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HIGH COURT OF JUSTICE.

RIDDELL, J., IN CHAMBERS, APRIL 16TH, 1912.

*REX EX REL. MORTON v. ROBERTS.
*REX EX REL. MORTON v. RYMAL.

Municipal Elections—Township Councillors — Candidate Declared Elected by Acclamation—Property Qualification—Municipal Act, 1903, *sec. 76—Sale of Qualifying Property after Election but before Declaration of Qualification—Mortgage Taken for Purchase-money—Qualification as Mortgagee — Defect in Declaration — Leave to Remedy—Effect on Seat of Councillor of Ceasing to Hold Qualifying Property—Application of Quo Warranto Procedure under Municipal Act—Notice of Motion—Amendment—Appeal—Costs.*

Appeals by the defendants from orders of the Junior Judge of the County Court of the County of Wentworth declaring that the defendants had lost the right to hold their seats as councillor and deputy reeve respectively for the township of Barton, having become disqualified since their election.

Both defendants were declared elected by acclamation at the municipal election for the year 1912.

Roberts had been assessed as a freeholder on a certain lot, and was admittedly "qualified" at the time of the election. By deed dated the 5th January, 1912, and registered on the following day, he conveyed the land absolutely to one Macdonald, having on the 1st January taken a mortgage for $4,100. On the 8th January, notwithstanding this transfer, he made a declaration of qualification, purporting to be in pursuance of sec. 311 of the Consolidated Municipal Act, 1903, and amendments, and upon that day took his seat as councillor and continued to hold it.

*To be reported in the Ontario Law Reports.

The declaration omitted the word "and" between the words "have" and "had" in the third line of the form in sec. 311.

Rymal had also been assessed for certain property, and admittedly was "qualified" at the time of the election; but he also conveyed his property by deed dated the 28th December, 1911, registered on the 23rd January, 1912, on which day the transaction was completed by Rymal taking a mortgage for $4,500, part of the purchase-money and handing over the deed. On the 8th January, 1912, Rymal made a declaration, in the same defective form as that made by Roberts, and took his seat as deputy reeve and still claimed it.

J. G. Farmer, K.C., for the defendant Roberts.
A. M. Lewis, for the defendant Rymal.
W. A. H. Duff, for the relator.

RIDDELL, J.:— . . . The learned Judge proceeded on the ground that the property qualification of a member of a municipal council was a continuing qualification; and that once the property qualification originally necessary was lost, the incumbent of the office became ipso facto disqualified.

In the view I take of the case, I do not think I need pass upon that question. It is, however, to be observed that from the very earliest times the qualification has been expressed to be that entitling a person to be elected. . . .

[Reference to 1 Vict. ch. 21; 4 & 5 Vict. ch. 10, sec. 11; 12 Vict. ch. 81, secs. 22, 57, 65, 83; C.S.U.C. 1859 ch. 54, sec. 70; 3 Edw. VII. ch. 19, sec. 76.]

Sometimes, indeed, the provision is negative, as at present, and sometimes positive, as was the original form—but, whether it be "no person but" or "every person who," it is always "to be elected."

Language quite different was used almost from the first in respect of certain cases. . . .

[Reference to the cases of particular classes of persons not to "be qualified to be members of the council" or to "become disqualified." See 3 Edw. VII. ch. 19, sec. 207.]

The difference in terminology affords a very cogent argument against the view that the Legislature intended the sale of the qualifying property to operate as an act ipso facto disqualifying the member, at all events after proper declaration of qualification made. . . .

On the other hand, a consideration of the form of the oath or declaration affords a strong argument that the ownership of

the property on which the qualification is based must continue—at all events until the oath or declaration is made. . . .

From a very early period it has been a statutory requirement that a councillor, etc., should make a declaration (or take an oath.) . . .

[Reference to 1 Vict. ch. 21, secs. 9, 36; 4 & 5 Vict. ch. 10, secs. 15, 16; 12 Vict. ch. 81, sec. 129; C.S.U.C. 1859 ch. 54, sec. 175; 29 & 30 Vict. ch. 51, sec. 178; 36 Vict. ch. 48, sec. 211; 3 Edw. VII. ch. 19, sec. 311; 6 Edw. VII. ch. 34, sec. 10.]

The statute, in my view, lays down three pre-requisites to a de jure occupation of the office (I do not pause to inquire as to others): (1) possession of property qualification; (2) election, by acclamation or otherwise; (3) making the declaration prescribed. Absence of any one of these will prevent the seat being filled de jure—absence of one or all will not, of course, prevent it being filled de facto. . . .

[Reference to Dillon on Municipal Corporations, 5th ed., sec. 395, and American cases cited in note (1) on p. 680; Rex. v. Swyer, 10 B. & C. 486; Rex v. Mayor, etc., of Winchester, 7 A. & E. 215; Regina ex rel. Clancy v. St. Jean, 46 U.C.R. 77, 81, 82; Regina ex rel. Clancy v. Conway, 46 U.C.R. 85, 86; United States v. Bradley, 10 Peters 343; United States Bank v. Dandridge, 12 Wheat. 64.]

It can scarcely be seriously argued that the declaration taken is "to the effect" of the form in the statute. . . . It is wholly absurd to suggest or argue that declaring "I have had property," etc., is to the same effect as declaring "I have and had property," etc.

It must be held that neither respondent is de jure a member of the council.

We have next to consider whether the present procedure is open to the relator. . . .

[Reference to Regina ex rel. Grayson v. Bell, 1 U.C. L.J. N.S. 130, and Regina ex rel. Halsted v. Ferris, 6 U.C.L.J.N.S. 266; Rex v. Darley, 12 Cl. & F. 520; Regina ex rel. Moore v. Nagle, 24 O.R. 407; Askew v. Manning, 38 U.C.R. 345; 12 Vict. ch. 81, sec. 146; C.S.U.C. 1859 ch. 54, secs. 127, 128(1); 29 & 30 Vict. ch. 51, secs. 130, 131; 36 Vict. ch. 48, secs. 131, 132; R.S.O. 1877 ch. 174, secs. 179, 180; 55 Vict. ch. 42, sec. 188; 60 Vict. ch. 15, schedule C (44); 3 Edw. VII. ch. 18, sec. 32; 6 Edw. VII. ch. 36, sec. 26; 9 Edw. VII. ch. 73, sec. 5 (1).]

The scope of the statutory remedy being extended to cover the case of a contest as to a deputy reeve's and a councillor's right to sit, there can be no doubt that the practice followed here is proper.

It would seem that the facts as to the transfer of the property—and, I suppose, the form of the declaration—came to the knowledge of the relator within six weeks of the application; and, consequently, he is in time under the amendment of 1907, 7 Edw. VII. ch. 40, sec. 5. . . .

I think the notice of motion may be amended so that it may set up the omission to make the statutory declaration. . .

The mere fact that a proper declaration was not been made does not in itself compel the Court to declare the seat vacant. . . .

[Reference to the St. Jean and Conway cases, before cited, 46 U.C.R. 82, 85.]

The form of the declaration contemplates that the declarant shall have, at the time of making the declaration, the qualification. . . . The refusal to make the declaration is equivalent to a refusal of the office, even if the party is incapable of making it: Attorney-General v. Reed (1678), 2 Moo. 299; Starr v. Mayor, etc., of Exeter (1683), 2 Lev. 116, 2 Show. 158; Rex v. Larwood (1693), Carth. 306.

If the elected can now make the declaration required by sec. 311, then, under Regina ex rel. Clancy v. Conway, supra, they should be allowed to do so, and so make their occupancy of the office de jure, as it is now de facto.

The position of a mortgagee is well understood: he has the legal estate in the land, holding the legal estate and the land as security for his debt. Is this legal estate sufficient? . . .

[Reference to 4 & 5 Vict. ch. 10, sec. 10; 12 Vict. ch. 81, secs. 22, 57, 65, 83; 22 Vict. ch. 99, sec. 70; 29 & 30 Vict. ch. 51, sec. 70; 36 Vict. ch. 48, sec. 71; R.S.O. 1877 ch. 174, sec. 70; 46 Vict. ch. 18, sec. 73; 49 Vict. ch. 37, sec. 2; R.S.O. 1887 ch. 184, sec. 73; 55 Vict. ch. 42, sec. 73; R.S.O. 1897 ch. 223, sec. 76; 3 Edw. VII. ch. 19, sec. 76.]

I think that the Legislature must have had in view the difference between legal and equitable estates; and that the language now employed, differing as it does from that formerly used, must be given full effect to.

What estate, then, had Rymal at the time of the election, and what estate has he now? . . .

At the time of the election he had a legal estate worth 4,500 and more—no equitable estate had been carved out of it. Now he has the very same legal estate, but it is worth only $4,500, for an equitable estate has been created, cutting down the value.

I think that, employing the language of sec. 76, Rymal "has, as owner, a legal freehold which is assessed in his own name on

the last revised assessment roll of the municipality to at least the value of $4,500."

But it is argued that mortgagees cannot be considered persons contemplated by the statute, and that they could not qualify unless they were in possession. . . . I can find nothing in principle or authority to prevent a mortgagee who is assessed for the property qualifying on his legal estate.

The same considerations apply also to Roberts.

If they make a proper declaration within ten days, their appeal will be allowed, but without costs here or below. They are given an indulgence in being allowed to make now a declaration which they should have been made three months ago, and without which they had no right to their seats. . . . If for the relator to file an affidavit that the facts as to the defect in the declaration came to his knowledge only within six weeks before the notice of motion was served, he will be permitted to do so, if so advised, for the greater caution in case of an appeal from this decision or in case either of the defendants fails to make the proper declaration.

TEETZEL, J. APRIL 17TH, 1912.

*NATIONAL TRUST CO. v. TRUSTS AND GUARANTEE CO.

Company—Winding-up—Realisation of Assets—Claim by Mortgagee to Proceeds—Contestation by Liquidator—Mortgage Covering Chattel Property—"Floating Security"—Invalidity—Bills of Sale and Chattel Mortgage Act—Necessity for Registration—Agreement not to Register—Book-debts—Validity of Assignment without Registration—Status of Liquidator to Contest Claim—Notice—Necessity for Addition of Creditor as Party—Winding-up Act, sec. 33.

This action, the nature of which is explained in former notes and reports, 2 O.W.N. 761, 1314, 24 O.L.R. 286, was tried before TEETZEL, J., without a jury, on the 11th March, 1912.

R. C. H. Cassels, for the plaintiff.
W. Laidlaw, K.C., for the defendant.

*To be reported in the Ontario Law Reports.

TEETZEL, J.:—The plaintiff is trustee for bondholders of the Raven Lake Portland Cement Company, hereinafter referred to as "the company," and the defendant is liquidator of that company under the Dominion Winding-up Act.

By mortgage dated the 13th September, 1904, the company duly granted, assigned, transferred, conveyed, and mortgaged to the plaintiff in trust, subject to a certain other mortgage, all and singular its undertakings then made or in course of construction or thereafter to be constructed, together with all the properties, real or personal, tolls, incomes, and sources of money, rights, privileges, and franchises, owned, held, or enjoyed by it, then or at any time prior to the full payment of the bonds thereby secured, to secure payment of the bonds mentioned in the mortgage, amounting to $50,000, and interest. The lands are specifically set out in a schedule attached to the mortgage. The mortgage also purports to cover "all machinery of every nature and kind, including all tools and implements used in connection therewith, which are now or which may hereafter during the currency of this mortgage be brought upon the said lands or into any of the buildings thereon, including all machinery used or to be used in the manufacture of cement and plant and tools connected therewith. . . . The dredge at Raven Lake, the machinery, tools, etc., to be deemed fixtures for the purpose of this mortgage, whether the same shall be actually affixed to the said lands or buildings or not."

The 23rd and 24th clauses read as follows: "And it is further hereby declared and agreed, for the purpose of this mortgage security, that all machinery, plant, and personal property of the company are to be considered fixtures to the realty, and it is expressly understood and agreed that this mortgage is not to be registered as a bill of sale or chattel mortgage. Provided and it is hereby declared that the company may at all times, so long as there is no default in payment of principal or interest on the said bonds or otherwise hereunder, sell and dispose of its manufactured products in the ordinary course of business free from the lien of this mortgage."

Each bond, a copy of which is set forth in the mortgage, contains this clause: "This bond is one of a series, amounting in the aggregate to $50,000, and is secured by a mortgage, duly executed according to law, conveying to the National Trust Company Limited, as trustee, all the present and future real and personal properties, rights, franchises, and powers of the Raven Lake Portland Cement Company Limited, as by refer-

ence to the said mortgage will more fully appear; the nature of the security, the rights of the holders of the bonds secured by it, and the terms of the trust, appear by the said mortgage, to which reference is hereby expressly directed, and which terms are made a part of this bond."

The mortgage contains the usual provisions for redemption, and that until default the mortgagors shall be permitted "to possess, operate, manage, use, and enjoy the mortgaged premises, and to take and use the rents, incomes, profits, and issues thereof in the same manner and to the same extent as if these presents had not been executed."

It also contains elaborate provisions enabling the mortgagees, upon default, to take possession and operate or sell the mortgaged premises.

The mortgage was duly registered against the lands covered thereby, but was not filed as a chattel mortgage, nor was anything done to comply with secs. 2, 3, or 23 of the Bills of Sale and Chattel Mortgage Act—as, from the beginning, the plaintiff has assumed that the provisions of that Act did not apply to the mortgage.

On the 14th September, 1907, the company made a general assignment for the benefit of its creditors to Henry R. Morton, who entered into possession as assignee and proceeded to realise upon the personal estate of the company.

By order dated the 20th September, 1907, made under the Dominion Winding-up Act, the company was declared to be insolvent and ordered to be wound up, the defendant appointed provisional liquidator, and a reference directed to Mr. McAndrew, an Official Referee, to appoint a permanent liquidator, and to take all necessary proceedings for and in connection with the winding-up of the company. On the 30th November, 1907, the defendant was appointed permanent liquidator.

The appointment of liquidator having superseded that of the assignee, the former took possession of all the assets of the company, and proceeded to convert the same into money and to collect outstanding accounts, and generally to administer the affairs of the company. . . .

The first claim made by the plaintiff to assets and proceeds of assets in the defendant's hands was by a notice in October, 1909, in which the plaintiff claims all the proceeds of the assets of the company realised by the defendant as liquidator, and all other assets (if any) which may be unrealised in the hands of the liquidator, upon the ground that all such assets belonged to the plaintiff by virtue of the above-recited mortgage.

Nothing appears to have been done under this notice until the 28th September, 1910, when joint objections to the plaintiff's claim were filed and served by the defendant and the Imperial Plaster Company Limited, the latter "on behalf of themselves and all other creditors of the Raven Lake Portland Cement Company, Limited," upon the ground, among others, that the mortgage was void for non-compliance with the Bills of Sale and Chattel Mortgage Act, and that the assets were not covered by the mortgage. Instead of adjudicating upon the claim and the objections thereto, the learned Referee on the 3rd November, 1910, granted leave to issue a writ and prosecute an action against the defendant "in respect of goods and chattels and book-debts and choses in action formerly belonging to the Raven Lake Portland Cement Company Limited or the proceeds thereof claimed by the National Trust Company Limited."

This action was accordingly brought, but it is to be observed that the other contestant, the Imperial Plaster Company Limited, was neither made a party to the action, nor was its objection adjudicated upon by the Referee.

An application was made to the Master in Chambers by the defendant to have that company added as a party defendant, but the motion was refused, and the refusal was sustained on appeal, without prejudice to an application being made to the trial Judge, if it should appear to him that the proposed defendant is a necessary party to enable him to adjudicate upon the title to the money in question. . . .

The following questions arise for determination:—

(1) Does the mortgage bind the goods and chattels in question, notwithstanding the provisions of the Bills of Sale and Chattel Mortgage Act?

(2) Does the mortgage bind the book-accounts in question or any of them?

(3) Is the defendant, as liquidator, entitled to contest the plaintiff's claim on the ground that the provisions of the Bills of Sale and Chattel Mortgage Act were not complied with?

(4) If the defendant is not so entitled, should the Imperial Plaster Company Limited be added as a party defendant?

Upon the first question, counsel for the plaintiff submits that the mortgage creates a floating security, and as such extends to all personal property of the company, whether existing at the date of the mortgage or subsequently acquired, and relies upon the decision in Johnston v. Wade (1908), 17 O.L.R. 372. . . .

[Reference to the facts of the case cited and quotations from the judgments.]

The validity and effect of what is called a "floating charge" on the property, both present and future, of a company, has been the subject of much judicial consideration in England. The cases are collected and discussed in Palmer's Company Law, 9th ed., pp. 307-311. . . .

As to the injustice to subsequent execution creditors arising from the nature of a floating security, as defined by the authorities, see observations of Buckley, J., in In re London Pressed Hinge Co., [1905] 1 Ch. 576, at p. 583; also the dissenting judgment of Garrow, J.A., in Johnston v. Wade, 17 O.L.R. pp. 392 et seq. . . .

