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CARTWRIGHT, MASTER, APRIL 5TH, 1909.

CHAMBERS.

STOW v. CURRIE.

Discovery—Examination of Parties—Undertaking of Solicitor—Breach—Letters — Interpretation—Counterclaim —Separate Examinations of Same Parties in Action and Counterclaim—Motion for Judgment on Counterclaim in Default of Defence.

Motion by the defendants (other than Currie and Otisse) to set aside several appointments issued by the plaintiff for the examination of the defendants or their officers for discovery as such defendants, and also similar appointments for their examination as plaintiffs by counterclaim, together with an order for production of documents by them as such counterclaiming plaintiffs.

F. Arnoldi, K.C., for defendants the Otisse Mining Co.

Eric N. Armour, for defendants Warren, Gzowski, and Loring.

R. F. Segsworth, for defendants Currie and Otisse.

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

THE MASTER:—The grounds of the motion are: first, that these appointments and order are in breach of the undertaking of plaintiff's former solicitors; second, that they are irregular in so far as they assume to deal with the counterclaiming plaintiffs as distinct from them as defendants in the action.

Dealing first with the question of the undertaking, it is to be observed that the whole evidence is happily documentary, and no facts of any kind are in dispute. So entirely is this the case that no affidavit has been filed in answer to the motions.

The undertaking was given in the following circumstances. The statements of defence were long overdue when, on 2nd December last, the plaintiff issued the usual order for production by the defendants. The time for defendants to plead had previously been extended until 7th December, and on that day the statements of defence and counterclaims were duly delivered. Two days later, the defendants gave notice of motion for 14th December to set aside this order of 2nd December, on the ground that plaintiff was not entitled to discovery from the defendants (other than Otisse and Currie) until he had established his right as against them. Among the material to be used on this motion was the intended examination of the plaintiff for discovery; and by my direction all proceedings in the action were stayed until this motion should be finally disposed of.

On that 9th December the solicitors then acting for the plaintiff wrote a letter to Mr. Arnoldi, in which, after saying they had received the above notice and had had some conversation with Mr. Arnoldi about it, they continued: "It was agreed between us that the examination for discovery of Mr. Stow and this motion stand indefinitely for the present, and *we agreed that we should take no steps in the action nor make any effort to examine your clients until the examination of Mr. Stow should have been had, so that you might have the opportunity of using same upon the motion*, you to be at liberty to bring on the motion at any time, upon two days' notice; we also to be entitled to give you two clear days' notice of our intention to proceed." The letter concludes with thanks "for your courtesy in acceding to this arrangement at our request under the present circumstances."

Mr. Arnoldi replied, and pointed out that part of the arrangement was that his solicitors were "to produce Stow for examination when required." To this Mr. McKay assented by letter of 12th December.

Had the matter ended here, I do not see how any doubt could have existed that in no circumstances was any further proceeding to be taken by plaintiff until his examination

for discovery had been taken and the motion to set aside the order for production of 2nd December had been disposed if. The language of Mr. McKay's letter of 9th December (the part which I have italicised) could not admit of any other interpretation.

After more than 5 weeks had passed, and on 18th January, 1909, the defendants' solicitors wrote to Mr. McKay's firm that they were instructed to press the action to trial "at the earliest possible moment," and that if plaintiff did not set the case down and serve notice of trial, the defendants would be obliged to do so. The letter then went on: "The arrangement between us mentioned in your letters of 9th and 12th December last, as to the examination of your client, we desire now to terminate, and have served you with notice of examination for" the 28th January.

Plaintiff's solicitors replied the same day, making no objection. On the contrary, they expressed a hope that the examination would be possible on 28th January. But it is now contended that the arrangement as contained in the letters of 9th and 12th December has been terminated and wholly set aside by the defendants' solicitors, and that the plaintiff is at liberty to proceed without being examined for discovery.

To this, however, I am unable to accede. The plaintiff has had not only the benefit of the arrangement for the period to which it was at first expected to extend, but far beyond 28th January, so that on 5th April he still has not been examined, and the case is still awaiting its appearance on the peremptory list.

In my opinion, the fair construction of the letter of defendants' solicitors of 18th January is that it was only the arrangement "that the examination for discovery of Mr. Stow stand indefinitely for the present" that has terminated; and this is borne out by that letter going on to state that notice of plaintiff's examination for 28th January had been served.

To this view Mr. McKay appears to have acceded without any demur at the time. Nor does he assist the plaintiff's contention as now put forward. On the contrary, Mr. Arnoldi states in his uncontradicted affidavit, filed on this motion, that he has personally applied to Mr. McKay, who made the arrangement, and that he agrees with the

above interpretation of the letter of Messrs. Arnoldi & Grierson of 18th January.

It is, therefore, beyond question that the plaintiff is still bound "to take no steps in the action nor make any effort to examine" the defendants until "he has been examined for discovery and the motion to set aside his order to produce has been disposed of."

This being so, it becomes unnecessary to deal at any length with the other ground, inasmuch as the action was in its present condition when the undertaking was given on 9th and 12th December.

Even if no such undertaking had been given, it seems doubtful whether it can be successfully argued that a counterclaiming defendant can be treated as if he were the plaintiff in a separate action, for the purposes of having a distinct procedure. If this is not so, then a plaintiff might omit to give notice of trial in his own action and give it later for the counterclaim. Would not such a notice of trial be promptly set aside for irregularity? Theoretically and technically, in some cases where the counterclaim is really a cross-action, this might be possible, but any separate procedure would not be allowed (if at all) in practice, except perhaps in cases where the counterclaim was directed to be tried separately.

It does not seem conceivable that such proceedings as are in question here can be proper, when the whole counterclaim so-called is really nothing more than a defence, and is based on the theory that the plaintiff's action must fail, and the claim for relief for $50,000 damages is on the ground of plaintiff having without any justification registered a caution against the lands of the Otisse Mining Co., and thereby injured them as well as Warren, Gzowski, and Loring.

As the question has been raised, I have thought it useful to point out some of the objections, as they appear to me, to the course attempted by the plaintiff. But I do not express any considered opinion, and would desire to reserve the question for further consideration if it should ever come up squarely for decision.

Here at any rate the question in the action and the counterclaim is only one. All discovery that could at this stage be relevant to the counterclaim would necessarily be

relevant to the action. It therefore follows that the plaintiff is attempting to do indirectly what he has bound himself not to attempt to do directly, under an agreement which is still in force.

The motion of the defendant is therefore entitled to succeed, and the appointments and orders should be set aside and discharged, with costs in the cause.

The motion by the counterclaiming plaintiffs to have judgment on the counterclaim for default of defence thereto I have not overlooked. It does not, however, seem to be of any assistance to plaintiff on this motion. It was necessary that the counterclaim should be disposed of by being at issue or otherwise. That this must be so before a copy of the pleadings can be certified seems to shew that there can be only one record, and therefore only one trial; except where a trial of a separate issue has been ordered. After some difficulty I have found the case referred to by Mr. Hodgins of which he could not give the name. It is Alcoy v. Greenhill, 74 L. T. R. 345. It is on the question as to rights of discovery where the defendants were bringing in alleged guarantors as third parties. It deals rather with the rights arising from this than from the fact that the defendants had counterclaimed.

APRIL 5TH, 1909.

C.A.

ROYAL ELECTRIC CO. v. HAMILTON ELECTRIC LIGHT AND CATARACT POWER CO.

Sale of Goods—Action for Price—Contract—Failure to Fill Requirements of—Tests—Evidence—Acceptance of Goods by Conduct—Retention — Failure to Notify Vendors — Defects in Goods — Right to Deduction from Price — Counterclaim for Damages—Measure of Damages—Property not Passing — Construction of Contract — Special Terms—Judgment—Reference—Scope of—Interest.

Appeal by defendants and cross-appeal by plaintiffs from judgment of ANGLIN, J., 9 O. W. R. 437.

The appeal was heard by Moss, C.J.O., Osler, Garrow, Maclaren, Meredith, JJA.

G. F. Shepley, K.C., W. E. Middleton, K.C., and W. W. Osborne, Hamilton, for defendants.

Wallace Nesbitt, K.C., H. S. Osler, K.C., and H. E. Rose, K.C., for plaintiffs.

Garrow, J.A.:—The action was brought to recover the price of certain machinery supplied by the plaintiffs to the defendants under contracts of conditional sale, by the terms of which the property was not to pass until payment, or, in the alternative, for a return of the articles and payment of the difference between the purchase price and the proceeds of a sale of the articles so returned.

The defendants denied acceptance of the goods, denied that they were in accordance with the contracts, and counterclaimed for damages for breach of the contracts, and for moneys paid on account thereof.

The main, and at this stage the only, contest between the parties is concerning the two generators, for I understand that neither side objects to the reference as to the other matters

The facts are all stated in the very full and careful judgment of Anglin, J., with which in the main I agree.

The duty of the plaintiffs was, of course, to supply generators of the quality and capacity and within the time limited and provided in the contract. This it is clear they did not do. The duty of the defendants was either to accept or reject the generators actually supplied within a reasonable time after they had had an opportunity of testing them and discovering their defects. In the correspondence which passed prior to the reconstruction agreement of 11th January, 1902, the defendants definitely enough assumed the position that they would not accept the articles in question; and their continued user thereafter and until the reconstruction may well, on the evidence, be assumed to have been at the instance and with the consent of the plaintiffs, in the hope, for all parties were apparently acting in good faith, that the machines might in the end be made satisfactory.

But after the reconstruction under the terms of the last-mentioned agreement, which agreement was clearly intended

to, if possible, finally solve the difficulty which had arisen, one way or the other, the defendants' conduct, as evidenced in the correspondence, was for some reason much less definite, and indeed gave no reliable indication at all that they intended to reject. They, it is true, grumbled and wrote complainingly, but they continued to use the machines, without, so far as I can see, anything in the evidence which would justify the inference of continued acquiescence on the part of the plaintiffs. This user was, of course, entirely inconsistent with an intention to rescind. The result, therefore, reached by the learned Judge, that the defendants had by their conduct subsequent to the reconstruction accepted the generators, although still in fact imperfect and in substantial particulars not up to the contract, was, in my opinion, inevitable.

The point may be unimportant, and it has not been argued on either side that it is of importance, but I cannot, with deference, agree that the effect of the commencement of the action was to waive the provision that the property should not pass until payment, because I find nothing in the terms of the written contract or otherwise to prevent the plaintiffs from suing for the price and also retaining and enforcing their other rights, as indeed they seek to do by the terms of their statement of claim.

A similar point was recently considered by a Divisional Court: see Utterson Lumber Co. v. H. W. Petrie Limited, 13 O. W. R. 104, 17 O. L. R. 570, with the conclusion in which I agree.

The point might be important if the defendants were seeking to set off damages arising as upon a breach of warranty, or at all events might involve a consideration of the cases in which it has been held that until payment a purchaser under the usual conditional sale contract cannot sue upon the warranty. But that is not exactly the position. The defendants assert that what was delivered, and in the circumstances accepted, never in fact complied with that which the contract called for, and that they are entitled, in the circumstances, to reduce the contract price for which they are now sued, by the difference between that price and the value of what they actually received. And, although there does not seem to be much authority upon the subject, except in cases where the property had passed, justice seems to require that the right to modify the price in this way,

when the plaintiff elects to sue for it, should not depend upon whether the property has actually passed or not. The modern practice since the Judicature Act certainly is to have, as far as possible, all questions between parties respecting the subject matter in litigation determined in the one action.

The substantial defect in the machines in question, as found by Anglin, J., is that, whereas they were entitled to get generators which at full load would have a temperature rise of not more than 40 degrees and on an overload of not more than 45 degrees, the machines actually delivered and accepted exceeded these temperature rises by 15 degrees and 17½ degrees respectively.

And, in my opinion, it will facilitate the reference to state in the formal judgment that these are the particulars in which the machines are defective, and to which, therefore, the evidence before the learned referee should be directed. And I also think the inquiry as to whether the machines can be made to conform to the contract should be eliminated. The machines have been delivered and accepted, and the question, in so far as this item of damages is concerned, may conveniently be the simpler one of what is the difference in value between machines which would comply with the contract and specifications, and the defective machines actually delivered.

After the writ issued, the circumstance that the plaintiffs took possession of the machines and had them again overhauled was, as held by Anglin, J, ineffectual to alter the rights of the parties under the contract. But the circumstance must not be wholly ignored.

The plaintiffs should restore the machines to the defendants at the place whence they were taken, free of all expense, upon payment, in the same condition as they were in when tendered after the overhauling. And, in default of payment, the relief asked by the plaintiffs of sale and payment of the loss, if any, should be granted.

Interest should, I think, only be calculated upon the value of the machines as found by the learned referee after making all proper reductions, and not upon the contract price. And there should be no interest upon the price of the machines from the time the plaintiffs took possession of them until they tendered them back.

And, finally, in my opinion, the reference as to damages should in form be in general terms, and not as in the formal judgment, although I do not dissent from the principle upon which damages have been awarded and directed to be computed, by Anglin, J.

Subject to what I have said, the appeal should be dismissed with costs. And the cross-appeal should also be dismissed, but without costs.

MEREDITH, J.A., gave reasons in writing for the same conclusion.

MOSS, C.J.O., OSLER and MACLAREN, JJ.A., also concurred.

APRIL 5TH, 1909.

C.A.

CARROLL v. ERIE COUNTY NATURAL GAS AND FUEL CO.

Contract—Breach—Supply of Gas—Value—Damages—Measure of—Liability of Several Defendants—"Reservation"—Plant—"Exception" — Judgment — Construction of Contract—Evidence as to Damages—Measurement of Gas—Computation—Reference—Report—Appeal.

Appeal by the defendants and cross-appeal by the plaintiffs from a judgment of BRITTON, J., 10 O. W. R. 1017, varying the report of the Master at Welland made upon the reference to him to ascertain and report the damages (if any) payable to the plaintiffs under the judgment in this action.

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

W. M. Douglas, K.C., and T. D. Cowper, Welland, for defendants.

S. H. Blake, K.C., and W. M. German, K.C., for plaintiffs.

Moss, C.J.O.:—The Master found and reported that the defendants the Provincial Natural Gas and Fuel Co. were liable to pay to the plaintiffs the sum of $113,965.29, but exonerated the defendants the Erie County Natural Gas and Fuel Co. from liability therefor.

From this report the defendants the Provincial Natural Gas and Fuel Co. appealed on a number of grounds, their chief contentions being that the Master erred in finding liability for any damages, and in any event the amount was excessive.

The plaintiffs also appealed on the ground that the Master should have held that the defendants the Erie County Natural Gas and Fuel Co. were liable with their co-defendants.

Britton, J., held that the Master should have found both defendants liable, but he reduced the amount of the damages to $54,031.82.

The defendants appealed to this Court, and raised the contentions which had been urged before Britton, J., as to their liability and the extent thereof. In addition, the defendants the Erie County Natural Gas and Fuel Co. raised the question of their liability, but did not press it, their counsel admitting the difficulty of sustaining the Master's view, in face of the judgment and the terms of the reference.

The plaintiffs cross-appealed, on the ground that the amount of the award should not have been disturbed, and they asked that the Master's finding in that respect should be restored.

There was much learned argument as to the meaning and effect of the so-called "reservation" contained in the instrument of 20th April, 1891, as rectified by the judgment in this action: whether it is to be treated as an interest in land reserved out of land granted, or an interest or property in the natural gas beneath the surface, or a right reserved to enter upon the land granted and to win and take for use natural gas found below; or whether it is a covenant binding the defendants to allow to the plaintiffs the use of such quantities of the natural gas taken from the lands as they required for the specified purposes.

But much of what was contended seems to be disposed of by the pleadings and proceedings in the action, the judgment, and the form of the reference directed.

In the statement of claim the plaintiffs set out fully the character and nature of the rights retained and secured to them by the "reservation" in the instrument of 6th April, 1891, and allege the result to them by way of damage from the acts of the defendants in depriving them of the rights so retained and secured, and they claim to be entitled not only to a rectification of the instrument of 20th April, so as to ensure the maintenance and continuation of their rights, but also judgment against the defendants for the amount of damages, costs, loss, and outlay which was sustained by reason of the defendants' wrongful acts (paragraphs 6, 7, 9, 10, 11, and 12 of the statement and paragraph 2 of the claim). At the trial, when a discussion arose as to evidence bearing on the quantum of damages, the learned trial Judge said: "I would direct a reference if I came to the conclusion that this contract ought to be reformed." And, having come to that conclusion, at the end of the trial he said: "There will be a reformation as of the date of the deed and a reference as to damages as against both (defendants)."

Following this, the judgment as entered contains the following: "And this Court doth further order that it be referred to the Master of this Court at Welland to ascertain and report what damages (if any) the plaintiffs have suffered by reason of the action of the defendants in non-permitting them to take gas for the supply of their works operated by them on the property referred to in the said agreements in question herein."

By this direction the defendants are concluded from arguing before the Master or elsewhere that the reservation conferred no rights upon the plaintiffs which were damnified through the defendants' actions, or from urging that the reservation was effective only as a re-grant, and was inoperative by reason of the defendants not having signed the instrument, or that it was not a covenant for breach of which they could be held liable.

Once the learned trial Judge determined that the instrument must be reformed by the introduction into it of the "reservation," it then became incumbent on the defendants, before there was a reference as to damages, to raise before and have determined by him the meaning and effect of the reformed instrument and the nature and extent of the damages recoverable under it. If, as is now argued, it gave no rights, and the plaintiffs were not damnified by what the

defendants had done, that should have been raised and determined before the reference was directed. It seems plain that the Master was to deal with the report upon the quantum of damages sustained by reason of the defendants' infringement upon the plaintiffs' right to take gas for the supply of their works. In short, to repeat the words of Britton, J., "it was not open to the Master and is not open to me on appeal to say that it does not operate as a covenant or agreement in plaintiffs' favour, or that it is void because there cannot be a reservation of gas, or because the reservation is void for vagueness."

The question to be dealt with by the Master was the comparatively simple problem; the plaintiffs being entitled to use gas sufficient to supply their plant or the works operated by them on their property, and the defendants having deprived them of such use and supply, what amount of damages have the plaintiffs suffered?

The Master and Britton, J., agreed that the damages should be assessed not merely to the date of the commencement of the action, but down to the time when the plaintiffs ceased to be entitled to the supply. This view is in accordance with the practice under Rule 552. They also agreed that the measure of damages was the market value to the plaintiffs of the gas which they were obliged to use, instead of that which they should have received under the terms of the "reservation," but they differed as to the mode of ascertaining the quantities properly consumed by the plaintiffs for the purposes for which they were entitled to the supply.

The method adopted by Britton, J., commends itself as the more simple and reasonable way of solving the question of quantity, and, upon consideration and comparison of the testimony, his conclusions as to the measure and the amount of damages appear to approach as nearly to accuracy as it is possible to attain in the circumstances. If the plaintiffs have really suffered greater damage than the learned Judge has found, they have only themselves to blame for not being able to demonstrate it with such clearness and accuracy as to justify its allowance. There is much weight in the suggestion that the plaintiffs, from the commencement of their difficulties with the defendants, had in view their claim for damages, and that, by the use of meters and a carefully kept record, they could have demonstrated to a certainty, almost, the amount of gas actually used for

their purposes. This not having been done, there is more difficulty in arriving at the actual quantity, but the learned Judge appears to have made all reasonable allowances to the plaintiffs that should be fairly awarded. It is not without significance that upon the reference in the former action the plaintiffs' own estimate of the quantity of gas used per month for operating the plant, other than kilns, was considerably lower than the monthly average allowed by the learned Judge. Possibly additional plant, other than kilns, may account for this to some extent, but, taking this into consideration with other testimony, it is not easy to say that the learned Judge has erred in his estimate of the quantities.

The defendants contended that, if damages were allowed at all, the more accurate way of ascertaining them would be to find what it cost the plaintiffs to acquire lands, drill for gas, and pipe it to their works, and to make a proper allowance on that basis. It appears that the cost and expenditure for these purposes totals very nearly the same amount as that allowed by the learned Judge, unless, as was contended, the plaintiffs should give credit for the selling value of the lands so purchased and developed. But the gas withdrawn and used was the valuable production of the land which the plaintiffs could have sold to others or have had unconsumed, had they not been compelled to use it, instead of that of which the defendants deprived them.

The judgment appealed from should be affirmed and the appeal and cross-appeal dismissed, each with costs.

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

MEREDITH, J.A., dissented as to the measure of damages, for reasons stated in writing.

APRIL 5TH, 1909.

C.A.

BOYLE v. ROTHSCHILD.

Company—Rival Boards of Directors—Judgment for Payment of Money to Company—Attempted Satisfaction—Payment into Bank to Credit of Company—Attachment of Money as Debt Due to Company—Issue as to Satisfaction of Judgment—Appointment of Receiver—Appeal—Waiver of Right by Adoption of Order Appealed against.

Appeal by plaintiffs from order of a Divisional Court, 12 O. W. R. 168, allowing an appeal by defendants from order of RIDDELL, J., 11 O. W. R. 963, and directing the trial of an issue to determine whether a certain judgment had been satisfied.

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

Wallace Nesbitt, K.C., and A. M. Stewart, for plaintiffs.

