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APPELLATE DIVISION.

SECOND DIVISIONAL COURT. DECEMBER 18TH, 1918.

*CITY OF TORONTO v. TORONTO R.W. CO.

Street Railway—Agreement with City Corporation—Construction—55 Vict. ch. 99, sec. 25 (O.)—Claim of City Corporation to Recover Moneys Expended in Removing Snow and Ice from Railed Streets of City—Liability of Street Railway Company—Jurisdiction of Court—Exclusive Jurisdiction of Ontario Railway and Municipal Board—Ontario Railway and Municipal Board Act, R.S.O. 1914 ch. 186, sec. 22—Damages—Reference.

Appeal by the defendants from the judgment of LENNOX, J., 42 O.L.R. 603, 14 O.W.N. 117.

The appeal was heard by MULOCK, C.J.Ex., CLUTE, RIDDELL, SUTHERLAND, and KELLY, JJ.

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

C. M. Colquhoun and Irving S. Fairty, for the plaintiffs, respondents.

CLUTE, J., read a judgment in which he said that the plaintiffs' claim was for the cost of removal of snow from the streets of the city in January and February, 1915.

After referring to the agreement of the 1st September, 1891, between the plaintiffs and one Kiely and others, set out in the schedule to the Act incorporating the defendants, 55 Vict. ch. 99 (O.), and especially clauses 21 and 22 of the agreement, and to sec. 25 of the Act, the learned Judge said that he agreed with the trial Judge that this Court had jurisdiction.

Section 22 of the Ontario Railway and Municipal Board Act, R.S.O. 1914 ch. 186, provides that "the Board shall have exclusive jurisdiction in all cases and in respect of all matters in which juris-

* This case and all others so marked to be reported in the Ontario Law Reports.

diction is conferred on it by this Act or by any other general or special Act."

Section 260 of the Ontario Railway Act, R.S.O. 1914 ch. 185, provides that where a street railway is operated upon or along a highway under an agreement with a municipal corporation, and it is alleged that such agreement has been violated, the Board shall make such order as may seem just, and by such order may direct the company or person operating the railway to do such things as the Board deems necessary for the proper fulfilment of such agreement, or to refrain from doing such acts as in its opinion constitute a violation thereof; and (sub-sec. 2) for that purpose may enter upon the company's property and may exercise the functions of the directors.

This section was intended to get over the difficulty of forcing the railway company to obey an order of the Board; but it does not deprive the Court of jurisdiction to entertain an action for damages for breach of contract; and the question of ultra vires does not arise.

Clauses 21 and 22 of the agreement and sec. 25 of the Act were considered in City of Toronto v. Toronto Railway (1908), 16 O.L.R. 205, by the Court of Appeal. The result of that decision is, that the use of the electric sweeper was permissible; and that the snow which fell upon the track and was swept to the side was not a deposit within clause 22 of the agreement and sec. 25 of the Act.

The learned Judge said that, in his opinion, the effect of the clauses and section was to make it imperative upon the railway company to remove the snow and ice, whether 6 inches or more. If less than 6 inches, it might be evenly spread upon the adjacent portions of the roadway. If more than 6 inches, it should be removed and deposited at such point as might be ordered by the city engineer; and sec. 25 prohibited such deposit upon any street or public place without the permission of the city engineer. The effect of sec. 25 is not to do away with the portion of clause 22 which provides that, if the engineer so directs, the snow and ice to be removed shall be deposited at such point or points on or off the street as may be ordered by the engineer.

In the present case the defendants were ordered to remove the snow and ice, and they asked a direction as to where it should be placed. This the engineer refused to give, taking the position that they were not bound to furnish a place whereon the snow and ice might be deposited.

In the opinion of the learned Judge, the defendants were not relieved from their obligation, under the clauses and the section, to remove the snow and ice, even when the engineer refused to name the place where they might be deposited.

The defendants have the right to sweep the snow, whether the fall is under or over 6 inches, to the side of the street. It is that snow so swept from the tracks to the side of the street and there accumulated, where it exceeds 6 inches, that it is to be removed. The ascertainment must be upon evidence; and the evidence adduced at the trial was of so uncertain a character that, if the defendants desired, they should have a reference as to damages only.

The defendants must within 10 days elect whether or not they will take a reference. If they do not take a reference, the appeal should be dismissed with costs. If a reference is taken, the costs of the appeal and reference should be in the discretion of the Master; and in other respects the appeal should be dismissed.

MULOCK, C.J.Ex., agreed with CLUTE, J.

RIDDELL, J., agreed in the result, for reasons stated in writing.

SUTHERLAND, J., agreed with RIDDELL, J.

KELLY, J., agreed in the result, for reasons stated in writing.

Appeal dismissed, subject to a reference as to damages, if desired.

SECOND DIVISIONAL COURT. DECEMBER 18TH, 1918.

*HALL MOTORS LIMITED v. F. ROGERS & CO.

Contract—Sale of Goods—Action for Price—Items of Claim—Counterclaim for Damages for Breach—Evidence—Onus—Claim for Return of Money Paid—Dismissal of Part of Counterclaim—Reservation of Leave to Set up in New Action—Appeal—Costs.

An appeal by the plaintiffs and a cross-appeal by the defendants from the judgment of COATSWORTH, Jun. Co. C.J., dismissing with costs an action brought in the County Court of the County of York, to recover $490.40 for work done for the defendants, dismissing without costs the defendants' counterclaim for $800 (while reserving the defendants' right to bring a separate action therefor), and dismissing with costs another counterclaim of the defendants, except as to $31.43, for which sum judgment was given for the defendants with Division Court costs—costs to be set off pro tanto.

The appeal and cross-appeal were heard by MULOCK, C.J.Ex., CLUTE, RIDDELL, SUTHERLAND, and KELLY, JJ.

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

George Wilkie, for the defendants.