That case (Johnston v. Wade) is, therefore, differentiated from this case by the fact that in this case the bonds do not create the charge, but a mortgage is given which creates the charge in favour of a trustee for the bondholders; and, although it embraces the company's real as well as its personal property, I think that, so far as it purports to charge personal property, it is clearly a "mortgage or conveyance intended to operate as a mortgage of goods and chattels," within the meaning of secs. 2 and 23 of our Bills of Sale and Chattel Mortgage Act; and, not having been accompanied by an immediate delivery and an actual and continued change of possession of the things mortgaged, and not having been registered as a chattel mortgage, is, as such, under sec. 5 of the Act, "absolutely null and void as against creditors of the mortgagor."

As a chattel mortgage, it was also void ab initio as against creditors, according to the view of the late Chief Justice Strong in Clarkson v. McMaster & Co. (1895), 25 S.C.R. 96, at pp. 105-6, by reason of the agreement that it should not be registered under the Bills of Sale and Chattel Mortgage Act.

Then as to the book-debts, it is well-settled that they are not within the Bills of Sale and Chattel Mortgage Act, and that a transfer of them does not require registration: Kitching v. Hicks (1884), 6 O.R. 739; Trilby v. The Official Receiver (1888), 13 App. Cas. 523; Thibaudeau v. Paul (1894), 26 O.R. 385.

While the mortgage in question does not specifically mention present or future book-debts, I think the language "undertakings . . . together with . . . income and sources of revenue, moneys, rights, privileges . . . held or enjoyed by it now or at any time prior to the full payment," etc., is sufficiently comprehensive to create an equitable charge on present and future book-debts: Re Perth Flax and Cordage Co. (1908), 13 O.W.R. 1140; . . . Government Stock Co. v.

Manila, [1897] A.C. at p. 86; and Buckley's Companies Act, 9th ed., pp. 230-231.

I am of opinion, therefore, that as to any book-debts that were unpaid at the date of the assignment by the company, the plaintiff is entitled to recover the amount that was realised therefrom by the assignee or the defendant, and that the fact that no notice of the charge was given by the plaintiff to the debtors does not, as argued by Mr. Laidlaw, alter that right. Upon this point, Thibaudeau v. Paul (supra), Re Perth Flax and Cordage Co. (supra), and Eby-Blain Co. v. Montreal Packing Co. (1908), 17 O.L.R. 292, are, I think, conclusive.

The question of the right of the defendant, as liquidator, to contest the plaintiff's claim under the mortgage and to hold the proceeds of the chattel property for the benefit of the creditors, has given me much trouble; but I have arrived at the conclusion that the defendant has that right, and that it is not necessary for the purpose of adjudicating upon the title to the fund in question to add the Imperial Plaster Company as a defendant. . . .

[Reference to sec. 33 of the Winding-up Act; Palmer's Company Law, 9th ed., p. 395.]

While the title of the estate of the company does not, under the Act, vest in the liquidator, it must clearly be his duty, as an officer of the Court, when he has in his custody property to which the company appears to be entitled, to protect that property for the benefit of the creditors who may be interested therein. Now, when the defendant, as liquidator, took possession of the property in question, which was then in the possession of the company's assignee for creditors, the liquidator had no notice of any claim of the plaintiff, nor, so far as I can see, had he any notice of such claim until after the chattel property had been converted into money; and, when he so took possession, it was property to which, within the meaning of sec. 33, the company or its assignee for creditors "appeared to be entitled." . . .

[Reference to In re Canadian Camera Co. (1901), 2 O.L.R. 677, at p. 679.]

Being, therefore, from the beginning, prima facie lawfully in possession of the property in question as an officer of the Court, and having, as I find, converted the same into money without notice of the plaintiff's alleged lien, and being charged with the duty of applying the proceeds in payment of the company's creditors in due course of administration, I hold that the defendant is entitled, in right of the creditors represented by it

as liquidator, to contest in this action the validity of the plaintiff's mortgage.

Under the circumstances found in this case, the liquidator is, I think, entitled to maintain in defence of the action the superior claim of the creditors whom he represents. . . .

[Reference to Clerke & Linsdell on Torts, 3rd ed., p. 552.]

Here the defendant's position is strengthened by the fact that at the time of the action the prima facie title, by possession, was in the defendant. See further as to defence of title of third party, Richards v. Jenkins (1886), 17 Q.B.D. 544, affirmed in 18 Q.B.D. 451.

Judgment will be in favour of the plaintiff for payment by the defendant of all money realised from book-debts outstanding and unpaid at the date of the assignment, 14th September, 1907; but dismissing the other claims of the plaintiff; and declaring that the mortgage is as a chattel mortgage void as against the creditors of the company. No costs of action to either party, but the defendant's costs, as between solicitor and client, will be paid out of the balance of the fund.

If the parties cannot agree upon the amount to be paid to the plaintiff, there will be a reference to the Master in Ordinary, with costs of such reference reserved until after the Master's report.

TEETZEL, J. APRIL 18TH, 1912.

RE FARRELL.

Will—Construction—Disposition of Residue—Codicils—Inconsistency—Revocation — "Balance" — Annuities — Income —Expenses of Obtaining Probate—Absolute Gift of Company-shares.

Motion by the trustees under the will of Dominick Farrell, deceased, for an order determining certain questions arising in the administration of the trusts as to the proper construction of the will.

Glyn Osler, for the trustees.

I. F. Hellmuth, K.C., for Catharine Forbes and other legatees and for all the infants.

D. L. McCarthy, K.C., for Edward Farrell.

TEETZEL, J.:—The most difficult question for determination is question (a): "Who is entitled to the residuary estate, having regard to clauses 17 and 19 of the will and the codicil dated the 20th March, 1909?"

Clauses 17, 18, and 19 read as follows:—

"17. In further trust after payment of annuities and all other bequests and expenses to divide the income to be derived from my residue estate equally between Eva Farrell Dorothy Farrell and Cyril Farrell the children of my son Vincent F. Farrell and Minnie Finn and Catharine Forbes the children of my daughter Mary Finn and in the event of the death of any such grandchildren without issue him or her surviving the parent's share of the capital from which such income was derived to be equally divided among his or her brothers and sisters but to those only above named.

"18. Provided also that my executrices and trustees shall after the death of any of the said children as aforesaid and until their said issue becomes entitled hereunder to receive their said shares pay to the said issue or expend in any way which may be deemed best for their education or support the interest and income from their respective shares in the whole of my estate.

"19. In respect of the said residue of my estate I direct that all or any property and moneys belonging to my estate given or bequeathed to the various parties and objects mentioned herein or not so given which may fall in fail or in any way lapse on account of the death of any person or other cause whether it be in the nature of income or principal shall form part of the said residue and be distributed finally among my said grandchildren or other persons mentioned above upon the principle and according to the provisions hereinbefore set out so as to prevent the possibility of any intestacy as to any part of my estate."

And the codicil of the 20th March, 1909, reads as follows:—

"This is a codicil to the last will and testament of me Dominick Farrell formerly of Halifax Nova Scotia but at present residing in Worthing Sussex England Esquire which will bears date on or about the 13th day of July 1907.

"Whatever balance may remain to the credit of my estate whenever the final settlement of the same is made by my trustees the National Trust Company of Ontario at Toronto I direct and it is my will that the same shall be invested to the best advantage by them and paid over to my grandson Doctor Edward Farrell after the death of his mother and in the case of his death divided

equally between his issue and if no issue to go to my residuary estate. . . ."

The will was dated the 13th July, 1907, and within the next three years the testator executed eleven codicils, the above-recited codicil being the seventh.

Substantially, the answer to question (a) turns upon whether the said codicil revokes the gifts in clauses 17, 18, and 19 of the will, by reason of its inconsistency with those provisions.

In paragraph 3 of his will the testator gives all the rest and residue of his personal estate to his executors and trustees upon certain trusts, which are set out in several paragraphs of the will prior to paragraph 17, and which consist chiefly in making provision for payment out of the income of a number of annuities and also pecuniary and specific legacies.

The provisions in the will subsequent to paragraph 19 chiefly consist of directions to his trustees.

It is quite plain, on perusing the will and the codicils, that the testator had constantly before his mind the creation and disposition of a residuary estate, the first reference thereto being in paragraph 4, in which he makes provision that, should the legatee therein die without issue, the amount given should go "back to my estate to become part of the residue."

In clause 6, he makes similar provision, stating that the amount given "shall revert to my estate and become part of the residue thereof."

In clause 8 he uses the words, "and if no issue back to my estate to form part of the residue thereof."

Then it will be observed that in clause 17 he uses the words "residue estate," and in clause 19 "said residue of my estate."

In clause 25 he makes provision that, if any legatee shall make any claim against his estate which is not presented in his lifetime, or shall institute any legal proceedings against his estate, etc., he shall be deprived of all participation in the estate, and the share or shares to which he would have been entitled "shall form part of my residuary estate and be divided pro rata among the other legatees." This is the first instance in which he uses the words "residuary estate," but thereafter, in the third codicil, he makes provision that certain legacies therein shall "fall into and form part of my residuary estate," and he uses the same words in the fourth and fifth codicils; and in the above-recited codicil he makes provision that, in default of issue, the legacies shall "go to my residuary estate."

Having, therefore, clearly made provision for residuary estate and a disposition of it under clauses 71 to 19 of his will, the

difficulty arises to determine what the testator meant by using the words "whatever balance may remain to the credit of my estate whenever the final settlement of the same is made" in the above-recited codicil.

It may be that, being anxious to avoid an intestacy as to any part of his estate, as expressed in the 19th clause, and having made so many alterations and substitutions in the preceding six codicils, the testator may have, for greater caution, and to avoid intestacy should there be any balance of his estate undisposed of, made the above provision. On the other hand, if he meant thereby to give his residuary estate to Dr. Edward Farrell, that gift would be quite inconsistent with the gift of the residue contained in his will; and, under the well-settled rule that where there are inconsistent gifts the last must ordinarily prevail and operate as a revocation of the first, this codicil would probably have that effect.

I am unable, however, upon consideration of all the provisions of the will, to conclude that the testator meant by the codicil to revoke the bequest of the residue in his will.

In the first place, it seems to me that the use of the words "balance," etc., in the first part of the gift, and providing in the latter part that, if there is no issue to take that balance, the same is to go to his residuary estate, is quite inconsistent with the view that the testator could have contemplated that the balance referred to was the same as the whole body of the residuary estate disposed of in his will, which, I understand, represented by far the greater portion of his total estate. The codicil treats "residuary estate" as an existing fund and the "balance" as problematical.

Then, if the effect of the codicil is to revoke the former gift of the residuary estate, and if there should be no issue of Dr. Edward Farrell, there would happen an intestacy; because, outside of the provisions in clauses 17 and 19 of his will and this codicil, there is no one named to take the residuary estate, and the contingency of an intestacy was one that from the language of clause 19 the testator was anxious to avert.

Clauses 17 and 19 are clearly so worded as to leave no chance of any balance remaining, although, as I have said, by reason of the testator having in his codicils made other gifts, he may have conceived the idea that there was a possibility of a balance; but, if it is a fact that under the provisions of the will there is no chance of a balance remaining to the credit of his estate, then this provision is void, not for uncertainty, but because there is no fund upon which it can attach. It would seem to me to be

unduly extending the rule as to revocation by an inconsistent subsequent bequest to hold that the words "balance," etc., necessarily or reasonably mean the residuary estate; for it is also a rule that to cut down or revoke a previous gift by a subsequent one it must be reasonably clear that the testator intended to revoke or cut down the previous gift. It furthermore seems to me that, if the testator had intended to revoke the residuary gift, he would have made his intention more manifest than it can be argued he did from this clause, because, in other codicils, when the testator desired to revoke a provision in the will, he effected the revocation by clear and appropriate language.

The answer to this question will therefore be, that the gifts provided for in the 17th, 18th, and 19th clauses of the will are not affected by the codicil of the 20th March, 1909.

To question (b) the answer is, Yes.

Question (c): By arrangement, this question and question (e) were reserved for subsequent application, should events hereafter arise making it necessary.

Question (d): The trustees shall set aside a sum at the present time, the income on which, in their opinion, will be sufficient to meet the annuities.

Question (f): The income during the period of obstruction to be temporarily suspended only, and not absolutely lost.

Question (g): The expense should be confined to the expenses of obtaining probate.

Question (h): Mary Finn is entitled under the codicil of the 3rd March, 1910, to the twenty-five shares of stock absolutely.

Costs of all parties out of the estate; those of the trustees as between solicitor and client.

TEETZEL, J. APRIL 18TH, 1912.

EASTON v. SINCLAIR.

Contract—Exchange of Properties—Rescission—Improvidence—Parties not on Equality—Lack of Information and Advice—Representations Recklessly Made—Damages.

Action for the rescission of a contract for the exchange of lands and for damages.

E. H. Cleaver, for the plaintiff.

R. Wherry, for the defendant.

TEETZEL, J.:—I have no difficulty in finding, upon the evidence and from the appearance and manner of the plaintiff in the witness-box, that the plaintiff is a man of a lower degree of intelligence than most men: he is unacquainted with and unskilled in business matters, and could easily be persuaded and deceived, and would be very much like wax in the hands of the witnesses Baker and Connors, who are exceedingly bright and intelligent men, employed by the defendant to sell vacant lots in a subdivision adjoining the city of Brandon.

The plaintiff owned six lots in a subdivision in the city of Calgary.

I also find that, in the exchange of properties between the plaintiff and defendant, negotiated and effected by Baker and Connors, the plaintiff was overmatched and overreached by them, without proper information and without advice; and that, as affecting the plaintiff, the exchange was a most improvident one; and, apart from any question of actual fraud, I think the facts bring the case within the principle of Waters v. Donnelly (1884), 9 O.R. 391, and that the plaintiff is entitled to have the transaction rescinded.

But I further find, upon the evidence, that many of the representations made to the plaintiff, both with respect to the plaintiff's property and to the property given in exchange for it, and as to Baker having been sent to the plaintiff by his brother Charles, as to all which representations I accept the plaintiff's evidence, were untrue and were made recklessly and without honest belief in their truth, and under such circumstances as entitle the plaintiff to relief under Derry v. Peek (1889), 14 App. Cas. 337; White v. Sage (1892), 19 A.R. 135; and other well-known cases in the same line.

The transaction should be rescinded, and the property retransferred; but, as the defendant had sold four of the lots obtained from the plaintiff before the plaintiff repudiated the exchange, it is impossible to place the parties in statu quo, so that the judgment will be in favour of the plaintiff awarding damages against the defendant, which I fix at $825; and the judgment will further direct that the defendant shall protect the plaintiff against any liability to the Alliance Investment Company under his agreement of the 1st August, 1911, to purchase the Calgary lots; and, upon payment of $825 and the costs of action to the plaintiff, he must transfer to the defendant the lots obtained from the defendant.

MEREDITH, C.J.C.P. APRIL 18TH, 1912.

*TOWNSEND v. NORTHERN CROWN BANK.

Banks and Banking—Securities Taken by Bank under sec. 90 of Bank Act—Securities upon Lumber—Wholesale Dealer—"Product of the Forest"—Construction of sec. 88(1)—Assignment for Benefit of Creditors — Securities Given within Sixty Days—Continuation of Former Securities—Assignment of Building Contracts—Assignment of Book-debts.

Action by the assignee for the benefit of creditors of Joseph E. Brethour to set aside certain securities given by Brethour to the defendants to secure his indebtedness to them.

W. Laidlaw, K.C., for the plaintiff.
F. Arnoldi, K.C., for the defendants.

MEREDITH, C.J.:—The securities which are attacked are securities taken by the defendants under sec. 90 of the Bank Act, R.S.C. 1906 ch. 29, and assignments by Brethour of moneys payable to him under building contracts which he had entered into and book-debts; and these securities were given within sixty days before the making of the assignment; and the plaintiff attacks them on several grounds.

The securities taken under sec. 90 of the Bank Act are attacked on two grounds.

It is contended that Brethour was not a person from whom securities under that section upon lumber could lawfuly be taken, because, as is said, he was a builder, and not a wholesale dealer in lumber. The evidence does not support this contention. . . .

It is also contended that sawn lumber is not a product of the forest, within the meaning of sec. 90.

In support of this contention, Molsons Bank v. Beaudry (1901), Q.R. 21 S.C. 212, was cited. The opinion of the Chief Justice (Sir Alexander Lacoste) in that case, no doubt, supports the contention. Hall, J., however, differed from the Chief Justice, and the other member of the Court (Wurtele, J.) expressed no opinion on the point. The question was not necessary for the decision, as the Court was unanimous in affirming, on other grounds, the judgment that had been given against the plaintiffs. The provision of the Bank Act then under considera-

*To be reported in the Ontario Law Reports.

tion was sub-sec. 2 of sec. 74 of 53 Vict. ch. 31. . . . That sub-section was repealed by sec. 17 of 63 & 64 Vict. ch. 26, and re-enacted with some changes that are not material to the present inquiry; and the substituted sub-section appears in R.S.C. 1906. ch. 29, as sub-sec. 1 of sec. 88.

In my view, the construction placed by Hall, J., on sec. 74 was the correct one. In my opinion, the words "and the products thereof," in the fourth and fifth lines, apply to all the articles previously mentioned in the sub-section, and, therefore, apply to the products of the forest; and the words "the products thereof" in the last line apply as well to the products mentioned in the earlier part of the sub-section as to the products of live stock and dead stock.