G. F. Shepley, K.C., R. F. Sutherland, K.C., and W. E. Middleton, K.C., for defendants.

OSLER, J.A.: — If the balance remaining due on the judgment had been paid in gold with the account of the Canadian Klondyke Co., with the assent of the company, no one doubts that this would have been a payment of the judgment entitling the defendants to have satisfaction entered up. It is contended that what really took place, by the delivery on behalf of the defendants of a cheque for the amount on the People's State Bank of Detroit, and the credit to the company in their account in the same bank, upon the indorsement of the cheque by the company's president and secretary, was payment just as much as if the amount had been deposited in gold; and with this I agree. No one can doubt that, as a matter of business, payment may be made quite as effectively in one way as the other, nor that, in whatever way the People's Bank became debtor to their depositors, the Klondyke Co., the debt in their hands was subject to process of garnishment by the company's creditors. In such a proceeding in the Courts of Detroit

the right of the garnishing creditor may be tried and the existence of the debt disputed. The plaintiffs' suggestion is that the mode of payment adopted was collusive and fraudulent; that there was no real payment; and that the defendants were only endeavouring to aid the garnishors in obtaining payment from the company of claims which they had in the action failed to induce the learned Judge who made the order now sought to be restored, to allow to be set off against the balance due on the judgment. The result of that refusal was that the judgment had to be paid in full. If it has been paid, that is an end of the matter, and that is really the only question involved in the present proceeding.

That was the opinion of the Divisional Court, and I agree with them that the utmost measure of relief to which the plaintiffs are entitled is an issue for the purpose of determining whether at the time of the execution of the satisfaction piece the judgment in Boyle v. Rothschild had been satisfied.

The appeal should be dismissed.

MEREDITH, J.A.:—Unless one is to be stampeded by a cry of "stop thief," the judgment appealed against must be affirmed.

The judgment, recovered in the year 1907, which is in question, being part paid to a large amount, the balance was paid to the proper officers of the company, and the amount was deposited to the credit of the company by such officers, with the bankers of the company, in the usual manner; and such bankers now hold, and have ever since it was so deposited held, the amount to the company's credit, and indeed it has been there attached, in due course of law, by persons claiming to be creditors of the company, and thereupon satisfaction was entered upon the roll of the judgment. Upon such facts it is obvious that such transactions ought not to have been interfered with in any judicial proceeding.

But it is said that the payment was a fraudulent one. It is difficult to understand what is meant by that, unless it be to draw off the mind from the real facts of the case. The money was actually received, and now stands to the credit of the company in the company's own banking institution, proved to be—so far as the evidence goes in this case—one of the highest standing in the State of Michigan. To say that it was not paid in legal tender has weight enough only to cause

regret and possibly irritation that such things can be seriously put forward in a court of appeal. The money has been paid, and is deposited to the company's credit, with their own banker; and what possible difference can it make that it was paid in only in the invariable way in large transactions, through bankers by way of cheque?

Then it is said that, by virtue of an order of the High Court of this province, the money should have been paid into that Court. There is no sort of warrant in fact for such contention; on the contrary, the provisions of the order relied upon for it make it as plain as possible that the money in question was "to be paid" to the company, not into Court, but was not to be paid out by the company without the leave of that Court, except upon liabilities already incurred, or which might thereafter be incurred, in the usual course of business, and necessary for carrying on such business.

Again, it is contended that the money could not be received by the company because, under the same order, the plaintiff Boyle was "permitted" to take, in the name of the company, "such steps as he might be advised, and as may be necessary, to realise the amount payable under the judgment." By another order of the same Court, that plaintiff was restrained from intermeddling, as a board of directors, with the affairs of the company, and from taking, or attempting to take, possession of any of its property, and from taking, or attempting to take, any proceedings in the name of the company, and from otherwise, in any manner, usurping the functions of directors or agents of the company.

In the face of these facts, the contention has obviously no force. Because some of the directors of the company were the judgment debtors, and might not enforce the judgment against themselves as promptly or effectually as they ought, the plaintiff Boyle was authorised to take the necessary steps to realise the amount payable. How the authority to compel payment by taking the necessary steps to enforce the judgment could be thought to prevent payment by the debtors to their creditors without compulsion is difficult to understand.

Lastly, it is said that the payment was not a real one, or, if real, was made with the purpose of enabling pretended creditors of the company to attach, and become possessed of, the money. The purpose of the debtors, in making pay-

ment, cannot make the payment any the less a payment, if duly made to the creditors; and there is no sort of evidence that the payment was not a real one. The money is in the hands of such a banking institution as I have before mentioned, and attached in course of law as the moneys of the company to answer demands of those who allege that they are creditors of the company, and who are seeking to enforce their claims in the due course of law, in the State of Michigan. I find it difficult to perceive anything real in the contention. But the appellants, if sincere in their contention, have the choice of an issue to determine the question, and so there is no sort of excuse for dissatisfaction with that which was done in the Divisional Court, in this respect.

In this respect I have no sort of doubt that the appeal entirely fails.

The other branch of the appeal seems to me to fail likewise.

I can perceive no sort of substantial grounds for taking the management of the affairs of this company out of the hands of its shareholders into the Courts, or into the hands of a receiver under the direction of the Court. What is there that is alleged in any of the actions which would justify such an extraordinary course? The board of directors are a body of business men chosen by the shareholders, and entirely competent to carry on the business of the company, and quite able to meet even the most extravagant money demands that can be made against them; as their payment of the judgment shews. The only excuse, as it seems to me, for such an order, was the failure to enforce the judgment in question, but that was amply provided for in the earlier order, and is now out of the way by reason of the payments made.

There was, no doubt, an attempt to foist upon the later company the obligations of the earlier one; and it may be that the later one was formed in part for that purpose; but that purpose signally failed years ago, and, as the learned Judge who tried the case when that matter was litigated observed, that was an uncommon thing, and was one which generally fails. Subsequent unauthorised payments, which have been made good, afford no sort of excuse; nor can I think allegations made of others, which if proved these

directors are able unquestionably to make good, at all warrant it.

The duplication of litigation over the same subject matter—one part in this province and the other in the State of Michigan—was much lamented, and unquestionably would be deplorable. But it is quite in the power of the appellants to prevent that; and, if the means of preventing it be unfair to them, their proper course is to apply to stay proceedings where their prosecution would be unfair, or, for any good reason, inadvisable. There is no excuse for supposing that the Courts of Michigan will not conserve the interests of the parties in this respect quite as carefully as the Courts of this province would, nor for supposing that they will not have quite as much regard for the comity of the Courts.

The contention that the respondents were precluded from appealing to the Divisional Court, because they had adopted the order, is equally futile. To say that those who have the largest interest in property have sought and obtained a benefit under an order of the Court which puts them out of possession and puts in another, in whom they have no confidence, merely because they have appealed to that Court to at least make that other give ample security in accordance with the practice of the Court, before taking such possession, seems to me too idle for serious discussion. The other circumstance relied on has, if possible, even less weight.

I would dismiss the appeal.

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

APRIL 5TH, 1909.

C.A.

TEMISKAMING AND NORTHERN ONTARIO RAILWAY COMMISSION v. ALPHA MINING CO.

Mines and Minerals—Railway—Right of Way—Encroachment—Statutes—Trespass—Damages.

Appeal by defendants from judgment of RIDDELL, J., 10 O. W. R. 1110, in favour of plaintiffs in an action for damages for encroaching upon and taking away valuable

mineral under the land occupied by the plaintiffs' railway as "right of way."

G. H. Watson, K.C., and J. B. Holden, for defendants.

D. E. Thomson, K.C., and A. W. Fraser, K.C., for plaintiffs.

The judgment of the Court (MOSS, C.J.O., OSLER, GARROW, MACLAREN, MEREDITH, JJ.A.), was delivered by

MOSS, C.J.O.:—The issues in this action were in substance those involved in the action of La Rose Mining Co. v. Temiskaming and Northern Ontario Railway Commission, 9 O. W. R. 513, 10 O. W. R. 516, the main dispute being as to the title to the ores, mines, minerals, and mining rights upon and under a parcel of land forming a portion of the right of way of the Temiskaming and Northen Ontario Railway.

In the last-mentioned action the dispute had been decided in favour of the plaintiffs in this action, but when this action came on for trial before Riddell, J., the judgment of this Court (10 O. W. R. 516), affirming the plaintiffs' title, had been appealed to the Judicial Committee of the Privy Council, but the appeal had not been heard. Riddell, J., gave judgment for the plaintiffs, and when this appeal from his judgment came on for argument before this Court, the appeal to the Judicial Committee still remained undisposed of. It was evident, and was conceded, that if that appeal failed, this must share the same fate.

The Judicial Committee has now given judgment dismissing the appeal, and the order in council to that effect has been received.

This appeal must, therefore, be dismissed with costs.

APRIL 5TH, 1909.

C.A.

RE FITZPATRICK AND TOWN OF NEW LISKEARD.

Municipal Corporations — Expropriation of Land — Water Supply — Compensation to Land-owner — Arbitration and Award — Principle of Valuation — Amount of Compensation.

Appeal by the town corporation from an order of ANGLIN, J., increasing the sum awarded by a board of arbitrators upon expropriation proceedings by the town corporation, taken to acquire certain lands of J. W. Fitzpatrick, containing a spring of water, for waterworks purposes.

ANGLIN, J. (11 O. W. R. 483), after hearing an appeal from the award, directed further evidence to be given before himself, which was done, and thereupon he gave judgment increasing the sum awarded.

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

H. D. Gamble, K.C., for the appellants.

R. G. Code, Ottawa, for J. W. Fitzpatrick, the respondent.

GARROW, J.A.:—The by-law to expropriate was passed on 5th April, 1907. It apparently provided for the expropriation of more than one parcel, but before the arbitration the claim was limited to one, namely, the part in the award secondly described, containing 50 acres, more or less, forming part of lot number 1 in the 2nd concession in the township of Harris, for which the arbitrators awarded as the value the sum of $1,500.

From this award Mr. Fitzpatrick appealed, and on the argument of the appeal before Anglin, J., that learned Judge directed that further evidence might be given, which was done, and, on the matter again coming before him, the learned Judge increased the amount to the sum of $5,240.

A perusal of the judgment makes it quite apparent that the increased amount was arrived at as the result of a somewhat elaborate calculation of the income-producing value of

the waters of the spring as a source of supply for the use of a waterworks system in the hands of and operated by a private owner, the conclusion reached being that if thus operated it would produce a net annual income of $262, which if capitalised would yield the $5,240 allowed.

Objection is made by counsel for the town, both to the principle upon which this result was arrived at and to the calculation itself—as based upon insufficient and misleading data.

Effect must, I think, be given to the first of these objections, because it is, I think, a clear and well-established rule in such matters that the value to be arrived at is the value to the owner and not the value to the expropriating body: see In re Harvey and Town of Parkdale, 16 A. R. 468. But, like many another rule, it is more easily stated, perhaps, than applied. A recent and instructive application is to be found in Re Lucas and Chesterfield Gas and Water Board, [1909] 1 K. B. 16, where it was stated, among other things, by the Court of Appeal, that the basis to be taken must not be "a realised possibility," which was, in my opinion, essentially the method adopted by the learned Judge.

But, while one cannot adopt a realised possibility as a basis, it is quite proper to regard the effect upon value of an unrealised possibility, such as that this spring would within a reasonable time probably be sought as a source of water supply by a neighbouring town or village. And if more than one, then the circumstance (unimportant in this case) that there might be competition would also enter into the question.

One of the difficulties in the matter is that the spring is evidently insufficient as a sole source of supply, even for the town of New Liskeard. This, I think, greatly affects, although it does not destroy, its value, for in the evidence it is shewn that there are other springs which may be reached sufficient with this one to give all the water required for some time to come.

While unable to agree with the method employed, or with the conclusion reached by Anglin, J., I am also unable to adopt the result reached by the arbitrators. The weight of evidence indicates that the land itself, considered as agricultural land, its only apparent immediate use, would be worth about $5 per acre. The only things of special value beyond that are, apparently, the spring and the water front on Lake Temiscaming. And yet for the whole 100 acres

it is an undisputed fact that quite recently Mr. Fitzpatrick paid the sum of $2,700, a circumstance which, it seems to me, must have been overlooked, or at least ignored, by the arbitrators.

In my opinion, that incontestable fact affords the safest starting point for the present inquiry into values. What the town corporation propose to do is to take the southerly 50 acres, which includes the spring and the whole water front on the lake, leaving to Mr. Fitzpatrick the northerly 50 acres, worth, for its only apparent use, about $5 per acre, or $250.

In these simple elements, the recent purchase and the value of what remains, we have, I think, a reasonably safe guide, upon a proper principle, to a proper conclusion, and upon them I would fix the sum to be paid Mr. Fitzpatrick at $2,500.

As to the costs, there has, I think, been some extravagance on both sides. Neither has quite maintained its position, and upon the whole it is not unfair that no order should be made, but that each should be left to bear its and his own costs throughout.

MOSS, C.J.O., OSLER and MACLAREN, JJ.A., concurred.

MEREDITH, J.A., for reasons stated in writing, was of the opinion that the appeal should be wholly allowed and the award of the arbitrators be restored, with costs.

APRIL 5TH, 1909.

C.A.

McDONOUGH v. COOK.

Promissory Notes — Action by Payee against Indorser — Liability of Indorser — Bills of Exchange Act — "Negotiated" — Authority of Decisions — Agreement — Recitals —Estoppel.

Appeal by defendant Crawford from judgment of CLUTE, J., 11 O. W. R. 991.

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

J. B. Bartram, for appellant.

J. McCurry, North Bay, for plaintiff, respondent.

MACLAREN, J.A.:—The plaintiff, as the payee of two promissory notes for $6,000 and $2,000, recovered judgment against the makers, and also against the defendant Crawford, who had indorsed the notes before they had been delivered to the plaintiff. From this judgment Crawford has appealed, on the ground that his indorsing in this manner did not make him liable to the plaintiff.

The trial Judge was of opinion that the case came within the decision of Robinson v. Mann, 31 S. C. R. 484, which was binding upon him, and that the appellant was estopped from denying that he was an indorser of the notes sued upon, by virtue of the admissions made by him in an agreement under seal, to which the plaintiff and the defendants were parties.

It was contended before us, on behalf of the appellant, that Robinson v. Mann did not apply, but that the present case fell under the English and Canadian authorities which held that a party who signed a bill or note before the payee, did not become liable to him, and that the payee could not become a holder in due course, or claim the benefit of sec. 56 of the Imperial Act, or the Canadian Act of 1890, inasmuch as it could not be said that the bill had been "negotiated" to him—being merely issued to him but not negotiated.

Before the Act of 1890, such an indorsement was well known in the province of Quebec as an "aval," and the party so signing was liable under art. 2311 of the Civil Code, without notice of dishonour. In Ontario and the other provinces, where a stranger to the note indorsed as warrantor for the maker, the method adopted was for the payee to indorse "without recourse" above such warrantor, who would then be liable to him and to subsequent holders or indorsers.

When sec. 56 of the Bill of 1890 was under discussion in the Senate, it was decided to recognise such indorsement and to adopt the Quebec doctrine, but to treat the "aval" as an ordinary indorser, and give him notice of dishonour. In order to accomplish this, there were added to sec. 56 of the Imperial Act the words, "and is subject to all the provisions of this Act respecting indorsers," making that sec-

tion read: "Where a person signs a bill otherwise than as a drawer or acceptor, he thereby incurs the liabilities of an indorser to a holder in due course, and is subject to all the provisions of this Act respecting indorsers."

In Duthie v. Essery, 22 A. R. 191, where this Court gave judgment in favour of an indorsee, who had become holder after maturity, against a stranger who had indorsed the note sued upon before the payee, Burton, J.A., described the old practice of the payee indorsing such a note "without recourse" above the signature of the warrantor, as a clumsy contrivance and unnecessary.

The appellant in this case relied upon Jenkins v. Coomber, [1898] 2 Q. B. 168. The authority of that case is, however, much shaken by the subsequent cases of Lloyd's Bank v. Cooke, [1907] 1 K. B. 794, and Glenie v. Bruce Smith, [1908] 1 K. B. 263.

To my mind, the reasoning in Herdman v. Wheeler, [1901] 1 K. B. at p. 372, referring to the definition of "holder" in sec. 2 (g) as including payee, in Lloyd's Bank v. Cooke, supra, at p. 806, and in Glenie v. Bruce Smith, supra, at pp. 268-9, is conclusive as to the possibility of a payee becoming a holder in due course. See also Lilly v. Farrar, Q. R. 17 K. B. 654, where the Quebec Court of Appeal held that the payee may become a holder in due course.

But, even if there were uncertainty as to the effect of the language of the Imperial Act on the point, I consider that any ambiguity was removed from sec. 56 in the Canadian Act by the added words above quoted. In construing this section of our Act according to the rule laid down by Lord Herschell in Bank of England v. Vagliano, [1891] A. C. at p. 144, by asking in the first instance what is its natural meaning, uninfluenced by other considerations, it seems to me that the proper interpretation of the Act has been given by the trial Judge.

The case, however, is concluded by an authority binding upon us, Robinson v. Mann, 31 S. C. R. 484, which I am unable to distinguish from the present case. There it was expressly held that the indorsement which we have in this case, and which was known in French commercial law as an "aval," was a form of liability adopted by the statute into English law.

It is true that since the decision in Robinson v. Mann the Act has been recast, and what was formerly the first part of

sec. 23 has been placed before what was formerly sec. 56, the section thus formed being now sec. 131 of R. S. C. 1906 ch. 119. The words thus prefixed are: "No person is liable as drawer, indorser, or acceptor, of a bill, who has not signed it as such." I do not think this re-arrangement of these sections has in any way altered the law, certainly not adversely to the plaintiff.

This being the case of a note, and there being no drawer, the defendant, not having signed as a maker, is subject to all the provisions of the Act respecting indorsers. Even if the plaintiff were not a holder in due course, but only a holder for value, which he is proved to have been, I am of opinion that he would be entitled to recover under our Act.

But there is more. The plaintiff is entitled also to recover on the ground of estoppel. In an agreement under his hand and seal, to which the plaintiff was a party, the defendant declared that the original note for $8,000, of which the notes sued upon are renewals, and which was precisely in the same form, was "indorsed" by him, and that he was the "indorser" of the note.

The appeal should be dismissed.

OSLER and MEREDITH, JJ.A., gave reasons in writing for the same conclusion.

MOSS, C.J.O., and GARROW, J.A., also concurred.

APRIL 5TH, 1909.

C.A.

RE PORT ARTHUR ELECTRIC STREET R. W. CO.

Ontario Railway and Municipal Board—Jurisdiction—Street Railway — Control and Management by Commissioners — Agreement between two Municipalities—Ownership of Railway—Ontario Railway Act, 1906 — Special Act — New Board of Management.

Appeal by the Board of Electric Railway Commissioners of Port Arthur from an order of the Ontario Railway and Municipal Board, requiring the appellants to give up posses-

sion to a new board, and restraining the appellants from meddling with the Port Arthur Electric Street Railway.

H. Cassels, K.C., for the appellants.

C. A. Moss, for the Corporation of the City of Port Arthur, supported the appeal.

C. J. Holman, K.C., for the Corporation of the City of Fort William and the Joint Commission, objected that the appeal on behalf of a so-called Board should not be entertained.

The appeal was heard on the merits subject to the objection.

The judgment of the Court (MOSS, C.J.O., OSLER, GARROW, MACLAREN, MEREDITH, JJ.A.), was delivered by

MEREDITH, J.A.:—Mr. Cassels's contention, that the policy of the legislation was to confer jurisdiction upon the Board of Commissioners in matters affecting the public only, does not aid his contention that they have exceeded their powers in this case; for the question whether the appellants were usurping the right of control and management of the railway in question, is one in which two large municipalities —with possible conflicting interests—and their inhabitants, as well as the public generally, were very materially, if one may not in regard to the municipalities say vitally, interested.

But one need not be troubled with questions of policy if the words of the legislation confer, as they seem to me plainly to do, jurisdiction.

Under the agreement made between the two municipalities and confirmed by legislation—8 Edw. VII. ch. 80 (O.)—one of the municipalities was, on payment of the amount of an award to be made, to become the owners of a part of the railway in question, which theretofore had been owned by the other, although operated in both municipalities, and the whole road was to be operated and managed by a Board of Commissioners constituted in the manner provided for in the legislation and agreement. The award having been made, and the amount awarded having been paid, and the appellants retaining control, management, and possession of the railway, and refusing to permit compliance with the provisions of the agreement and enactment in regard to its operation and management, the Board was applied to, and such compliance was enforced by it.

The one question is, whether the Board exceeded its powers.

Under the enactment constituting, and conferring jurisdiction upon, the Board—6 Edw. VII. ch. 31, sec. 16—it was given power to require any company, person, or municipal corporation, to do any act, matter, or thing, required to be done under that Act, the Ontario Railway Act, 1906, or the special Act, or any agreement entered into by the company with any municipal corporation, and to prohibit the doing or continuing any act, matter, or thing which is contrary to any of the said Acts or any such agreement; and the jurisdiction conferred on the Board was made exclusive, and its decisions upon any question of fact and as to whether any company, municipality, or person is, or is not, a party interested within the meaning of that section, should be conclusive in all Courts, as well as binding on such parties.

I cannot think that the enactment gives power to the Board to confer upon itself jurisdiction, even as to parties, by a misinterpretation of the law affecting its powers; but rather that, in an emphatic, and possibly a somewhat further-reaching, manner in regard to matters of fact, the ordinary rules which prevail in prohibition proceedings are expressly applied.

By virtue of the interpretation clauses of the first-mentioned enactment, the words "the special Act" include any Act authorising the construction of, or otherwise specifically relating to, a street railway, and with which the Ontario Railway Act, 1906, is incorporated: and under that enactment all Acts relating to street railways within the legislative authority of the province are, in effect, incorporated with it, unless expressly excepted: see secs. 3, 4, and 5; and, if anything may be thought to turn upon that subject, under sec. 207 a municipal corporation assuming the ownership of a street railway, and operating the same, shall be deemed a street railway company for all the purposes of that Act.