RIDDELL, J., reading the judgment of the Court, said that the particulars of the $490.40 claimed by the plaintiffs began with $179.64, account rendered, and then items were added amounting to $859, making a total of $1,038.64. In the account credit was given for these sums: contra account, $211.07; carburetor allowance on trucks, $70; allowance on installing, $267.17: in all, $548.24; leaving $490.40 as the balance claimed.

The statement of defence and counterclaim set out a purchase, in April, 1916, by the defendants from the plaintiffs, of two motor-trucks with a loading capacity of 3½ tons and in a perfect operating condition; alleged non-delivery of one of the trucks till September, a capacity of only 2 instead of 3½ tons, want of perfect operating condition; an agreement by the plaintiffs to install new engines in the trucks, and deficiency of power in the new engines; and that the work for which the plaintiffs claimed payment was really done on their own behalf to implement their contracts. By the counterclaim the defendants (1) claimed $1,433.63 damages for loss of the use of the trucks and loss in the endeavour to operate them; (2) claimed the return of $800 which the defendants had paid the plaintiffs on account of the price of the trucks.

The trucks were second-hand articles; the agreement was for "two only 3½-ton second-hand Sheffield motor-trucks, formerly owned by Canadian Fairbanks Morse Co.," on the following conditions: "Hall Motors Limited to properly overhaul trucks and turn them out in A1 shape mechanically."

It was said that the plaintiffs did not "overhaul trucks and turn them out in A1 shape mechanically;" and it was mainly for damages for the breach of this contract that the counterclaim for $1,433.63 was made.

There were only three questions to be tried: (1) what damages, if any, the defendants were entitled to for breach of the primary contract; (2) the right of the defendants to recover the $800; and (3) what the plaintiffs were entitled to recover upon their claim.

The second question was dealt with by the trial Judge in a peculiar way: he dismissed this part of the counterclaim without costs, but allowed a separate action to be brought. This he should not have done without consent: Lockie v. Township of North Monaghan (1917), 12 O.W.N. 171; Tyrrell v. Tyrrell (1918), 43 O.L.R. 272. The trial Judge rightly dismissed this part of the

counterclaim, but he should not have reserved leave to litigate it further.

Upon the third question: the first item of the plaintiffs' claim, $179.64, was admitted. The other items were admittedly made up of: (1) $225 for each of the two new engines; (2) the installing of the same; and (3) certain other items unconnected with the engines and their installation. The first two classes of items must be disallowed, as admittedly they were replaced by the fixed sum of $500; but at the same time the third credit item on the plaintiffs' statement, "allowance on installing, $267.17," also disappeared. There was no dispute that all the articles charged for were actually supplied; the defence was that they were (mostly) so supplied in the endeavour on the part of the plaintiffs to implement their contract. The onus of proving this was on the defendants; and they admitted that some of the items were properly charged. There was no evidence to establish the contention of the defendants. The plaintiffs' counsel pointed out 25 items, amounting in all to $111.40, wholly unconnected with the new engines and their installation; there was no evidence the other way, and that sum should be allowed to the plaintiffs, making in all $509.97. But the plaintiffs claimed only $490.40, and they should have judgment for that sum, with interest from the date of the writ of summons, and with costs here and below.

Upon question No. 1 the defendants must accept the onus of proving breach and consequential damages. The sale was not by description, but of two specific trucks well known to both parties. There was no pretence in the evidence that the defendants gave the plaintiffs to understand that they were relying upon the plaintiffs' skill or judgment. There was thus no implied contract by the plaintiffs except as to title. Then, as to the express contract of the plaintiffs, it must be borne in mind that the trucks were second-hand; the contract to turn them out in A1 shape mechanically did not require the plaintiffs to turn them out as good as new, but only mechanically in first-class shape for second-hand trucks. There was nothing in the evidence to justify a finding of breach of this contract by the plaintiffs and damage resulting therefrom.

The appeal of the plaintiffs should be allowed, and judgment should be entered in their favour for $490.40 and interest from the teste of the writ, with costs here and below, and dismissing the cross-appeal of the defendants, thereby dismissing both branches of the counterclaim, with costs here and below.

This should not prevent the defendants, if so advised, setting up in any other action a breach by the plaintiffs of an implied contract to install the Russell engines skilfully—although it would

operate as res judicata to prevent the setting up in another action of the claim for $800 and that for damages based upon the original contract.

Plaintiffs' appeal allowed; defendants' appeal dismissed.

SECOND DIVISIONAL COURT. DECEMBER 18TH, 1918.

*RE WATERLOO LOCAL BOARD OF HEALTH.

CAMPBELL'S CASE.

Nuisance—Abatement—Public Health Act, secs. 6, 81 (2)—Report of Provincial Board of Health—Order of Judge of Supreme Court—Affidavits Challenging Correctness of Report and in Support of Report—Refusal of Judge to Enlarge Motion—Contract for Disposal of Garbage of City—Liability of City Corporation for Nuisance—Contractor Considered Agent or Servant of Corporation—Extension of Time for Abating Nuisance—Appeal—Costs.

An appeal by the Riverside Garbage Disposal Company, A. B. Campbell, and the Corporation of the City of Kitchener, from an order of HODGINS, J.A., made under sec. 81 (2) of the Public Health Act, R.S.O. 1914 ch. 218, on the application of the Local Board of Health of the Township of Waterloo, directing the appellants to remove and abate a certain nuisance and perpetually restraining the appellant Campbell from receiving upon his lands garbage for the purpose of allowing hogs to be fed thereon, and from feeding hogs upon his lands with garbage.

Leave to appeal was granted by FERGUSON, J.A.: ante 184.

The appeal was heard by MULOCK, C.J.Ex., CLUTE, RIDDELL, SUTHERLAND, and KELLY, JJ.

Gideon Grant, for the appellants the Riverside Garbage Disposal Company and Campbell.