Being of this opinion, it is unnecessary to express an opinion as to whether sawn lumber is a product of the forest, within the meaning of the sub-section; but I am inclined to think that it is.

It is further contended that, as the security under which the defendants claim was given less than sixty days before the making of the assignment, it cannot prevail against the assignment. That security was, however, but a continuation of a former security of the like character held by the defendants for the indebtedness; and this contention, therefore, fails.

Some of the lumber upon which the defendants held security was manufactured into doors and window sashes and the like, and these products of the lumber are covered by the securities: R.S.C. 1906 ch. 29, secs. 88, 89.

None of the other articles covered by the securities are within sec. 88 of the Revised Act; and the securities do not, therefore, extend to them.

Some of the lumber covered by the securities was used by Brethour in the erection of buildings; and, as far as the money payable under the building contracts assigned to the defendants represents the lumber so used, they are entitled to it.

The claim of the defendants to the book-debts cannot be supported. . . .

If the parties cannot agree as to it, there will be a reference to the Master in Ordinary to determine what part of Brethour's stock in trade at the time of the assignment, not being lumber, was the product of lumber covered by the defendants' securities, and what part, if any, of the money payable under the building contracts assigned represented lumber or the products of lumber covered by those securities.

As success is divided, there will be no costs to either party.

MIDDLETON, J., IN CHAMBERS. APRIL 18TH, 1912.

REX v. HARRAN.

Game—Ontario Game and Fisheries Act—Justices' Conviction for Hunting and Fishing in Enclosed Land—Jurisdiction of Justices—Bona Fide Assertion of Right—Title to Land—Jus Tertii—Land Covered by Water—Reasonable Claim of Right.

Motion by the defendant to quash a magistrates' conviction for an offence against the Ontario Game and Fisheries Act, 7 Edw. VII. ch. 49, sec. 25.

G. P. Deacon, for the defendant.

D. L. McCarthy, K.C., for the prosecutor.

MIDDLETON, J.:—There is no doubt, upon the evidence, that the accused entered upon the lands in question for the purpose of hunting and fishing thereon; and the Justices have found, upon ample evidence to justify the finding, that the lands were enclosed in the manner pointed out by sec. 25, sub-sec. 5, and that sign-boards forbidding hunting and shooting were placed, as required by sub-sec. 2 (b) and (c).

Upon the motion it was argued that the jurisdiction of the Justices was ousted by reason of what was done by the accused being a bona fide assertion of right to hunt and fish, and the title to lands having been brought into question.

The Ontario statute under which this prosecution is taken contains no such provision as that found in the Petty Trespass Act, R.S.O. 1897 ch. 120, sec. 1, which excepts from its penal provisions "any case where the party trespassing acted under a fair and reasonable supposition that he had a right to do the act complained of," as well as any case falling under the provisions of the Criminal Code.

The Criminal Code, sec. 540, provides that its penal provisions with respect to injury to property shall not apply to "any case where the person acted under a fair and reasonable supposition that he had a right to do the act complained of," and "any trespass, not being wilful and malicious, committed in hunting and fishing or the pursuit of game."

In many of the cases cited, the determination was under statutes containing some similar provision. But, quite apart from any statutory provision, the Courts have uniformly held

that the jurisdiction of the magistrate is ousted where there is shewn to be a bona fide claim or dispute, and where the action of the accused is in assertion of a colourable claim. But in these cases, as said by Cockburn, C.J., in Cornwall v. Sanders, 3 B. & S. 206, "there must be some show of reason in the claim, and it is not sufficient unless the defendant satisfies the Justices that there is some reasonable ground for his assertion of title;" and, a fortiori, upon a motion for a prohibition it is incumbent upon the applicant to satisfy the Court that he has at least a colourable claim of right, and that there is some real question. The jurisdiction of the Justices cannot be defeated by the mere assertion of some fanciful or imaginary claim. See also Regina v. Davy, 27 A.R. 508.

Counsel for the accused, in his elaborate argument, based his case upon two main contentions: first, that there was some defect in the prosecutor's title to the lands; and, secondly, that there was a colourable claim of right to fish and to shoot upon the navigable water which covers a portion of the lands patented.

The Cartwright Game Preserve is an incorporation under the laws of Ontario, and has the paper title to the lands, and is in possession. The suggested defect arises from the fact that there was some dispute at one time as to the township in which the lands were actually situated; a dispute which was ultimately placed at rest by the Legislature. It is said that this invalidated the sale for taxes, because the effect of this legislation was to declare that the land was not situated in Cartwright, which imposed the assessment, but in the township of Reach.

The other suggested defect arose from an entire misunderstanding of the facts. The accused thought that a registrar's abstract proved the title. It turned out that, at the date of the abstract, some of the title deeds had not been registered. I think this contention is completely covered by the case already referred to, Cornwall v. Sanders, which determines that the claim of title to oust the jurisdiction of the Justices must be a claim of title in the party charged, and that the suggestion of a jus tertii, or of a mere defect in the complainant's title, is quite beside the mark.

The other objection seems to be equally unavailing. The Crown has patented the land. Part of the land is covered with water. This undoubtedly makes the land subject to the right of navigation; but, subject to this right, the ownership of the land is absolute. See McDonald v. Lake Simcoe and Cold

Storage Ice Co., 31 S.C.R. 130. The fact that others have the right to navigate does not confer any title upon the accused to shoot in this game preserve.

The accused, also, before the magistrate, sought to shew a right to hunt and fish by reason of the fact that others had hunted and fished there for many years, and that he had also done so for a long time. This brings the case very close to the case already cited, where it was held "that the jurisdiction of the Justices was not ousted by the claim of a prescriptive right in gross to kill game upon the land, there being no colour for such a claim." The same view appears to have been taken in Reece v. Miller, 8 Q.B.D. 626. The Irish decision, Johnston v. Meldon, 30 L.R. Ir. 15, is entirely consistent with this view. It is there held that the jurisdiction of the magistrates is ousted if there is a bona fide claim, but it is the duty of the magistrates to determine whether the claim is bona fide; and, upon finding upon this question, they should then decline to proceed farther. It may well be that they will not give themselves jurisdiction by an erroneous decision; but in this case the applicant has not satisfied me that he has a bona fide claim within the cases.

I quite believe that the accused is honest in making his claim. That, as I understand the rule, is not enough. There must be some show of reason.

This case is not at all like Rex. v. Lansing, 1 O.W.N. 186; as here it is shewn that the land was enclosed, and that signboards, as required by the statute, were placed, and that there is no doubt of the offence having been committed. While Mr. Justice Britton states that the title to land was brought into question, this was not essential to his judgment, nor does he deal at all with the aspect of the matter above indicated.

The application fails, and must be dismissed with costs.

DIVISIONAL COURT. APRIL 18TH, 1912.

*RE DENTON.

Will—Construction—Specific Legacy — Vested Gift — Substitutionary Gift to Children of Legatee—Predecease of Original Legatee—Primary and Secondary Legatees.

Appeal by J. H. Dickenson, representative of Naomi Dickenson, deceased, from the order of RIDDELL, J., ante 678, 25 O.L.R.

*To be reported in the Ontario Law Reports.

505, upon one of the questions submitted as to the construction of the will of John M. Denton, deceased.

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

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

M. D. Fraser, K.C., for the beneficiaries under the will other than Naomi Dickenson.

Joseph Montgomery, for the executor.

BOYD, C.:—The 7th and 8th clauses of the will are these:—

(7) After the death of my wife to sell property and pay to sister Naomi and to Mary $500 and to divide the remainder equally amongst all my brothers and sisters, including Naomi and Mary.

(8) Should any of my brothers or sisters die before the final division of my estate leaving lawful issue then and in such case I desire that the share which such deceased brother or sister would have been entitled (to) if living shall be divided equally amongst the children of such deceased brother or sister so that such child or children shall take the portion which his or her or their parent would have been entitled (to) if living.

Upon questions submitted to the Court touching the proper construction of John Denton's will, the fifth one was this: Are the children of Naomi entitled to share under the provisions of clause 8 in the remainder of the fund formed under clause 7 of the will?

The Judge's answer is, that these children are excluded. From this the present appeal is lodged.

The important dates are these. The will of the testator was dated and made on the 24th June, 1889. The sister of the testator, Naomi, died in 1892, leaving children. The testator died in 1896. His widow died in 1910. At that time, in 1910, his estate became finally divisible upon the death of the life tenant. Naomi died before this final division: she also died before the testator; but the important point, which appears to have been passed by unconsidered, is, that she was alive at the date of the will, and formed then one of the class capable of sharing in the residue, when it should fall to be divided. The learned Judge, applying the solvent of "common sense," thought the testator intended to benefit the children of Naomi, but was compelled by authority to decide the other way. But, bearing in mind the cardinal fact that the sister was alive at the date of the will, there appears to be comparative concord in the later

case law in favour of the bequest to the children being well and legally bestowed. . . .

[Reference to Christopherson v. Naylor, 1 Mer. 321; Gray v. Garner, 2 Hare 268; Ive v. King, 16 Beav. 53; Coulthurst v. Carter, 15 Beav. 421; Waugh v. Waugh, 2 My. & K. 41; Peel v. Catlow, 9 Sim. 372; Congreve v. Palmer, L.R. 8 Eq. 52; Re Hotchkiss Trusts, L.R. 8 Eq. 650; Thornhill v. Thornhill, 4 Madd. 377; Theobald on Wills, 7th ed., p. 671; In re Hannam, [1897] 2 Ch. 39; In re Webster's Estate, 23 Ch. D. 739.]

I favour the construction of this will as one in which the gift is not strictly of substitutionary character, but as presenting two classes of original legatees: one, the primary legatees, who are the brothers and sisters of the testator who are alive at the time of final distribution, after the death of the testator's wife; the other, the secondary legatees, consisting of the issue or the children of any of the primary legatees who may die leaving issue before the period of final distribution. I would adopt and apply the language of Kindersley, V.-C., as used in Lamphier v. Burk, 34 L.J. Ch. 356: "The gift is to two classes of objects, to such nephews and nieces as shall be living at a given time and to the issue of such nephews and nieces as shall be dead at that time. Is that an original gift to the issue or a gift by substitution? Clearly an original gift to them. It is true you may say in a sense that they are substituted for their parents, because they take the share respectively among them which their parent would (if he had come under the first class) have himself taken; and in that sense (but that is not the accurate and proper sense) you may say that there is a substitution; but it is as much an original gift to the issue of such of the nephews and nieces as shall have died before the tenant for life (or the period of distribution) as it is an original gift to such of the nephews and nieces as shall be living at the death of the tenant for life" (or other fixed period).

I find no authority preventing us from giving effect to the clear and obvious meaning of the testator, that the children of his sister should take the share intended for their parent, had she been alive. The whole field of testamentary interpretation in this regard has been broadened, and, if I may say so, harmonised, by the exposition of the subject by the Lords in Barraclough v. Cooper, as reported in a note to the case of In re Lambert, [1908] 2 Ch. 117. They repudiate any canon of construction beyond the fact that enough is found in the language of the instrument to shew what was the meaning of the testator. And

Lord Macnaghten quotes with emphatic approval the words of Vice-Chancellor Kindersley in Loring v. Thomas, 1 Dr. & Sm. 510. . . .

The House of Lords have in effect given their sanction to the vigorous words of James, V.-C., in Haberghem v. Richards, L.R. 9 Eq. 339. . . .

A case of Re Fleming, 7 O.L.R. 651, decided by Mr. Justice Street, supports the view taken on this appeal.

I agree with my brother Riddell as to the meaning of the testator, and I do not read the authorities cited as going to interfere with the operation of common sense in the construction of the testator's language.

I rather favour giving costs of this appeal out of the estate.

MIDDLETON, J., gave written reasons for the same conclusion. He referred to In re Palmer, [1893] 3 Ch. 369.

LATCHFORD, J., also agreed.

Appeal allowed; costs out of the estate.

DIVISIONAL COURT. APRIL 18TH, 1912.

*UNDERWOOD v. COX.

Contract—Settlement of Claims—Action to Enforce—Fraud and Misrepresentation—Undue Influence—Absence of Independent Advice—Confidential Relationship—Invalidity of Claims—Evidence—Letter Written "without Prejudice"—Threat Made pendente Lite, to Induce Settlement.

Appeal by the defendant from the judgment of KELLY, J., ante 765, in favour of the plaintiffs, in an action brought by William J. Underwood and his sister, Catharine Laurie, against their sister, Jane Cox, to recover payment of $964.70 and interest, claimed as their two-thirds share of an amount agreed by the defendant to be paid to the plaintiffs and another sister, Mary Ann Cox, by an agreement dated the 5th May, 1910, in settlement of claims, made by the plaintiffs to shares of their father's estate—he having by his will left all his property to the plaintiff and her infant daughter.

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

*To be reported in the Ontario Law Reports.

Gordon Waldron, for the defendant.

R. U. McPherson and J. W. McCullough, for the plaintiffs.

BOYD, C.:—This appears to be a nefarious tranaction, though its real import was obscured at the trial by reason of the rejection of evidence. Had the letter written by the plaintiff Underwood to the defendant pendente lite been admitted and considered by the learned Judge I do not doubt but that he would have arrived at a conclusion diamentrically opposite to that now under appeal. He was impressed favourably with the appearance of the plaintiff Underwood; but Underwood's own letter shews to what unworthy means he will stoop to serve his own ends. The dispute falls to be decided (as I take it) mainly, if not entirely, on what occurred during the first interview of one hour between brother and sister (the said parties) on the 4th May, 1910, when he made the claim which was afterwards given legal effect to by the writing under seal which is the foundation of this suit. But to understand the situation it is needful to refer to what is in evidence and to the prior sequence of events. . . .

[Reference to the evidence.]

The facts . . . shew a perfectly hopeless case for attacking the disposition of property made by the testator, either on the grounds set forth in the caveat, or upon the vague oral intimation alleged to be given by the testator, a quarter of a century before his death, that he would leave the son (the plaintiff William J. Underwood) something by will. How then does it come that the defendant appeared willing to settle the plaintiff's claims by paying $1,400? It is to be noted that Mary Ann makes no claim on the estate and takes no part in this litigation; and, further, that the alleged claim of Catharine for nursing was not in any way referred to before the defendant, it being supposed and believed that she (Catharine) had been paid by the testator all that he had promised to pay her—at so much per week. This apparent family compromise turns out to be really a surrender by the defendant, at the bidding of the plaintiff, because of his knowledge and use of a family secret. That secret may be revealed by the use of the plaintiff's own words in the letter dated November, 1911, written to the defendant after he had been examined for discovery in this action:—

"I am going to use what evidence I can get to shew that I had good reasons to enter a caveat against the will . . . You

know that my father was induced to make his will in the way he did just because of that child that Walter (the defendant's husband) declared did not belong to him, and my father told us, when he lived with us in Uxbridge, that the child did not belong to Walter and did not look like him, and went so far as to hint pretty loudly who it did belong to, and there are others in Scarborough who will be brought to tell what they know.

"You will remember that I was in Scarborough that day that Walter laid drunk on the side of the road, after being up at Markham, and threatened to leave you, and you know his reasons, and he told them to some others in Scarborough. . . . All I want is my rights."

This precious epistle was enclosed in an envelope and addressed to Mrs. Jane Cox and marked "personal," with a double injunction marked on the envelope and written again on a strip of paper to the post-master, "Please see that the enclosed letter is given to no one else but to Mrs. Cox," and the whole put into an envelope addressed to the post-master at Malvern. This outside envelope is stamped as of the 24th November at Malvern and as of the 25th November at London, where it was posted. This is a mute indication that people at Malvern are not to be hurried. This letter begins, "Dear Sister Jane," and ends "Your Bro. Will," and has at its opening "Without prejudice." The plaintiff has some knowledge of the niceties of law, such as that he should not draw an instrument of which he gets the benefit; and he, doubtless, thought that this would be a secret missive not to be revealed or used against him in Court. And he hoped, no doubt, that it would work no less efficaciously in writing than if given by hint or word of mouth. But the authorities shew that this kind of letter, containing threats not written for the purpose of a bona fide offer of compromise, is not within the category of privileged documents.

On the grounds of public policy letters written without prejudice and written bona fide to induce the settlement of litigation are not to be used against the party sending them. But, when the letter embodies threats, if the offer be not accepted, it is in the interests of justice that such tactics should be exposed, and no privilege protects: Kennedy v. Spence, 58 L.T. 438, 441; Phipson on Evidence, p. 211; Pirie v. Wyld, 11 O.R. 422.

A critical point in the case was reached at the beginning of the cross-examination of the plaintiff. I quote: "You said you never made any threats to this woman? A. I never made any threats. Q. You did not make any threats on the 4th or

5th May? A. Oh, no. Q. Or on any other occasion? A. Threats——No, sir.'' Then counsel calls for the letter, but further questioning is frustrated by the ruling that it was not admissible. Now, this letter, when looked at and read on this appeal, is fatal to the plaintiffs' success. The trial Judge, believing the answers made by the plaintiff Underwood, gives judgment in his favour. But this letter is full of threat and menace of the basest kind; and so his answers must be discredited, for this letter discloses his threats, and therein stamps him as untruthful, and its contents reveal that he is also unscrupulous. . . .