Then, the special enactment authorising the construction of the railway in question—see 56 Vict. ch. 78 (O.)—and the enactment 8 Edw. VII. ch. 80, in effect, amending it, which were not excepted from the provisions of the Ontario Railway Act, 1906, are incorporated with it; and so the enforcement of its provisions and the forbidding of the doing or continuing of anything contrary to it, rests with the Board.

I cannot think that the fact that the municipality of Port Arthur controlled the railway through Commissioners can make any difference: the railway is none the less out of the municipality: see 57 Vict. ch. 57, secs. 4 and 5. It was owned by the municipality; that municipality was to be paid and was paid the price which the other municipality was to pay and did pay for the interest it acquired in the railway. The Commission was merely an agency of the municipality for the management of that part of its property.

The action, therefore, of the Board, in preventing the appellants from continuing in the control and management of the railway contrary to the agreement and contrary to the enactment, was quite within their powers; and the question of fact, whether the time had arrived when the new board of management should have such control and management, was one for the Board, and their finding upon it is not only binding upon the parties, but also "in all the Courts."

Appeal dismissed with costs.

APRIL 5TH, 1909.

C.A.

LENNOX v. HYSLOP.

Principal and Agent—Authority of Agent—Husband and Wife — Contract — Preparation by Architect of Plans for Building—Remuneration—Credit Given to Agent—Land Owned by Wife—Building to be Erected for Company—Findings of Trial Judge—Reversal in Part by Divisional Court—Further Appeal—Amount of Remuneration—Evidence.

Appeal by defendant Margaret Hyslop and cross-appeal by plaintiff from order of a Divisional Court (22nd June, 1908), affirming the judgment of FALCONBRIDGE, C.J., in so far as it was against the defendant Margaret Hyslop, but reversing the judgment as to the other defendants, William Hyslop and Hyslop Brothers Limited, and dismissing the action as to them.

The action was brought to recover the amount of an account for the plaintiff's services as an architect in the preparation of plans, etc.

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

G. H. Watson, K.C., and N. Sinclair, for defendants.

T. P. Galt, K.C., for plaintiff.

OSLER, J.A.:—This is a case in which the findings of the trial Judge and his acceptance of the evidence of the plaintiff as against that of the defendant William Hyslop make it extremely difficult to interfere with the judgment, affirmed as it practically has been by the Divisional Court, though I must say that the evidence as printed undoubtedly leaves an impression on my mind less favourable to the plaintiff's case than the trial Judge seems to have derived from the auricular testimony. Nevertheless, the plaintiff's letter of 31st May, to which the appellant's husband, and, as we must say, agent, has been found to be privy, and the application for a loan made by him in her name to the Manufacturers Life Association, are hard to reconcile with the appellant's present contention that the plans to be prepared by the plaintiff were to be for a building costing not more than $65,000, or that the plaintiff's right to any remuneration was conditional upon his being able to prepare plans for a building costing not more than that or a lesser sum. Unless we can say that the trial Judge and the Divisional Court were wrong in deciding against the appellant on this point, the appeal cannot succeed, and this is the conclusion to which, after a careful examination of the evidence and consideration of Mr. Watson's able argument, I feel obliged to come. The formal judgment at the trial was against all the defendants, though from the learned Judge's reasons I should have said that he intended to treat the defendant William Hyslop alone as liable, there being no reference to the other defendants or to any ground on which a judgment against them could be rested. In the Divisional Court the case seems to have been regarded as one of principal and agent as between the appellant and her husband William Hyslop, and the action was dismissed as against the latter and the other defendants, Hyslop Brothers Limited. Taking the findings of the trial Judge and the correspondence of the plaintiff with Hyslop Brothers Limited

and also the letter of 31st May, already referred to, I should have thought that a reasonably plain case had been made out for judgment against the company, regarding William Hyslop as their agent, of which there is much stronger evidence than of his agency for his wife, or against that defendant alone, regarding him as the person to whom the plaintiff gave credit and always really looked to for payment; and this, taking the evidence as a whole, is the view which most commends itself to me. There is, however, some evidence from which it may be inferred that the appellant's husband was acting as her agent, having regard to the fact that she was the owner of the land on which the building was to be erected, and that she knew that he was having the plans prepared by the plaintiff; and this, I suppose, is the ground on which the judgment of the Divisional Court is founded, although we have no note of their reasons.

On the whole, therefore, we should not disturb the judgment against the appellant; and, although the respondent has cross-appealed against the dismissal of the other defendants from the action, this was not pressed if the judgment against the appellant was upheld, and at all events he could not very well have judgment against both principal and agent, knowing all along, as he must have done, the relations of the parties in this respect.

The cross-appeal must, therefore, also be dismissed.

The amount awarded was very much complained of, and it certainly seems large, much larger than, under the circumstances, the plaintiff deserved; but it is supported by the evidence, including that of the defendants' own witness, which the learned Judge acted upon; and it is not a sufficient reason for reducing it that I should myself probably have assessed the plaintiff's remuneration at a much smaller sum.

Appeal and cross-appeal dismissed with costs.

MEREDITH, J.A., gave reasons in writing for the same conclusion.

MOSS, C.J.O., GARROW and MACLAREN, JJ.A., also concurred.

APRIL 5TH, 1909.

C.A.

WADDELL v. PERE MARQUETTE R. R. CO.

Master and Servant—Injury to Servant—Negligence of Railway Company—Explosion—Defective Condition of Boiler—Necessity for Inspection—Failure of Company to Discharge Duty of Master — Liability at Common Law — Evidence.

Appeal by the defendants from the judgment at the trial before MAGEE, J., and a jury, in favour of the plaintiff for $3,000 damages, in an action for negligence.

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

C. St. Clair Leitch, St. Thomas, and J. R. Green, St. Thomas, for defendants.

L. F. Heyd, K.C., and R. H. McConnell, St. Thomas, for plaintiff.

GARROW, J.A.:—The plaintiff was a workman in the defendants' employment at Rondeau station, as car inspector, and on the occasion in question had gone to the engine-room of the defendants' pumping station to get a saw which he required to use. And, while in the room for that purpose, the engine exploded, causing to him very severe injuries.

Nineteen questions were submitted to the jury, the unusual number perhaps caused by the alternative contention of a liability at common law and also under the Workmen's Compensation for Injuries Act.

The findings of the jury were: that the defendants were guilty of negligence in neglecting to have the boilers tested by hydraulic pressure at stated intervals; that the injury to the plaintiffs was caused by reason of the defect in the boiler, consisting of the inner plate; that the water jacket was worn thin by long usage and erosion; that the defect had not been discovered by the defendants because of their neglect to adopt a system of boiler inspection; that the injury was not caused by the neglect of any person in the service of the

defendants who had superintendence over the plaintiff, nor by reason of any person in the service of the defendants who had charge or control of any machine upon the defendants' railway; that the plaintiff was not aware of any defect or negligence, but had an opinion that the boiler was too old for service, and had discussed the matter with Sells, the pumper; that the plaintiff was not aware that the defendants, or some one in their employment superior to himself, already knew of the defect or negligence; no contributory negligence; damages, $3,000; and earnings for 3 years, $1,861.50. And there was judgment for the $3,000, the learned Judge holding that a cause of action at common law had been established, with which conclusion I agree.

The master's duty to his servant at common law is to take reasonable care to supply safe and adequate material and appliances with which to carry on the master's operations, and to maintain them in a reasonably safe condition. Where the master does not carry on the work personally, he can shift the burden by employing competent servants under him to discharge the duty otherwise resting upon himself. Wearing machinery, or plant which would in time become unsafe from use, must be inspected, and proper repairs must be made. And the master would be responsible for defects causing injury which such an inspection would have disclosed, but which for lack of inspection were not discovered in time to avoid the accident: Murphy v. Phillips, 35 L. T. N. S. 477.

If the fault lies with the inspector, either for not inspecting or making an insufficient inspection, the recovery would be under the statute, because it would then be the case of the negligence of a fellow-servant, but, if there was no inspection and no inspector, when there should have been one, the remedy would be at common law.

The facts are not really in serious dispute. The accident occurred on 21st November, 1907. The plaintiff and Sells, the pumper, had each a key to the boiler-room, where, in one of the two compartments, the plaintiff's tools were kept. He had gone there to get a saw, or borrow a saw from Sells, for both statements are made. Sells says that at the time when plaintiff came in he was fixing the injector, which had been out of repair, and time was consumed at the trial in an attempt to prove that the plaintiff was helping Sells to make the repairs at the time of the explosion, which, if proved, could not, I think, have affected the result. Sells swore that

the boiler was old and worn out, and that he had complained of it to some one, but it is not clear that he ever made his complaint in the right quarter. A week or two before the accident it had been repaired by one McKinnon, a repairer from Chatham. Sells had been in charge for about two years, and during that time there had been no inspection to his knowledge. The plaintiff had been at the same work for about 4 years before the accident, and, although he kept one of the two keys, he had never known of an inspection, which he thought could not have been had without his knowledge. And no evidence was given by the defendants, either that there had been an inspection, or that there was an officer of the defendants whose duty it was to inspect the boiler in question. William Vester, a man familiar with boilers, and who had acted as inspector of boilers for an insurance company, saw the boiler in question shortly after the accident, on the same day, and he described the boiler as one which had been in service a little too long, a conclusion he reached because of "the pitting of the iron and the sheets being so thin, eaten away from the sulphur fumes of the coal on the inside, and probably on the other side, the mineral water and acids in the boiler."

His opinion was that the boiler was weak from old age, that it had been used too long and got thin, "and should have been condemned long ago." What occurred was, in his opinion, rather a rupture than an explosion, the rupture having been due to the thinness of the metal of the sheet.

There was, of course, evidence of a more favourable character as to the condition of the boiler, given on behalf of the defendants, chiefly by employees. But even the defendants' witnesses admitted the duty, and indeed the necessity, of periodical tests and inspections. Thomas McKinnon, called by the defendants, who knew this boiler, and had repaired it about 10 days before the accident, said that an inspection was necessary, and should be held as often as once a year, the inspection or test to consist of "filling her up and seeing how much she will hold—pressure"—the only safe way, as he said. Another witness spoke of it as in fair condition for an old boiler. The same witness, Hiram Rushton, defendants' foreman boiler-maker, said that he knew of no system of inspection established by the defendants for such boilers as the one in question, and he thought he

would have known if there was one. He stated afterwards that a test was necessary; that the proper test would be hydraulic pressure; and that it should take place at least once every 3 years. This was concurred in by Mr. Alein, foreman boiler-maker for another railway company, and by Mr. Betts, an inspector of boilers upon the same railway. No one was apparently able to give the history of the boiler. But on every hand it was shewn to be old. No one proved what its condition was when it was installed at the pumping-station. A fair inference from all the evidence would be that at the time of the explosion it was not merely old, but infirm and even dangerous, a condition which could have been easily ascertained by a reasonable inspection by a competent man. There is no evidence of such an inspection, nor of any inspection or test, and there is no evidence even that the defendants ever appointed an inspector whose duty it would be to make such an inspection.

That they had would, I think, be proper matter of defence upon the evidence in this case as it stands. But, even if the plaintiff was bound to give some evidence in support of the negative, there was, I think, enough in the references which I have made to justify the jury in finding that no inspection had in fact taken place, which is, I think, under the circumstances, sufficient.

I think the appeal should be dismissed with costs.

MACLAREN, J.A., gave reasons in writing for the same conclusion.

MOSS, C.J.O., and OSLER, J.A., concurred.

MEREDITH, J.A., dissenting, was of opinion, for reasons stated in writing, that the appeal should be allowed and a new trial granted, upon terms.

APRIL 5TH, 1909.

C.A.

CARPENTER v. CANADIAN RAILWAY ACCIDENT INSURANCE CO.

Accident Insurance — Expiry of Policy—Attempted Renewal after Accident—Death from Injuries—Authority of Agent of Insurers to Renew—Renewal Receipt—Ontario Insurance Act, sec. 148—Payment of Premium.

Appeal by defendants from judgment of LATCHFORD, J., in favour of plaintiff in an action upon a policy of accident insurance, brought by the sister of the insured, the beneficiary in the policy.

G. F. Shepley, K.C., and A. W. Fraser, K.C., for defendants.

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

The judgment of the Court (MOSS, C.J.O., OSLER, GARROW, MACLAREN, MEREDITH, JJ.A.), was delivered by

MEREDITH, J.A.:—Unless the contract of insurance in question was one which the insured had a right to continue or renew, the provisions of the enactment given effect to by the trial Judge (sec. 148 of the Ontario Insurance Act, R. S. O. 1897 ch. 203) in this case cannot be applicable. It does not, and could never have been intended to, give one party to a contract the right to compel the other party to it to enter into a new contract, of the same or any other character, against his will. It does, and was intended to, make uniform and extend the commonly contracted for grace which was given to the insured to renew, after forfeiture or default, a contract renewable, or not, at his will.

It was, therefore, necessary for the plaintiff to prove a contract renewable at his instance, without the consent of the insurers, to bring the case within the enactment applied to it. That, in my opinion, she has failed to do. There are, no doubt,some expressions in the body of, as well as indorsed upon, the contract, which, at first sight, look the other way;

but when it is borne in mind that such contracts can be, and very frequently are, carried on, or renewed, by mutual consent, the purposes of such expressions become apparent. And, indeed, there does not seem to be anything superfluous in them. On the other hand, the absence of such provisions as the usual one for forfeiture in default of payment of premiums, makes it still more plain that the contract was for one year only, and one which could be continued, or renewed, only by mutual consent. "Accident" insurance is obviously different in this respect from "life" insurance; in the former the contract is frequently for a journey, a day, a few days, or a month, or other definitely fixed period; the latter is generally for life, if the insurer chooses to continue it; so that the proper inferences to be drawn may be different; but the provisions of the Act are as much applicable to one as the other, provided, of course, that they are so renewable.

Then was there such a renewal? The insurers were willing and anxious to renew: the insured was not willing, before the accident, and was doubtful even after that until persuaded by the insurers' agent. Had the insurers known the facts, it is very obvious that they would not have continued or renewed the insurance—surely would not have assumed liability for an injury already sustained and a cause of action already arisen. They were not liable, in any sense, for the injury sustained after the termination of the contract; nor would they be liable under the new contract unless it were given a retrospective effect. The only possible ground for giving such effect to it would be pure charity, or else a legal right to a renewal, which latter, as I have said, did not exist. The renewal receipt, given by the agent under these circumstances, was given without authority. He was not intrusted with the receipt for any such purpose. The agent had neither actual nor ostensible authority to so renew; and, even if he had, the evidence does not prove payment of the premium to the insurers before repudiation, or indeed at any time.

The appeal must be allowed.

APRIL 5TH, 1909.

C.A.

RE KNOX ASSESSMENT.

Assessment and Taxes—Assessment Act, sec. 10 (1) (e)—Departmental Store—Question of Fact—Decision of Ontario Railway and Municipal Board—Appeal.

Motion by the Corporation of the City of Toronto for leave to appeal from the judgment of the Ontario Railway and Municipal Board cancelling the business assessment of S. H. Knox & Co., in respect of a retail business carried on in the city of Toronto. See a former report, 12 O. W. R. 499, 17 O. L. R. 175.

The motion was heard by MOSS, C.J.O., OSLER, GARROW, MACLAREN, MEREDITH, JJ.A.

J. S. Fullerton, K.C., for the applicants.

D. W. Saunders, K.C., for the respondents.

OSLER, J.A.:—Whether Knox & Co. were persons carrying on the business of a departmental store or of a retail merchant dealing in more than 5 branches of retail business in the same premises, or in separate departments of premises under one roof, and therefore assessable under sec. 10 (1) (e) of the Assessment Act, was a question of fact and nothing else. As such, the Court has no jurisdiction to entertain an appeal from the decision of the Board, and the application for leave to appeal must, therefore, be refused.

MOSS, C.J.O., gave reasons in writing for the same conclusion.

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

MEREDITH, J.A., dissented, being of opinion, for reasons stated in writing, that the real question was one of interpretation of the enactment, and so the case was an appealable one.

APRIL 5TH, 1909.

C.A.

HEINTZ v. COLLIER.

Broker—Sale and Purchase of Shares for Customer—Margins—Stop Order—Deficiency — Liability — Evidence—Findings of Trial Judge—Affirmance by Divisional Court—Appeal to Court of Appeal.

Appeal by defendant from order of a Divisional Court, 12 O. W. R. 681, affirming (with a variation) the judgment of FALCONBRIDGE, C.J., at the trial, in favour of plaintiffs in an action to recover $5,719.76, the amount alleged to be due to plaintiffs for shares bought for defendant on margin, after crediting the price for which the shares were sold by plaintiffs, who were brokers.

C. J. Holman, K.C., and S. T. Medd, Peterborough, for defendant.

A. C. McMaster, for plaintiffs.

The judgment of the Court (MOSS, C.J.O., OSLER, GARROW, MACLAREN, MEREDITH, JJ.A.), was delivered by

MEREDITH, J.A.:—The questions involved in this appeal are entirely questions of fact, and questions of fact simple in character. Upon a conflict of testimony these facts were, at the trial, found against the defendant; and such findings have been unanimously affirmed by a Divisional Court. Unless there be something extraordinary in the case, an appeal in these circumstances cannot but be a hopeless one. There is no extraordinary circumstance in the case, unless indeed it be in the taking of a further appeal in the very ordinary circumstances of it. It is true that the trial Judge spoke of the parties being "apparently of reasonably equal credibility," but, as he at the same time came to the conclusion that the plaintiffs were right and the defendant wrong upon all the questions of fact involved in the case, however complimentary, or soothing, the observation may be, to either party, it is of no great weight upon such an appeal as this: see Re Blye and Downey, not yet reported.*

*The judgment of Moss, C.J.O., is reported 12 O. W. R. 986.

If, however, we were at liberty to deal with the case just as if there had been no prior findings of fact by a Judge of much experience, who had the great advantage of seeing and hearing the witnesses, I would have no hesitation in coming to the same conclusions as those reached by that learned Judge. The probabilities are altogether against the defendant throughout the case. He was a speculator in stocks, in a comparatively small way, in Peterborough, where the plaintiffs had a branch office in constant communication with their main office, in Buffalo, by what is known as a private wire, so that the defendant was thus put close in touch with stock quotations and with any business which might be transacted by the plaintiffs for him in his ventures. It seems to me, in these circumstances, that there can be no doubt of the defendant knowing all about the purchases which were made for him upon his instructions given at the branch office, or that he kept a close and earnest watch over them from day to day. The market went against him, and now he pleads his ignorance, which would have had no place in the transactions if the market had gone the other way, and he had been a winner, instead of a loser. Without the conclusive evidence of his letters asking time for payment of the debt, and detailing some of his efforts to raise the money for that purpose, I would have had no difficulty in reaching this conclusion; with it, the defence made on this ground seems to me to be futile. So, too, in regard to what is called the "stop order letter." If received, why not acknowledged; and when not acknowledged, why was an acknowledgment not asked, as it might, at any moment, have been done, by post, or by means of the private wire? And if received, why would the plaintiffs act in defiance of it, if it had the effect which the defence now claims for it? Why would they give the defendant the benefit of speculating in his name, with the knowledge that, if there were a loss, he could not be compelled to make it good? It is true that comparatively few letters are lost in the mail; but it is equally true that sometimes letters are found in the pockets of discarded coats which, but for the discovery, the owner would very positively have sworn were duly posted. And sometimes it is dishonestly asserted that a letter was written and posted; an assertion generally considered a safe one, owing to the manifest difficulty of disproving it.

But, as one of the Judges of the Divisional Court pointed out, such a letter would be but a revocable mandate, and one which the sender could revoke by anything which amounted to a withdrawal of it, or even an order to do anything inconsistent with it.

I have no hesitation in saying that the appeal ought to be dismissed.

APRIL 5TH, 1909.

C.A.

REX v. COOK.

Criminal Law—Abortion—Attempt to Procure—Indictment —"Operate" — Evidence — Rebuttal — Conviction— Crown Case Reserved — Form of Questions Submitted— Quashing Conviction.

The accused was charged at the General Sessions of York with an offence against sec. 303 of the Criminal Code. The indictment contained two charges: the first alleged that, with intent to procure the miscarriage of a certain woman then pregnant with child, the accused did unlawfully use upon her person an instrument; the second, that, with the same intent, he did unlawfully operate upon her.

The jury found the accused not guilty on the first count, but guilty on the second.

The Chairman of the Sessions reserved for the Court of Appeal the following questions:—

1. Was I right in admitting the evidence of Drs. Johnson and Cotton as witnesses in rebuttal upon the question of the girl's pregnancy and as to the pain that would be produced by the use of an instrument—they not having been called as witnesses and not having given any evidence in chief?

2. Was I right in charging the jury as I did with reference to the difference between the first and the second counts of the indictment?

3. Was I right in telling the jury, when they found that there was no proof of the use of an instrument, that there

was evidence upon which they might find the prisoner guilty under the second count of the indictment?

4. Was I right in telling the jury that there was any evidence to support an attempt to procure an abortion, in distinction to the completed offence charged in the second count of the indictment?

5. Was my charge to the jury, or were any of the instructions that I gave to the jury upon their being recalled, inaccurate in law?

The evidence and charge were made a part of the reserved case.

The case was heard by Moss, C.J.O., Osler, Garrow, Maclaren, Meredith, JJ.A.

H. H. Dewart, K.C., for the accused.

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

Moss, C.J.O.:—I have given to this case much time and consideration, with the result that, no matter what I may think of the guilt or innocence of the accused, I feel compelled to the conclusion that his conviction under the second count of the indictment ought not to stand.

Much of the difficulty has been created by the frame of the second count and some by the frame of the questions submitted.

The first count was well laid under the language of sec. 303, which enacts that "every one is guilty of an indictable offence . . . who, with intent to procure the miscarriage of any woman, whether she is or is not with child . . . unlawfully uses on her any instrument or other means whatsoever, with the like intent."