R. S. Robertson, for the appellant city corporation.

J. C. Haight, for the Waterloo Local Board of Health, respondent.

The judgment of the Court was read by MULOCK, C.J.Ex., who, after stating the facts, and referring to secs. 6 and 81 (2) of the Public Health Act, said that the evidence shewed that the Local Board of Health investigated the conditions and found that

a grave nuisance existed. Then the Provincial Board of Health conducted an investigation and found to the same effect. The undisputed evidence shewed that the garbage of a city having a population of about 20,000 had been deposited since the 15th April, 1918, on the surface of Campbell's land; that it was not covered with earth nor treated so as to prevent decomposition or the giving off of offensive odours; and that Campbell's hogs were allowed to feed upon this garbage, adding their excrement to the mass. That these conditions created a nuisance was beyond reasonable doubt.

On this appeal the appellants produced a number of affidavits challenging the correctness of the finding of a nuisance by the Provincial Board of Health. Had these affidavits been before Hodgins, J.A., he would not have been justified in attaching any weight to them; and, therefore, the appellants were not prejudiced by that learned Judge's refusal to enlarge the application made to him.

The question of nuisance had been determined by the Provincial Board of Health; affidavits supporting the finding of the Board were inadmissible, and, it might be assumed, had no weight with the learned Judge.

It was shewn that the contract between the city corporation and the contractor for collection and disposal of garbage had been terminated, and that the garbage was now disposed of by incineration; also that since the 16th November, 1918, no garbage had been deposited on Campbell's land. These facts were not brought to the attention of Hodgins, J.A. The depositing of garbage having ceased, the order of the learned Judge might properly be varied by extending until the 1st April next the time in which to abate the nuisance, with the right to the appellants to apply for a further extension.

The second clause of the order appealed against should be amended by adding words preventing the feeding of hogs on the garbage so as to cause a nuisance.

For the city corporation it was contended that the Riverside company was an independent contractor, and therefore the city corporation was not liable for the nuisance caused by the disposal of the garbage. The contract did not provide for its disposal, but simply for its collection and cartage to a point outside of the city. Whilst in the contractor's hands, the garbage remained the property of the city corporation; and, in the absence of express instructions, the contractor had, as agent or servant of the corporation, implied authority to dispose of it, and its disposal was made by the Riverside company not qua contractor but qua agent or servant of the corporation, whereby the latter became liable for its wrongful disposal: Dalton v. Angus (1881), 6 App. Cas. 740; Robinson v. Beaconsfield Rural District Council, [1911] 2 Ch. 188.

Subject to the variations indicated, the appeal should be dismissed, and the appellants should pay the costs of the appeal and of the motions made before Hodgins, J.A., and Ferguson, J.A., respectively.

Appeal dismissed.

SECOND DIVISIONAL COURT. DECEMBER 18TH, 1918.

*O'DELL v. TORONTO R.W. CO.

Negligence—Collision upon Highway between Automobile and Street-car—Injury to Automobile and Driver—Action Brought by Driver—Addition of Owner as Co-plaintiff—Evidence—Findings of Jury—Operation of "Backing" Street-car—Control from Front—Question for Ontario Railway and Municipal Board—Negligence of Conductor—"Misjudging Course of Automobile"—Failure of Driver of Automobile to Give Signal when Turning—Reversal of Judgment for Plaintiffs—New Trial Refused.

An appeal by the defendants from the judgment of the County Court of the County of Wentworth in favour of the plaintiffs for the recovery of $350 and costs, in an action in that Court, tried with a jury, for damages in respect of injury caused to the plaintiff Thomas O'Dell by a collision of an automobile which he was driving, with a car of the defendants.

The appeal was heard by MULOCK, C.J.Ex., RIDDELL, SUTHERLAND, and KELLY, JJ.

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

W. Morrison, for the plaintiffs, respondents.

The judgment of the Court was read by RIDDELL, J., who said that the plaintiff Thomas O'Dell was driving an automobile north on the easterly side of Yonge street, Toronto, at a moderate rate; in front of him was a street-car going in the same direction; this car turned westerly on a "Y" at Woodlawn avenue, then took the north wing of the "Y" and backed toward Yonge street. The plaintiff also turned to the west, and the car and his automobile came in collision.

The jury found that the accident was due to the negligence of the defendants, which consisted in "having the car controlled from the wrong end and in the conductor misjudging the course

of plaintiff's automobile." They negatived contributory negligence, and assessed the damages at $350.

An order was made at the trial adding the plaintiff's mother, who was the real owner of the automobile, as a co-plaintiff. The order was plainly right: Thompson v. Equity Fire Insurance Co. (1908), 17 O.L.R. 214, affirmed by the Privy Council, S.C., [1910] A.C. 592, reversing the judgment of the Supreme Court of Canada, Equity Fire Insurance Co. v. Thompson (1909), 41 Can. S.C.R. 491.

The substantial grounds for appeal were that the answers of the jury did not disclose actionable neglect, and that in any event there was no evidence to justify a finding of negligence.

The jury seemed to have considered that the street-car should have been controlled from the rear, so that the conductor might himself have put on the brakes, instead of from the front, leading to inevitable but dangerous delay. But that was a matter with which the jury had nothing to do; it was under the control and direction of the Ontario Railway and Municipal Board.

Reference to the Ontario Railway and Municipal Board Act, R.S.O. 1914 ch. 186; the defendants' Act of incorporation (1892), 55 Vict. ch. 99, agreement in schedule, cl. 36; Grand Trunk R.W. Co. v. McKay (1903), 34 Can. S.C.R. 81, 87, 90, 91, 92, 97, 98; Minor v. Grand Trunk R.W. Co. (1917), 38 O.L.R. 646, 649.

As to the negligence of the conductor in "misjudging the course of the plaintiff," it appeared that the conductor, seeing the automobile coming from the south, believed that it was going to continue north on Yonge street, but, instead, it turned west toward Woodlawn avenue. The plaintiff said that he was going north at 5 or 6 miles an hour, and turned to go west on Woodlawn avenue; but he did not pretend that he gave the "visible and audible warning" required by sec. V. of by-law No. 5770 of the City of Toronto, or any kind of notice or warning that he intended to turn; and, unless the conductor were a mind-reader, it was hard to see how he should have been able to judge the course of the plaintiff. There was here not even a scintilla of evidence—there was "a mere surmise that there may have been negligence," which could not even be left to a jury: Toomey v. London Brighton and South Coast R. W. Co. (1887), 3 C.B. N.S. 146, 150.