I cannot doubt that the woman was overmatched and overreached by her shrewd brother. From the moment of seeing her he kept her in hand till the paper was signed on the 5th May. He knew that the husband's advice would rather confuse than help her, and he resolutely refused any opportunity for them to get independent assistance. When they did get such assistance, the result was a letter, dated the 14th May, in which the instrument sued upon is repudiated, and the reasons given for its repudiation. . . .

I have gone over the main turning point and the subsidiary ones on which the judgment should turn. Everything else in the way of detail is of little moment. There was the going to the executor Wyper to see if he would draw the paper. He moralised that it was a good thing parties could agree together, and passed them on to a lawyer. Mr. Wilson simply put the thing into legal shape, according to what Underwood told him, and all this was in the absence of the wife. She had no one but her husband, who was baffled in his attempt and gave it up. No doubt, she was able to go about the house and attend to domestic routine, getting dinner ready and the like; but that is really no more to the point than to suggest that, because the brother kissed her as he left in the evening of the 4th May, he had the most fraternal regard for her, and that she reciprocated his friendship.

The plaintiff had no belief in his flimsy claims upon his father or upon his estate or in respect to the validity of the will; his whole action indicates a scheme to put money in his pocket (by hook or by crook) at the expense of his sister.

The judgment should be vacated and the action dismissed, with all costs below and in appeal to be paid by the plaintiffs.

MIDDLETON J., concurred, for reasons stated in writing.

LATCHFORD, J., also concurred.

Appeal allowed.

DIVISIONAL COURT. APRIL 18TH, 1912.

TEW v. O'HEARN.

Promissory Note—Failure of Consideration—Sale of Shop Fixtures — Representation by Vendor — Claim by Landlord under Lease—Evidence—Reformation of Lease—Equitable Title of Landlord.

Appeal by the plaintiff from the judgment of the District Court of the District of Nipissing, dated the 19th May, 1911, after the trial before the Senior Judge on the previous 4th April.

The appeal was heard by MEREDITH, C.J.C.P., TEETZEL and RIDDELL, JJ.

J. P. MacGregor, for the plaintiff.

McGregor Young, K.C., for the defendant White.

J. W. Mahon, for the defendants O'Hearn.

The judgment of the Court was delivered by MEREDITH, C.J.:—The action is against three defendants, Esther O'Hearn, M. J. O'Hearn, and Solomon White; as against the first-named two, to recover the balance alleged to be due on a promissory note made by the defendant M. J. O'Hearn and indorsed by the defendant Esther O'Hearn; and as against the respondent White, an alternative claim for the same amount as damages for the wrongful detention of the shop fixtures in respect of which the O'Hearns defend.

The defence of the O'Hearns, except as to $73.66, which they have brought into Court, is, that there was a partial failure of the consideration for which the promissory note was given.

The respondent White, besides delivering a statement of defence, counterclaimed for damages; but it is unnecessary to refer to the nature of the counterclaim, as it was abandoned at the trial and dismissed without costs.

The appellant's action was also dismissed as against all the respondents with costs.

The appellant is the assignee for the benefit of creditors of Thomas J. Toland, who was, at the time he assigned, tenant of the premises in which he carried on his business, under a lease dated the 15th April, 1909. The appellant put up for sale by public auction the stock in trade of the assignor, including the fixtures in question, and they were purchased by the defendant

M. J. O'Hearn at 72 cents in the dollar on their value, as stated in an inventory which was prepared for the purposes of the sale.

At the time of the sale, the stock in trade and the fixtures were still in the premises of the assignor, and they appear to have been checked over by the respondents the O'Hearns, to whom the key of the premises was handed by an agent of the appellant.

Shortly after this occurred, the respondent M. J. O'Hearn began moving what he had purchased to other premises, when he was prevented by the respondent White from removing the fixtures in question, White claiming them as his property and denying the right of O'Hearn to remove them.

O'Hearn never did remove them, and they appear to have remained on the premises, and to have been taken possession of by White.

No reasons were given by the learned trial Judge for his judgment, and we are without any light from him as to the grounds upon which he proceeded.

In the view I take, it is unnecessary to determine what is the legal effect of the lease between the respondent White and Toland, or whether there is any inconsistency between the provision in the lease, which is on a printed form and is made under the Short Forms Act, "that the lessee may remove his fixtures," and the last provisions of the lease, which is in writing and reads as follows: "It is understood that all repairs, fixtures, plate glass and other things shall be and remain the property of lessor at determination of lease"—or, if there is an inconsistency, which of the provisions is to prevail.

There is evidence that the respondents the O'Hearns accepted the key and gave the promissory note on the faith of the representation of the appellant's agent that there would be no difficulty, as far as the respondent White was concerned, in their getting possession of all that they had bought, and from which the inference may properly be drawn that they would not have closed the transaction or given the promissory note but for that representation.

There is not the slightest ground for suspecting that there was any collusion between the O'Hearns and White, or for doubting that they did everything in their power, short of forcibly removing them or bringing an action, to obtain possession of the fixtures.

The examination for discovery of White was put in evidence by the appellant, and it shews that the understanding between Toland and him, at the time the lease was signed, was, that they should become the property of White at the determination of the

lease, and that a less rent was fixed because of that understanding.

There was no contradiction of White's testimony, and I do not see why, upon the uncontradicted testimony, if the lease as drawn does not express correctly the terms agreed upon as to the fixtures, White would not be entitled to have it reformed so as to express the true agreement.

That no steps to that end had been taken by White, is, I think, immaterial for the purpose of this case—the question on this branch of it being, whether or not White was entitled to the fixtures; and, upon the facts as I have stated them, White was, in equity at least, entitled to them; and that is sufficient for the purpose of the defence.

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

DIVISIONAL COURT. APRIL 18TH, 1912.

HITCHCOCK v. SYKES.

Principal and Agent—Sale of Land—Commission Received by Partner of Purchaser from Vendors—Failure to Disclose to Purchaser—Action by Vendors for Specific Performance—Counterclaim by Purchaser for Rescission.

Appeal by the defendant Webster from the judgment of FALCONBRIDGE, C.J.K.B., ante 31, after trial without a jury, in favour of the plaintiffs, in an action for specific performance of a contract for the sale of mining lands, with a counterclaim for rescission.

The appeal was heard by MEREDITH, C.J.C.P., TEETZEL and MIDDLETON, JJ.

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

C. H. Cline, for the plaintiffs.

MEREDITH, C.J.:—The respondents were the vendors of a mining property which they sold to the appellant and the defendant Sykes for $167,500; $20,000 of which were paid on the 12th April, 1910, when an agreement embodying the terms of the sale was executed by the contracting parties.

The appellant paid the $20,000, and it was arranged between him and Sykes that the latter was to repay one-half of it.

After the agreement was executed and the $20,000 were paid, the respondents paid to Sykes $2,000 on account of a commission of 10 per cent. which they had agreed to pay him if he effected a sale of the property for them, on the sums paid by the purchaser as and when the same should be paid.

The fact that Sykes was to receive this commission, or that he actually received the $2,000 on account of it out of the $20,000 paid on account of the purchase-money, was not communicated by Sykes or by the respondents to the appellant; but there is nothing in the evidence to lead to the conclusion that the respondents had in mind, or did anything, knowingly at all events, to conceal from the appellant the fact that Sykes was to receive the commission, or that he was being paid the $2,000 on account of it.

It is, however, contended by the appellant that, Sykes being, as is also contended, a partner with the appellant in the purchase, the principle of the cases as to the effect of an agent for one of the contracting parties receiving a bribe from the other contracting party is applicable; and that the appellant is, therefore, entitled to repudiate the agreement and to have it rescinded, as he sought to do by his counterclaim.

Upon the facts as developed in the evidence, that principle is not, in my opinion, applicable.

The respondents were desirous of selling part of the property, and had arranged with an insurance and real estate agent named Robert Corrigan to pay him a commission of ten per cent. on the purchase-price of the property if he should find a purchaser for it at the price for which they were willing to sell.

Sykes was at Corrigan's office in connection with another matter, when the latter laid before Sykes, as Corrigan states it, "the proposition of Mr. Hitchcock's silver mine," and told him that "there was ten per cent. in it, provided that a purchaser could be introduced to Mr. Hitchcock." "Sykes seemed to be quite taken up with the proposition," and Corrigan made an appointment with him for the same evening, and "had Mr. Hitchcock come in." At this interview, further discussion took place, when, according to Corrigan's testimony, he told Sykes that, "if he would secure a purchaser, that possibly he was in touch with some moneyed men in Montreal, that possibly he might be, a deal might be brought about, and, if so, there would be ten per cent. in it."

Hitchcock's account of the transaction, upon his examination for discovery, was, that Sykes had gone to Corrigan "to

get him to 'handle' some stock in another mining company, and Corrigan told him of our proposition, and asked him if he couldn't find a buyer, and he said, 'If you can, there is ten per cent. commission in it for us, and it is a good property.' "

That, up to the time that Sykes introduced the appellant to the respondents, Sykes was acting as the agent of the respondents to find a purchaser, appears to have been the view of counsel for the appellant; for, upon Wilbur R. Hitchcock's examination, the following question was put to him: Question 48: "Up to that time he (i.e., Sykes) was looking around as an agent would or somebody acting in that capacity for a prospective purchaser, and when he came there and brought someone with him you knew that the two of them were going to buy the property jointly or as partners?" And again, question 56: "Then I am right in understanding that your bargain with Sykes was to pay him ten per cent. of the purchase-price from time to time as it was paid to you under the agreement?" To which the answer was, "That was the bargain."

Again, question 203, Hitchcock is asked: "Was there any arrangement in writing with Mr. Sykes about commission?" To which he replied: "No, there was no arrangement in writing; it was verbal."

After the meeting in Corrigan's office, Sykes saw the appellant and applied to him to join him in the purchase; and, after some negotiation between them, the appellant agreed to do so, and the respondents and Sykes and the appellant met on the 12th April, 1910, at the office of Mr. Cline, who acted as solicitor for the respondents; and an arrangement was there concluded for the purchase of the property which Sykes had been commissioned to find a purchaser for, and for the surface rights of an adjoining property, which Sykes appears to have thought it necessary to acquire as a means of access to and for the purpose of transporting the product of the mine.

Until this meeting the respondents had not seen and did not know the appellant, either in connection with the purchase of the property or otherwise.

Upon this state of facts, however unfair it may have been on the part of Sykes not to have disclosed to his partner the fact that the respondents were to pay him a commission for finding a purchaser of the property, I am unable to see that any duty was cast upon the respondents to disclose that fact to the appellant.

They had employed Sykes to find a purchaser for the property, and Sykes had introduced as the purchasers the appel-

lant and himself: they knew nothing of the arrangements between the appellant and Sykes, and were not, I think, called upon to make any inquiry as to them. Surely an owner of property who employs an agent to find a purchaser of it, upon the terms that the agent is to be paid a commission on the purchase-price, is under neither a legal nor a moral duty, when the agent comes to him with a third person and tells him that he and that third person are willing to purchase the property on the terms proposed, to ask the third person whether he is aware that the person with whom he is joining to make the purchase is his (the owner's) agent to find a purchaser, and that the agent is being paid a commission for having done so, or to inform of those facts.

I fully recognise the importance of adhering to the rules which Courts of Equity have established for promoting fair dealing, and would not wittingly depart from them; but I am unwilling to set up an artificial standard of morals which the average honest man is unable to reach, and to undo transactions which have been entered into because the acts of one of the contracting parties do not square with that artificial standard.

I venture to think that an honest business man in the position of the respondents would be surprised to be told that he had been guilty of fraud because he had not done that which the appellant asks us to hold that it was the respondents' duty to do.

It was also contended that the appellant was entitled to a return of the $20,000, because, as it was urged, the respondents have rescinded the contract.

This contention is, in my opinion, untenable. The agreement provides that, in the event of failure by the purchasers to pay any of the instalments of purchase-money, the moneys previously paid on account of it are to be forfeited; and, default having been made in the payment of the instalments, the respondents are entitled to retain the $20,000.

There is some question as to liens which have been registered against the property, and it was arranged by counsel upon the argument that that question should not be dealt with until the lienholders' actions have been disposed of; and, subject to that arrangement, the appeal should, in my opinion, be dismissed with costs.

TEETZEL, J.:—I agree.

MIDDLETON, J., dissented, for reasons stated in writing. He

said that as soon as the plaintiffs knew that Sykes and Webster were partners, that moment they ought to have appreciated that Sykes could not in honesty receive a part of the price paid without Webster's full assent, and it became their duty to ascertain that Webster knew and assented. Failing in this, they were guilty of fraud, both in morals and law. Reference to Panama and South Pacific Telegraph Co. v. India Rubber Gutta Percha and Telegraph Works Co., L.R. 10 Ch. 515; Grant v. Gold Exploration and Development Syndicate Limited, [1900] 1 Q.B. 232, 248. The contract should be rescinded, and the money paid under it refunded, with interest, if Webster can reconvey or cause to be reconveyed the lands free and clear of all incumbrances done or suffered by him or any one claiming under him.

Appeal dismissed; MIDDLETON, J., *dissenting.*

BRITTON, J. APRIL 19TH, 1912.

JEWER v. THOMPSON.

Vendor and Purchaser—Contract for Sale of Land—Objections to Title—Rights of Way—Admission by Vendor of Validity of Objections—Declaration of Termination of Agreement, under Provision therefor—Registration of Agreement by Purchaser—Right of Vendor to Discharge of Registration.

Action to vacate the registration of an agreement for the sale of a house and land, after the plaintiffs had cancelled the contract, as they alleged, and for a mandatory injunction to the defendant to execute a release or discharge of the agreement, and for damages.

F. E. Hodgins, K.C., for the plaintiffs.
J. J. Maclennan, for the defendant.

BRITTON, J.:—The plaintiffs were the owners of house No. 761 on the east side of Gladstone avenue, in the city of Toronto. The defendant, desiring to purchase this, made an offer in writing to A. Jewer, one of the plaintiffs, which offer is in part, and so far as seems to me material, as follows: "I, W. Thompson, of the city of Toronto (as purchaser), hereby agree to purchase all

and singular the premises situate on the east side of Gladstone avenue, in the city of Toronto, known as house No. 761, plan No. , as registered in the registry office for the said city of Toronto, having a frontage of about 19 feet by a depth of about 62 feet more or less, at the price of $3,000, as follows. . . . The vendor shall not be required to furnish abstracts of title or to produce any deeds or copies of deeds not in his possession or control. The purchaser to be allowed ten days to examine title at his own expense. All objections to title to be made in writing within that time. Any valid objection which the vendor is unable or unwilling to remove, the agreement to be null and void, and deposit, if any, returned . . . ."

The offer or agreement, on the part of the defendant, was dated the 24th November, 1911. On the same day, the plaintiff A. Jewer signed an acceptance, and agreed to and with the defendant to carry out the same, on the terms and conditions above mentioned, and he accepted $50 as a deposit.

The plaintiffs gave the names of Messrs. Morine & Morine as their solicitors. The defendant employed Mr. Robert Wherry as his solicitor. On the 1st December, the defendant's solicitor made requisitions on title, of considerable length and of great minuteness and particularity. These were answered in part, but the answers were deemed by the defendant's solicitor to be unsatisfactory. The property is, in fact, subject to two rights of way, one over a small part at the north end, and another over a small part at the south end. Both were put forward as serious objections by the defendant, but more stress seems to have been laid upon the right of way over the southerly one foot and some inches. Upon the land immediately adjacent to the south, which land was formerly owned by the plaintiffs, is erected a building used and occupied as a store. The distance between the southerly wall of 761, and the northerly wall of the store, is about 3 feet. In selling the store lot, the plaintiffs' conveyance reserved a right of way over the northerly 1 foot 6 inches of the store lot, and granted a right of way over the southerly one foot 6 inches of 761. Apart from this right of way, it was established that the defendant would have got the full 19 feet frontage; but the defendant insisted upon getting title to all of what was called 761, freed and discharged from these rights of way—and particularly the right of way over the southerly part, of about 18 inches. The plaintiffs, not being able to satisfy the defendant, treated his objection as a valid objection, which the plaintiffs were unable or unwilling to remove, treated the agreement as null and void—declared it to be so, and tendered to the de-

fendant his deposit of $50. The plaintiffs then again offered the property for sale, and subsequently they received an offer from Robert Garbutt, which offer the plaintiffs accepted. After the plaintiffs had cancelled the agreement, the defendant caused the agreement to be registered, and refused to release or discharge it. Garbutt insisted upon having the defendant's alleged agreement removed from the registry; hence this action, which was commenced on the 15th February last. The plaintiffs ask for judgment vacating and discharging the registration of the agreement referred to, made between Alfred Jewer and the defendant, and a mandatory injunction compelling the defendant to execute a release or discharge of it. The defendant denies the plaintiffs' right to cancel the agreement, and he sets up as objections to the plaintiffs' title the right of way mentioned, and asks for specific performance of the agreement or performance of it, subject to these rights of way, with an abatement in the purchase-price. The determination of this action depends upon the plaintiffs' right to rescind, under the words in the contract itself.