The first count properly charged that the accused, with the intent specified in the section, did unlawfully use upon the person of the woman an instrument.

The second count, instead of charging that the accused, with the aforesaid intent, did unlawfully use "other means," leaving it to the prisoner by a demand of particulars to obtain a specific statement as to what the other means were, or specifying them in the first instance, either of which would have been proper, adopted language not in the section, and alleged that the accused unlawfully did "operate" on the woman.

The word "operate," as there employed, is equivocal. It does not necessarily carry with it a meaning suggestive of the employment of means other than an instrument, and the count might, not unnaturally, be regarded as a mere repetition, in another form, of the gravamen of the first count.

It is very apparent from the record that the minds of the counsel on both sides, of the Judge and the jury, in fact of all engaged in the trial, were bent upon the one inquiry, viz., whether, as charged in the first count, the accused did unlawfully use an instrument. The object of the Crown was to prove the possession and use by the accused of an instrument called a sound, which, if used, in the manner spoken of, upon the person of a pregnant woman, was very likely to cause miscarriage. Indeed, the evidence for the prosecution was calculated to negative the use of the hand or finger alone as a means of procuring a miscarriage, and the effort was to demonstrate that the accused had and used the sound. The hand or finger would necessarily be used in making use of the sound.

There was no evidence upon which the jury, as reasonable men, could say that the accused had used means other than an instrument with the intent or for the purpose of procuring a miscarriage.

The only evidence on this branch of the case was, that it was not possible by the use of the hand or the finger to bring about a miscarriage at the stage of pregnancy at which it was said the woman was. The Crown witnesses did not contradict the evidence given on behalf of the accused on this point.

If, as the learned Judge thought, the word "operate" was the equivalent of "other means," the jury should have been instructed that the only other means pointed at by the Crown was the use of the hand or finger, and that, unless they could find on the evidence that such use would procure a miscarriage, they ought not to infer an intent on the part of a skilled professional man, to procure it by such means.

And they should also have been instructed that there was no evidence on which they could find that fact.

And the jury having found the accused not guilty of the charge contained in the first count, having thus negatived the unlawful use of an instrument with the intent and for the

purpose charged, the whole case against the accused practically failed.

Turning now to the questions, it is only necessary to say that if the first is one proper to be made the subject of a reserved case, it should be answered in the affirmative.

There are objections, both as to form and substance, in regard to some of the other questions, but, inasmuch as the answers are indicated in what I have said, and the conclusion on the whole case is that the conviction cannot stand, it is not necessary to specify them in detail here.

The conviction should be set aside.

MACLAREN, J.A., concurred, for reasons stated in writing.

OSLER and GARROW, JJ.A., also concurred.

MEREDITH, J.A., dissented, for reasons stated in writing.

APRIL 5TH, 1909.

C.A.

RE MANES TAILORING CO.

CRAWFORD'S CASE.

Company—Winding-up — Misfeasance of Directors — Allotment of Shares as Fully Paid up—Necessity for Proof of Damage to Company—Contributory—Value of Shares.

Appeal by J. P. Langley, liquidator of the company, from an order made by TEETZEL, J., 11 O. W. R. 498, on appeal from an order of James S. Cartwright, an official referee, made in the course of proceedings to wind up the company, under the Winding-up Act, R. S. C. 1906 ch. 144.

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

I. F. Hellmuth, K.C., for the liquidator.

W. M. Douglas, K.C., for the respondent Crawford.

Moss, C.J.O.:—The company was incorporated in November, 1902, with a share capital of $40,000, divided into 4,000 shares, and carried on business until it was declared insolvent and directed to be wound up by an order made on 10th May, 1907.

The respondent Crawford was one of the incorporators, having been one of the subscribers to the memorandum of agreement of the company, and was named a provisional director in the letters of incorporation. He had subscribed and agreed to pay for 300 shares of the capital stock, at the par value of $10 each. He contributed $25 towards the expense of procuring the incorporation, which has been treated as a payment on his shares.

At the organisation meeting held on 27th November, 1902, he was, with 3 others, elected a director, and at a subsequent meeting of the directors he was elected president.

At that time 5 persons constituted the whole body of shareholders, and all were present at the meeting. At the same meeting of directors it was resolved that the shares of the capital stock subscribed for by each of these 5 persons be allotted to them as fully paid up common stock or shares of the company.

It was also resolved to offer for sale not more than 1,500 shares to be sold as preferred stock, at the par value of $10 per share, the holders thereof to be entitled to receive out of the net profits dividends equal to but not exceeding 8 per cent. by way of preference and priority to the holders of common stock. At a subsequent meeting of the 5 shareholders, held on the same day, the action of the directors was confirmed.

Thereafter the business of the company was proceeded with, a considerable number of preferred shares were disposed of at par, and a few of the remaining shares of common stock were subscribed for, apparently at par, but they do not appear to have been paid for.

In November, 1903, as the result of some arrangement between the 5 original shareholders, 25 more of the so-called paid up shares of common stock were transferred to the respondent. He continued to hold 325 shares and to act as president until 19th August, 1904, when he resigned his position of director and president, and transferred his shares to T. W. Manes, receiving therefor $150, deriving in this

way a profit of $125. He never afterwards intermeddled in the affairs or business of the company. He deposed that, when he transferred the shares to Manes, so far as he knew the latter was perfectly solvent and well able to meet any liabilities he might incur. In November, 1906, the then board of directors made a call of 100 per cent. upon the then holders of 1,300 shares, including the 325 formerly held by the respondent. Default having been made in payment of the call, the board, on 14th December, 1906, declared these shares to be forfeited to the company.

In the course of the winding-up proceedings steps were taken by the liquidator to charge the respondent as a contributory upon and in respect of the shares, but the official referee ordered his name to be struck off the list, upon the ground, doubtless, that, the shares having been transferred to Manes long before the commencement of the winding-up proceedings, the respondent could not be rendered liable as a contributory in respect of them.

The liquidator then applied under sec. 123 of the Winding-up Act for an order declaring that the respondent and others as directors of the company were guilty of misfeasance or breach of trust in issuing 1,300 shares of the capital stock as fully paid up, and that they were jointly and severally liable to the liquidator to the extent of the unpaid liability on the stock at the time of the issue.

The official referee found and determined that the respondent and T. W. Manes and J. M. Spence were jointly and severally liable to pay to the liquidator the sum of $12,875, or so much thereof as they or any of them should be called upon to pay in respect of any unpaid debts or liabilities of the company, including the costs of the liquidation and of the application.

Upon appeal by the respondent, Teetzel, J., reduced the amount of the respondent's liability to $125, the profit he derived from the sale to Manes.

Both the official referee and the learned Judge exonerated the respondent from any imputation of moral wrongdoing, and it is undeniable that he acted in good faith. They also agreed that the allotment of the shares as fully paid up shares was improper and could not be sustained under the circumstances. And as to this there can be no reasonable doubt. At the time of the allotment the shares were the

property of the company, and, apart from any other question, the position of the respondent as director precluded him from joining in or accepting what was virtually a gift to him of the company's property. Whether, apart from the agreement to pay for them, they were of any substantial value, will be considered later on. That the shares did, at that time, belong to the company, and could only be allotted as such, has been made clear by the certificate of the official referee, dated 8th January, 1909, given in response to inquiries directed by the Court.

The difference between the official referee and Teetzel, J., as to the extent of the respondent's liability, arises from the different points of view from which they have regarded the question of damage resulting to the company. Section 123 of the Winding-up Act, which is almost identical in terms with sec. 165 of the Companies Act, 1862 (Imp.), and sec. 10 of the Companies (Winding-up) Act, 1890 (Imp.), enacts that "when, in the course of the winding-up . . it appears that any past or present director . . . has misapplied or retained in his own hands or becomes liable or accountable for any moneys of the company, or been guilty of any misfeasance or breach of trust in relation to the company, the Court may . . . examine into the conduct of such director . . . and . . . make an order requiring him to repay . . . or to contribute such sums of money to the assets of the company, by way of compensation in respect of such misapplication, retention, misfeasance, or breach of trust, as the Court thinks fit."

It has been held that the corresponding sections of the Imperial Acts are confined to claims the successful assertion of which will increase the assets of the company, and they are not to be extended to all manner of claims against directors and other persons named in the section. Under it the inquiry is threefold: (1) Has the person sought to be charged been guilty in relation to the company of one or more of the acts specified? (2) If so, has loss resulted to the company or its assets for which compensation ought to be directed to be made? (3) What is the extent of the compensation which ought to be directed?

In In re Kingston Cotton Mill Co. (No. 2), [1896] 2 Ch. 279, in appeal from a decision of Vaughan Williams, J., [1896] 1 Ch. 331, Lindley, L.J., discussing the object of these sections, said (p. 283): "That object was to facilitate

the recovery by the liquidator of assets of a company improperly dealt with by its promoters (sec. 10 of the Imperial Act of 1890 includes promoters, who are not named in sec. 123), directors, or other officers. The section applies to breaches of trust and to misfeasances by such persons. I agree that the section does not apply to all cases in which actions will lie by the company for the recovery of damages against the persons named; it is easy to imagine cases of breach of contract, trespasses, negligences, or other wrongs, to which the section is inapplicable, and some such have been the subject of judicial decision; but I am not aware of any authority to the effect that the section does not apply to the case of an officer who has committed a breach of his duty to the company, the direct consequence of which has been a misapplication of its assets for which he could be made responsible by an action at law or in equity. Such a breach of duty, if established, is a 'misfeasance' within the meaning of the section . . ." See also the remarks of Rigby, E.J., in In re London and General Bank (No. 2), [1895] 2 Ch. 673, at p. 691.

What was done by the respondent in accepting as fully paid up the shares in question in this case, though done under an honest belief in its propriety, cannot be upheld. It follows as of course that the profit of $125 made upon the transfer to Manes must be accounted for.

There remains the question whether that is the full measure of the respondent's liability to contribute to the assets of the company by way of compensation.

Daniell's Case (No. 2), 23 Beav. 568, 1 DeG. & J. 372, the authority of which has been somewhat shaken by more recent decisions—see Carling's Case, 1 Ch. D. 115—does not seem to be applicable to the facts of this case. There Daniell was held and treated as a contributory on the footing of one who still remained a shareholder. Here the respondent ceased to be a shareholder before the commencement of the winding-up proceedings, and, but for the circumstance of his having been a director, no liability could attach to him as contributory or otherwise. He has already been held not to be liable as a contributory, and that is now final as against the liquidator.

But this does not solve the question of the extent of liability under sec. 123 of the Act.

In estimating the amount of compensation, the fact that the director sought to be charged, and the other directors with

whom he joined in declaring their shares to be fully paid up, had actually subscribed for their shares, and so become liable to pay for them at their par value, while not to be overlooked, is by no means conclusive of the loss to the company by reason of the directors' act. All the circumstances must be considered, and the Court is to say what is to be paid by way of compensation, not by way of punishment: Coventry and Dixon's Case, 14 Ch. D. 660, per Bramwell, L.J., at p. 673. The act of misfeasance was not failure to pay or to enforce payment from the others. Nor would that alone be a "misfeasance," within the terms of sec. 123. Calling them fully paid up shares did not release the liability to the company. The holders remained indebted in respect of them, and the company could only be deprived of the right to recover payment, from any one in whose hands they might be, by that person shewing a purchase under such circumstances as would debar action at the suit of the company against him, for example, a purchase on the faith of a certificate from the company stating that the shares were fully paid, made by one ignorant of the facts. In that case a different view might be taken: see Re Wiarton Beet Sugar Co., Freeman's Case, 12 O. L. R. 149, 7 O. W. R. 613.

No case has been cited or referred to in which it was decided that failure by directors to enforce payment of the amount due on shares is a misfeasance or breach of trust, within the terms of sec. 123. The decisions, so far as they go, seem to point to the contrary conclusion. See In re Forest of Dean Coal Mining Co., 10 Ch. D. 450.

The principles applicable to a case like the present were fully considered in Shaw v. Holland, [1900] 2 Ch. 305. It is true that that was not a proceeding under the Winding-up Acts, but, notwithstanding the expression of opinion of Sir George Jessel, M.R., in In re National Funds Assurance Co., 10 Ch. D. 118, at p. 125, it is now settled that sec. 123 does not create any new liability or any new right, but only provides a summary mode of enforcing rights which must otherwise have been enforced by the ordinary procedure of the Courts: Coventry and Dixon's Case (supra).

In Cavendish Bentinck v. Fenn, 12 App. Cas. 652, Lord Macnaghten said (p. 669): "The 165th section of the Act of 1862 has often come under discussion, and it has been settled, and I think rightly settled, that that section creates no new offence, and that it gives no new rights, but only

provides a summary and efficient remedy in respect of rights which, apart from that section, might have been vindicated either at law or in equity. It has also been settled that the misfeasance spoken of in that section is not misfeasance in the abstract, but in the nature of a breach of trust resulting in a loss to the company."

In Shaw v. Holland (supra) there had been an improper allotment of shares to two directors of a company at an undervalue. In an action by a shareholder it was held that the directors must account to the company for the profits which they had derived from the sale of such of the shares thus allotted as they had disposed of, and that as to shares which they retained, the proper measure of damage was, under the circumstances, the market value of the shares at the dates at which they were respectively allotted to the directors.

It was also held that the market value was not to be fixed by shewing the price obtained on sales of small lots out of a large number of shares.

The result of the authorities seems to be that, in endeavouring to ascertain the loss, if any, to the company, the whole of the circumstances must be looked at; and that the value is to be ascertained as of the date of the allotment.

It is necessary to examine the facts in order to arrive at the position of the company and the value to it of the shares at the time when they were allotted as fully paid up.

The share capital was $40,000, in 4,000 shares of the nominal value of $10 each. Of the 4,000 shares, 1,500 were set apart, to be sold as preferred stock at the par value of $10 per share, the holders of which were to receive out of the net profits of each year the whole amount thereof until the profits should be equal to a dividend of 8 per cent. on the preferred stock sold at the time of declaring dividends, and no dividend was to be applied to the common stock until the profits should exceed a sum equal to 8 per cent. on the preferred stock sold; the surplus profits over and above the 8 per cent. dividends to be applied as dividends on the subscribed common stock.

This left 2,500 shares of common stock, of which 1,300 were allotted as already stated, leaving 1,200 for subscription or sale.

It is obvious that any persons desirous of investing in the shares of the company would naturally invest in the preferred

stock, at least until the business had demonstrated its ability to produce dividends for the holders of the common stock. And what appears is that, while 605 shares of the preferred stock were subscribed and paid for during the time that the company was in existence, only 10 shares of common stock were subscribed for, and, as far as the books shew, they were not paid for, but were afterwards cancelled for default.

There is a reference in one of the financial statements (p. 28 of the case) to 1,303 shares of common stock, in a connection which would go to shew that only 3 shares were subscribed for in addition to the 1,300. In the same statement the preferred stock is put at 500 shares, though this does not seem to agree with the share register.

But, however that may be, it is obvious that there was no market for the common stock, and that at the date when the 1,300 shares were declared to be fully paid up, the shares in the common stock were of no intrinsic value to the company. As to the 1,300 shares, the liability of the holders still continued, and no act was done which deprived the company of its remedy against the holders, unless the act of the company, done long after the respondent had parted with his shares, in declaring them forfeited and cancelling them, has had that effect. But that is a question which it would not be proper to discuss here. The respondent's act in transferring his shares to Manes was not illegal or wrongful, and was not, any more than the failure to pay and enforce payment from the others was, an act of misfeasance or a breach of trust within sec. 123.

In any view of the case, the respondent is not responsible in this proceeding for any sum beyond the $125, with which he was charged by the order under appeal.

The appeal should be dismissed with costs.

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

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

APRIL 5TH, 1909.

C.A.

FLORENCE MINING CO. v. COBALT LAKE MINING CO.

Constitutional Law—Provincial Legislature — Property and Civil Rights—Mining Lands — Rights of Discoverers of Minerals — Order in Council Withdrawing Lands from Prospecting Rights—Act of Legislature Approving—Action by Assignees of Discoverer — Status — Avoidance of Patent—Constitution of Action—Parties—Attorney-General—Powers of Legislature—Compensation—Evidence—Minister of the Crown—Motives for Executive Action—Public Policy.

Appeal by plaintiffs from judgment of RIDDELL, J., 12 O. W. R. 297, dismissing the action.

J. M. Clark, K.C., S. H. Bradford, K.C., and R. U. McPherson, for plaintiffs.

G. F. Henderson, K.C., and Britton Osler, for defendants.

E. D. Armour, K.C., for the Attorney-General for Ontario.

The judgment of the Court (MOSS, C.J.O., GARROW and MACLAREN, JJ.A.), was delivered by

MOSS, C.J.O.:—The first matter for consideration on this appeal is the constitution and frame of the action and the nature and extent of the relief which, assuming them to be entitled to any, the plaintiffs can be awarded on the present record.

By letters patent under the great seal of the province, dated 15th January, 1907, the Crown, in consideration of the payment of $1,085,000, granted to the defendants in fee a parcel of land covered with water situate in the township of Coleman, containing 55 acres, more or less, described as being composed of Cobalt Lake mining location, being land covered with the water of part of Cobalt Lake, together with the mines, minerals, and mining rights thereon and thereunder, and being all that part of the land covered with

the water of Cobalt Lake lying southerly, easterly, and south-westerly of the south-easterly limit of the right of way and Cobalt station grounds of the Temiskaming and Northern Ontario Railway, excepting that portion of land covered with water of the lake designated as mining location J. S 55, containing 4 acres, more or less, granted by letters patent dated 31st July, 1905, to certain named persons.

The plaintiffs, claiming as the assignees of one W. J. Green, allege that on 7th March, 1906, the said Green, while engaged in explorations under the waters of the lake, made a discovery of valuable ore or mineral in place under part of the lake, and thereupon staked out a mining claim in accordance with the Mining Act, embracing 20 acres or thereabouts of the lands covered with the waters of the lake, thereby becoming, as they allege, entitled to the said mining claim and the minerals thereunder, and afterwards and within due time sought to procure the due filing of the claim in the office of the recorder of mining claims in the proper mining district, but he was unsuccessful, owing to the refusal of the recorder to receive and record his claim and the refusal of the Bureau of Mines or the Minister of the Department to entertain or consider his claim; that, notwithstanding the existence of the said claim, the Crown assumed to sell and grant to the defendants the lands described in the letters patent, including therein the portion embraced in the said mining claim; that such sale was without any legislative authority, and the letters patent were issued erroneously and by mistake and improvidently; and that, notwithstanding the said sale and issue of letters patent, the plaintiffs are entitled to the parcel of land described in the claim of the said W. J. Green.

The plaintiffs claim: (1) a declaration that the letters patent were issued erroneously, by mistake, and improvidently, and are utterly void as against the plaintiffs, and that the plaintiffs are entitled to the lands and minerals; (2) a declaration that the defendants' rights, if any, under the letters patent, are subject to the plaintiffs' said rights; (3) an injunction restraining the defendants, their servants, workmen, or agents, from extracting or removing ore or minerals from the claim or interfering with the plaintiffs' exclusive right of possession; (4) an account of all ore or minerals that may be extracted or removed from the claim; (5) a judgment setting aside as ultra vires and void the

letters patent in favour of the defendants as against the plaintiffs, or in the alternative confining the operation thereof to the lands therein described other than those claimed by the plaintiffs; (6) costs; (7) further and other relief.

The Crown is not a party to the action. True, the Attorney-General was represented at the trial and the argument of the appeal, but that was by reason of a notice under the Judicature Act (sec. 60) because of the plaintiffs having called into question the constitutional validity of certain Acts of the legislature, to which further reference will be made.

The presence of the Attorney-General or his representative under this provision does not, of course, enlarge the jurisdiction of the Court in respect of any substantial relief sought in the action. In that respect the action must still be regarded as one to which the Crown is not a party. It is obvious, therefore, that the interposition of the Court must be confined to such relief as may be awarded in the absence of the Crown as a party to the record.

A long line of decisions has settled that an action to declare void a patent for land, on the ground that it was issued through fraud or in error or improvidence, may be maintained, and that measure of relief granted, at the suit of an individual aggrieved by the issue of such patent, and to such an action the Attorney-General as representing the Crown is not a necessary party: Martyn v. Kennedy, 4 Gr. 61; Stevens v. Cook, 10 Gr. 410. See also Farah v. Glen Lake Mining Co., 17 O. L. R. 1, 11 O. W. R. 1020.

But in such cases the relief is limited to declaring the patent void, leaving the parties to stand to one another as if the patent had never issued, their final rights in respect of the land being left to be determined and settled by the Crown, to which the lands are restored by the avoidance of the patent.

The Court is not called upon, and, in the absence of the Crown as a party to the record, cannot be called upon, to exercise the jurisdiction which is vested in it by sec. 26 (7) of the Judicature Act to decree the issue of letters patent from the Crown to rightful claimants. It is not necessary to enter upon a discussion as to the powers possessed by the Court under this provision, or to consider whether it applies to letters patent granting Crown lands, for in this case the record is not so framed or constituted as to parties

as to enable such relief to be granted. Nor, in the absence of the Crown, can the Court undertake to make any declaration as to the ultimate title or right of the plaintiffs, for the reason that no such declaration could have any binding effect upon the Crown's rights in the premises. The utmost to which the Court should go in this direction is to inquire into the plaintiffs' claim to the extent necessary to ascertain whether they have a reasonable ground for invoking the jurisdiction of the Court to declare the patent void in whole or in part as having issued through error or improvidence: Farmer v. Livingstone, 8 S. C. R. 140. Fraud is not alleged or proved in this case.