It was suggested that a new trial should be directed, but there was no ground for such an order. The street-car was moving at a slow rate of speed, the gong was sounding, the plaintiff saw the car, no negligence which could be suggested was proved, and the accident was due either to the plaintiff's own fault or an unexpected failure of the engine of his automobile.

The appeal should be allowed and the action dismissed with costs, if asked.

Appeal allowed.

SECOND DIVISIONAL COURT. DECEMBER 20TH, 1918.

WALT v. WRIGHT.

Contract—Agreement for Use of Chattels—Lease—Option of Purchase—Construction of Agreement—Ambiguity—Evidence of Surrounding Circumstances—Rent of Chattels—Right to Return of Chattels—Damages—Injunction.

Appeal by the defendant from the judgment of BRITTON, J., 14 O.W.N. 240.

The appeal was heard by MULOCK, C.J. Ex., CLUTE, RIDDELL, and SUTHERLAND, JJ.

W. C. Mikel, K.C., for the appellant.

E. G. Porter, K.C., for the plaintiff, respondent.

CLUTE, J., in a written judgment, said that the plaintiff enlisted in 1915, and went overseas in 1916 as a member of the Canadian Army Dental Corps. Before leaving Canada, he practised as a dental surgeon in the village of Stirling. The defendant was a dental surgeon practising in Trenton. On the 2nd December, 1915, the plaintiff and defendant entered into an agreement in writing for the continuation of the plaintiff's Stirling business by the defendant during the plaintiff's absence, for which the defendant was to pay rental.

Paragraph 3 of the agreement was as follows: "That during the absence of the said lessor on military service, or if, within three months of his return or discharge from said service, the said lessor, his representatives or his successors, shall require the lessee to purchase said equipment under this agreement, then the said lessee shall pay to the said lessor, or his representatives or successors, the sum of $1,000, deducting therefrom that portion already paid as rental, and the equipment shall remain the property of the said lessor until purchased and paid for by the said lessee, and that the said lessee acquires no title to the said equipment until he has paid the said sum above specified as agreed upon under this agreement and lease."

Paragraph 4 was as follows: "That upon the payment of $1,000, either by rent or cash during the term of this agreement and lease, then and in such case the said equipment shall become the property of the said lessee, and he shall have the right to remove or dispose of said equipment without the permission of the said lessor in writing."

The trial Judge was right in his conclusion that the true meaning of the agreement was that para. 4 contained the terms of

payment, either by rent or by cash, in case there should be a sale by the lessor (plaintiff) desiring to sell and requesting the lessee (defendant) to purchase.

The plaintiff did not desire to sell, and did not request the lessee to purchase, and so in fact no sale ever took place, and para. 4 did not come into operation.

The two paragraphs should be read together, the 4th as supplementary to the 3rd; the 4th did not give a distinct right of purchase to the defendant; para. 3 gave to the plaintiff the right to require the defendant to purchase, and the property was not to pass until paid for by the defendant. The 4th paragraph did not purport to give the defendant the right to purchase, but simply provided for payment in case para. 3 came into effect, and then declared that the equipment should become the property of the defendant.

Neither the 3rd nor the 4th paragraph purported to provide for a sale of the business or the goodwill of the business. It was the "equipment" only that was to become the property of the lessee; although, by another paragraph, the lessor agreed that, should the business be purchased by the lessee under this agreement, the lessor would not practise the profession of a dental surgeon within 7 miles of Stirling.

On the 26th January, 1918, the plaintiff gave the defendant notice to quit and deliver up possession of all the dental equipment and of all other goods and utensils leased to him under the agreement, on the 1st April, 1918—a clear intimation that the plaintiff did not intend to avail himself of the right of sale reserved under the agreement.

The appeal should be dismissed with costs.

MULOCK, C.J. EX., in a written judgment, said that he agreed with the construction put upon the agreement by Clute, J., and with his disposition of the appeal. No ambiguity existed as to the meaning of the agreement, and parol evidence in explanation was inadmissible.

RIDDELL, J., in a written judgment, said that the document was ambiguous, and might be read in favour of the plaintiff, although, in his opinion, looked at alone, it should be read in favour of the defendant's contention. The trial Judge was right in admitting evidence of the surrounding circumstances; and the evidence, when read in the light of the finding of fact of the trial Judge, shewed that the intention of the parties was that the defendant should not have the right to purchase *in invitum*. That construction should be given to the contract; or, if not, it should be rectified.

The appeal should be dismissed.

SUTHERLAND, J., in a written judgment, said that when paras. 3 and 4 were read together, as they should be, there was no ambiguity; and that the construction put upon it by the trial Judge, namely, that "acquiring" meant "an acquiring when the lessor or his representatives desired to sell," was the proper one.

The appeal should be dismissed.

Appeal dismissed with costs.

SECOND DIVISIONAL COURT. DECEMBER 20TH, 1918.

*STADDON v. LIVERPOOL MANITOBA ASSURANCE CO.

Insurance (Fire)—Statutory Condition 3—Property Insured Assigned without Written Permission of Company—Effect of Written Permission for Earlier Assignment—Loss Payable to Mortgagee as Interest may Appear—Assignment of Interest of Mortgagee to Owner of Property Insured—Mesne Conveyances.

Appeal by the plaintiff from the judgment of the Judge of the County Court of the County of Essex dismissing the action, which was brought to recover the amount of a loss by fire alleged to be insured against by the defendant company.

The appeal was heard by MULOCK, C.J. Ex., RIDDELL, SUTHERLAND, and KELLY, JJ.