I find, as it seems to me clear upon the evidence, that the plaintiffs did not have in mind the existence of any right of way over the southerly end of this lot until after the defendant's offer and the plaintiffs' acceptance of it. The plaintiffs did not personally give instructions as to the survey, and they really thought that the land belonging to 761 extended to the northerly wall of the store mentioned.

The defendant could see for himself the position at the northerly end. If he was innocently misled as to the southerly end, he was not as to the northerly end. I find that the plaintiffs had the right to treat the defendant's objection as a valid objection to the title; and, being unable and unwilling to remove this objection, the plaintiffs could, as they did, annul the agreement and declare it void and of no effect.

The plaintiffs, in doing this, did not act unreasonably or capriciously, but acted in good fatih, and acted promptly under the circumstances.

The right of way over the southern part was not actually used by the occupant of the store; and, by reason of this, the plaintiffs might well not bear in mind the fact that such right of way existed. There was no pretence at the trial that the plaintiffs wilfully concealed or intended to conceal anything from the defendant.

In entering into this contract, I do not think that the plaintiffs or either of them "omitted anything which the ordinary prudent man, having regard to his contractual rela-

tions with other parties, is bound to do:" In re Jackson and Haden's Contract, [1906] 1 Ch. 412.

There was no waiver of the plaintiffs' right to rescind.

The case In re Dames and Wood, 29 Ch. D. 626, seems to me authority for the plaintiffs' contention.

The purchase-price was a bulk sum; the sale was not by the foot. The number of feet frontage was "more or less," and the defendant would get at least all the agreement called for in measurement, exclusive of the right of way. See Wilson Lumber Co. v. Simpson, 22 O.L.R. 452.

Apart from the correspondence between the solicitors, I find that the plaintiff Alfred Jewer saw the defendant on the 19th December, 1911, and told him in substance that he would not comply with the requisition as to those rights of way, and that the defendant could "take the property or leave it," and that the defendant then said that he would not take the property subject to the right of way. Nothing was then said about abatement of price. The defendant, by his solicitor, registered the agreement on the 21st December, 1911. The plaintiffs did not know of this, and again offered the property for sale; and on the 3rd January, 1912, the plaintiffs accepted the offer of Robert Garbutt, and are bound to convey to him. Garbutt and the plaintiffs both acted in good faith—Garbutt had no notice of the defendant's offer. Garbutt is not a party to this action. It is clear from the conduct of the defendant that, had not the plaintiffs cancelled the offer and acceptance as they did, the plaintiffs would have been involved in expensive and protracted litigation.

The plaintiffs are entitled to judgment vacating and discharging the agreement mentioned in the statement of claim, registered in the registry office of the western division of the city of Toronto, as No. 19076 D., on the 21st December, 1911, and to a declaration that on that date the defendant had no right, title, or interest under the said agreement in the said property.

A mandatory order will go, compelling the defendant to execute a release or discharge of the said agreement, so far as it affects the land in question and forms a cloud upon the title thereto.

The judgment will be with costs, payable by the defendant to the plaintiffs. The $50 deposit may be applied by the plaintiffs upon the costs payable by the defendant.

The defendant's counterclaim will be dismissed with costs.

MIDDLETON, J. APRIL 19TH, 1912.

NADEAU v. CITY OF COBALT MINING CO.

Master and Servant—Injury to Servant by Kick of Master's Horse—Findings of Jury—Habit of Kicking—Scienter—Imputed Knowledge of Master—Incorporated Company—Negligence.

Action for damages for injuries sustained by the plaintiff by being kicked by a horse owned by the defendants, while cleaning it for the defendants, by whom he was employed.

A. G. Slaght, for the plaintiff.

A. E. Fripp, K.C., for the defendants.

MIDDLETON, J.:—The plaintiff, Edward Nadeau, was employed by the defendants; and, at the time of the accident, he had, among other things, the duty of attending a horse owned by the defendants. Upon entering the stall for the purpose of cleaning it, he received a severe kick, which broke his leg. The jury, in answer to questions submitted, have found that the plaintiff was guilty of no negligence; that the horse was vicious, in that it was accustomed to kick, as described by several witnesses; and that the teamster Hausie, who had charge of the animal before it was given into the plaintiff's care, was told of this habit before the occurring of the accident. Save in this way, the defendants had no knowledge of the vice of the animal.

The sole question remaining is, whether this is sufficient proof of scienter. I think it is; because Hausie was the person who had the care of the horse.

In Baldwin v. Casella, L.R. 7 Ex. 325, Blackburn, J., says: "So all dogs may be mischievous; and, therefore, a man who keeps a dog is bound either to have it under his own observation and inspection, or, if not, to appoint some one under whose observation and inspection it may be. The defendant has appointed his coachman to that duty. The coachman knew of the mischievous propensities of the dog, and his knowledge is the knowledge of the master." This view is concurred in by Martin, B., and Channell, B.

In Stiles v. Cardiff Steam Navigation Co., 33 L.J.Q.B. 310, Crompton, J., dealing with a similar case—in which knowledge had to be brought home to a corporation—says: "They cannot contend that, because they are a corporation, it is impossible

that they can have knowledge of such a matter; and such a doctrine would be very dangerous; and I quite agree with what was said by my brother Blackburn in Penhallow v. Mersey Docks Co.: 'If a corporation cannot know anything except by its servants, it would seem that the corporation must be liable for the knowledge of its servants and the acts of its servants, or not liable at all.' Upon this point there is no difference between a corporation and an individual; and I quite agree that the knowledge of a servant representing his master, and acting within the scope of his delegated authority, may be competent to affect his master with that knowledge."

In that case the plaintiff failed because he did not bring any knowledge home to those in care of the dog in question or in care of the yard, but only to servants in no way in charge of either the beast or the premises.

In Applebee v. Percy, L.R. 9 C.P. 647, the plaintiff failed on precisely the same ground, as it was not "shewn that either of the two men spoken to had the general management of the defendant's business or had the care of the dog."

Judgment will, therefore, be for the plaintiff for the sum awarded by the jury, $1,250, and costs.

BOYD, C. APRIL 20TH, 1912.

PEEL v. PEEL.

Lunatic—Trial of Issue—9 Edw. VII. ch. 37, sec. 7—Unsoundness of Mind—Inquiry under 1 Geo. V. ch. 20, sec. 1—Capacity for Managing Affairs—Evidence—Costs.

Issue under 9 Edw. VII. ch. 37, sec. 7, as to the mental condition of John James Peel, the defendant, directed upon the application of his brother, Charles Alfred Peel, the plaintiff, for an order declaring lunacy; and inquiry under 1 Geo. V. ch. 20 as to capacity for managing affairs.

The issue and inquiry came before BOYD, C., at Lindsay.

I. E. Weldon, for the plaintiff.

F. D. Moore, K.C., for the defendant.

BOYD, C.:—An issue being directed to be tried at Lindsay, pursuant to the provisions of the Lunacy Act, 9 Edw. VII. ch. 37, sec. 7, I found upon the evidence that John James Peel was

not of unsound mind and incapable of managing himself or his affairs, and thus disposed finally of that issue except as to costs.

I also then considered an application under the Act of 1911, 1 Geo. V. ch. 20, permitted (by the order directing the issue) to be made before the Judge who tried the issue, as to whether the same person was "through mental infirmity, arising from disease, age, or other cause, or by reason of habitual drunkenness, or the use of drugs, incapable of managing his affairs:" sec. 1.

This Act is apparently an adaptation from and an extension of the provision in the English Lunacy Act of 1890, 53 & 54 Vict. ch. 5, sec. 116 (1 d), intended for the protection of persons who, "through mental infirmity arising from disease or age," are incapable of managing their affairs. Our Act is not limited to "mental infirmity arising from disease or age," but is couched in wider terms. The present case would not come under the terms of the English Act, for the peculiarities of John James Peel arise neither from disease nor age, nor are they referable in any respect to drunkenness or the use of drugs: the infirmity or weakness of his mind arises from "other cause." Both Acts deal with cases on the border line between sanity and insanity: In re Brown, [1894] 3 Ch. 416.

At the trial it abundantly appeared that he was free from any mental disease, and so could not be regarded as of unsound mind: In re Barber, 39 Ch. D. 187; and it was also well proved that he was neat, clean, and careful in all his habits, and far from being incapable of managing himself. The strongest medical witness against him described his condition as one of "imbecility" or of arrested development which was not capable of improvement. Thus used, "imbecility" is synonymous with the expression of the statute "mental infirmity," a term or phrase of flexible meaning, indicating various degrees of weak-mindedness. The test called for by the statute is, whether the person is so weak-minded as not to be able to manage his affairs. The policy of the law is, that the liberty of no man should be interfered with if he has sufficient understanding for the handling of his business according to the ordinary usages of the neighbourhood where he lives.

I gave my opinion provisionally on this man's capacity at the close of the hearing, subject to a further consideration of the whole, after I had read a great body of evidence taken upon his examination before the Master at Lindsay on the 10th and 11th May, 1911. Having perused this bulk of material, consisting of 811 questions and answers on the first day and of 614 on the second, I am confirmed in my conclusion that this is not a case

for the interference of the Court. The examination, no doubt, shews his limitations; he has lived in a narrow world, and his geographical and other knowledge extends no further than to the three townships which he has been in, Verulam, Ops, and Emily; in this locality he lived at home with his mother till her death, eleven years ago. He was then emancipated, and he is now fifty-one years of age. "Home-keeping youths have ever homely wits." He was a dull, slow-witted boy, afflicted also with imperfect eyesight, so that he got little or no schooling. But he was far from being what the old statute calls a "natural fool;" he is "one who hath had beforetime wit and memory, and hath not failed of his wit, but hath of late improved the same," so that his farm and money (worth in all $3,000) can be by him "safely kept without wasting or destruction." See R.S.O., vol. 3, ch. 341, secs. 1 and 2, from ancient statutes of uncertain date. His answers as a whole are intelligent, some even shrewd and sane; few, rather astray; but this was more from ignorance than from lack of comprehension. Some subjects broached were not of his ken, and yet his definition of "overdraft" as "a good pile of money" was not a bad guess. He said, sagaciously enough, that, if he were left to himself, "he would not get rattled, like as if there was a dozen around ripping and teasing and cross-questioning." I am satisfied that he has a modicum of practical sense and judgment sufficient for the handling of his affairs in his own way. His mind has markedly improved since the death of his mother, when he has had to fend for himself, and he will not only be better in mind but will do better in business if left to look after his own little property, uncontrolled by the Court.

His own view of this application is, that he regards his brother, the applicant, as a man who is after his property, and he does not want to have the Court put any man above him. I had a short and satisfactory interview with him, and he is looking forward to the investment of the $1,000 now in Court so that it will yield him 6½ per cent., and would not be content to take 4½ per cent. from the Court. I see no reason why this money should not be paid out to the joint order of himself and his solicitor, Mr. Moore, which will be the first step towards its proper investment.

As to the costs, I have conferred with my brother Riddell, who directed the issue; and I think the right disposition of these is, that there should be no costs of proceedings prior to the application which resulted in the order of the 7th June, 1911; but that all the subsequent costs, including the costs of that

order, should be paid by the applicant to the defendant. The applicant, having failed in satisfying the Judge beyond reasonable doubt as to the unsoundness of mind, might well have retired at that point; but he urged the matter on to a further large expenditure of cash; and these lost costs should be paid by the unsuccessful party.

DIVISIONAL COURT. APRIL 20TH, 1912.

EYERS v. RHORA.

Surrogate Courts—Times for Sittings—Surrogate Courts Act, 10 *Edw. VII. ch.* 31, *secs.* 29 (1), 30—*Irregularity — Waiver.*

Appeal by the defendant W. H. Rhora from the judgment of the Judge of the Surrogate Court of the County of Haldimand directing the issue of letters probate of the will of Menno Rhora, deceased.

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

J. E. Jones, for the appellant.
C. A. Moss, for the plaintiff.

RIDDELL, J.:—The Judge of the Surrogate Court of the County of Haldimand sat at Cayuga on the 9th February, 1911, to try this action. The plaintiff was applying for letters probate of the will of the late Menno Rhora; the defendant W. H. Rhora had filed a caveat and defended the action upon the usual grounds, incapacity, undue influence, etc.; one of his co-defendants admitted the validity of the will; M. E. Rhora did not.

At the opening of Court, and before the trial proceeded, counsel for the defendant W. H. Rhora objected to proceed—alleging several grounds, amongst them that the Court had no power to sit at the time.

The objection was overruled, and the trial proceeded, counsel for the defendant W. H. Rhora, cross-examining witnesses called for the plaintiff, at the close of the plaintiff's case renewed his objection, and, after consultation with counsel for M. E. Rhora, announced that he would call no witnesses, but argued that the plaintiff should pay the costs. His Honour decreed probate of the will, with costs against W. H. Rhora, but no costs against M. E. Rhora or the submiting co-defendant.

W. H. Rhora now appeals.

It is not pretended that any injustice has been done, or that there is any ground for the appeal, unless the objection to the Court sitting as and when it did is fatal.

The statute in force was the Surrogate Courts Act, 1910, 10 Edw. VII. ch. 31, which by sec. 29 (1) provided that "there shall be four sittings in each year for hearing and determining matters and causes in contentious cases and business of a contentious nature, which, except in the County of York, shall commence on the second Monday in January and the first Monday in April, July, and October."

We have nothing to indicate that the Court sat on the second Monday in January, *i.e.*, the 8th January—the date for the trial of the action was fixed as the 12th January, apparently without objection, although that is disputed most vigorously. I do not think it is of the slightest importance.

By sec. 30 of the Act, it is provided that "with respect to all matters within the jurisdiction of the Surrogate Courts, such Courts and the Judges and officers thereof respectively shall have and may exercise all the powers of the High Court and of the Judges and officers thereof."

"The Judges of the High Court . . . shall appoint the days upon which the . . . sittings for trials shall be held:" Con. Rule 113. And I see no reason why the Judge of the Surrogate Court has not the power to appoint a day for the sitting for the trial of cases in his Court. True, the statute fixes four sittings in each year, to begin upon a fixed date; but there is no provision that these sittings shall end at any particular date; and I see no objection whatever to a Surrogate Court Judge setting a particular day in February as part of the sittings beginning on the second Monday in January.

I cannot think that the trial was a nullity; if an irregularity, the act of the present appellant in appearing at the trial, cross-examining witnesses, and arguing as to costs, would be a waiver of the irregularity.

The appeal should be dismissed with costs.

Nothing I have said should be considered an approval of a disregard of the express directions of the statute that the sittings "shall commence" at certain fixed dates.

FALCONBRIDGE, C.J., and BRITTON, J., agreed in the result.

MASTER IN CHAMBERS. APRIL 22ND, 1912.

RE SOLICITOR.

Solicitor—Sum Paid for "Retainer"—Application by Client for Delivery and Taxation of Bill of Costs—9 Edw. VII. ch. 28, sec. 24 et seq.—Agreement between Solicitor and Client—Necessity for Allowance by Taxing Officer—Jurisdiction of Master in Chambers—Motion Referred to Judge.

Motion by the client for an order for delivery of a bill of costs and for taxation of the same, in the circumstances set out below.

J. D. Falconbridge, for the client.
F. Arnoldi, K.C., for the solicitor.

THE MASTER:—The client, being in gaol and awaiting transportation to the Central Prison, instructed the solicitor to take proceedings to have the conviction quashed. At the time of such engagement, an agreement was drawn by the solicitor as follows: "October 20th, 1911. I hereby retain" (the solicitor) "to make application for my release from gaol, and herewith deliver to him cheque for $300 as retainer." This is produced, signed by the prisoner, and witnessed in pencil by the gaoler. The gaoler makes affidavit of execution in his presence, and also says that the contents of the agreement "were carefully explained to the (client) before he signed the same." In a second affidavit, he says that the cheque for $300 was filled in before signature by the prisoner. The client is very positive that he gave the solicitor a blank cheque, and that he never understood that he was to pay as much as $300 for his solicitor's services.

The client is a foreigner, and says he has a very imperfect knowledge of the English language. From his signature to the affidavit and agreement, he seems to be of an ordinary education.

The application to quash the conviction failed; and the client was informed of that by the solicitor on the 23rd January, 1912, by letter, which also said: "The cheque of $300 that you gave to me, in accordance with our agreement, covers your part of the transaction."

On the 6th February, the client replied repudiating any such agreement or signature of cheque for $300 and asking for a bill of costs.

On the 8th February, the solicitor wrote refusing the client's request.

After another month, the present solicitors took the matter up without result—and the present motion was thereupon launched.

Looking at what was said in the similar case, Re Solicitor, 21 O.L.R. 255, affirmed by a Divisional Court, 22 O.L.R. 30, it would seem that, if the view of the solicitor is accepted by the Court, he can retain what he has been paid, on stating his willingness to accept that in full of any claim for costs.

But, looking at the provisions of 9 Edw. VII. ch. 28, sec. 24 et seq., it does not seem that, in a case like the present, where the client is a prisoner in close custody, a foreigner and without independent advice, the use of the word "retainer" in the agreement would be conclusive.

Section 25 seems to require a solicitor not to receive any sum under an agreement for his professional services until it has been allowed by a Taxing Officer of the Court. If he confirms it, then it would seem to be binding on the client. If the officer is in doubt, he may require the opinion of the Court or a Judge to be taken thereon.