The Court, being satisfied that the plaintiffs have shewn an interest in the land existing before and at the time of the issue of the letters patent (Mutchmore v. Davis, 14 Gr. 346, in the Court of Error and Appeal), which prima facie appears to entitle him to obtain a grant thereof from the Crown, and that the defendants' patent issued either through error or improvidence, may sweep it out of the way and restore the status quo.

But it cannot be expected that on this record the Court will go further and adjudge as to the respective titles of the Crown, the plaintiffs, or the defendants.

The next question then is, has it been made to appear that, at the date of the issue of the letters patent to the defendants, the plaintiffs were possessed of or entitled to such an interest in the portion of the patented lands claimed by them as entitled them to ask the interposition of the Court in their favour? The learned trial Judge did not pass upon this question. The defendants dispute the plaintiffs' status and present a number of objections, some of which are formidable, if not insurmountable. They point out that the plaintiffs' interest, if any, is that claimed by their assignor, W. J. Green, as a prospector and explorer holding a miner's license, by virtue of an alleged discovery of valuable ore or mineral in place under the waters of Cobalt Lake, and they say that at the time of the alleged discovery neither Green nor any one working for him held a miner's license, and that Cobalt Lake was withdrawn by the Lieutenant-Governor in council from sale, location, or exploration, under the provisions of the Mines Act, and that Green and those associated with him were aware of that fact, or could have ascertained the fact if they had made

proper inquiry, but they deliberately refrained from doing so; that whatever may have been done in the way of exploration or discovery was done without the authority of a miner's license, and was conducted in direct contravention of the prohibition of the Mines Act against exploration on lands of the Crown withdrawn from sale, location, or exploration, and any supposed discovery made under such circumstances conferred no right to a mining claim under the Act. The defendants say, further, that no discovery of valuable ore or mineral in place was actually made, and that the provisions of the Mines Act and the regulations made thereunder with regard to discovery, staking, proof of claim, and inspection, were not complied with, and the claim was never presented, recorded, or inspected, in such manner as to entitle Green to assert under the Act any title to a mining claim situate under the waters of Cobalt Lake, or to confer on him any right thereto. The defendants further say that, upon presentation of the claim for record in the office of the mining recorder, it was rightly rejected by the recorder, because it purported to be a claim of discovery in Cobalt Lake, which was not open for exploration, and because he was under instruction not to receive claims in respect of it; that his action was confirmed by the officers of the Bureau of Mines, and that the Minister of Lands, Forests, and Mines rejected the claim for the same reasons.

Now, in order to obtain the recognition by the Crown of a right in respect of a mining claim, it was incumbent on the claimant to place himself in the position of one who had fully or substantially fulfilled all the requirements of the Mines Act and the regulations thereunder.

The primary requisites at the date of the alleged discovery were the possession of a miner's license and discovery made on Crown lands not withdrawn from location or exploration: Mines Act, R. S. O. 1897 ch. 36, sec. 9, and secs. 45, 46, and 47, as amended by the Act 61 Vict. ch. 11, secs. 1 and 2. Section 9 reads that any person may explore for minerals on any Crown lands . . . except such as may have been withdrawn from sale, location, or exploration; but a reference to the other sections shews that the person spoken of is a person holding a license. See also the regulations approved by order in council of 5th April, 1905, clauses 1, 12, 13, 15, and 16.

It is plain that the explorations leading to the alleged discovery were all made before Green or any one assisting him in the work had procured a miner's license, and it was not until they believed themselves to be on the eve of a discovery of valuable mineral that the withdrawal of a core from the diamond drill was suspended until a miner's license was hurriedly obtained. Then, when the withdrawal was actually made, no inspector was present to verify the core as one bona fide taken from the place, though probably the omission to have an inspector there might have been remedied later on by the withdrawal of another core in the presence of an inspector. But, assuming the regularity of these proceedings, they could be of no avail to create rights if the land was withdrawn from location or exploration: sec. 47. Whether it was or not depends on the true construction of 3 orders in council of 14th and 21st August and 30th October, 1905, as reflected in the light of an Act of the legislature, 6 Edw. VII. ch. 12.

Section 33 of the Mines Act (R. S. O. 1897 ch. 36) provided that where a part or section of the province was shewn or reported to be rich in mines or minerals, the Lieutenant-Governor in council might withdraw the whole or a portion thereof from sale or lease, and set the same apart pending an exploration thereof or the prospecting of veins, lodes, or other deposits of ores or minerals therein by the use of a diamond drill or otherwise, under the direction of the Commissioner of Crown Lands (now the Minister of Lands, Forests, and Mines), and might fix the price or offer the same for sale by public auction.

The order in council of 14th August, 1905, directed that —together with other specified property of the Crown—"the lakes known as Cobalt and Kerr Lakes, situated in the township of Coleman, be withdrawn from exploration for mines and minerals, and from sale, lease, or location." This treatment of Cobalt Lake, as well as previous dealings in regard to portions of it, seems to import the view that the provisions of the Act and of the regulations with regard to discovery, staking, proof of claim, recording, etc., were applicable to lands covered by a large body of water, and were not confined to surface lands. Unquestionably such provisions as those relating to the planting and maintenance of discovery and marking posts cannot be satisfactorily complied with so as to insure permanence, where deep water

covers the land upon which the discovery is said to have been made. Where, as in this instance, the posts were merely planted in the ice, all traces of the point of discovery and of the supposed boundaries of the claim are obliterated with the breaking-up of the ice.

The order in council, however, left no doubt as to the intention of the Crown with regard to the lakes mentioned, viz., that they were not to be subject to exploration for mines or minerals. By means of it, at all events, they were made prohibited territory for explorers and prospectors, and were also removed from the list of lands open for location, lease, or sale. While that prohibition existed, it was not open to any person to make a discovery upon which he could validly maintain a claim under secs. 26 to 33, having regard to secs. 9, 33, 46, 47, and 48 of the Mines Act. And this quite apart from the difficulties, some of which have already been alluded to, surrounding the marking of the place of discovery, the placing of permanent posts shewing the boundaries of the claim, and the proof thereof for purposes of recording.

The order in council of 28th August, 1905, after setting forth that the townships of Coleman and Burke, Lorraine and Hudson, in the district of Nipissing, were shewn to be rich in ores and minerals, directed that such parts of the said townships as had not already been leased or sold be "withdrawn from sale and lease" under the Mines Act, and be set apart under sec. 33—not interfering with the rights of any one who had theretofore made applications for mining lands in the said townships. No specific mention is made of Cobalt and Kerr Lakes, which had been specially dealt with by the order in council of 14th August.

There is nothing in the order in council of 28th August to indicate an intention to supersede the prior order as regards the withdrawal of these lakes from "exploration for mines and minerals." To that extent, at all events, the first order was left to its operation on these lakes, and, while the unsold and unleased parts of the township were placed under sec. 33, the lakes still remained withdrawn from exploration, and so under the prohibition contained in secs. 9 and 47.

The order in council of 30th October, 1905, dealt only with the effect of the order in council of 28th August. Its purpose was to enable licensed miners to do what was requisite

in order to acquire a mining claim upon any of the open lands in the township, and to record it, subject to the specified conditions and restrictions. But it did not authorise or assume to authorise the receiving or recording of a mining claim in respect of a part of the township which was withdrawn from exploration, and was, therefore, still under the prohibition of secs. 9 and 47. The testimony of Mr. G. T. Smith, the mining inspector and recorder for the district, supports the view that this was the intention. He shews that he received his instructions from the Department or Bureau of Mines that the lakes were withdrawn from exploration, accompanied by a copy of the order in council, on or about 18th August, 1905, and those instructions were never afterwards countermanded; that no claim was thereafter presented to him for record until 8th March, 1906, when Green's was presented, and he declined to receive or record it because Cobalt Lake was withdrawn from exploration.

As to this the learned trial Judge says: "It is plain that the inspector considered that Cobalt Lake was not open for prospecting, and that the same opinion was shared by the officers of the department, including the Minister;" and this appears to be a fair and proper inference from the facts and circumstances in evidence.

Strengthening this view is the Act of the legislature 6 Edw. VII. ch. 12, by sec. 1 of which it is enacted that the order in council of 14th August, 1905, is confirmed and declared to have been and now to be binding and effectual for the purposes therein mentioned. This Act received the assent of the Lieutenant-Governor on 14th May, 1906, rather more than two months after the refusal to record the claim on which the plaintiffs rely, and it is argued that effect should not be given to it to their prejudice. In view, however, of the actual situation before and at the time when Green and those associated with him assumed to make explorations on Cobalt Lake, their course of conduct is difficult to understand. Assuming that it was the intention that Cobalt Lake should continue and remain withdrawn from exploration, an inquiry from the Department or the Bureau of Mines or from the inspector and recorder of the district, whether that was the case, would have elicited an affirmative answer. But, according to Green's testimony, he appears to have deliberately refrained from addressing the question to any one.

He is described in the statement of claim as a broker, but from his testimony it appears that for some time he practised law, and had acquired a good deal of experience in mining law. In January, 1906, he consulted a legal gentleman practising law in Toronto about forming a syndicate to prospect at Cobalt. He was introduced to a Major Gordon, and there was a discussion about the chances of finding mineral on Cobalt Lake, and Gordon said he was certain he could find a vein of mineral in the lake. Green then went to the Bureau of Mines and inquired for information relating to the Cobalt district. He saw one of the clerks, a young woman, and was given several pamphlets, one or two mining reports, and the rules and regulations. He told the clerk that he wanted all the information they could give him relating to the Cobalt district. She handed him the pamphlets and told him that everything was contained there, except a map of what claims or sections were open for location, but that he would find the map probably at the recorder's office at Haileybury. He then went to Haileybury to the mining recorder's office and saw a young woman clerk in charge of the office. He asked for a map shewing what claims were open for location, and was handed a map of claims shewing sections marked. On the map appeared sections marked with a capital "A." The clerk told him the sections so marked indicated the sections applied for. From the rules and regulations and the map, he says, he came to the conclusion that Cobalt Lake was open for exploration. He and Major Gordon then set up a diamond drill on Cobalt Lake and worked there for some weeks. Neither of them had a miner's license. On cross-examination he said that when he went to the Bureau of Mines he didn't see the Minister or his deputy. He did not think it was necessary to see anybody who was appointed to give out information. He did not make any inquiry at that time as to whether or not Cobalt Lake was open. He made no special inquiry about Cobalt Lake; simply asked for the literature and all information. He made no inquiry about orders in council. He made no special inquiries at Haileybury about Cobalt Lake. He asked the clerk at Haileybury of the map was up to date, and she replied "yes." She said it was made up every two or three days. He merely asked her the question, "Is this up to date?" and she said "Yes." He did not direct her attention to Cobalt Lake, nor mention any special place where he

was going to prospect. Then, without more, the diamond drill was placed on the ice and operations were begun in Cobalt Lake.

Now, if Green was misled, he had only himself to blame. A plain, direct question either at the Bureau of Mines or Haileybury would have undoubtedly elicited the information that Cobalt Lake was not open for prospecting. But, evidently to suit his own purposes, he did not desire to put the direct question.

There was nothing misleading in the information he did obtain. The regulations were, of course, applicable to all mining districts. The first clause directs attention to the fact that no exploring is to be done on lands withdrawn from sale, location, or "exploration." And clause 16 repeats verbatim the proviso of sec. 47 of the Act against marking or staking a mining claim on Crown lands withdrawn from location or exploration. The map furnished him shewed a condition entirely consistent with the intention and practical working of the orders in council of 14th August and 30th October. The sections or lots actually applied for out of the parts of the township in respect of which the order in council of 30th October authorised the recorder to record claims, were marked on the office map from day to day as they came in, and it is not suggested that the map was inaccurate. A frank question would have led to a full explanation, but for some mysterious reason it was not asked.

In these circumstances, the plaintiffs have nothing to blame the Department or Bureau of Mines for. They present no valid ground or reason for saying that effect should not be given to the intention of the Crown with regard to Cobalt Lake. It follows that what was assumed to be done by Green and his associates by way of exploration and alleged discovery, marking and staking, did not create a right to a mining claim under the Mines Act. That being so, it is hardly necessary to say that what is shewn to have been afterwards done or attempted to be done by them in the way of insisting upon recognition of the claim, is immaterial, and need not be considered. The Crown never receded from the position which was taken on its behalf the moment Green's claim was presented, that, Cobalt Lake being withdrawn, there was no claim to be considered. And afterwards, acting under the authority of sec. 33 of the Mines Act, a sale was made to the defendants. The result is,

that the plaintiffs have no status to impeach the sale or the letters patent issued in pursuance thereof.

On these grounds the judgment appealed from should be upheld. But, if these grounds should not prevail, there still remain the questions of the defendants' position as purchasers for value, and the effect of the Act of the legislature 7 Edw. VII. ch. 15.

That the defendants became the purchasers in good faith and for value the evidence leaves in no doubt. Apparently, they had no notice of the plaintiffs' claim until after the acceptance of the tender and payment of the deposit, but before the payment of the balance of the purchase money and the issue of the letters patent, they were aware that the plaintiffs were claiming the portion of Cobalt Lake in respect of which this action is brought.

And, assuming that the plaintiffs were able to establish a status entitling them to impeach the sale, the defendants would derive no protection from the plea of purchasers for value without notice.

But they would still be entitled to the benefit of the Act 7 Edw. VII. ch. 15.

Many objections have been urged with much force and ability against the constitutional validity and the legal effect of this Act.

It is impossible, however, to conclude that it is a private and not a general Act, and that it was not intended to validate and confirm the sale and grant of the lands comprised in the letters patent, and of all the mines and minerals being and lying in and under the lands and all mining rights therein and thereto, and to vest the property therein and thereto in the defendants as and from the date of the sale, absolutely freed from all claims and demands of every nature whatsoever in respect of or arising from any discovery, location, or staking. Having regard to what is known to have transpired before and up to the time of the passing of the Act, it is not possible to ignore the significance of the enactment, or to seek to treat it as inapplicable to the plaintiffs' asserted claim to impeach the grant to the defendants. And, unless the enactment was beyond the legislative authority of the legislature, it must be taken as absolutely concluding any claim to the lands to which the plaintiffs assert title in this action.

It was urged that the legislation was ultra vires and incompetent, because it was enacted during the pendency of this action, and its effect, if valid, is to usurp the functions of the Courts and to declare the rights of individuals in property in derogation of the ordinary law of the province.

But the subject matter of the enactment falls clearly within the category of property and civil rights. The right claimed by the plaintiffs is, if anything, a right in property within the province. So the right to bring an action is a civil right. And both have, by sec. 92 of the British North America Act, been made subject to the legislative authority of the provincial legislature. And where there is jurisdiction over the subject matter, arguments founded on alleged hardship or injustice can have no weight. As said by Lord Herschell in Attorney-General for Canada v. Attorneys-General for the Provinces, [1898] A. C. 700, when discussing the question of the relative legislative powers and authority of the Parliament of Canada and the legislatures of the provinces under the British North America Act (p. 713): "The suggestion that the power might be abused so as to amount to a practical confiscation of property does not warrant the imposition by the Courts of any limits upon the absolute power of legislation conferred. The supreme legislative power in relation to any subject matter is always capable of abuse, but it is not to be assumed that it will be improperly used; if it is, the only remedy is an appeal to those by whom the legislature is elected." Lord Herschell added: "If, however, the legislature purports to confer upon others proprietary rights where it possesses none itself, that, in their Lordships' opinion, is not an exercise of the legislative jurisdiction conferred by sec. 91." But this latter remark was made in relation to the respective powers and property rights of the Dominion and the provinces, and has no application to a case like the present, where the lands were Crown lands, the property of the province.

Even supposing the opinion of a Court to be that the letters patent issued in error and improvidently, the Act must still remain as a legislative declaration of the validity of the sale. And in that respect the Act would form a bar to the plaintiffs' alleged rights.

Another point, not however raised by the pleadings or argued in the Court below, was suggested in argument of the appeal. It was contended that the grant to the defend-

ants did not comprise or carry with it a grant of the precious or "royal" metals. The grant is of the land covered with water composed of Cobalt Lake mining location, together with the mines, minerals, and mining rights thereon and thereunder.

The Mines Act, R. S. O. 1897 ch. 36, sec. 2 (6), defines mining rights as meaning the ores, mines, and minerals on or under any land where the same are dealt with separately from the surface of the land: see also the Mines Act, 1906, sec. 2 (9), (10), and (12). Here the letters patent are issued subject to the provisions of secs. 188 to 221, inclusive, of the Mines Act, 1906, and there is a grant both of the land and of the mining rights, as well as of the mines and minerals thereon and thereunder; words which, having regard to the nature of the territory and the purposes of the grant, seem broad and comprehensive enough, one might suppose, to justify a construction that would include metals and minerals of every description. Sections 3, 4, and 5 of the Mines Act, R. S. O. 1897 ch. 36, and secs. 2 (16) and 3 (1) and (5) of the Mines Act, 1906, seem to indicate an intention to withdraw from the Crown any right under its prerogative title to the precious metals. But, if this be not so, the plaintiffs' case is not thereby advanced, for their claim, if any, is under the Mines Act, R. S. O. 1897 ch. 36, and any grant to them would not be more extensive in terms or effect than the grant made to the defendants. However, the point is not properly open to the plaintiffs on this appeal.

There may be a question whether the plaintiffs are entitled to maintain this action as assignees of Green. Section 47 of the Mines Act, R. S. O. 1897 ch. 36, enables a licensee, who has discovered a vein or other deposit of ore or mineral, to mark or stake out a mining claim, providing that it is on Crown lands, not withdrawn from location or exploration, and "to transfer his interest therein to another licensee."

This appears to be the only provision, in force when the transfer was made to the plaintiffs, enabling a discoverer to transfer his interests to another. He does not appear to be authorised to make a transfer of a mining claim arising in respect of Crown lands withdrawn from exploration. The question whether, assuming that Green did acquire mining rights in or under Cobalt Lake notwithstanding that it was withdrawn from exploration, he could make a valid transfer

of such rights so as to enable his transferee to maintain an action in respect of them, was not raised or discussed, and it is not necessary to the disposal of the appeal that it should be considered.

The appeal must be dismissed.

APRIL 5TH, 1909.

C.A.

MORIN v. OTTAWA ELECTRIC R. W. CO.

Damages—Personal Injuries to Young Woman by Negligent Operation of Street Railway Car—Charge to Jury—Elements of Damage—Loss of Prospect of Marriage—Quantum of Damages—Excess.

Appeal by defendants from judgment of MEREDITH, C.J., upon the findings of a jury, in favour of plaintiff Lena Morin for the recovery of $5,500 damages in an action for personal injuries. There was also judgment in favour of plaintiff Oliver Morin for $233, but this was not appealed against.

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

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

A. E. Fripp, K.C., for plaintiff.

MOSS, C.J.O.:—At the trial the defendants abandoned their defences to the plaintiffs' allegations of negligence, and the sole question submitted to the jury was as to the damages proper to be awarded to the plaintiffs respectively.

The plaintiff Oliver Morin was allowed $233, and this is not objected to. The plaintiff Lena Morin, who was injured by reason of the negligent conduct of those in charge of one of the defendants' cars in which she was riding, was allowed $5,500.

The defendants complain of the amount as excessive, and ask for a new trial on that account. They also complain of misdirection, but on the argument of the appeal

this ground did not appear to be urged with much confidence.

The objection is that the learned trial Judge, when specifying the heads of damage which the jury might consider and take into account in estimating the compensation which the plaintiff Lena Morin might receive, included amongst them the effect, if any, on her prospects of matrimony, of the injuries which she had received. The learned Judge did not press the point very strongly. What he said was: "I suppose all women have a hope of marriage: how far will it interfere with her prospects of being settled in life, and how far can you fairly measure that in money?" And, he added, dealing apparently not only with this, but with all the other heads he had been previously alluding to: "It is a very difficult thing for any one to estimate, and all you can do is to bring your sound judgment fairly to the consideration of these matters."

At the time of the accident the plaintiff Lena Morin was between 20 and 21 years of age, living with her father, but earning her own livelihood, working as a stenographer at a salary of $6 per week. She had been engaged in this occupation for over 3 years. From her injuries resulted the amputation of her left leg at the knee, the loss of control of, or a form of paresis in, a hand and arm, from which, according to the medical testimony, there may never be an entirely satisfactory recovery; and a very serious shock to her nervous system.

Manifestly, all these tend to affect more or less permanently the health and constitutional powers of the individual, and the jury had an opportunity of observing the plaintiff while she was giving her testimony and of forming some judgment as to her physical condition. From what they saw and heard they could draw their own conclusions as to whether the results of her injuries were or were not likely to impair her prospects of a suitable marriage and settlement in life, with the accompanying freedom from self-dependence.

The jury may take into consideration any damages that are the natural and necessary result of the act complained of, and it would not be improper to draw the attention of the jury in this case to what was in all probability in the minds of all, the possibly injurious effect of the accident upon her prospects of entering into the marital relation.

There does not appear to be any case or opinion unfavourable to this view in our own or the English Courts, while, on the other hand, the views of Courts in the United States, so far as expressed, are favourable. There is nothing in what the learned trial Judge said that would be likely to unfairly influence the jury in considering the question of damages, and a new trial ought not to be granted on the ground of misdirection.

As to the damages being excessive, it must be confessed that they seem liberal. But they are the jury's estimate, and it is to be borne in mind that the plaintiff has not only been greatly crippled in the use of her major limbs, but she was subjected to the pain and suffering incident to these and the other injuries she sustained, and has been permanently, it may be—though the medical witness hopes not—incapacitated from pursuing her occupation and means of livelihood.

The learned trial Judge fully laid before the jury all the elements of damage which they should consider and take into account. He cautioned them against giving to the plaintiff such a sum as would really amount to a punitive award rather than a fair compensation, and warned them of the impropriety of giving an amount that would secure her an annuity eqaul to or nearly approaching what she could have earned if she had not been injured, and finally told them that they were not to give her anything on account of sympathy, "and do not especially give her anything because you think this railway company ought not to have allowed the accident to happen, and because you want to punish them and teach them to be more careful in the future, because that is not your function."

