appeal should be allowed without costs and the action dismissed without costs; but, if he refused, the appeal should be dismissed with costs. C. A. Moss, for the defendant. H. Cassels, K.C., and R. T. Harding, for the plaintiffs.

RE ONTARIO SUGAR CO. (MCKINNON'S CASE)—MIDDLETON, J., IN CHAMBERS—JAN. 17.

Company — Winding-up — Contributory — Res Judicata — Leave to Appeal.] Motion by the liquidator of the company for leave to appeal from the order of MEREDITH, C.J.C.P., ante 496, dismissing the liquidator's appeal from the report of an Official Referee, upon a reference for the winding-up of the company, striking the name of S. F. McKinnon from the list of contributories. MIDDLETON, J., said that upon the argument of the motion for leave he arrived at the conclusion that the case was of sufficient importance and difficulty to warrant an appeal, and that the learned Chief Justice concurred in that view. Leave granted; costs in the appeal. W. N. Tilley, for the liquidator. W. H. Wallbridge, for S. F. McKinnon.

GALBRAITH v. CONNELL ANTHRACITE MINING CO.—FALCONBRIDGE, C.J.K.B.—JAN. 17.

Landlord and Tenant—Lease not in Writing—Dispute as to Length of Tenancy—Statute of Frauds—Evidence—Onus.]—Action to recover possession of the premises No. 237½ Yonge street, in the city of Toronto. The plaintiff alleged that by an arrangement not evidenced in writing he leased the premises to the defendants for one year from the 1st May, 1905; and that subsequent dealings took place between the parties, the result of which was that the defendants were tenants from year to year. On the 30th October, 1909, the plaintiff gave the defendants a notice to quit for the 1st May, 1910. The defendants refused to deliver up possession, alleging that their tenancy is of a much more extended character—namely, a lease for the life of four beneficiaries under a will. The Statute of Frauds was not pleaded; the plaintiff asked leave to amend by setting it up; but the Chief Justice did not find it necessary for the decision of the case to allow the amendment to be made. He held that the onus lay upon the defendants to prove their agreement, and this they had failed to do, even without regard to the burden of proof. Judgment for the plaintiff, with costs, for immediate possession and for occupation rent since the 1st May, 1910, at the rate of $50 a month. G. H. Watson, K.C., for the plaintiff. W. N. Ferguson, K.C., for the defendants.