If the solicitor does not conform to sec. 25, but takes the risk of the question being raised later, then, by sec. 33, even after judgment by the client within twelve months of such payment, "the High Court Division or a Judge thereof" may require the agreement to be re-opened and order a taxation in the usual way—if a case for so doing is made out.

It was objected by Mr. Arnoldi that, under sec. 33, this application should be made to a Judge of the High Court Division, that is, at present, to a Judge of the High Court.

The power of the Master in Chambers is limited, in regard to making an order such as is asked for here, to the ordinary case under the old practice. The change made by the recent Act is statutory, and the procedure must be strictly followed. My view has always been that the Master in Chambers has no jurisdiction under a statute unless he is expressly named, as, e.g., in the Insurance Act.

I have thought it well to express an opinion on the Act, as it was discussed on the hearing. But the only course to be adopted now is to refer it to a Judge. If he thinks it cannot be heard in Chambers, he can enlarge it into Court before himself, as is not unusual.

DIVISIONAL COURT. APRIL 22ND, 1912.

RE CORKETT.

Will—Construction—Division of Residue — Maintenance of Children—Sale of Residence—Costs—Allocation.

Appeal by Margaret J. Kee, one of the legatees under the will of George Corkett, deceased, from the judgment of CLUTE, J., ante 761, declaring the construction and interpretation of certain clauses of the will.

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

A. McLean Macdonell, K.C., for the appellant.

B. F. Justin, K.C., for William George Corkett.

E. C. Cattanach, for the infant Cecil M. Corkett.

Featherston Aylesworth, for the executors.

BOYD, C.:—The testator by his will gives to his son William George the west half of lot 4; to his daughter Margaret all his household effects. His residence is to be sold, and the proceeds equally divided among his three children, William George, Margaret, and Cecil. These provisions are not disturbed but confused by the codicil. The will then deals with his residuary estate, which is to be invested, and the profits applied to the maintenance, etc., of the children till Margaret attains twenty-one, when she is to receive thereout $1,000. The residue is to be kept invested and applied as before till Margaret has attained twenty-six years, and then the residue goes into thirds, of which—

A. One-third, less the $1,000, is to be paid to Margaret; the balance to be invested and so applied till the son William attains twenty-five years of age.

B. And the one-half of the residue is to be paid to William George; the balance to be kept invested and so applied till Cecil attains twenty-one years.

C. And then the whole balance or residue is to be paid to Cecil.

This residuary clause is disturbed by the codicil; the share (one-half) given to William is revoked; and, instead of that, he is to get $1,500 in cash (as well as the third part of the proceeds of the sale of the residence), and the balance is to be divided between Margaret and Cecil "according to the terms and conditions specified as to the other bequests made by the will."

Any difficulty created by these words is cleared by simply deleting the words in clause B. (as I have divided it) of the residuary portion of the will, and inserting from the codicil these words, "one-half of the residue to be divided between Margaret and Cecil." Then the terms and conditions specified as to the other bequests in the will require to be applied cy près to the new bequests given to Margaret and Cecil; so that one-half of the residue intended for William is to be divided between Margaret, who gets her half of it forthwith, as she has reached twenty-six years of age, and Cecil, whose half of the portion intended for William is to be kept invested for his maintenance till he attains twenty-one years, when it is to be paid to him, with the original one-half of the residuary estate given to him by the will.

The costs below and of appeal to be borne by the estate in such wise that each child's share bears a third of the whole costs.

LATCHFORD, J.:— . . . The only alteration made by the codicil of the bequest to William is to substitute for his one-third of the residue mentioned—amounting, it would appear, to $7,039—a specific sum of $1,500, plus one-third the proceeds of the sale of the residence—disposed of for $2,000—or, in all, about $2,200. "Instead of my said son being bequeathed one-half of the residue," he is to have much less; "the balance is to be divided between Margaret and Cecil." The balance of what? The balance, I think, of the share which, but for the codicil, William would have received. It cannot be the balance of the proceeds of the sale of the residence. That had been disposed of by the will, and is not affected by the codicil. Nor can it be the balance of the residue after deducting the share of Margaret, the specific legacies, and the bequest to William by the codicil. For the effect of that construction would be to cut down the legacy of Cecil, which the codicil confirms. According to the statement made by counsel of the executors' accounts, Cecil's share under the will is, like Margaret's and William's $7,039. Reduced by the $2,200 bequeathed by the codicil, there remained of William's third, $4,839. If this went into the general residue, and were added to what remained —$7,039—the residue would amount to nearly $12,000. One-half of this to Cecil would be less, by upwards of $1,000, than what he is given by the will, confirmed by the codicil. Margaret, on the other hand, would upon that construction receive about $13,000.

The testator by his will manifested an intention to treat all his children approximately alike, the elder ones being given a slight advantage—the son the farm, and the daughter the furniture. For some reason, he afterward desired to diminish the share of the elder son. He intended, in my opinion, to divide what was then left of that son's share between his other two children, and used language sufficient to carry out his intention. The "balance to be divided" is the balance of William's share under the will.

I think the appeal should be allowed.

MIDDLETON, J.:— . . . The questions argued do not depend upon any general principle, but entirely upon the will itself. . . .

Although somewhat clumsily expressed, the intention of the testator is clear. The three children are to share equally in the residuary estate, each being paid off as he or she attains the stipulated age.

The testator, by his will, had directed that his residence should be held until his youngest child came of age, when it should be sold, and the proceeds divided between these three children. He had also given his farm to his eldest son, William, and his household furniture to his daughter Margaret.

By a codicil, the testator evidently intended to modify the provision made for his son William. The codicil recites the gift to him of his one-third share in the residue; and, instead of this, the testator gives him $1,500 in cash, in addition to his share of the proceeds of the sale of the residence, and directs "the balance to be divided between my said daughter Margaret and my son Cecil according to the terms and conditions specified as to the other bequests made by my said will."

The question is as to the meaning of the words quoted. The appellant, Margaret, contends that no disposition has been made of the difference between the $1,500 given to William by the codicil and the third of the residuary estate given to him by the will; and that, as to this, there is an intestacy. Her counsel treats the quoted words as being merely a confirmation of the provisions made in the will.

The judgment in review accepts this construction of the codicil, but holds that the effect is not an intestacy, but that the undisposed of fund falls into the ultimate residue given to the infant.

I find myself unable to accept either view. It appears to me that the codicil was intended to deal with the share of

the residuary estate given by the will to William. Out of this portion of the residue William is to receive $1,500, plus his share of the proceeds of the residence; and the balance—that is, the balance of William's share—is to be then divided between the other two children, Margaret and Cecil.

The judgment appealed from should be varied accordingly, and costs of all parties here and below should be paid out of the estate. These must be so allocated that one-third of the total cost will be borne by each of the beneficiaries. The whole burden must not be placed upon the infant's share.

The principle on which costs must be dealt with is indicated in Hilliard v. Fulford, 4 Ch. D. 389; In re Bell, 39 L.T. N.S. 423; and In re Giles, 55 L.J. Ch. 696.

DIVISIONAL COURT. APRIL 22ND, 1912.

CONNORS v. REID.

Malicious Prosecution—Reasonable and Probable Cause—Belief of Defendant in Truth of Charge Laid—Verdict of Jury—Judge's Charge—Improper Remark Calculated to Swell Damages—Reduction of Damages if Consent Given—New Trial.

Appeal by the defendant from the judgment of the Judge of the County Court of the County of Ontario, upon the second trial of the action, upon the verdict of a jury, in favour of the plaintiff, for the recovery of $250 damages for malicious prosecution.

At the first trial, there was a verdict for the plaintiff for $175. This was set aside by a Divisional Court and a new trial ordered: 25 O.L.R. 44, ante 209.

The defendant now asked to have the second verdict and judgment set aside and for a third trial.

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

L. F. Heyd, K.C., for the defendant.

J. M. Ferguson, for the plaintiff.

The judgment of the Court was delivered by BRITTON, J.:—The only points for consideration in this case are: (1) was there a finding of the trial Judge of absence of reasonable and pro-

bable cause? and (2) was the charge to the jury so objectionable as to entitle the defendant to a new trial?

As to the first: the learned Judge in a roundabout way did in fact tell the jury that, if they found that the defendant did not himself believe, at the time he laid the information against the plaintiff, that the plaintiff stole his milk, he, the Judge, would decide that there was an absence of reasonable and probable cause; so the jury, upon their finding against the defendant's belief in the plaintiff's guilt, could go on and assess the damages. As the jury assessed the damages, it must be assumed that the jury, understanding the charge, found upon the evidence that the defendant did not believe in the plaintiff's guilt. There was no necessity of any formal announcement by the Judge of his finding an absence of reasonable and probable cause.

As to the second point: no doubt, the learned Judge in his charge quite improperly referred to the defendant as a wealthy farmer and to the plaintiff as a poor woman, etc. This could, of course, only affect the damages. It would naturally prejudice the defendant as to amount. It must be borne in mind that there was a former trial, and at that the damages were assessed at $175. It is not an unusual thing, where, in an action for damages such as the present, a new trial is granted, to have the damages increased. The standing of the parties, apart from the circumstances of the case and from the evidence given, must have been very well known to the jury, but the charge was improper, and the defendant may have been prejudiced.

If the plaintiff consents to reduce the damages to $175, being the amount of the former verdict, I would dismiss the appeal without costs. If not, there should be a new trial; and, in that event, the costs of the appeal will be costs to the defendant in any event.

MIDDLETON, J. APRIL 23RD, 1912.

BUCKNALL v. BRITISH CANADIAN POWER CO.

Mines and Minerals—Mining Claim—Inchoate Property Right—Destruction of Value of Claim—Actionable Wrong—Damage by Flooding—Lease by Crown of Water Power Location—Erection of Dam — Cause of Flooding — Application for Lease Prior to Discovery of Minerals—Damages—Jury.

Action by the owners of certain mining claims for damages sustained by flooding occasioned by the construction by the defendants of a dam upon the Mattabitchewan river.

The action came on for trial before MIDDLETON, J., and a jury, at North Bay, on the 9th April, 1912, when it was arranged that the jury should ascertain the extent of the injury done by the defendants, and that the learned Judge should try all the other issues without the jury.

S. A. Jones, K.C., for the plaintiffs.
J. Lorn McDougall, for the defendants.

MIDDLETON, J.:—By instrument dated the 29th May, 1909, the Crown leased to the Mines Power Limited a water power location upon the river in question, the limits of which are defined upon the plan attached thereto. These limits do not include the plaintiffs' mining locations. The lease was granted pursuant to the statute 61 Vict. ch. 8, and the regulations passed pursuant to the Act. It contains a clause—13—providing that the lessee shall not, by virtue of the lease, have power to overflow or cause to be overflowed any lands other than those demised, and providing that, if any such lands are overflowed or damaged, the Crown shall be in no way responsible for damage done to the owners. It also confers the right to flood any Crown lands along the river and its expansions.

Prior to the granting of this lease, the mining claims in question had been located: the discovery being, in the case of four of the claims, March, 1908, and in the case of the fifth claim, May, 1908. The working conditions were duly complied with in the case of each of these claims; and on the 4th March, 1912, certificates were issued by the Mining Recorder shewing that the requirements of the Mining Act had been fully complied with.

The main work done on these claims was the sinking of a small shaft near the surface of the water of Bass lake. When the dam was erected by the defendants, it raised the water forty feet. It is admitted that the water was not raised to an amount exceeding that authorised by the lease. As a consequence of the raising of the water, the work that had been done upon the mining claims was completely lost. The plaintiffs were entitled to obtain a patent for their claims, but did not do so, because this involved the payment of the Government charge, and it is said that they refrained because of the complete destruction of all real value in the claims by the flooding.

The Mining Act recognises a mining claim as a property right. It is true that this right is in a sense inchoate; but, upon compliance with the requirements of the statutes, it ripens into a full title; and I think that the destruction of the value of

the mining claim, although the title is inchoate, is an injury for which an action will lie. The title of the owner of the mining claim had its inception in the discovery and the recording of the discovery.

It is said that the water power company made application for the lease in 1907, prior to the plaintiffs' discovery; and that, by parity of reasoning, its rights ought to date back to the date of the original application; and, therefore, would be superior to the rights of the plaintiffs. I do not think that this follows. It may well be that the Crown Lands Office will deal with applicants for power leases in the order of their priority; but the application for the lease confers no title whatever; it gives no right to the applicant, and his title is derived from the lease, and from the lease alone. When the lease purports to give, as it does, "the right to overflow any Crown lands along the shore of the Mattabitchewan river and its lake expansions and tributaries," I think that this is not intended to derogate from or interfere with the inchoate title of the locatees of mining claims; nor do I think that it would be competent for the Crown to defeat this statutory title by any lease.

I left the question of damages to the jury; and, while they have awarded the amount sworn to by the plaintiffs as having been expended upon the property, I asked them upon their return if they intended to allow the items so claimed. They told me that they did not; that they had allowed the same amount, setting off the value of the claim, as a claim, against the exaggeration of the amount expended in the statement put in. They also explained to me that they had not included in the sum named the value which they fixed for the wood upon the flooded land. This amount, at the figures given by the jury—forty cords per acre, 25 cents per cord, for the forty flooded acres—would give an additional sum of $800; so that the damages would be $3,627. I can see no reason why the plaintiffs should not be allowed for the timber.

MIDDLETON, J. APRIL 23RD, 1912.

GREAT WEST LAND CO. v. STEWART.

Vendor and Purchaser—Contracts for Sale of Land—Construction—Payment of Purchase-money—Deferred Instalments—Default—"Crediting Agreement"—Compensation—Interest—Rate of—Costs.

Action by the Great West Land Company Limited and the Union Trust Company Limited against James Stewart and others for a declaration of the plaintiffs' rights and the rights and responsibilities of the defendants under certain agreements, and for an injunction.

Matthew Wilson, K.C., for the plaintiffs.
R. T. Harding, for the defendants.

MIDDLETON, J.:—On the 3rd March, 1906, the Great West Land Company agreed to sell to Messrs. Leitch et al. 100,000 acres of land in Saskatchewan, at $6.50 per acre. It was not intended that the purchasers should themselves pay for these lands; and the agreement contains clauses dealing with the rights of those to whom the purchasers might sell portions of the land. Under the agreement, the title is to remain in the vendors until the land is paid for or until the amount paid reduces the unpaid balance to one-half of the value of the land, when a mortgage is to be given to the vendors or to the Union Trust Company for half the value of the land, with interest at six per cent.

Land sold by the purchasers or paid for is to be discharged from mortgages, upon receipt by the vendors of a fair price, either in land or purchase-agreements or mortgages; which lands, purchase-agreements, and mortgages are to be held as security for the purchase-price; and any individual purchaser of a parcel is to be entitled to have his parcel clear and to receive a conveyance when he has paid one-half of his purchase-price and reduced the amount so that the remainder will represent not more than half of the balance of the land, when the vendors will take, and procure the Union Trust Company to take, a mortgage of the purchaser as cash. All contracts of sale to individual purchasers shall be assigned to the vendors as security.

On the 25th April, 1906, Leitch et al. sold to Panton and Macbeth 60,000 acres, a portion of the lands covered by the

above-mentioned agreement, at $8 per acre; the Union Trust Company, who had a mortgage upon the property, joining in this agreement. The lands sold are described in a schedule. This agreement, again, contemplated a sale by the purchasers before the completion of the contract, and it provides that the purchasers shall be entitled to sell the lands or any portion, all money and contracts of sale being turned over to the trust company.

By an agreement of the 14th July, 1906, the Battleford Saskatchewan Farm Lands Company—who had succeeded to the title of Panton and Macbeth—agreed to sell 11,550 acres to the defendants, at $9 per acre. The lands covered by this agreement are set forth in a schedule.

Some time subsequent to this agreement, and about the 8th August, 1906, it was discovered that the vendors therein were unable to make title to some of the lands mentioned in the schedule; and negotiations took place by which another agreement, similar in its terms save as to the lands described in the schedule, was substituted. As part of the same agreement, and as compensation for the difference in value between the substituted and the original lands, it was agreed that $2,000 should be abated from the purchase-price; but, instead of modifying the terms of the contract, a duplicate of the original agreement of the 14th July was prepared, with an amended schedule. This was executed; and contemporaneously the Battleford Company signed a memorandum agreeing to credit, and crediting, $2,000 upon the first payment falling due under the terms of the substituted agreement.

Without disclosing the existence of this "crediting agreement," the Battleford Saskatchewan Farm Lands Company assigned the substituted agreement of the 14th July, 1906, to the original vendors, as collateral security for the purchase-price.

The first question arising is this: Are the vendors bound to credit upon the purchase-price this $2,000?

In the agreement between the Great West Land Company and Leitch et al. is contained a provision calling for interest at the rate of six per cent. per annum, payable half-yearly, upon the purchase-price, after maturity and upon arrears of interest; this being the same rate as stipulated in the agreement, before maturity. In the agreement between Leitch and Panton, interest is to be paid at six per cent. per annum, both before and after maturity; but there is no provision that such payment is to be made half-yearly.