In this, as in every other branch of the charge, the learned trial Judge directed the jury fairly and reasonably, and with a due regard to the defendants' rights, and there is no reason to suppose that the jury misunderstood him in any respect. There is nothing in the circumstances to fairly give rise to the inference that the jury have taken into account matters which they should not have considered, and their award should not be interfered with.

The appeal should be dismissed.

OSLER, J.A., gave reasons in writing for the same conclusion.

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

LATCHFORD, J. APRIL 6TH, 1909.

CHAMBERS.

McLEAN STINSON & CO. LIMITED v. WHITE.

Discovery—Examination of Officer of Plaintiff Company—Relevancy of Question—Conspiracy — Damages—Settlement with some Defendants—Amount Paid.

Appeal by plaintiffs from order of Master in Chambers, ante 713.

Shirley Denison, for plaintiffs.

Glyn Osler, for defendants.

LATCHFORD, J., dismissed the appeal with costs to defendants in any event.

RIDDELL, J. APRIL 6TH, 1909.

CHAMBERS.

ROBINSON v. MILLS.

Appeal to Divisional Court—Leave to Appeal from Order of Judge in Chambers—Rule 1278—Conflicting Decisions—Good Reason to Doubt Correctness of Order—Security for Costs—Libel—Newspaper—R. S. O. 1897 ch. 68, sec. 10—Right of Sub-editor to Security—Application First Made to Master in Chambers—Finality of Decision—"Judge of the High Court"—Affidavit in Support of Motion for Security—Sufficiency.

Application by the plaintiff for leave to appeal from the order of MEREDITH, C.J., ante 763, allowing an appeal from the decision of the Master in Chambers, ante 606, and requiring the plaintiff to give security for costs.

F. Morison, Hamilton, for plaintiff.

J. King, K.C., for defendant.

RIDDELL, J.: — Until recently an order such as that against which it is desired to appeal, would, subject to a possible statutory limitation, have been appealable as of right, but the late Rule No. 1278, for well or ill, has much limited such right to appeal. The Rule provides that no appeal shall lie in such cases without leave, and such "leave shall not be given unless (a) there are conflicting decisions by the Judges of the High Court upon the matter . . . and it is, in the opinion of the Judge (applied to for leave), desirable that an appeal should be allowed; or (b) there appears to the Judge to be good reason to doubt the correctness of the judgment or order from which the applicant seeks leave to appeal, and the appeal would involve matters of such importance that, in the opinion of the Judge, leave to appeal should be given."

The defendant is in the statement of claim described as a reporter of "The Times," Hamilton; but in his affidavit, which is not controverted, he calls himself "the Sporting Editor" of the Hamilton Times, and swears that he has "the control and editorship of the sporting and dramatic intelligence, which is in" his "hands solely."

Referring to clause (a) of the Rule, it is argued that there are decisions which the learned Chief Justice disregarded. They were not overlooked, as they are referred to in the judgment.

The first case is Egan v. Miller, 7 C. L.T. Occ. N. 443. In that case the defendant was a correspondent of a newspaper; he wrote and signed a letter, and this was printed in the newspaper, with which the defendant had no other connection. The Divisional Court held that he was not entitled to an order for security for costs, and this is the full extent of the decision. It is true that in the scanty note which we have of the case it is said that the Court held that the provision applied "only to the publisher, editor, or proprietor of a newspaper." But this is a mere obiter dictum, not called for by and forming no part of the decision.

In Neil v. Norman, 21 C. L. T. Occ. N. 293, the connection of the defendant with the newspaper was a little closer. It is said that he was a country correspondent of the paper, and the alleged libel was contained in one of his periodical contributions. Mr. Justice Robertson held that he was not entitled under the Act to security for costs. Again, the scanty report contains a statement that the learned Judge

held that only the editor, publisher, or proprietor is entitled to security, but again this is obiter, the only decision being that the correspondent was not.

In Powell v. Ruskin, 35 C. L. J. 241, Judge Barron, of Stratford, acting as local Judge, held that advertisers were not entitled to an order for security for costs.

There are a number of cases in 16 P. R., 17 P. R., and 18 P. R., but in none of these is it held—that is, decided—that any one connected with a newspaper, from managing editor to printer's devil, is not entitled to security for costs. There are, therefore, no conflicting decisions of Judges of the High Court upon the matter involved in the appeal; and so no order can be made under sub-sec. (a), so far as this point is concerned.

It is said, however, that the affidavit should have been held insufficient under Robinson v. Morris, 15 O. L. R. 649, 11 O. W. R. 361, 431, 559, as the affidavit as to merits says, "I am advised by my solicitor and I believe that I have a good defence on the merits," the statute requiring "an affidavit by the defendant or his agent . . . that the defendant has a good defence upon the merits." This is answered by the old case of Crossby v. Innes, 5 Dowl. P. C. 566. The affidavit there was by the defendant that he had a good defence on the merits, "as he is advised and believes," and it was contended for the plaintiff that the defendant thus only swore to the merits of his defence in a qualified manner. But Williams, J., said, p. 568: "I think the affidavit is sufficient. It is made by the defendant himself, and if he is a person unacquainted with law and knowing only the facts, he can only know the goodness of his defence in point of law from the advice of others. I do not, therefore, see how he could swear in a more satisfactory manner." There is no more reason for supposing a sporting editor to be acquainted with the law than the defendant in the case just cited, and therefore this clause answers the statute.

In other respects the affidavit might well have been drawn in exact compliance with the Act, but, following principle, and even though "the provisions of the statute must . . . be followed with some approach to strictness," as was held in Robinson v. Morris, 15 O. L. R. at p. 651, there is enough in this affidavit to meet the demands of the statute. The only doubt in my mind was whether the last prerequisite had been furnished. It will be seen

that this statute, R. S. O. 1897 ch. 68, sec. 10, differs from R. S. O. 1887 ch, 89, sec. 2. The latter, as pointed out in Robinson v. Morris, requires the affidavit to shew 4 facts—this requires the affidavit to shew 5, as follows: (1) the nature of the action; (2) the nature of the defence; (3) that the plaintiff is not possessed of property sufficient to answer costs (these 3 are the same in each statute); (4) that the defendant has a good cause of action on the merits; and (5) either (a) that the statements complained of were published in good faith, or (b) that the grounds of action are trivial or frivolous. The first 4 of these are met thus: the first, by making the statement of claim an exhibit; the second, by saying that the good defence sworn to consists in the fact that the words are innocent and harmless and not libellous; the third, almost, if not quite, in the words of the statute; the fourth I have spoken of at length. The fifth fails as to the first alternative, but I think that swearing that the words "are innocent and harmless" is equivalent to swearing that the "grounds of action are trivial and frivolous." I cannot, however, quite understand why, when a statute prescribes the form of an affidavit, such form is not exactly followed.

I am unable to give leave to appeal under clause (a) of the Rule.

As to clause (b), I am to see if there is good reason to doubt the correctness of the decision of the learned Chief Justice; that is, as I understand, I am to determine if, in my reason—the best judgment I can bring to bear—there is any good reason why the decision should be held to be wrong. If that test is met, I should have no hesitation in holding that the appeal would involve matters of such importance that an appeal should be permitted.

Making an order for security for costs often puts an end to an action. "In the ordinary case a plaintiff residing in Ontario, however poor he may be, may not be compelled to furnish security for the costs of an action as a term of being permitted to proceed:" Robinson v. Morris, 15 O. L. R. at p. 651. And it is, in my judgment, a matter of very great importance, and worthy of decision by the highest Court, whether a newspaper sub-editor can be allowed to libel with impunity a poor man for the reason that the libelled man cannot afford to put up security for the costs of an action.

However important the question may be, I cannot give leave to appeal unless there appears to me to be good reason to doubt the correctness of the order.

The first point made is, that the decision of the Master in Chambers was final under sec. 15 of the Act; the argument being that the Master is given many of the powers of a Judge of the High Court, and that, as an application was made by the plaintiff to him in that capacity, he must be considered a Judge of the High Court for the purposes of this proceeding. That cannot be. Whatever his powers, he is not a Judge of the High Court, and the first part of the section no more applies to him than does the latter. It would not be argued that the Master has the power of hearing appeals from a local Judge; it is plain that such appeals must be heard by a Judge; such appeals have been heard by a Judge, as in Neil v. Norman.

The section was introduced by 57 Vict. ch. 27, sec. 7. 5th May, 1894, and the practice has been uniform: Smyth v. Stephenson, 17 P. R. 374, Drumm v. O'Beirne, ib. 376n., Bartram v. London Free Press Printing Co., 18 P. R. 11, are all instances of an appeal being heard by a Judge from the order of a local Judge.

The words "Judge of the High Court" have the same meaning in the earlier as in the latter part of the section. Appeals have been heard from time to time, since the enactment was passed, by Judges from the decisions of the Master, and, so far as I can find, without question. The practice was followed in Georgian Bay, etc., Co. v. World Newspaper Co., 16 P. R. 320; Macdonald v. World Newspaper Co., ib. 324; Lennox v. Star Printing and Publishing Co., ib. 488: all since the Act, and all instances of appeals being entertained from the Master by a Judge of the High Court. It does not seem to have been doubted that the Master in Chambers had jurisdiction. If so, it would seem that the application may be made in the first instance either to the Master or to a Judge. An order made by the former is appealable; an order made by the latter is not. And it may be that the present order, being in fact an order made by a Judge of the High Court, is by statute made non-appealable. I do not need to pass upon that question here.

I do not think that there is any good reason to doubt the correctness of this decision, so far as it holds the defendant to be within the protection of the Act. The main conten-

tion is that the defendant is not an editor; and the decisions referred to are appealed to to shew that, if not, he is not protected by the statute. I have already pointed out that there is no such decision. The statute itself says: "In an action brought for libel contained in a newspaper, the defendant may . . . apply . . . for security for costs . . ." It does not say: "In an action brought against an editor, publisher, or proprietor of a newspaper for libel contained in a newspaper. . . ." I can find nothing in the Act at all limiting the persons who may take advantage of this section. It is suggested that any one else than an editor, publisher, or proprietor could not swear that the statements complained of were published in good faith (7 C. L. T. Occ. N. 443). I can see no more difficulty in a writer swearing to this upon information and belief than his swearing to a good defence on the merits upon such information and belief, and that we have seen is sufficient; and there is, in any case, no more difficulty in the way of a writer than there is in the way of a proprietor of a newspaper whose editor inserted matter without his knowledge, as in the recent case of Scarrow v. Gummer, ante 608.

The anomaly referred to in 35 C. L. J. 241, that a defendant libelled by a postal letter would be refused benefit by way of security, while, if the same "is contained in a newspaper," he must get it, by no means proves that all but editors, publishers, and proprietors are excluded from the benefit of the statute. The statute is itself an anomaly; and it is quite as anomalous to say that if an editor writes a private letter to a friend containing a libel, no matter if that libel is to be read to a public meeting, he cannot get security for costs, but, if he print the letter so that his friend and the public may have it in print, he can get security for costs. Either way there is an anomaly. And is it not an anomaly that the editor of a paper published every two weeks is protected and the editor of one published every month is not? Other Courts have said that the intention of the statute "is to protect newspapers, reasonably well conducted, with a view to the information of the public:" Bennett v. Empire Publishing Co., 16 P. R. 63, at p. 69. That may be so, but I can find nothing of the kind in the Act; and the best manner of finding out what the legislature means is to find out the meaning of what it says. Applying this rule, there is no reason that I can see for re-

stricting the protection of the statute at all, or for reducing the meaning of the plain words, "libel contained in a newspaper." Were it not for authority binding upon me, I should be prepared to hold that even a correspondent could obtain security for costs if sued for the publication in a newspaper; of course this would not apply if the action were for the publication to the editor by letter. (I have had the papers in Egan v. Miller looked up, and I find that at least in one affidavit the solicitor swears that the libel sued for was "alleged to be contained in a letter of correspondence alleged to have been written by the defendant to a certain local newspaper published in the locality where the parties live." If this be so, the decision is wholly explained; but in other affidavits the libel is said to have been contained "in a letter published by the defendant in a country newspaper." I have not the statement of claim, and am not sure of the facts). If ever the question comes squarely before the Court as to the position of a correspondent sued, not for publishing to the newspaper staff, but "in a newspaper," the precise facts of this case may require to be determined.

Were it not for the cases referred to, I should be prepared to hold that the statute means what it says; but, even with the said cases and giving full effect to them, I think the least the statute did was to throw a mantle of protection over all who are concerned in the actual publication in the newspaper and all who are responsible for the acts of those.

The reason for the legislation we need not inquire; it is no concern of the Courts; but it would seem that the legislature has, for some reason, decreed that different laws shall be applied to all connected with newspapers published at intervals of not less than 26 days between issues and to those —editors or what not—who write private letters, or publish circulars, or monthly magazines.

It seems to me that all within the favoured group, whether proprietor, publisher, editor, printer, sub-editor, or what you will, must receive the protection of the Act respecting actions of libel and slander.

With that view of the law, it will be seen that, had the decision of the Chief Justice been the other way, I should have (quantum valeat) given leave to appeal; but, the decision being as it is, I do not think there is good reason to doubt its correctness.

The motion will be dismissed with costs to the defendant in any event of the action.

MACMAHON, J. APRIL 6TH, 1909.

TRIAL.

DAVIS v. ROWSOME.

Fire—Negligence in Setting out—Injury to Land—Destruction of Timber and Fences—Damages—Valuation—Conflict of Evidence.

Action for negligently setting out fire, which spread and ran into the plaintiff's lands and fences, and consumed his lands, timber, and wood, on the north-east quarter of lot 4 in the 9th concession of the township of Elizabethtown.

W. A. Lewis, Brockville, for plaintiff.

J. A. Hutcheson, K.C., for defendant.

MACMAHON, J.:—No by-law had been passed by the township council for regulating the times during which stumps, wood, logs, brush, &c., might be set on fire.

It was admitted that the defendant was negligent in starting the fire which injured the plaintiff's property. The only question for decision is, therefore, the amount of damage to which the plaintiff is entitled.

The plaintiff's farm consists of 98 acres, on which there is a dwelling-house and the necessary farm buildings. He paid $1,500 for the property a few years ago, and valued it at the time of the fire at $2,500.

John Haly and two other valuators made an estimate of what they considered the damage done by the fire. They found that 35 acres of wood land consisting of spruce, cedar, tamarack, and some elm and birch, had been run over by the fire and had injured the wood to the extent of $25 per acre, = $875 00

73 rods of fence destroyed, ... 29 20

Damage done to 7 acres of land by being burned, ... 95 80

$1,000 00

Edward Hough, who lives on a farm adjoining the plaintiff's, was present when Haly and the other valuators appointed by the plaintiff made the measurements, and he thought they went around the proper boundaries of the burned portion. He put the damage to the wood destroyed at $20 to $25 per acre.

Colonel Chesley, T. H. Hill, and William Davies made a measurement of the wooded lands injured by fire, which they put at 19 acres. Colonel Chesley estimated the damage to the 19 acres at $10 per acre. He said the land would only grow inferior timber; and the farm with the buildings off would not be worth more than $1,000.

William Davis, a valuator, lives half a mile from the plaintiff's farm, and knows the swamp land which the fire burned over, and he thought the damage to the 19 acres would amount to $3 or $4 per acre.

Thomas H. Hill's estimate is the same as that of William Davis.

Norton Hill, whose farm is 80 rods west of plaintiff's, said that he made an independent valuation of the damage. He estimated that there were 20 acres of the wooded part burnt and partly burnt, and he valued the damage at $10 per acre, $200.

George Davis, an uncle of the plaintiff, owns 4 acres of the land included in the whole lot of which the plaintiff owns part. Witness's father owned the farm in question 30 years ago, and was on it for 8 years, and, while he owned it, could not get much big timber off it.

With this conflict in the evidence of the two sets of valuators, it is a somewhat difficult matter to decide. That made by the valuators appointed by the plaintiff is, I regard it, excessive in the measurement of the burned area, and a too high valuation has been placed on the damage done to the timber. The measurement of the burned area by the valuators appointed by the defendant is correct, but I regard the estimate of the loss as being under value.

John Haly, after the fire, bought from the plaintiff one acre and $\frac{5}{100}$ of an acre, for which he paid $13. Haly said that what he got was about as good as was in the burnt portion of the wooded land.

I allow for 20 acres burned at $15 per acre; that would be $300 00
Damage done to 7 acres of land by the fire which burned the soil 95 80
73 rods of fence destroyed 29 20

$425 00

There will be judgment for the plaintiff for $425 and costs of suit.

APRIL 6TH, 1909.

DIVISIONAL COURT.

See page 58

DELAMATTER v. BROWN.

Fences—Boundary Line between Farm Lots—Evidence as to Position of Former Fence—Statute of Limitations—Proceedings of Fence Viewers—Line Laid by Surveyor—Appeal to County Court Judge from Award of Fence Viewers—Order on—Effect of—Jurisdiction—Determination of True Boundary—R. S. O. 1897 ch. 284—Injunction—Counterclaim—Declaration of Title—Costs.

Appeal by defendants from judgment of RIDDELL, J., ante 58.

E. D. Armour, K.C., for defendants.

W. M. German, K.C., for plaintiff.

The judgment of the Court (ANGLIN, J., MAGEE, J., LATCHFORD, J.), was delivered by

MAGEE, J.:—The plaintiff's farm adjoins the west side of that of the defendant company. Previous to 1891 there was a rail fence between them, which had been there so long that both admit it must be taken to have been the boundary, whether it was actually on the true survey line between their lots or not. Where that fence was itself located is now the question involved in this action. Different parts of it had been removed at various times between 1891 and 1905, without being replaced, so that in the latter year, out of the total

length of about 50 chains, only about 153 feet of it remained, the north end of which was about 360 feet south of the concession road at the north.

In 1905 it was proposed to erect a new fence, and the parties, being unable to agree, called in the local fence viewers. They on 2nd August, 1905, made an award in which they directed that the plaintiff should put up and maintain the north half of it and the defendants the south half, and settled the description of fence to be built, and they also assumed to fix the line to be occupied by the fence. That award, made by men on the spot, directed that the line should start from the point where the old fence had stood at the north of the lot, without indicating where that point was, and that it should run on the west side of a mountain ash, a walnut and a chestnut tree, through the centre of the old fence then standing, and then south, running 4½ feet west of the centre of a row of spruce tree stumps formerly a hedge, in a straight line to the southerly boundary. The spruce hedge referred to was about 1,375 feet long, and began about 447 feet south of the standing piece of rail fence. The plaintiff was dissatisfied with the award, and appealed to the County Court Judge. He directed a surveyor to be called in to locate the line, and the parties having agreed upon Mr. Gardiner, O. L. S., that gentleman was instructed by both parties to do so. He endeavoured to locate the original survey line between the two lots, and, finding a stone, such as would be likely to be used for the purpose, imbedded in the ground near where the angle should be on the south boundary and at the end of a hedge which the defendants had planted about the year 1893 along their south boundary, and that the stone would reasonably accord with the original intended dimensions of the lots, concluded, against the protests of the plaintiff's husband, that it was the true corner stone, and that a line drawn from it to the centre of the remaining portion of the old rail fence, and continuing north in a straight line to the north limit of the concession, formed the true boundary, and he stated that he thought it impossible to make a more equitable division. He had not, however, been instructed to make an equitable division, but only to find the line, and in his report he mentioned that from statements of several persons he had no doubt that the old fence bore east from the line he described when going south, but that it was not clear that it did not when approaching the south limit bear west again

to the stone monument alluded to. Admittedly, therefore, he had not adopted the true line of the old fence.

The plaintiff contested this report also, and, after hearing all the evidence adduced by both parties, the County Court Judge fixed a new line, and directed the award to be amended in accordance therewith. While the old fence was existing, the defendants had planted alongside the west boundary of their farm at its southern end, and coming within a few feet of the southerly boundary, a row of poplars about 638 feet long, as a wind-break. Mr. Gardiner's line would go 13 feet 8 inches west of the southerly end of the line of poplars, and only about 2 feet 1 inch west of where he found the fence viewers' line would go. About 900 feet north of the south end of the spruce hedge was an oak tree, which Mr. Gardiner found to be 5 ft. 9 in. east of his line and about 3 ft. west of the spruce hedge. The line found by the County Court Judge started at a distance of 8 ft. from the south-west end of the line of poplars, and ran north in line with the centre of the oak tree, and then following on a line north, through the centre of the old rail fence then on the ground, to the concession line at the north. The Judge's order was made on 22nd June, 1906. It, perhaps, leaves something to be desired in the way of exact description. Thereafter Mr. McCaw, another surveyor, was called in by the plaintiff to lay out upon the ground a line in accordance with the Judge's order. He ran what he considered to be such a line through the centre of the oak tree, and placed stakes along it. The plaintiff had already planted at the north end a post, which Mr. McCaw found 2 ft. 2 in. east of his line, and 3 ft. 8 in. east of a maple tree, much discussed in the evidence, standing on the concession road in front of the plaintiff's farm. Mr. McCaw found that when his line running north reached the south end of the rail fence it deflected somewhat to the right to follow the line of that fence. Possibly there was also a deflection at that point in the old rail fence. otherwise the fact would seem to indicate that the rail fence had continued southward rather to the west. Indeed, Mr. McCaw so states, and also that he had to deflect his course at the oak tree westward to reach the centre of the rail fence. He also says he followed the centre line of the fence north and the production of it to the road. That part of the old fence appears to have been on hilly ground and had sagged from side to side, and whether the line was produced in the direction of

its northerly end or of its general course, or whether both coincided, does not appear, but there was still room for dispute, at the north end. Then the plaintiff had the old piece of fence removed and the ground ploughed over, thus making more room for dispute as to where it had been. When she proceeded to erect a fence, which it appears is not even now exactly on the line laid out by Mr. McCaw, the defendant's men interfered and pulled up some of the posts. Forthwith the plaintiff commenced this action and obtained an ex parte order from the local Judge enjoining the defendants from interference. During the currency of that order she went on and had the fence erected from the north side south to the centre, as directed by the fence viewers' award, and did not ask for a continuance of the injunction.