W. A. Smith, for the appellant.

R. S. Robertson, for the defendant company, respondent.

MULOCK, C.J. Ex., in a written judgment, said that by a policy of insurance, dated the 30th July, 1914, the defendant company insured John Griffin, his heirs, executors or administrators, for 3 years, to the amount of $800, against loss or damage by fire to a frame dwelling situated on land owned by Griffin. After the issue of the policy, Griffin sold and conveyed the land, including the building, to a realty company, which reconveyed the same by way of mortgage to Griffin, to secure payment of $850, part of the purchase-price. Thereafter, the realty company sold and conveyed its equity of redemption in the land to one Sova, who sold and conveyed to one Pulford. To none of these conveyances did the defendant company give its written consent. On the 27th October, 1915, Griffin assigned to Pulford, the then owner of the equity of redemption, the policy of insurance and all benefits thereunder, by an assignment in writing endorsed on the policy: "For value

received, I hereby transfer, assign, and set over unto Charles Pulford of Sandwich West (the purchaser) all my right, title, and interest in this policy of insurance and all benefits and advantages to be derived therefrom, with loss, if any, payable to me as my interest may appear." Beneath this assignment, the company, by its agent, on the same day, in writing, consented to the assignment "by John Griffin . . . of the interest in this policy to Charles Pulford, present owner, subject nevertheless to all the terms and conditions herein contained, with loss, if any, payable to said John Griffin as his interest may appear."

Subsequently, Pulford conveyed the land, subject to Griffin's mortgage, to T. and W. Affleck, and they conveyed the same to the plaintiff. The written consent of the defendant company was not given to either of these two conveyances.

On the 12th October, 1916, the building was totally destroyed by fire, and the plaintiff applied to the defendant company for payment of the loss, but the company refused payment on the ground that the insured property had been assigned without the written consent of the company, and thereby the policy had become void under statutory condition 3, Ontario Insurance Act, R.S.O. 1914 ch. 183, sec. 194, which is: "If the property insured is assigned without a written permission endorsed thereon by an agent of the company duly authorised for such purpose, the policy shall thereby become void; but this condition does not apply to change of title by succession or by the operation of the law, or by reason of death."

On the defendant company's refusal to pay the insurance moneys to Griffin, the plaintiff paid to Griffin the amount owing upon his mortgage, and obtained from him an assignment of his interest in the policy and in all moneys payable thereunder; and, as assignee, he now sought to recover from the defendant company the sum of $800.

It was unnecessary to determine whether, in view of the consent given by the company to the assignment of the policy by Griffin to Pulford, the company's liability ceased upon the conveyance by Griffin to the realty company. But for the subsequent assignment of the policy and the consent thereto of the defendant company, the conveyance to the realty company would have terminated the insurance contract created by the policy. The view most favourable to the plaintiff was that the effect of the subsequent assignment of the policy and the company's consent thereto was to create an insurance contract with Pulford as the assured, with loss payable to Griffin as his interest might appear.

With this as a starting-point, the question was, what was the effect of the subsequent conveyance of the land by Pulford to the Afflecks, subject to the mortgage to Griffin? By this conveyance Griffin denuded himself of all interest in the insured building.

The defendant company's contract was to the effect that the assured, to the extent of $800, should suffer no loss or damage, that is, the company would indemnify him in respect of loss or damage by fire to his building to the extent of $800. Having, before the fire, parted with all interest in the building, he suffered no loss or damage by its destruction, and therefore had no claim for indemnity, and was not entitled to maintain this action. Nor did the plaintiff stand in any better position than the assured. By the terms of the company's assent to the assignment of the policy to Pulford, with loss payable to Griffin, the latter became entitled simply to intercept for his own benefit moneys otherwise recoverable by Pulford; and, inasmuch as Pulford, having sustained no loss, could not recover, neither could Griffin, whose title was derived from Pulford, nor could the plaintiff, whose title was derived from Griffin.

The appeal should be dismissed with costs.

SUTHERLAND, J., agreed with MULOCK, C.J. Ex.

RIDDELL, J., agreed in the result, for reasons stated in writing.

KELLY, J., also agreed in the result, for reasons stated in writing.

Appeal dismissed with costs.

SECOND DIVISIONAL COURT. DECEMBER 20TH, 1918.

*TEMISKAMING TELEPHONE CO. LIMITED v. TOWN OF COBALT.

Telephone Company—Powers of—Right to Maintain Poles and Wires in Streets of Town—Company Incorporated in 1905 by Letters Patent Issued under Ontario Companies Act—Agreement with Town Corporation—Permission to Use Streets—Monopoly for Five Years—Municipal Act, 1903, secs. 331, 559—6 Edw. VII. ch. 34, sec. 20.

Appeal by the plaintiff company from the judgment of MIDDLETON, J., 42 O.L.R. 385, 14 O.W.N. 35.

The appeal was heard by MULOCK, C.J.Ex., RIDDELL, LATCHFORD, SUTHERLAND, and KELLY, JJ.

I. F. Hellmuth, K.C., for the appellant company.

H. H. Dewart, K.C., and W. N. Tilley, K.C., for the defendant town corporation, respondent.

MULOCK, C.J.Ex., in a written judgment, said that the sole question was, whether the plaintiff company was entitled to maintain its telephone lines on the public streets of the town of Cobalt. After referring to the letters patent issued by the Lieutenant-Governor, under the Ontario Companies Act, incorporating the plaintiff company; the agreement between the plaintiff company and the defendant town corporation, authorised by by-law of the town council, and dated the 19th June, 1912; and the Ontario Act 6 Edw. VII. ch. 34, sec. 20; the learned Chief Justice said:—

The Legislature having by the Ontario Companies Act delegated to the Lieutenant-Governor in Council authority to create corporations by letters patent and to endow them with certain powers, the granting of such letters patent is a legislative act, and the same construction must be placed on the language used in the letters patent as would be placed on the same language if used in a private Act incorporating the company and bestowing powers upon it. When the Legislature creates a corporation, authorises it to carry on an undertaking, and clothes it with powers which, in the opinion of the Legislature, are necessary or proper for the purpose of the undertaking, and fixes no limitation to the duration of such powers, they continue (unless a contrary intention appears in the statute) forever, or so long as the corporation retains its corporate existence; and the same interpretation applies to incorporation by letters patent.