In the agreement between the Battleford Land Company and Stewart, interest is also payable at six per cent. per annum, and there is no provision for payment half-yearly. Indorsed upon this agreement is a covenant of Macbeth by which he agrees to pay every alternate instalment of interest; this to be refunded to him at the end of the year by the Stewarts.

The Great West Land Company, by three collateral mortgages, dated the 5th February, 1907, mortgaged the lands in question, with other lands, to the Union Trust Company, with interest payable at six per cent. annually.

On the 11th December, 1910, an agreement was made between the Great West Land Company and the Union Trust Company, reciting these mortgages and the desire that the time for payment should be extended, and the assent of the mortgagees thereto upon the terms stipulated. In this agreement the land company covenant to pay interest at the rate of seven per cent. per annum, payable half-yearly, both before and after maturity.

The second question for determination is this: Are the plaintiffs entitled to claim interest against the defendants at any higher rate than six per cent. per annum, payable half-yearly? The plaintiffs contend that they are entitled to interest at the rate of six per cent. half-yearly until they were compelled to pay a higher rate to the mortgagees, when they should be allowed the amount actually paid, seven per cent. half-yearly.

The following facts are also material:—

On the 26th February, 1907, an agreement was made between the Great West Land Company— in which the trust company joined,—and Leitch—who had acquired the title of his co-adventurers under the original agreement—reciting the original agreement, the sales made under it, and the agreement of the land company, with the consent of the trust company, to cancel the agreement with Leitch and to take over the contracts of sale made by Leitch; the unsold lands reverting to the land company.

In pursuance of this, on the 18th March, 1907, a list was furnished of the sales made, which included, among others, the sale to the defendants of the 11,550 acres. By virtue of this title, the Union Trust Company made claim against the defendants in respect of the money due under this purchase. On the 2nd May, 1908, the defendants assigned certain mortgages upon lands quite apart from the parcel in question, as security for what was due under the purchase-agreement and

as security for a collateral note of $25,000 given in respect of the purchase-money.

Certain questions arose between the parties other than those indicated, and litigation has been pending between them for some time; but ultimately the matters in dispute have narrowed themselves to the two questions above-indicated; and by an agreement of the 10th April, 1912, it was agreed that these questions should be submitted to me for adjudication.

I have heard the evidence and the argument of counsel; and, after giving the matter careful consideration, I have arrived at the following conclusions:—

The right of the plaintiffs, regarding them simply as vendors, is to receive the price stipulated by the agreement of the 3rd March, 1906—i.e., $6.50 per acre—and the interest thereby stipulated—i.e. six per cent. before maturity and six per cent. on arrears of principal, with interest half-yearly (not six per cent. compounded, as this makes interest upon interest bear interest, which the bond does not call for).

If regarded from the standpoint of the purchasers (the defendants), their right, having purchased for what the agreement calls a "fair price," is to receive the lands on payment of the amount due under their purchase-agreement. This agreement provides for payment of interest at six per cent. per annum upon all payments in default, both of principal and interest; and I cannot see any way by which the rate can be increased.

In either aspect, the interest cannot be made more than six per cent. upon the principal and interest in arrear; and I think this must be computed annually, as the agreement of the 14th July is the measure of the purchasers' liability. There is no provision for compound interest.

Then as to the $2,000. It is not contended that the price, even after the abatement, is not a "fair price;" and the vendors have treated the agreement of the 14th July as one authorised by the terms of the original agreement. I cannot find any way of placing the plaintiffs, as to this, in any higher position than the Battleford company. They take the agreement subject to the true state of accounts between the parties. Had any case been made indicating that the substituted agreement of the 14th July had been made for a larger sum than really due, for the purpose of misleading the plaintiffs, then the case would be different; but, as it is, the assignee can take no more than the assignor could give.

As to costs. The defendants have succeeded in the two

matters argued; but the plaintiffs have a balance due to them, and the form of the agreement was well calculated to mislead; so I leave each party to bear his own.

The case is a hard one upon the vendors, as the interest payable upon the mortgage is seven per cent.; but at the time of the agreement this was six per cent. and the contracts provide for the rate payable after maturity.

I find upon the matters submitted: (1) the defendants are entitled to have the $2,000 credited; (2) the plaintiffs are entitled to interest at per cent. annually on all arrears of principal and interest not compounded; (3) no costs.

(See terms of agreement of the 10th April, 1912.)

CLUTE, J. APRIL 24TH, 1912.

IMRIE v. WILSON.

Principal and Agent—Agent's Commission on Sale of Land—Introduction of Probable Purchaser—Introduction by Latter of Actual Purchaser—Efficient Cause of Sale—Causa sine quâ non—Costs.

Action for a commission on the sale of land.

J. R. Roaf, for the plaintiffs.
F. Arnoldi, K.C., for the defendant.

CLUTE, J.:—All the parties to this action are land brokers, residing in Toronto. In November or the beginning of December, 1911, the defendant Wilson stated to the plaintiff Graham that he was interested in two properties on Broadway and Eglington avenues, immediately east of North Toronto, and that the price of the one property, known as the Wilson lot, would be about $2,000 an acre, and the other, the Atkinson lot, about $1,000 an acre; and that, if Graham's firm (Imrie & Graham) could make a sale of the property, he would pay two and a half per cent. commission. The property was then visited by Graham and Wilson, and a blue print of the Wilson property was given to Graham. The person whom Graham had in view did not care for the property, and thereupon he brought it to the attention of the plaintiff Stinson, with whom the plaintiffs Imrie & Graham agreed to share the commission, if Stinson could find a purchaser. Stinson introduced to Wilson one Kligensmith, as

a probable purchaser of one or the other of the properties in question. Kligensmith, at this time, was a member of a syndicate who desired to buy property in that locality. He opened negotiations with Wilson for the Atkinson property, and the deal would probably have gone through but for the death of Mrs. Atkinson. While the negotiations for the Atkinson property were pending, but suspended owing to the illness of Mrs. Atkinson, Kligensmith inquired of Wilson about the other property, and Wilson shewed him over it. The other members of Kligensmith's syndicate, not caring for the Wilson property, withdrew; and thereupon, Kligensmith states, he could not take the matter up alone, and told Wilson that, if he (Kligensmith) could get an offer, he would submit it to Wilson. Wilson received from the plaintiff Graham the blue print which he had given him, and gave it to Kligensmith.

Kligensmith obtained a purchaser; and, at the time the agreement for purchase was being closed, Wilson asked Kligensmith if he would be satisfied with two and a half per cent. commission. He stated that he would; and, in his letter transmitting the offer to Wilson, he states that the offer is conditional upon his being paid two and a half per cent. commission.

As throwing light upon the transaction and the motives of the parties, it may be stated that Wilson was desirous of putting through the Atkinson deal, because he would receive, out of that, two and a half per cent. commission upon a sale representing probably $100,000. Whereas, in the sale of the Wilson property he was not interested, and did not seek a commission. . . .

On cross-examination, Wilson states that, when Kligensmith was introduced to him by Stinson, neither of the properties was especially mentioned. This is also corroborated by Stinson.

I was favourably impressed with the evidence of Wilson, as far as his recollection served him. On certain points he would not contradict the plaintiffs. As to his express agreement to safeguard the plaintiffs in respect of their commission upon a sale of either of the properties, I think that the conversation referred to had, at that time, special reference to the Atkinson property. It may well be that the plaintiffs had in mind both or either of the properties; but Wilson had in mind, I think, the property in respect of which the deal was at that time likely to go through; and that, as I understand the evidence, was the Atkinson property. The result is, that the case is reduced to this simple statement. The plaintiffs were authorised to obtain a purchaser for the property in question. They introduced a probable purchaser, who retired from that position while the

negotiations were pending for the Atkinson property, and himself introduced a purchaser. Wilson, however, frankly states in his evidence that he would "never have met Kligensmith had it not been for the plaintiffs." The question is, whether, under this statement of facts, the plaintiffs are entitled to recover.

The fact that Wilson did not own the property and was not interested in any way in the property further than acting as agent for and on behalf of the owner, does not relieve him from personal liability, if, in fact, he engaged the plaintiffs to find a purchaser.

In dealing with the plaintiffs he acted as owner, as the person liable, and he cannot afterwards relieve himself from such responsibility. . . .

[Reference to Jones v. Littledale, 6 A. & E. 490.]

It further remains to inquire whether, having been introduced by the plaintiffs to a person who procured him a purchaser, he is liable to them for the commission, though such person did not in fact become the purchaser.

The plaintiffs' counsel relied strongly on Stratton v. Vachon, 44 S.C.R. 395. That case differs somewhat from the present one. . . .

[Reference to the facts of that case and quotations from the judgments.]

Kligensmith states that, after the Atkinson deal fell through, he intended to make an offer for the Wilson property; but his associates would not go in with him; and that he then obtained a purchaser for the property, which was quite distinct from the first deal. No doubt, the introduction by Stinson of Kligensmith to Wilson was the cause without which the sale would not have been effected; but was it the causa causans, or was there a new and distinct act which intervened which really brought about the sale? If it be true, as stated by Kligensmith, and which I see no reason to doubt, that, although he intended and desired to have his syndicate join him in purchasing the Wilson property, yet, they having refused, he from that time had no further interest as proposed purchaser, and in the sale which he procured took no interest whatever beyond his commission, then, I think, this was a new and distinct transaction. It required a new act to procure a purchaser; in short, the plaintiffs' acts were not the effective cause of the sale which actually took place. The most that can be said is, that the introduction was merely a causa sine qua non.

If Kligensmith had at any time been associated with the purchaser, and then retired, or retained an interest, directly or indirectly, in the purchase, that would have been a continuing of

the original negotiations brought about by his introduction to Wilson. It would have been the immediate cause of the sale. Or, if there had been any evidence of collusion, shewing that the name of the purchaser was merely changed in order to avoid liability for commission, the result might have been different; but, after a careful consideration of the evidence, I cannot find anything to support such a view. Kligensmith sought for and obtained a purchaser, who had not formerly been interested in his syndicate, and with whom he now retained no interest. That, I think, was a distinct act intervening between the introduction of Kligensmith and the sale, the real causa causans of the purchase, a new transaction attributable to Kligensmith's finding a purchaser and not to the original introduction, although that was the causa sine qua non which resulted in the sale.

While the plaintiffs cannot, I think, succeed, it is not unreasonable, under all the circumstances, that they should be relieved from the defendant's costs. The action is dismissed without costs.

SUTHERLAND, J. APRIL 25TH, 1912.

RE PORT HOPE BREWING AND MALTING CO.

JOHNSON'S CASE.

Company—Winding-up—Contributory—Application for Shares—Resolution of Directors—Allotment—Notice—Proof of—Onus—Agreement—Re-allotment.

An appeal by Harrison Johnson from an order of the Master in Ordinary, in a winding-up proceeding, placing the appellant on the list of contributories of the company.

W. R. Smyth, K.C., for the appellant.
D. O'Connell, for the liquidator.

SUTHERLAND, J.:—. . . The company had been in existence for years prior to the month of October, 1904, and were at that time in process of reorganisation. On the 3rd October, 1904, the plaintiff made application, in writing and under seal, for two shares of stock of the value of $100 each in the capital stock of the company, payable as follows: five per cent. in one month from the date of the application and the remainder in nine

equal monthly instalments thereafter; and appointed the secretary of the company his attorney to accept the transfer of such shares as should be asisgned to him.

On the 21st December, 1904, at a meeting of the "executive directorate," held at the company's office, a resolution was passed "that all stock already subscribed for be allotted." . .

Shortly after the date of the resolution, a notice of the allotment of the shares was sent by the company to the appellant; and, later, notices of the monthly calls for payment according to the terms of the application. These facts were proved to the satisfaction of the Master. I think he was fully warranted in accepting the testimony offered in support thereof. The onus is, of course, upon a liquidator, in winding-up proceedings, who seeks to shew that a person is a shareholder and liable to contribute. I agree with the Master, however, in thinking that the liquidator has reasonably satisfied that onus.

The Master found that there was a binding agreement between the company and the appellant with reference to the two shares of stock in question. I think he was right in so doing. Beyond what he says in his reasons, it may be added that, in connection with the proceedings before him, the liquidator called the appellant to prove his signature to the application for the stock. He was cross-examined, but was not asked to deny the case made out as above. On re-examination, however, he did state that, a couple of years subsequent to his application for the stock, having lost his license as an hotel-keeper, he saw Mr. Elliott, the president of the company. What occurred between them is set out in his evidence as follows:—

"Q. I suppose you anticipated you would have some difficulties in making your payment under the agreement after you lost your license? A. Yes; I lost everything I had at that time.

"Q. And, knowing that, you saw Mr. Elliott about the matter? A. Yes.

"Q. And told him the difficulty you would have in making your payments? A. Yes; I told him I was not able to pay anything."

This evidence on his part would appear to confirm the claim of the company that there was an existing agreement. He was not repudiating his liability to pay, but stating his inability.

He said further in his evidence that Elliott then intimated that, so long as he (Elliott) was connected with the company, he (the appellant) would not be bothered; but such a statement, even if made, would not bind the company or liquidator or effect a release.

Reliance was placed by the appellant on an unreported case of Smith v. Gowganda Mines Limited, which is said to have decided that where a company "has allotted stock to a purchaser, and a call on it remains unpaid, and no forfeiture is declared, the company cannot sell, re-allot, or transfer that stock to another." I agree with the Master, however, that that case has no application here. In the present case, as the Master has properly found, the appellant applied for stock of the company, not for any particular stock, and certainly not for stock that had already been disposed of by sale or allotment to any one.

I do not think that I can usefully add anything to what has been said by the Master in his reasons. I think he was justified in placing Harrison Johnson on the list of contributories; and, therefore, dismiss the appeal with costs.

KELLY, J. APRIL 25TH, 1912.

SANDWICH LAND IMPROVEMENT CO. v. WINDSOR BOARD OF EDUCATION.

Public Schools—Expropriation of Land for Site—Action for Injunction to Restrain Arbitrators from Proceeding—School Sites Act, 9 Edw. VII. ch. 93—Remedy by Summary Application to County Court Judge—Dismissal of Action—Costs.

Action by the improvement company and an individual against the board of education, Henry T. W. Ellis, John Curry and Samuel Stover, for an injunction restraining the defendants from proceeding with an arbitration to fix the value of lands of the plaintiffs which the defendants desired to expropriate for a school site, and from taking possession of the lands, and for a declaration that the defendants had no warrant or right to arbitrate and that the arbitration proceedings and award were irregular and void, and to set aside the award and vacate the registration thereof.

The action was tried before KELLY, J., without a jury, at Windsor.

J. L. Murphy, for the plaintiffs.

A. R. Bartlett and W. G. Bartlett, for the defendants.

KELLY, J.:—The writ of summons was served on the defendants prior to the 25th October; and on that date the arbitrators

considered the questions submitted to them and made their award.

The plaintiffs took no part in the arbitration, or in the proceedings leading up thereto.

On the opening of the trial, the defendants moved that the action be dismissed, on the ground that, under sec. 20 of the School Sites Act, 9 Edw. VII. ch. 93, the action is not maintainable.

Sub-section 1 of sec. 20 is as follows: "Any question touching the validity of proceedings taken or an award made under this Act, or, in the case of arbitrations other than those provided for in section 7, as to the compensation awarded, shall be raised, heard and determined upon a summary application by way of appeal to the County Judge and not otherwise."

I think the questions raised in this action are intended by this section to be heard and determined on summary application in the manner therein provided, and not by this Court. For that reason, I dismiss the plaintiffs' action.

I allow the defendants such costs only as they would have been entitled to had they specially pleaded this sec. 20, and then brought on the matter by way of motion for judgment on the pleadings.

KEARNS v. KEARNS—MASTER IN CHAMBERS—APRIL 18.

Pleading—Counterclaim—Relation to Subject-matter of Action—Embarrassment—Delay.]—The plaintiff sued his son to recover a sum of about $1,260, made up chiefly of three promissory notes, all overdue, and interest thereon for about five years. The statement of defence set out, first, a contemporaneous verbal agreement shewing that these notes were given only to secure the interest thereon at 4 per cent. to the plaintiff as long as he lived, and were then to be cancelled. Then in the 7th and three following paragraphs, as well as in part of the counterclaim, it was alleged that the plaintiff received $1,400 in September, 1896, under the will of his wife, the defendant's mother, which sum was to be held by the plaintiff as trustee for three of the children, who were then minors, till they should become of age; that all of the three died intestate and unmarried; that the plaintiff took and kept possession of this $1,400, and also of all their other property, and had never paid any part thereof to the defendant or accounted in any way for the same, though frequently asked to do so. The defendant counter-

claimed for his share of the estates of his deceased brothers and sister. The plaintiff moved to have all this part of the statement of defence expunged as (1) embarrassing, (2) having no relation to the subject-matter of the action, and (3) because the trial thereof would unduly delay the trial of the plaintiff's claim. The Master said that a cardinal principle of the Judicature Act is, that all matters in controversy between the same parties should, as far as possible, be disposed of in one action. It is for this purpose that the right to counterclaim is given. That the defendant was now bringing in effect a cross-action was, therefore, not in itself objectionable. It is the very object aimed at by the present procedure that the accounts between the plaintiff and defendant should all be investigated and disposed of at the same time, so that the ultimate balance may be awarded to the party found entitled thereto, whatever may be the amount. The statement of defence alleged that one brother died over fifteen years ago, the other over six years ago, and the sister over five years ago. It was not said whether any administration of these estates had been granted. If this was necessary, it could be set up as a defence to the counterclaim. Con. Rule 196 seems to shew that the appointment of a personal representative is not always a condition precedent to an action in respect of the estate of a deceased person. The argument as to delay is not very cogent. The non-jury sittings at Lindsay was five weeks off, so that there was time enough to have everything ready for trial at that time. Motion dismissed; the plaintiff to have a week to plead to the counterclaim. Costs of the motion to the defendant in the counterclaim. L. V. O'Connor, for the plaintiff. E. B. Ryckman, K.C., for the defendant.