The statement of claim based the plaintiff's right solely on the fact of that award as amended by the County Court Judge, and asked an injunction against interfering with the fence so constructed by her. The company by their statement of defence deny the authority of either the fence viewers or the County Court Judge to make any binding order as to the proper location of the fence, but assert that the line fixed by Mr. Gardiner, the surveyor called in by the Judge, was binding, and that the plaintiff's fence was not on that line nor on the true survey line, nor on the line of the old fence, and by counterclaim they asked to have it declared that the true line is that of the old fence, marked at the south end by the stone monument, and that the plaintiff's fence is wholly on their land, and they ask to have it removed and for an injunction against encroachment.

At the trial the evidence was very contradictory as to the location of the old rail fence and the situation relative to it of the 4 trees mentioned and other trees close to the boundary and the spruce hedge and row of poplars. The defendants had been tenants of the plaintiff's land for 12 years, beginning about 1891, and the fact of their occupation on both sides of the line and also the non-occupation by the plaintiff did not help to make matters more clear. The plaintiff's husband, indeed, went as far as to say that the spruce hedge was planted west of the bed of the old fence about the line of the western angles of the old rails. He also claimed that the oak tree referred to, through which the County Court Judge's line runs, was 4 ft. west of the centre line, and that a blazed chestnut tree, which is 4½ links east

of the spruce hedge, was in the centre line of the rail fence. According to the witnesses for the defendants, the hedge was 2½ ft. east of the fence. The line fixed by the County Court Judge, and upon which the plaintiff based her action, does not accord with that evidence of her husband. With such a difference as to a land mark 1,375 ft. long, no wonder the evidence as to single trees was equally diverse.

From the acts of one or other of the parties themselves, in removing now this now that part of the old fence, without having marks of its position agreed upon, it has become an almost impossible task to fix accurately what that position was. The best that can be done is to approximate it as nearly as may be, on the evidence offered. In dealing with differing statements of witnesses, it would be trite to refer to the advantage which the trial Judge, who sees and hears them, has in judging of the weight to be attached to the testimony offered. Reading the evidence over, one might be inclined to give attention to this or that detail, without knowing what reliance should be placed upon the witnesses who deposed to it, but, unless there be found such outstanding circumstances unmistakably proven, as to be inconsistent with the findings of fact by the trial Judge, and such as should materially affect the judgment to follow thereon, those findings should not be disturbed. In the recent case of Lodge Holes Colliery Co. v. Wednesbury Corporation, [1908] A. C. 326, the Lord Chancellor, speaking of the advantages enjoyed by a Judge who had heard the witnesses, said: "When a finding of fact rests upon the result of oral evidence, it is in its weight hardly distinguishable from the verdict of a jury, except that a jury gives no reasons."

Here the learned trial Judge has preferred the evidence given for the plaintiff to that for the defence. He has not given full effect to either. After carefully going through the evidence, I am unable to say that the plaintiff has undoubtedly encroached on the defendants' lands, or that she is not entitled to have the fence which she has had erected remain where it is. To that extent the learned trial Judge has gone, and I do not see that his decision can be interfered with.

The defendants, however, ask here that a complete boundary line should be defined and declared binding. It appears that this is not the first litigation between these parties. It is not creditable to them that they should have been unable

to agree about a few feet of land in farms of such a size. It is desirable to end this dispute and not leave it open for further controversy.

The learned trial Judge was satisfied that the stone found by Mr. Gardiner did not correspond with the centre of the rail fence. How it came there does not appear. The plaintiff's husband says it was 14 or 16 feet from the centre of the line fence. If that were true, the line would be east of the poplars. It appeared to have been at the end of the defendants' front hedge, but the evidence is not conclusive that the hedge and the plaintiff's front fence and the old rail line fence were coterminous. It is, I think, clear that the fence was west of the poplars. The distance between is a matter of dispute. The plaintiff herself says there was room for a horse and cultivator. Witnesses for the defence put it from about 6 feet up to 12 feet. Whatever that space was, there would have to be added half the width of the rail fence. I think a fair conclusion from the evidence would not disagree with that which appears to have been intended by the County Court Judge, that is, that there was a space of 8 feet from the centre of the south poplar tree to the centre of the fence. Then, at the north end, the fence erected for the plaintiff was intended by her to be on the line which she says was conclusively fixed by the County Court Judge, and she cannot complain if that is declared to be the boundary. It does not appear that the southerly half of the old fence was not a straight line. Assuming that the southerly end of the plaintiff's fence and the point 8 feet west of the poplar correspond with the old fence, a straight line connecting them should also correspond with it, and there, I think, the line should be drawn. It does not appear from the notes of the trial that the learned trial Judge was asked to fix the boundary line, and in giving his reasons for his judgment he expressly declares that he does not fix it. Had it been asked for, I have his authority for saying that he would have done so, and he would have approved of the line I have mentioned.

For the reasons given by the learned trial Judge, I do not think the fence viewers or the County Court Judge had authority to settle the location of the disputed boundary line, or that the amended award in that respect was binding upon the defendants.

On the other hand, the defendants' contention that Mr. Gardiner's survey was binding, cannot be given effect to. Mr. Armour conceded that there was no submission by the parties to the arbitrament of the surveyor made or intended, but it was argued that, from the mere fact of his having been called in at the instance of the County Court Judge, the line reported by him was binding, although an order of the County Court Judge, even if in accord with it, would not be binding. The Line Fences Act, R. S. O. 1897 ch. 284, secs. 3, 4, and 7, in case of dispute between adjoining owners respecting the proportion to be kept up by them of the fence which marks or is to mark the boundary, authorises the fence viewers to make an award respecting the matter so in dispute, and therein specify the locality, quantity, description, and lowest price of the fence, and the time for doing the work. It is manifest from sec. 7, which authorises the calling in of a surveyor by the fence viewers, that he is only to aid them to do that which they have authority to do without him—though great accuracy may be attained through his assistance.

The judgment should be varied in so far as it declares the present fence erected by the plaintiff to be wholly upon her own ground, and it should, instead, be declared that that fence and a straight line drawn from the southerly end thereof and passing west of the row of poplars, at a distance of 8 feet from the centre of the southerly poplar tree thereof, to the northerly limit of the allowance for road in rear of the 7th concession, is the true boundary between the lands of the plaintiff and defendant, and that part of the judgment which enjoins the defendants from interfering with the fence should be restricted to interference therewith otherwise than as a boundary fence.

The plaintiff having substantially succeeded as to the right to maintain in its position the fence erected by her, although not upon the grounds upon which she based it in her pleading, and the defendants having substantially failed on their counterclaim to have Mr. Gardiner's line established, the plaintiff should have the costs of the appeal.

Moss, C.J.O. APRIL 6TH, 1909.

C.A.—CHAMBERS.

McKENZIE v. McKENZIE.

Appeal to Court of Appeal—Leave to Appeal from Order of Divisional Court — Absence of Special Circumstances — Remuneration for Services to Deceased Person — Agreement—Breach—Quantum Meruit.

Motion by defendant for leave to appeal to the Court of Appeal from an order of a Divisional Court (10th March, 1909), setting aside the judgment of ANGLIN, J. (5th December, 1908), and directing judgment to be entered for plaintiff for $619.50 with costs of action and appeal.

The action was brought by one of the sons of Janet McKenzie, deceased, against her executor, another son, to enforce an alleged oral agreement between plaintiff and his mother for a conveyance to the plaintiff of one-half of his mother's farm, in consideration of the care, support, and maintenance of the mother by the plaintiff. The plaintiff alleged that, while his mother was being maintained by him in pursuance of the agreement, she was induced by the defendant to leave the plaintiff's house, and, while weak in both body and mind, to make a will leaving all her property to the defendant. Plaintiff sued for specific performance of the agreement, and the cancellation of the will, or alternatively for an allowance for the care, trouble, and expense incurred by plaintiff in maintaining his mother. The trial Judge dismissed the action, but the Divisional Court gave judgment for the plaintiff as above.

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

W. E. Middleton, K.C., for plaintiff.

Moss, C.J.O.:—I have read the evidence and looked at the decisions referred to on the argument and some others, and on the whole I am of opinion that the case does not present any special features which would render it proper to treat it as exceptional and allow a further appeal.

The Divisional Court did not, nor could it, consistently with the authorities, differ from the learned trial Judge's view as to the impossibility of enforcing specific performance

of the arrangement or agreement sworn to by the plaintiff, or as to the difficulties in the plaintiff's way if the alternative relief sought was to be regarded strictly as an action for damages for breach of the agreement.

The cases shew, however, that a person in the position of the plaintiff, who has paid money and performed services or done either, in circumstances like those found in this case, is not tied down to the remedy of damages as for breach of the agreement. He may be entitled to remuneration as upon a quantum meruit for the moneys paid and the services rendered for the benefit of the other party, upon the principles stated by Armour, C.J., in Walker v. Boughner, 18 O. R. 448, at p. 457, and by Ritchie, C.J., in McGugan v. Smith, 21 S. C. R. 263, at p. 264, and by Strong, C.J., in Murdoch v. West, 24 S. C. R. 305, at p. 306.

This view was taken by the Divisional Court, and would probably have been taken by the learned trial Judge if he had not been of the opinion that the plaintiff ought to be treated as relying solely upon the agreement.

I was at first inclined to think that the plaintiff should not have been allowed for the services performed by his wife, but upon consideration I am unable to say that the Divisional Court erred in the view it adopted, or that the point is one on which the plaintiff ought to be subjected to another appeal.

The motion must be dismissed with costs.

CARTWRIGHT, MASTER. APRIL 8TH, 1909.

CHAMBERS.

BARBER v. WILLS AND KEMERER.

Parties—Addition of Co-plaintiffs—Consent of One of two Partners to Addition of Firm—Dissolution — Rule 206 (3)—Claim for Conversion of Shares of Stock — Action by Assignee of Firm for Benefit of Creditors—Rule 185 —Plaintiffs all Seeking same Relief.

Motion by plaintiff for leave to add two persons as co-plaintiffs as at the commencement of the action, and to amend all the proceedings accordingly.

Shirley Denison, for plaintiff.

A. W. Ballantyne and M. P. Van der Voort, for defendants.

THE MASTER:—The action was begun by plaintiff as assignee for the benefit of the creditors of the firm of Stewart & Lockwood. The defence has been raised that, as the assignment was executed by Lockwood only, and not by authority of Stewart, it is invalid, and that, therefore, plaintiff has no status to maintain the action.

The plaintiff, therefore, has moved to be allowed to add Stewart and Lockwood as plaintiffs, nunc pro tunc, and to amend all the proceedings accordingly.

The only consent obtainable is one from Lockwood. It seems clear that this is not a compliance with Con. Rule 206 (3), and especially as the fact is that the firm was dissolved on 3rd February, or at least has ceased to carry on business since that date. But, if still in existence, it would not be within the scope of one partner's authority to give a consent to add the firm as plaintiffs in the action.

Even if this is not decisive, there is another very serious objection to the motion. It is not a case within Con. Rule 185, for there the plaintiffs are seeking separate reliefs. Here the plaintiffs, if joined, would all be seeking the same relief, viz., to recover damages for alleged conversion of certain shares of stock, in which Stewart and Lockwood were interested.

Here the difficulty is that what is asked for was refused by a Divisional Court in Tinning v. Bingham, 16 P. R. 110, reversing the decisions of the Master in Chambers and Galt, J. That case was the converse of this. There it was laid down that the addition of Lailey, Watson, & Co. made it a new action, altogether distinct from the action commenced, and so not within the Rule which is now Con. Rule 313. Here, too, as pointed out by Mr. Ballantyne, the fact that the alleged conversion took place only on 1st February, 1909, is very material. Barber might succeed on the ground of this being an unjust preference of defendants as creditors, but no such position could be taken by the assignors.. Further, if Barber recovered, it would be for the benefit of the firm's creditors. If they recovered, it would be for their own use, and subject to their disposition.

The motion fails, therefore, on both grounds, and must be dismissed with costs to defendants in the cause.

CARTWRIGHT, MASTER. APRIL 8TH, 1909.

CHAMBERS.

LINDSAY v. IMPERIAL STEEL AND WIRE CO.

Discovery—Examination of Party—Danger to Life from Examination—Special Arrangements—Affidavit of Physician—Cross-examination—Costs.

Motion by defendants to dismiss the action for the plaintiff's failure to attend for examination for discovery.

F. E. Hodgins, K.C., for defendants.

J. H. Spence, for plaintiff.

THE MASTER:—In answer to the motion an affidavit by plaintiff's physician has been filed. In this he says that during the last year he has attended her several times for attacks of a nervous heart; he considers that an examination would be sufficient to bring on one of these attacks, "any one of which attacks might end fatally." On cross-examination, he did not recede from this position.

The only order that can be made is that such arrangements be made as will allow the examination to be taken at plaintiff's house and in the presence of her physician, who is to be at liberty to stop the examination whenever he thinks that the condition of the plaintiff renders it advisable to do so.

The costs will be in the cause, except those of the cross-examination of the physician, which will be to the plaintiff in any event. The affidavit of a reputable physician should be accepted, and any cross-examination should be at the risk of the attacking party.

MACMAHON, J. APRIL 8TH, 1909.

TRIAL.

HARMER v. BRANTFORD GAS CO.

HOLSTOCK v. BRANTFORD GAS CO.

WILLIAMS v. BRANTFORD GAS CO.

Negligence—Explosion of Gas—Injury to Persons and Property—Cause of Explosion—Evidence—Liability of Gas Company—Natural Gas—Proper Precautions.

Three actions to recover damages for loss and injury sustained by the several plaintiffs from an explosion of gas supplied by defendants.

The 3 actions were tried together at Brantford on 16th, 18th, and 19th March, 1909.

L. F. Heyd, K.C., and E. C. Jones, Brantford, for plaintiffs Harmer and Holstock.

A. L. Baird, Brantford, for plaintiff Williams.

W. S. Brewster, K.C., and C. S. MacInnes, K.C., for defendants.

MACMAHON, J.:—Harmer, the plaintiff in the first case, claims damages from the defendants for the loss of property in a building, called the "Theatorium," situate on the south side of Colborne street, in the city of Brantford, of which he was the lessee, by the explosion of gas, caused, as alleged, by a connection with the gas main of a pipe leading into said premises, the end of which pipe, it is asserted, was not stopped, and the gas escaped therefrom into said building, and accumulated therein in such quantity that an explosion occurred on 11th September, 1908, whereby the said building and the contents thereof were destroyed.

The claim of Holstock, the plaintiff in the second suit, is for personal injuries to him while sitting in front of the Theatorium at the time of the explosion. The allegations in the statement of claim are: that the defendants were at the time laying down new gas mains on the south side of Colborne street, through which mains a high pressure of

natural gas was flowing; and that, owing to the defective condition of said gas pipes, and owing to the negligence of defendants' servants and workmen, an explosion of natural gas occurred.

Williams, the plaintiff in the third action, is a restaurant-keeper, carrying on business at No. 51 on the south side of Colborne street, in Brantford, and alleges that the fixtures, furniture, and stock in trade, were destroyed by an explosion of natural gas on 11th September, caused by the defendants' negligence in not properly caring for their gas pipes running in front of plaintiff's place of business.

The statute 62 Vict. ch. 107 (O.), intituled "An Act respecting the Brantford Gas Company," recites that on 13th March, 1854, the company were incorporated under the provisions of 16 Vict. ch. 173, intituled "An Act for the Promotion of Incorporated Joint Stock Companies for supplying Cities, Towns, and Villages with Gas and Water."

By the first section, the company are declared to be a body politic and corporate, having the powers conferred under R. S. O. 1897 ch. 199, or which may hereafter be conferred by any amending Act.

This is a private Act.

The powers conferred on gas companies by ch. 199, sec. 14, are to "manufacture and supply gas for heating, cooking, . . and . . manufacture and supply electric or other artificial light," etc. The "gas" which a company are restricted to supplying is "manufactured gas."

If a company desire to supply natural gas, they should be incorporated under R. S. O. 1897 ch. 200, which is intituled "An Act respecting Companies for supplying Steam, Heat, Electricity, or Natural Gas for Heat, Light, or Power." The 5th section of that Act provides that "every such company may construct and operate works for the production and distribution of . . . electricity or natural gas for the purposes of light, heat, and power along the streets . . . of the city, town, or other municipality; but as to such streets . . . only upon and subject to such agreement in respect thereof as shall be made between the company and the municipality, and subject to any by-law of the council of the municipality passed for such purpose."

The defendants—assuming that they had authority under their then existing charter and a by-law passed by the city

of Brantford—changed their system 5 years ago from manufactured gas to supply natural gas, using the same mains and service pipes.

Professor Ellis (who has been Professor of Applied Science for 25 years in the University of Toronto), when giving evidence, said that there is not much difference between manufactured and natural gas when you have to deal with their explosive qualities.

Without deciding whether the company have the power under their charter and the above mentioned by-law to supply natural gas—as the corporation of the city of Brantford have permitted the company during the past 5 years to supply natural gas to the city, and as the city corporation hold $10,000 in stock of the company, and have a member of the council on the directorate of the company, I shall deal with the case as if the company had power to supply natural gas.

On the south side of Colborne street in Brantford, commencing with and including the O'Neil shop (No. 41), which is the most westerly of the buildings wrecked by the explosion, the next building easterly is the Theatorium (No. 43) owned by James B. Holt, but at that time in occupation of Stephen Harmer, the plaintiff in the first suit. The Western Counties Electric Light Co. were the tenants of the basement to the Theatorium, which they used as a store-room for supplies. The premises adjoining the Theatorium on the east was No. 45, the ground floor of which was occupied by a man named Bouey as a shooting gallery and a bowling alley, and the second or upper storey was occupied by Thomas C. Horney as a dwelling. The ground floor of No. 47, to the east of Bouey's, was a Chinese restaurant kept by one Marr; and the upper storey Gerting Smith occupied as a dwelling. The basement of Nos. 45 and 47 was a pool-room kept by a man named Doyle. Adjoining Marr's restaurant on the east (No. 49) was Henderson's tailor shop, on the ground floor. No. 51, to the east of Henderson's shop, was tenanted by the plaintiff Williams as a restaurant. The second storey over Henderson's and Williams's was in the occupation of Mr. Thompson as the "International Schools."

On 11th September the workmen of defendants were digging trenches from the O'Neil building to a short distance east of Williams's restaurant, and putting in 6-inch mains, and making service connections from the mains with one-inch pipe to the different consumers on the east side of the street.

About 15 minutes to 2 o'clock the plaintiff Holstock and a companion named Blaiblow came to the Theatorium; and each sat on a pillar in the vestibule of the Theatorium; Holstock struck a match to light a cigarette, when there was a terrific explosion, and both were hurled to the north side of Colborne street, Blaiblow being killed and Holstock severely injured. The planks of the sidewalk, 10 feet long and 2 inches thick, were thrown across the street, and the walls of the O'Neil building were so badly damaged that they had to be torn down by the fire brigade; and the walls of the Theatorium were bulged out 5 inches, and had to be taken down.

As two people had been killed by the explosion, an inquest was held, and the coroner directed Charles Taylor, who had been a plumber for 38 years, to investigate the meters of those using gas in any of the buildings injured by the explosion, and to have the trenches where mains were laid and the trenches for the service pipes connecting with the Theatorium uncovered. Taylor found the meters in the Webling building (which adjoins O'Neil's shop on the west) in good order, and all the connections properly made. A new service had been put in the O'Neil building; all the pipes had cap-pieces on. The Theatorium meter he found on the top of the wall, where it had been blown. The stop-cock was on, and the meter was, therefore, shut off. Elias Foster, defendants' foreman, told Taylor that the police had given him authority to remove the meter from Bouey's place. Taylor found the pipes in Bouey's place with cap-pieces on. Foster said he removed the Bouey meter, and it was in a satisfactory condition. The Doyle meter and connections Taylor found in good condition.

Timbers had fallen on the meter in Marr's restaurant, and Taylor could not say in what condition it was. Neither Smith nor Horney used gas. Henderson removed immediately after the explosion, and took the meter to his new place of business, where Taylor and Foster saw it. It was in good condition. Taylor examined the connections with the main, and found them with cap-pieces on and all in order. Williams had removed his pipes connecting with the meter. The pipes and meter were in good order.

Eliza Hart, who cleaned out the Theatorium every day, said that on the day of the explosion a young man, Robert Taylor, a plumber employed by the defendants, came into

the Theatorium, and asked where the meter was, and was told he could not reach it that way. Mrs. Hart said that Foster was then in the trench, and wanted to make some couplings. This was between 9 and 10 o'clock, as she (Mrs. Hart) left the building before 10 o'clock. Mrs. Hart noticed a smell of gas inside the Theatorium that morning.

The case of the plaintiffs is, that, in digging up the trenches to make the connections with the Theatorium, the defendants uncovered what is called a "dead pipe," that is, a pipe which, although not connected with the main on the north side of Colborne street, had been put through the wall of the Theatorium; and that when this pipe was uncovered the defendants' workmen connected it with the main on the south side, and, as it was open at the end which entered the Theatorium wall, it filled the building with gas, and the explosion was caused thereby. . . .

[Reference to evidence of witnesses heard at the trial.]