Here the letters patent enabled the municipal councils to prevent the exercise of the plaintiff company's powers on the public streets by withholding consent to their user, or to qualify their consent by fixing a time-limit. There being no time-limit qualifying the consent given by the council of the defendant corporation, the company is authorised to exercise its powers in respect of the streets so long as the powers exist.

In the first clause of the agreement, in clear and unmistakable language, consent is given to the company exercising its powers on the public streets without any limitation as to time, that is, for all time; and there is nothing in any part of the agreement repugnant to or raising any doubt as to this being its plain intent and meaning.

In addition to this consent, the defendant corporation, by clause 7 of the agreement, agrees for a period of 5 years not to give, except to the Northern Ontario Railway Commission, any license or permission to use the streets for poles, ducts, or wires for a telephone business. There is no conflict between clauses 1 and 7: full effect may be given to both of them, the company being entitled by clause 1 to use the streets for all time and by clause 7 to freedom for 5 years from any rival except the Northern Ontario Railway Commission.

The appeal should be allowed with costs, and judgment should be entered for the plaintiff company declaring it entitled to maintain and operate its telephone system on the public streets of the town, and restraining the defendant corporation from interfering with such right; the defendant corporation to pay the plaintiff company's costs of the action.

SUTHERLAND, J., agreed with MULOCK, C.J.Ex.

KELLY, J., agreed in the result, for reasons stated in writing.

RIDDELL, J., read a dissenting judgment. He was of opinion that the franchise or right conferred by the agreement was not in perpetuity, but for a term only, as shewn especially by clause 9; and he had arrived at the same conclusion as MIDDLETON, J.

The appeal should, therefore, be dismissed.

LATCHFORD, J., also dissented, agreeing with RIDDELL, J.

Appeal allowed (RIDDELL *and* LATCHFORD, JJ., *dissenting*).

FIRST DIVISIONAL COURT. DECEMBER 20TH, 1918.

*RE TORONTO R. W. CO. AND CITY OF TORONTO.

Street Railway—Penalty for Non-compliance with Order of Ontario Railway and Municipal Board—Failure to Furnish and Operate Additional Cars as Required by Former Order—Powers of Board—Ontario Railway Act, sec. 260a (8 Geo. V. ch. 30, sec. 4) —Failure to Excuse Non-compliance—No Application to Rescind Order or Extend Time—Ontario Railway and Municipal Board Act, R.S.O. 1914 ch. 186, secs. 25, 42—Validity of Order of Board—"Superior Court"—British North America Act, sec. 96—Members of Board not Appointed by Governor-General—Jurisdiction—Method of Attacking Status of De Facto Judge—Proceeding by Quo Warranto Information—Administrative Body—Incidental Judicial Powers—"Superior Court"—"Court."

An appeal by the Toronto Railway Company from an order of the Ontario Railway and Municipal Board, dated the 19th April, 1918, made under the authority of sec. 260*a* of the Ontario Railway Act, added by 8 Geo. V. ch. 30, sec. 4, requiring the appellant

company to pay forthwith to the Corporation of the City of Toronto, the respondent, a penalty of $1,000 per day from the 27th March, 1918, to the 19th April, 1918, being $24,000 in all, for non-compliance, without proper excuse or justification, with an order of the Board, dated the 27th February, 1917, which required the appellant company to furnish and place in operation 100 additional cars not later than the 1st January, 1918, and 100 more not later than the 1st January, 1919.

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

J. W. Bain, K.C., and Christopher C. Robinson, for the appellant company.

Irving S. Fairty and C. M. Colquhoun, for the respondent city corporation.

MEREDITH, C.J.O., read a judgment in which he said that it was admitted that the appellant company did not comply with the directions of the order of the 27th February, 1917; but it was contended that the company, in good faith, made all possible efforts to comply with it, but was unable to comply, owing to the impossibility, because of war and other conditions, of getting the cars built for it, or obtaining the steel and labour necessary for the building of them if that work had been undertaken by the appellant company itself.

It was, no doubt, shewn that these difficulties existed to some extent, and were sufficient to have rendered the putting in service of 100 cars by the 1st January, 1918, difficult; but it was undoubted also that the company took no proper steps to obtain contracts for the supply of cars to be delivered at the earliest date at which car-builders would have been willing to have delivered them; and it was clear from the statement of the company's general manager that, if it had been practicable to have obtained the cars in time, the company would not have bought them because of the very large sum which the purchase of them would require. The company had not done all that it could and should have done to ensure the putting in service of these cars at the earliest practicable moment.

The company made no application, under sec. 25 or sec. 42 of the Ontario Railway and Municipal Board Act, to rescind or vary the order of February, 1917, or to extend the time; nor was an application made after the order was confirmed by an Act respecting the City of Toronto, 7 Geo. V. ch. 92, sec. 17, although by that section it was provided that nothing in it should interfere with the powers of the Board under sec. 25 above.

So long as the order of the 25th February, 1917, stood, what

the company set up as an answer to the application for an order imposing the penalty was no answer.

The substance of the thing to be done was the putting in service of the additional cars, and an order made for the purpose of compelling that to be done was such an order as it was contemplated might be made when power was given to the Board to impose a penalty (8 Geo. V. ch. 30, sec. 4), although the time limited for putting the cars in service had elapsed. The purpose of the legislation was, in part at least, to make effective the order of the 27th February, 1917, and to enable that to be done by imposing a penalty for non-compliance with it.

It was contended that the order of the Board had no validity because the Board was a "superior court" within the meaning of sec. 96 of the British North America Act, and its members, not having been appointed by the Governor-General, had no jurisdiction to exercise the powers conferred upon the Board by the Act by which it was created.

The status of a de facto Judge, having at least a colourable title to the office, cannot be attacked in a collateral proceeding; his acts are valid; and the proper way to question his right to the office is by quo warranto information.

Review of the authorities.