BATHO v. ZIMMER VACUUM MACHINE CO.—MIDDLETON, J., IN CHAMBERS—APRIL 19.

Particulars—Statement of Claim—Infringement of Rights under Patent for Invention—Postponement until after Discovery.]—An appeal by the defendants from the order of the Master in Chambers, ante 1009. MIDDLETON, J., dismissed the appeal with costs to the plaintiff in any event of the action. E. G. Long, for the defendants. A. C. McMaster, for the plaintiff.

WEBB v. BLACK—BRITTON, J.—APRIL 19.

Partnership—Failure to Establish—Fraud—False Arrest—Sale of Business—Judgment—Terms.]—Action for fraudulently and wrongfully depriving the plaintiff of his business; for false arrest; and to establish a partnership between the plaintiff and defendant. The learned Judge finds that there was not a particle of evidence of any fraud on the part of the defendant in his business transactions with the plaintiff; that there was no partnership in fact between the parties; and that, although technically there was an arrest, no damage resulted to the plaintiff therefrom. Upon the defendant consenting, there will be judgment directing that, upon payment by the plaintiff or his nominee to the defendant, within one week, of the amount actually paid by the defendant for machinery, rent, wages, and supplies, and the amount of liabilities actually incurred by the defendant in connection with the business, and $100 costs of the action, the entire business, machinery, stock in trade, and the lease of the premises, shall be handed over to the plaintiff or his nominee, and the defendant shall have nothing more to do with that business on these premises. The amount to be paid is found to be $2,080.21. In default of payment as above, the action to be dismissed with costs, fixed at $100. T. N. Phelan, for the plaintiff. A. J. Anderson, for the defendant.

WARD v. DICKENSON—LATCHFORD, J.—APRIL 19.

Chattel Mortgage—Power of Sale—Improvident Exercise—Sacrifice of Goods—Mala Fides—"Money Lender"—R.S.C. 1906 ch. 122, sec. 2.]—Action to recover possession of goods of the plaintiff taken by the defendant or for damages for their conversion. The plaintiff offered the defendant $25 for the loan of $100 for three months. The defendant agreed to make the loan, and took from the plaintiff a chattel mortgage upon the plaintiff's household effects. He advanced only $45; and he sold the goods, which were said to be worth $2,000, for $148. The learned Judge said that the defendant, as mortgagee, was reckless and improvident in his conduct of the sale. He was not liable for the conversion of the goods, because they were his under the chattel mortgage. The defendant did not act in good faith. He dealt with the plaintiff's property in such a way that her interests were unnecessarily sacrificed, and she

lost the right she would have had in the large surplus which would have been realised had the sale been properly conducted. For the damages she thus sustained, the defendant was answerable: Rennie v. Block, 26 S.C.R. 356.—There was no direct evidence that the defendant was a money-lender, within the meaning of the Act respecting Money Lenders, R.S.C. 1906 ch. 122, sec. 2. Upon his examination for discovery he stated that he usually charged twelve per cent. upon loans. The learned Judge said that he had concluded that the plaintiff was a money lender within the meaning of the statute, although he denied making loans unless asked to do so. The fact that the plaintiff offered him one hundred per cent. per annum did not justify him in accepting it; and his familiarity with the forms used by money lenders and his methods of enforcing his security supported the conclusion.—The learned Judge estimated the plaintiff's damages at $600, and gave judgment for her for that sum, with costs, subject to a reference as to damages if either party was dissatisfied. Costs of reference, if any, and further directions, reserved. T. J. W. O'Connor, for the plaintiff. John MacGregor, for the defendant.

McCUTCHEON v. PENMAN—LATCHFORD, J.—APRIL 19.

Fraud and Misrepresentation—Sale of Vehicle—Reliance on False Representation — Damages.]—Action for damages for fraud and misrepresentation upon the sale of a motor-car by the defendants to the plaintiff for $970, which amount the plaintiff had paid. The learned Judge found as facts, upon the evidence, that the car was not in good running order when sold to the plaintiff; that it had not been overhauled, as represented by the defendants; that the plaintiff had no knowledge of motor-cars, and relied on the representations of the defendants; that the car was worthless to the plaintiff; and that he was entitled to recover the damages which he had sustained by reason of the false representations. And held, that the plaintiff was entitled to test the motor-car before repudiating the bargain, and did not lose his right to recover by his efforts to put the car into running order. Judgment for the plaintiff for $970 with interest from the date of the purchase and with costs. W. A. Henderson, for the plaintiff. F. Arnoldi, K.C., for the defendant Pink.

BARTLETT v. BARTLETT MINES LIMITED—MASTER IN CHAMBERS—APRIL 20.

Attachment of Debts—Discharge of Order—Costs of Garnishees—Salary of Judgment Debtor Paid in Advance.]—Motion by the garnishees to discharge an order attaching debts alleged to be due by the applicants to the plaintiff, the judgment debtor. See ante 958. It was conceded that the order must be discharged. But as to the costs, the Master thought that they should not be given to the garnishees, as, if the salary of the debtor was not paid in advance, yet there was such a variation between the affidavit of C. W. Allen in answer to the motion and the full facts of the debtor's employment by the garnishees, as justified inquiry. This was the course taken in Wilson v. Fleming, 1 O.L.R. 599, followed in Fallis v. Wilson, 13 O.L.R. 595. If a judgment debtor is allowed to overdraw his account or is paid in advance, this deprives his creditors of a remedy which they might have if he was paid in the ordinary way. This was done for his benefit, and it would be open to his employers to recoup themselves for the expense to which they had been put for his advantage—a course of which he could not rightly complain. Order discharged without costs. The garnishees to have leave to appeal as to this, if they wished to do so. J. D. Falconbridge, for the garnishees. M. L. Gordon, for the judgment creditors.

CHARLEBOIS v. MARTIN—MASTER IN CHAMBERS—APRIL 22.

Summary Judgment—Con. Rule 603—*Action on Bills of Exchange—Defence—Reference under Con. Rule* 607.]—In this action the plaintiff, as assignee of the Union Bank of Canada, sued the defendant for $2,819.28, the sum total of ten bills of exchange drawn on the defendant by A. H. Dewdney & Co. between the 4th March and the 14th June, 1907, and accepted by the defendant. A. H. Dewdney & Co. assigned for the benefit of their creditors in July, 1907, and so far only a small dividend had been paid. The plaintiff moved for summary judgment under Con. Rule 603. The defendant was a native of Germany, over seventy years of age, with a very imperfect knowledge of English and very limited powers of expressing himself in that language. He said that he was a working jeweller employed by A. H. Dewdney & Co., and that anything he signed was solely for their accommodation and at their request. He

also thought that he was not incurring fresh liability on each occasion, but was only signing a renewal of the previous obligation. He admitted his signature to the documents, but said that he was never asked to pay them until the present action was brought. He also drew attention to the dividend paid on the Dewdney estate, which was not credited on the writ of summons in this action, nor mentioned in the plaintiff's affidavit: see Union Bank of Canada v. Aymer, 3 O.W.N. 773. The defendant also alleged that the Union Bank of Canada held other securities which, if properly handled, would have paid the indebtedness of the Dewdneys, but which have not been so applied, though realised—and he claimed to be entitled to an account of the proceeds of such securities. The Master said that, no doubt, the necessary discovery as to this could be obtained under Con. Rule 441 in an ordinary case; but the assignor here being a corporation prevented this being done, as was decided by a Divisional Court in the much-litigated case of Bank of Toronto v. Anchor Fire Insurance Co., 18 P.R. 41. It must be admitted that the circumstances under which this heavy liability was incurred by an elderly foreigner, however inexcusable, did not constitute a defence to the action. But, for the reasons given in the Aymer case, and the additional reason here of the long delay in bringing the action, the defendant had shewn facts sufficient to entitle him to have the matter investigated; and an order should be made under Con. Rule 607 for a reference to the Master in Ordinary. Costs in the cause. The fact, if it was a fact, stated in the plaintiff's affidavit in reply, that the defendant was disposing of his property, was no reason for not allowing him to defend in a proper case: Dobie v. Lemon, 12 P.R. at p. 76. On the prima facie right of a surety to be allowed to defend, see Lloyds' Banking Co. v. Ogle, 1 Ex. D. 262.

HOWIE v. COWAN—SUTHERLAND, J.—APRIL 22.

Parties—Numerous Defendants—Limitation of Representation by Counsel at Trial—Powers of Court—Con. Rule 200—Unnecessary Party—Motion to Dismiss—Absence of Consent.] —This was an action with reference to the estate of Richard P. Smith, deceased. The defendant Cowan was the executor of his will, to whom letters probate thereof had been duly issued. The plaintiffs, twelve in number, were claiming under certain other alleged wills. The defendants were some twen-

ty-nine in number. The plaintiffs were specific legatees, and the defendants specific and residuary legatees. It was admitted that, in any event of the action, there would be ample to pay all the specific legacies and costs. Issue had been joined, and the action was expected to go to trial at London at the sittings commencing there on the 29th April. The plaintiffs moved for an order that, at the trial, the defendants "are to be represented by separate counsel only in so far as they are divided into classes, and that each class be represented by its own counsel." It was suggested that the motion was made under Con. Rule 200. The learned Judge said that he thought it clear that that Rule had no application to motions such as this or to an action which had reached the stage that this one had. See Ward v. Benson, 3 O.L.R. 199, for the object and scope of that Rule. No authority was cited in support of the motion; and the learned Judge could not see what power he had to interfere with the rights of the defendants as to their representation at the trial by counsel. The motion was, he considered, misconceived, and must be dismissed with costs.—On the argument, counsel for the Presbyterian Church suggested that the church made no claim with respect to the legacy mentioned in the will, as it was one contingent upon events which did not happen before the death of the testator, and expressed a willingness on its behalf to be dismissed from the action. Counsel for the plaintiffs was not prepared to consent to this; and the learned Judge said that he could not make such an order without consent. R. U. McPherson, for the plaintiffs. J. H. Moss, K.C., for the executor and a number of legatees. H. Cassels, K.C., for the Presbyterian Church in Canada. S. G. Crowell, for Catharine A. Smith. J. Folinsbee, a specific legatee, in person. Joseph Montgomery, for the London and Western Trusts Company.

TANNER v. TANNER—KELLY, J.—APRIL 23.

Husband and Wife—Alimony—Cruelty—Desertion—Quantum of Allowance.]—An undefended action for alimony, tried at Welland. The learned Judge finds that the defendant was guilty of cruelty to the plaintiff; that he ordered her from his house; that he made no provision for her support or for that of their only child, who went with the plaintiff; that the plaintiff is without means of support for herself and child; and that the de-

fendant is possessed of property and means ample for that purpose. Judgment for the plaintiff for alimony at the rate of $75 per month, payable monthly, with leave to apply for an increase of the amount if and when the defendant's circumstances change. The defendant to pay the costs of the action. G. H. Pettit, for the plaintiff.

BROOM v. TOWN OF TORONTO JUNCTION—MASTER IN CHAMBERS—APRIL 25.

Parties — Proposed Addition of Defendant — Improper Joinder—Limitation of Actions.]—Motion by the plaintiff to have A. J. Anderson, formerly solicitor for the defendants the Corporation of the Town of Toronto Junction, added as a party defendant. The circumstances out of which this action arose took place in August, 1905, when Mr. Anderson was solicitor for the Corporation of the Town of Toronto Junction and acted for them in regard to the plaintiff's claim. On the 1st October, 1908, the town corporation paid the plaintiff $200 in full settlement of all matters in question in the action, as against the town corporation; and the action was thereupon discontinued as against the corporation. It was now sworn by the plaintiff in his affidavit in support of this motion that he had since discovered that the goods in question were handed over by Anderson to the Grand Trunk Railway Company (against whom the action was still pending) "in a loose and unsafe condition, for the sole purpose of getting rid of them from the municipal storehouse of the Town of Toronto Junction, where they had been stored for me by direction of the mayor of said town." The Master said that it did not appear how this cause of action (if any) could be joined with the existing action. And if any joint cause of action existed in August, 1905, it would now be barred, as the new action (as it would then be) would not have arisen within six years. It would, therefore, seem, under the decision in Clarke v. Bartram, ante 691, that the order should not be made, "when this would result in an improper joinder." The plaintiff was allowed to file an affidavit in reply to that of Mr. Anderson; but this only made it clearer that any action against Anderson would be against him personally. This being so, the motion must be dismissed with costs, if asked for. The plaintiff, in person. W. A. McMaster, for the proposed defendant.

EMPIRE LIMESTONE CO. v. CARROLL—KELLY, J.—APRIL 25.

Lease—Mutual Mistake—Reformation—Assignments of Lease—Knowledge of Assignees of Mistake—Reformation of Assignments.]—Action to restrain the defendants from entering on any part of the south-west 25 acres of lot 5 in the 1st concession of the township of Humberstone and from laying railway tracks thereon or removing sand or gravel therefrom and from interfering with the plaintiffs' rights under a lease of the 25 acres made in 1899 by Annie Benner and her husband to the defendant Samuel S. Carroll for a term of fifteen years. In 1902, Carroll assigned the lease to E. L. Fuller. In 1905, Annie Benner and her husband conveyed the land to Carroll, making no reference to the lease. In 1911, the personal representative of E. L. Fuller, who had died in 1909, assigned the lease to the plaintiffs. The only covenants in the lease on the part of the lessee were to pay rent and not to carry on any business on the premises that might be deemed a nuisance. But the lease contained this provision: "And the said lessee shall have the privilege of removing the whole of the sand bank situate on the northern portion of said demised premises, during said term, and for no other purposes." At the south end of the 25 acres, there was also a sandhill, the land between the two hills being described by a witness as a "plateau." The defendants counterclaimed for reformation of the lease, and, by amendment asked for at the trial and allowed, for reformation of the assignments of the lease. The learned Judge said that there was no doubt that the parties to the lease intended it to be a lease of the northerly sandhill only, and that there was a mistake in the lease, common to both parties. He also found that Fuller and the plaintiffs took their assignments with the knowledge and on the understanding that the lease was so limited; and he was, therefore, of opinion that the lease and the assignments should be reformed. Judgment dismissing the action with costs, and allowing with costs the counterclaim of the defendants. If the parties fail to agree on the manner of reforming these documents, there is to be a reference to the Local Master at Welland to settle the method. W. M. German, K.C., for the plaintiffs. H. D. Gamble, K.C., for the defendants.

DAVIDSON v. PETERS COAL CO.—MULOCK, C.J.Ex.D.—APRIL 25.

Master and Servant—Injury to Servant—Negligence—Use of Explosives — Unguarded Receptacle — Cause of Injury—Negligence of Servant—Findings of Fact of Trial Judge.]—The plaintiff, whilst in the employment of the defendants, was injured by an explosion of blasting powder contained in an open pail, and brought this action, under the Workmen's Compensation for Injuries Act, for damages because of such injury. The negligence charged was in supplying an open pail in which to handle the blasting powder. The action was tried before the Chief Justice without a jury. He found that the pail was supplied by the defendants of their own motion, and that they were negligent in so supplying it; but he was of opinion that the plaintiff had not shewn that that negligence was the cause of the injury. In a written opinion, he made an exhaustive examination of the evidence, and stated his conclusion as follows: From the evidence, I entertain no doubt that the plaintiff deposited the pail within a foot or two of the fuse in the hole (in quarrying stone), and that the sparks from the fuse fell into the pail and thus caused the explosion. The plaintiff's theory that sparks might have adhered to his sleeve and fallen into the pail, at a distance from the hole, was not supported by the evidence. The sparks would not live long enough. The evidence as to whether the small sparks would ignite is conflicting. From the practical test made in Court, it is clear that no sparks would keep alive during the time required to go a distance of two feet from the point of ignition. Further, sufficient time did not elapse between the ignition of the fuse and the explosion to have allowed immediately of the plaintiff's clothing being so far consumed as to fall away in sparks. There is no evidence whatever to shew that the plaintiff's clothing was set on fire or that any sparks lit upon his clothing. There is ample evidence, however, that the sparks flew directly from the fuse into the pail. Having regard to the plaintiff's experience as a quarryman, perfectly familiar with the danger incident to the use of blasting powder and of fuses, it was, I think, negligence on his part to have deposited the pail within reach of the falling sparks. If he had used proper care, he would have placed it at a safe distance, and the accident would not have happened. I, therefore, think his own negligence was the cause of his injury; and that, therefore, he is not entitled to recover. This action is, therefore, dismissed without costs. T. J. Blain, for the plaintiff. A. J. Anderson, for the defendants.