The veracity of the witnesses Foster, Robert Taylor, Roger McKinnon, and John Casey, was not impeached, and there was nothing in their manner of giving evidence which caused me to suspect the truthfulness of any of them. And, in order to find that the dead service pipe was connected with the main, I must find that they swore to what was untrue, and that they entered into a conspiracy to tell what they knew to be untrue, for their evidence was a corroboration of each other's statements.

Had the dead service pipe been connected with the main—it being the universal practice to red-lead the screw of the pipe—traces of red-lead would have been found on the screw and in the cap when the pipe was uncovered; but neither Sergeant Wallace of the police force, who had charge of exhibit 13 (the two pipes forming the dead-head pipe) from the time it was taken from the trench, nor Draper, found any traces of red-lead on the screw or in the cap, and I could find none in the cap, although I used white paper in my efforts to discover it.

From the oral evidence and the evidence furnished by the photographs which were taken within half an hour of the explosion (exhibits 8 and 14) will be seen the almost utter impossibility for any one to enter either of the trenches opposite the Theatorium.

James G. Crothers, superintendent of the Ontario Gas Light Co., James M. H. Young, superintendent of the City

Gas Co. of London, and George W. Barnes, consulting engineer, all having lengthened experience in connection with gas works, and the distribution of gas, were of one opinion in saying that all precautions were used by the defendants in laying down the new main and making the service connections therewith.

I cannot find any negligent act of the defendants in connection with their main or service pipes, and they are not responsible for the gas pipes of the consumers, which are absolutely under the consumers' control. The plaintiffs must allege and prove negligence, which they failed to do. . . .

[Reference to Green v. Chelsea Waterworks Co., 10 Times L. R. 175, 70 L. T. 548.]

It appeared that 600 feet of gas passed through the pipes in Bouey's bowling alley during the 3 weeks prior to the explosion which is unaccounted for; and, although there is a brick wall separating the bowling alley from the Theatorium, we know how subtle gas is and how fast it permeates through small holes and crevices; and Mrs. Hart, in the early morning of the day of the explosion, smelt gas in the Theatorium, which could hardly have come from the main, and it may have found its way through some hole or crevice between Bouey's and the Theatorium.

Natural gas will not explode until it is mixed with oxygen; and Professor Ellis stated that if 400 feet of natural gas was brought into contact with about 40 per cent. of air, it would cause the explosion in this case, on being ignited.

There will be judgment dismissing the actions, but, in the circumstances, it will be without costs.

Reference is made to the following cases: Dunn v. Birmingham Canal Co., L. R. 8 Q. B. 42; Dixon v. Metropolitan Board of Works, 7 Q. B. D. 418; Tremain v. Halifax Gas Co., 11 N. S. R. 394; Brown v. Waterous Engine Works Co., 8 O. L. R. 37, 3 O. W. R. 943; Blinkeron v. Great Central Gas Co., 2 F. & F. 437; Cowans v. Marshall, 28 S. C. R. 161; Am. & Eng. Encyc., 2nd ed., vol. 14, pp. 936-7; McArthur v. Dominion Cartridge Co., 31 S. C. R. 392; Labombarde v. Chatham Gas Co., 10 O. L. R. 446, 5 O. W. R. 534; and Prue v. Town of Brockville, 10 O. W. R. 359.

APRIL 5TH, 1909.

C.A.

BROWN v. CANADIAN PACIFIC R. W. CO.

Railway—Person "Stealing Ride" on Freight Train—Order from Conductor to get off while Train Moving—Injury—Evidence—Findings of Jury—New Trial.

Appeal by the defendants from the judgment at the trial, upon the findings of a jury, in favour of the plaintiff for the recovery of $2,000 in an action for damages for injuries sustained by plaintiff, owing, as he alleged, to being compelled by defendants' servants to jump off a moving train.

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

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

L. F. Heyd, K.C., for plaintiff.

OSLER, J.A.:—There must, in my opinion, be a new trial in this case.

The cause of action, as stated in the pleadings, is that, the plaintiff being upon a freight train of the defendants, the conductor compelled him to jump from it while it was in motion, and that in doing so he fell under the train and was injured.

The evidence was that the plaintiff and a friend of his, one Sharpe, were stealing a ride upon the train. The plaintiff said that the conductor, on seeing them, ordered them off the car; that he was "persuaded off;" that he got scared and missed his hold and went under the train; that the conductor came towards him and told him that, if he did not get off, he would put him off; that he "acted pretty mad, like as if we would not get off he was going to shove us off; he walked right in our direction. Sharpe got off first, and I got off next. I thought I was going to be shoved off, and I thought I could get off without being hurt, but the train

was going too fast for me to get out any other way; he (the conductor) came towards me and put me off; he was coming with a vengeance to put me off, and I got off; would not have got off if the conductor had not been there." On cross-examination: "He motioned with his hand; he said, as far as I can remember, 'Get off there, you have rode far enough.'" The witness appears to have been at one end of the car, and the conductor, according to his story, did not get any closer to him than half way down the car from the other end. "He made no threat by words." His companion got off without injury.

One Frank Egerton was then called for the plaintiff, and gave quite a different account of what occurred. He was standing on the station platform, about 100 feet away from where the plaintiff was. Saw the two men on the car; saw a person whom he supposed to be a railway employee, but whom he could not identify as the conductor, warn them off; saw Sharpe get off, and the plaintiff attempt to do so, but he apparently "lost his nerve" and got hurt. He took hold of the rail, and the conductor forcibly forced him off. He was quite near the end of the car. His hands were on the railing, and the conductor pulled them off—"tore them off" is the expression—and broke his hold from the rail, and he dropped between the platform and the rail.

For the defence, the conductor said that all he did was to motion the men from the other end of the car to get off. He did not touch either of them. The train was moving slowly, perhaps 2 or 3 miles an hour; the last he saw of the plaintiff was that he was standing with his hand on the railing; did not stop the train because they were going so slow that he did not think it necessary; thought they could get off safely. There was not a word of truth in Egerton's account that he had taken hold of plaintiff and forced him off.

Sharpe was also called for the defence. He thought that when the conductor spoke to them first, they were getting on the car. The conductor got on at the opposite end. They were 7 or 8 feet from the other end. The conductor said, "get to hell out of that, or off here." The conductor was then "4 or 5 feet from me. I got off as soon as I saw him; train was going pretty fast, 12 or 14 miles an hour. Conductor was within 3 or 4 feet of Brown. Did not see the conductor closer to Brown than that. Could not say for sure

whether the conductor touched him or not. Brown got off, but stumbled in doing so and fell."

Binning, the day operator at the station, said that he saw the men on the car; train was then going slowly, 3 or 4 miles an hour. They were at the east end of the car, and the conductor at the very west end. He was motioning to them to get off; the first one, Sharpe, got off at once all right. The conductor was then half way up the car, still motioning to get off. Brown put one foot out on the step, got hold of the rail, stepped on the platform, with his hand on the railing, ran about a car length, and then let go; he was running in towards the train, holding on to the bar. He seemed to fall off the platform, right between the box car and the tank car. The farthest the conductor went up was to the middle of the car. That was the closest he (Binning) saw the conductor get to Brown.

There was other evidence that the train was going slowly, not more than 2 or 3 or 4 miles an hour.

In answer to questions, the jury found that the injury was not occasioned by accident without blame to any one; that the defendants were to blame; and, in answer to question 2 (b), "What blameworthy thing or things caused the accident?" they said, "Conductor, because he had no right to put them off the train while moving."

There can be no doubt that the plaintiff and his friend were wrongfully on the train: sec. 425 (c) of R. S. C. 1906 ch. 37, the Railway Act; and were liable to be summarily convicted and fined therefor under that section; but, being there, though the conductor had a right to put them off, he had no right to use excessive or improper force in doing so. The defendants' case is that the conductor used no force; that the plaintiff simply complied, or attempted to comply, with an order to get off while the train was going so slowly that there was no reason to fear injury in doing so, and that the plaintiff had no reasonable ground to fear that physical force was immediately about to be used by the conductor to enforce compliance with his order. But for the evidence of Egerton, it would seem that the learned trial Judge would have dismissed the action, and I think he would have been justified in doing so. That evidence is diametrically opposed to the plaintiff's own statement of the transaction and to that of the witness Binning, and perhaps also to that of Sharpe, to

say nothing of that of the conductor himself. Yet I do not see how the learned Judge could have withdrawn it from the jury. It was evidence which the plaintiff had the right to adduce, and was evidence which, if believed, supported his case. It could not be rejected because it was inconsistent with the plaintiff's own story: see Stanley Piano Co. v. Thompson, 32 O. R. 341, and the cases there cited; though it is difficult to understand how the jury could have accepted it—if they did accept it—in the face of all the other evidence. I say "if they did accept it," because their answer which I have quoted is somewhat indefinite, and leaves it uncertain whether they may not have meant merely to say, speaking, as they do, of the case of both men, that the plaintiff was put off in the same manner as Sharpe was put off, towards whom there is no pretence that any actual violence was used; that is to say, by their own compliance with the condutcor's imperative order, no actual violence being used towards either.

For these reasons—the verdict being against the weight of the evidence, and the uncertainty as to the meaning of the answer, which seems rather to be the assertion of a proposition of law than a finding of fact—there must be a new trial, at which, I daresay, the jury will be desired to find clearly as to the testimony of Egerton. The damages, it must be said, are, in the circumstances, most unreasonably large, much larger than, in the view most favourable to plaintiff, he deserves to have. The costs of the last trial must abide the event. The costs of appeal must be to the defendants in any event.

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

MEREDITH, J.A., was of opinion, for reasons stated in writing, that the action should be dismissed, but, if not, that there should be a new trial.

APRIL 5TH, 1909.

C.A.

FRASER v. PERE MARQUETTE R. R. CO.

Crops—Destruction by Fire—Dominion Railway Act, sec. 298—Liability of Railway Company—Sparks from Engine—Marsh Hay Baled and Piled at Siding — Meaning of "Crops"—Construction of Statute—Noscitur a Sociis—Negligence—Contributory Negligence.

Appeal by defendants from order of a Divisional Court, 12 O. W. R. 838, affirming the judgment of TEETZEL, J., at the trial, ib. 531, in favour of plaintiff.

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

D. L. McCarthy, K.C., and W. E. Gundy, Chatham, for defendants.

A. B. Carscallen, Wallaceburg, for plaintiff.

GARROW, J.A.:—The only point involved is the proper construction of sec. 298 of the Railway Act, R. S. C. 1906 ch. 37, which says that when damage is caused to "crops," lands, fences, plantations, or buildings, and their contents, by a fire started from a railway locomotive, the company making use of such locomotive, whether guilty of negligence or not, shall be liable for such damage.

On 9th March, 1908, a quantity of hay or marsh grass, as it is called, belonging to the plaintiff, was destroyed by fire which escaped from a locomotive then being used by the defendants in the yards of the Wallaceburg Sugar Co.

The hay was grown on lands in the township of Dover at some distance from the line of railway; exactly how far was not stated, but it was certainly off the line of railway, and far enough away to have made it impossible that fire from a locomotive engine could have directly reached it there. The plaintiff had sold the hay, and had, for shipping purposes, teamed and placed it alongside the defendants'

railway track, where, in the ordinary course of business, the defendants' locomotive engine was shunting when the fire occurred.

Negligence is not alleged.

Teetzel, J., construed the statute as applicable to "crops," generally, wherever grown, if consumed by fire escaping from a locomotive engine. And this construction, after much examination of American authorities, was adopted by the Divisional Court—a conclusion with which I find it quite impossible to agree.

The question is, of course, what did Parliament intend by the language used? Did it intend to cast upon the steam railways of the country the burden of insurers against fire of everything movable which by the dictionary is called a "crop," no matter where grown, whether in Canada or elsewhere, which the owner for his own convenience chooses, without the knowledge or consent of the railway company, to place upon anybody's land within the danger zone? Or did it mean to protect the husbandman in the use and cultivation of his lands lying along the route of the railway, from the inevitable danger to his "crops, lands, fences, plantations, or buildings, and their contents," from escaping sparks, which risk, since the decision in Vaughan v. Taff Vale R. W. Co., 5 H. & N. 679, he was compelled to bear without redress, unless he could prove negligence?

Surely the latter was the plain and obvious intention. It was not the intention to cover all property, but only the property expressly enumerated, all of which, unless it be "crops," has the quality of fixity or attachment to the land along the route of the railway.

No reason is suggested, and none occurs to me, why "crops" in general, and apart from the place where they were grown, should enjoy a special protection not afforded to other inflammable property. But there is, I think, good reason why "crops" grown on land upon and along the route of a railway, and therefore in constant danger from its operation, should while growing and even when grown and reaped, while still on the land, be protected, at least to the same extent as the other named property, such as fences, plantations, buildings, &c. They are all, I think, in precisely the same category, and the maxim noscitur a sociis clearly applies.

The statute does more than merely enumerate the kinds of property intended to be protected, for it gives to the railway company an insurable interest in the property, for which under the statute it is made responsible. And upon the question of intention this is, I think, of considerable importance, because it was clearly intended that the whole risk might be insured against, and it is, therefore, quite legitimate to consider the matter from the insurance standpoint in a search for the true intention, always, of course, having regard to the language of the statute. Insurance to be useful must, it is needless to say, be made in advance of the loss. The subject matter need not, it is true, be fixed property, for movable property may be, and constantly is, insured, although usually, I think, affixed by description as at some particular place, or else in transit. The description of the property to be insured, that is, where it is and what it is, is the basis upon which the premium is calculated and the contract made. Chattels described as at a particular locality would cease to be covered on removal elsewhere; see Pearson v. Commercial Union Insurance Co., 1 App. Cas. 498; because, as pointed out by Lord Chelmsford, at p. 505, "an insurance against fire necessarily has regard to the locality of the subject matter of the policy, the risk being probably different according to the place where the subject matter of the insurance happens to be." A crop grown on lands along the route of the railway would certainly cease to be covered if removed to a place beyond the route of the railway. And, conversely, after the contract was made, and except upon consent or by virtue of special terms in the contract, the risk could not be materially increased by the assured bringing into the territory or place intended to be covered, a crop not grown there. And if the assured might not so increase the risk, there would be still less justification for permitting, or for supposing that Parliament intended to permit, a third person, not a party to the agreement at all, to do so. Any other construction would lead to extraordinary results. A farmer having a farm miles away from the railway might rent an acre of land on a railway siding in the village, and team and stack there ready for shipment, a thousand dollars' worth of hay, which, without expense or trouble to him, would be practically insured for as long as he chose to leave it there. And, if not consumed, he might ship it by the railway to a distant city, for sale, and again unloading it near

the track obtain the same ample protection. For, by the conclusion arrived at in the Courts below, as long as the article can be called a crop, and however often it may be moved from place to place, and however far it may travel in Canada. it will always, when and as often as it is placed along the route of a railway, be automatically protected by the statute, a result which, in my opinion, was never intended, and to which the language in no way compels. The language may not be as clear and distinct as it could be made, but, having regard to what was the law before the change, to the evil intended to be remedied, and to the language actually used for the purpose, and reading the whole section together, as of course should be done, I cannot say that I have any doubt that the real intention, and the proper construction, is the limited one which I have pointed out; in other words and to repeat, that "crops" means crops grown or growing upon lands upon and along the route of the railway, and actually situated upon such lands when destroyed. The change was clearly made for the benefit of the owner of such lands in respect of his crops growing or grown upon such lands, and not for the benefit or protection of any one else who might happen to own crops grown outside, but brought within, the protected territory.

For these reasons, I think the appeal should be allowed upon the terms contained in the order granting leave to appeal, namely, that the defendants shall bear their own costs of the appeal, and shall also pay the costs of the appellant.

And the action must be dismissed with costs, including the costs of the motion before the Divisional Court.

MEREDITH, J.A., concurred for reasons stated in writing.

MOSS, C.J.O., OSLER and MACLAREN, JJ.A., also concurred.

APRIL 10TH, 1909.

C. A.

THOMPSON v. SKILL.

Vendor and Purchaser—Contract for Sale of Land—Option —Consideration—Seal — Extension — Notice—Continuing Offer—Acceptance—Specific Performance.

Appeal by the plaintiff from order of a Divisional Court, 12 O. W. R. 1033, affirming the judgment at the trial of TEETZEL, J., who dismissed the action without costs.

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

J. B. Clarke, K.C., C. Millar, and J. M. Ferguson, for plaintiff.

J. W. Mitchell, for defendant Skill.

N. B. Gash, K.C., for defendant Sears.

MOSS, C.J.O.:—Many difficulties in the way of the plaintiff's case were pointed out by Mr. Mitchell in the course of his able argument for the respondent Skill.

But it does not seem necessary to deal with them all, for the initial difficulty, viz., that the option to purchase, on which the plaintiff relies, was terminable at any time, or, if not, that it was in any case limited to 14th September, 1907, and was not accepted or its conditions complied with on that day, and thereupon it came to an end, is fatal to the action.

If the memorandum of agreement of 20th August, 1907, is to be considered as a simple writing not under seal, the fullest effect that can be given to it is as an evidence of an option to the plaintiff to become the purchaser of the land in question for $8,000, provided that he pay that sum in cash on or before 14th September, 1907, with a distinct stipulation that, in case he fail to pay the $8,000 on or before that date, the agreement becomes absolutely void, and neither party is to have any claim upon the other by reason of it.

Now, although 14th September, 1907, was named as the day for completion, the plaintiff was not bound at all until

he signified his acceptance in some binding manner, and, if he wished to turn the offer into a binding contract against Sears, he was obliged to accept, either verbally or in writing. In like manner Sears was entitled to withdraw before acceptance. No consideration of any kind was paid by the plaintiff to him for the giving of the option, and he was under no obligation to hold it open for a stipulated time. He was at liberty to withdraw at any time before acceptance by the plaintiff, and to deal with any one for the sale or purchase of the property.

This is scarcely denied, but it was urged for the plaintiff that the memorandum is an instrument under seal, and a consideration between the parties is, therefore, to be conclusively presumed, because the seal imports a consideration, and so Sears was bound to keep the offer open until the 14th September had expired.

When it is proposed to invoke the legal fiction for the purpose of giving to the memorandum all the force and effect accruing from the actual payment or receipt of a valuable consideration, it is but reasonable and just to require the person seeking to attach that virtue to it to shew by convincing proof that the memorandum was in fact duly sealed as well as signed by the contractor.

The question whether it was or was not sealed is one of fact, and, upon the evidence, I find it impossible to conclude that the memorandum was so executed as to give it the effect of a sealed instrument.

And I think this conclusion may be reached without detracting from the value of Hamilton v. Dennis, 12 Gr. 325, In re Sandilands, L. R. 6 C. P. 411, In re Bell and Black, 1 O. R. 125, and In re Croome and Municipal Council of Brantford, 6 O. R. 188, and cases similar to them. See National Provincial Bank of England v. Jackson, 33 Ch. D. 1.

Upon this short ground, in addition to those dealt with by my learned brothers, I think the judgment appealed from should be affirmed.

OSLER, J.A. (after setting out the facts):—It is said that the option was extended by an agent of the grantee, by her authority, by a letter of 30th August. The agent, one Teepell, wrote to Mr. George Ritchie, who may be assumed to have been acting in this respect for the plaintiff, acknow-

ledging the receipt of a letter from Ritchie requesting time: "I have seen Mr. Sears, and he says you may have until the 1st October to dispose of the land. Hoping you may be successful in the matter, I am," etc.

Whether this letter was more than an authority to Ritchie himself may be doubted, but, even if it refers to the plaintiff's option, which in terms it does not, the extension which it is contended was given thereby was without consideration, and the document itself is not under seal. To my mind it is plain that it created no binding extension of the option, which therefore came to an end . . . on the 14th, and left Sears free to deal with any one else. There is, therefore, nothing to affect the defendant's conveyance, and the appeal must be dismissed.

GARROW, J.A. (after setting out the facts and referring to the cases cited by MOSS, C.J.O.):—My present impression decidedly is, that the printer's scroll, with the printed letters "L. S." within the scroll, is not, in this case, and on the evidence or lack of evidence, a seal or the equivalent of a seal, and, consequently, that the document is not a deed at all.

But, on the contrary assumption, it seems to me that the plaintiff is in no less difficulty. If it is a deed, it could not be altered or extended merely by parol, at least without a new consideration. The case relied on by the plaintiff, Marcus v. Smith, 17 C. P. 416, does not help—for in that case the extension was indorsed upon the document itself, and like it was also under seal.

Sears had a perfect right to do as he pleased with his and. . . . And if Sears had a perfect right to sell, unless he had legally bound himself not to do so, Skill had a perfect right to buy, and Mr. Cook, his agent, to be as energetic as he was in closing the purchase. The plaintiff was amply warned that the sale was about to go through, so that, unless sure of his ground, he should have acted upon the original option, and have tendered the purchase money, or at least have shewn that he was ready and willing to carry out the purchase before that option expired, but he did nothing of the sort. Nor is it even clear that he was ready and willing at any time before the expiry of what is called the extension on 1st October to pay the $8,000 pur-

chase money. Sears had then sold and conveyed to Skill, but to neither Sears nor Skill was there ever a tender of that sum, or indeed of any sum, although there is evidence of a bank arrangement for one-half of it, and a request for time to pay the balance. That was not enough. The parties were dealing very much at arm's length, and the plaintiff had no right, in the circumstances, to expect favours at the defendants' hands.

The appeal must be dismissed with costs.

MACLAREN, J.A., and MAGEE, J., concurred.

CORRECTION.

On p. 731, ante, 4th line from top, for "W. H. Garvey," read "C. M. Garvey."

In Rex v. Irish, ante 769, substitute for "J. R. Cartwright, K.C., for the Crown," "The Crown was not represented."

"M. B. Tudhope, Orillia, for the informant."