Further, the Board "is not a court, but an administrative body, having, in connection with its primary duty, power to construe the agreements which it is called on to enforce, but no general power such as the superior courts possess of adjudicating upon questions of construction in the abstract:" Re Town of Sandwich and Sandwich Windsor and Amherstburg R.W. Co. (1910), 2 O.W.N. 93, 98 (C.A.), a decision binding on this Court, and with which the Chief Justice agreed—saying that the Board, although it had for some purposes, and those but a small part of its powers and duties, judicial functions to perform, was not a court.

If the Board is a court, it is not a superior court, within the meaning of sec. 96 of the British North America Act.

Applying the rule, as to the constitutional validity of a provincial enactment, laid down by Strong, J., in Severn v. The Queen (1878), 2 S.C.R. 70, 103, this Court should hold that in the Ontario Railway and Municipal Board Act, 1906, the Legislature must be taken to have constituted a tribunal, the members of which should be appointed under its authority as provided by sec. 4 (2), rather than that the Legislature created a superior court and usurped an authority which it did not possess, but which was vested in the Governor-General.

The appeal should be dismissed with costs.

MACLAREN, MAGEE, and HODGINS, JJ.A., agreed with MEREDITH, C.J.O.

FERGUSON, J.A., for reasons briefly stated in writing, agreed that the appeal should be dismissed with costs.

Appeal dismissed with costs.

FIRST DIVISIONAL COURT. DECEMBER 20TH, 1918.

*TRUSTS AND GUARANTEE CO. LIMITED v. GRAND VALLEY R.W. CO.

Railway—Bondholders—Sale of Several Railways by Receiver—Distribution of Proceeds of Sale—Priorities—Exchange of Bonds of First Issue for those of Second Issue—Misrepresentation—Reinstatement or Rescission—Reference—Acquisition of Coupons—Purchase or Payment and Satisfaction.

Appeals by the bondholders of the defendant company, other than the bondholders of 1902, and by holders of coupons, from the judgment of FALCONBRIDGE, C.J.K.B., ante 23, upon the trial of an issue, adjudging payment of $66,273.51 to the bondholders of 1902.

The appeals were heard by MEREDITH, C.J.O., MACLAREN, MAGEE, and HODGINS, JJ.A.

A. C. McMaster and J. H. Fraser, for bondholders of 1907 who exchanged 1902 bonds, appellants.

A. W. Ballantyne, for bondholders of 1907 who never had 1902 bonds, appellants.

M. H. Ludwig, K.C., for holders of coupons under bonds of 1902 of the Brantford Street Railway Company and the Grand Valley Railway Company, appellants.

J. R. Roaf, for holders of coupons under bonds of Brantford Street Railway Company, appellants.

Joshua Denovan, for the Davies estate.

W. S. Brewster, K.C., for bondholders of 1902 who had not exchanged their bonds, respondents.

William Laidlaw, K.C., for Thomas Dixon, in the same position, respondent.

W. T. Henderson, K.C., for the Corporation of the City of Brantford, added as a party at the hearing of the appeal.

HODGINS, J.A., reading the judgment of the Court, said that the sum of money in Court came from the sale, by the receiver, of the Grand Valley Railway, the Brantford Street Railway, and the Grand Valley road between Brantford and Galt. The sale was under the Grand Valley mortgages of 1902 and 1907; that of 1902 including the Brantford to Galt road, and that of 1907 covering both, and also the Thames Valley Railway. No evidence was given to enable the Court to say what proportion of the purchase-money was attributable to the Brantford Street Railway undertaking as distinguished from the Brantford to Galt road, but it was stated that each had a separate value and had been operated separately.

The 1902 Grand Valley mortgage covered the Brantford to Galt road and the railway "constructed or which may be hereafter constructed" (under the powers conferred) "and all charters, franchises, privileges, and immunities now owned or possessed by it or to be hereafter acquired by it from any town or municipality or county or from any source whatever." It also included "all property whatever which may be hereafter acquired by it." It was argued that, notwithstanding these words, as the Grand Valley Railway Company in 1902 did not own and had no power to acquire the franchise of the Brantford Street Railway Company or the railway itself, the mortgage included only franchises from a town or county through which the Grand Valley road was then authorised to be built; and, in consequence, if the claim of the holders of coupons from the Brantford Street Railway was disallowed, the bondholders of the issue of 1907 came next to the $125,000 bond issue of the Brantford Street Railway, and were entitled to the money in Court so far as it was derived from the sale of the street railway undertaking in Brantford itself.

It was important to determine what the transactions were under which the coupons upon which claims were made were acquired—whether of purchase or of payment and satisfaction.

The finding of the trial Judge, upon the whole case, was, that the effect of the transactions was, that none of the coupons were sold or transferred in such a way as to preserve their lien or the right to rank with the outstanding bonds.

Review of the American authorities.

According to these authorities—and the learned Judge could find no English or Canadian authority inconsistent with them—the real test to be applied to determine whether there was a payment in satisfaction or by way of a purchase, lies in the knowledge and intention of both parties to the payment—which knowledge may be inferred from the circumstances—and, in case of doubt, the scale will be turned against the idea of purchase either by the want of proof of mutual intent or by the fact that there is not

enough in the security to pay the principal of the debt and the coupons as well, so that a purchase would be prejudicial to the bondholder.

There appeared to be an absence of satisfactory proof of the independent origin of the transactions which were set up as purchases; and, having regard to the importance attached by the Courts in such transactions to candour, publicity, and fair dealing, the view entertained by the trial Judge could not be considered erroneous; and the appeals of the coupon-holders must be dismissed with costs.

It was pointed out in the argument that the bondholders who claimed a return of their 1902 bonds and the cancellation of the agreement for exchange were not, in this proceeding, entitled to relief en masse. The misrepresentation proved at the trial was sought to be made applicable to the whole class there represented. That could not be done. Each bondholder who signed the agreement and exchanged his bonds must get relief because he was personally misled—he could not take advantage of the wrong done to another. The case should, therefore, go to the Master to allow the individual bondholders to prove their claims for rescission; the judgment should specially direct that they may do so; and the Master must in each case deal with the claim as if an action for rescission and reinstatement had been brought by each individual bondholder.

The point raised, as above mentioned, that in case of the disallowance of the coupon claims, the bondholders of 1907 came next to the Brantford Street Railway bonds on that undertaking and in priority to the 1902 bondholders, was not fully argued. If that contention were to prevail, perhaps the holders of 1907 exchanged bonds would not desire to proceed further with their claims for reinstatement. The amount realised by the sale from each railway might become important if the 1902 bondholders are restricted to the section outside Brantford. These two matters should be considered by the parties interested; and the case might be mentioned to the Court again at the opening of the sittings in January, 1919, as to the priority of the 1902 mortgage and the necessity for the division of the amount in Court, when the costs could also be dealt with.

The Corporation of the City of Brantford should be formally added as a party; and the agreement entered into between counsel for the 1902 bondholders and the exchange bondholders should be conformed, if desired, so far as in conformity with the views now expressed or those which might be developed later if the case were mentioned again.

Judgment below varied.

FIRST DIVISIONAL COURT. DECEMBER 20TH, 1918.

*REX v. DEBARD.

Criminal Law—Bigamy—Proof of First Marriage—Foreign Law—Marriage Certificate — Correspondence—Admissibility—Knowledge of Accused of Former Marriage and that Wife still Living —Proof of.

Case stated by the Senior Judge of the County Court of the County of York.

The prisoner was charged with and convicted of the offence of bigamy—the offence being that she went "through a form of marriage with Judson B. Hogate, knowing at the time that his wife was living."

The questions submitted were: "(1) Was I right in holding that the first marriage in the State of Iowa was sufficiently proved? (2) Was any evidence improperly admitted whereby a substantial wrong or miscarriage was occasioned on the trial? (3) Was I right in law in convicting the accused upon the evidence properly admissible; and, if not, should the conviction be quashed?"

The case was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, HODGINS, and FERGUSON, JJ.A.

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

Edward Bayly, K.C., for the Crown.

The judgment of the Court was read by MEREDITH, C.J.O., who said that the case of the Crown was that Hogate was married to Anna Moore on the 20th February, 1873, at Jefferson County, in the State of Iowa, by a Justice of the Peace having authority, under the laws of that State, to solemnise marriage, and that Anna Moore was living when the prisoner went through the form of marriage with Hogate.

Proper proof was adduced of the law of Iowa, and it was shewn that a Justice of the Peace was, at the time the marriage took place, one of the persons who were by that law authorised to solemnise marriage.

The fact of the marriage having taken place at the time mentioned was deposed to by Anna Hogate, the wife, who also testified that it was solemnised by George H. Case, who held the office of Justice of the Peace; that she and her husband lived together as man and wife for 20 years after the marriage, and that a son, issue of the marriage, and still living, was born in 1874.

A certificate of the marriage, signed by Case, and a certificate of the record of the marriage, signed by the clerk of the District

Court of Jefferson County, and also correspondence between Hogate and his wife, in 1917 and 1918, were admitted in evidence, notwithstanding objection.

There was sufficient proof of the marriage without the aid of the certificates and correspondence. Assuming that the certificates were inadmissible, there was still the evidence of the wife that Case was a Justice, and the presumption that a person acting in a public or official capacity is entitled so to act.

The correspondence between the husband and wife was admissible as evidence of the status of the parties, though not relevant upon the question of the prisoner's knowledge that Hogate was a married man.

The first question should be answered thus: There was evidence, apart from that afforded by the certificates, which, if believed—as it was by the trial Judge—sufficiently proved the first marriage.

And the second question should be answered in the negative.

The third question should be treated as if it were: "Was there any evidence, properly admissible, to warrant a conviction?" To answer this question it was necessary to consider whether there was any evidence that the prisoner, when she went through the form of marriage with Hogate, knew that his wife was living. It was clear that she knew that the woman Anna Moore was living; and there was evidence, believed by the Judge, that the prisoner knew that Anna Moore was Hogate's wife; and so there was evidence, properly admissible, sufficient to warrant a conviction.

Reference to Rex v. Naoum (1911), 24 O.L.R. 306.

Conviction affirmed.

FIRST DIVISIONAL COURT. DECEMBER 20TH, 1918.

SUTHERLAND v. HARRIS AND McCUAIG.

Appeal—Finding of Fact of Trial Judge—Credibility of Witnesses—Duty of Appellate Court—Action on Cheque—Alleged Delivery in Escrow—Transfer by Payee to Third Person—Holder in Due Course—Absence of Knowledge in Transferee of Equities Existing between Drawer and Payee.

Appeal by the defendant McCuaig from the judgment of MASTEN, J., at the trial, in favour of the plaintiff for the recovery against the appellant of $5,000, the amount of a cheque, dated the 27th October, 1917, drawn by the appellant, payable to the defendant Harris, and endorsed by Harris to the plaintiff,

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

Glyn Osler, for the appellant.

R. S. Robertson, for the plaintiff, respondent.

The judgment of the Court was read by FERGUSON, J.A., who said that the parties were all stockbrokers, and the cheque was given by McCuaig for the cash payment under an agreement for the sale by Sutherland to Harris of a one-half interest in 900,000 shares of a mining company, the whole price being $67,500. It was agreed between Harris and McCuaig that McCuaig should unite with Harris in his purchase, and that McCuaig should make all the payments provided for in the Harris-Sutherland agreement. The cheque sued on was signed by McCuaig on a Saturday afternoon, and was then handed to Harris's solicitor, and, after endorsement by Harris, was handed to Sutherland on the following Wednesday. Before the cheque was presented at the bank, McCuaig stopped payment of it, taking the position that it was not to be used until share-certificates had been deposited with a trust company—that the cheque was handed to the solicitor in escrow, to be delivered to Harris when the Sutherland-Harris agreement should have been signed and the share-certificates deposited. Sutherland sued as a holder in due course.

The learned Justice of Appeal, after reviewing the evidence, said that the trial Judge had not chosen to discredit Sutherland; and, in view of Sutherland's positive statement "that he had not any notice of anything from McCuaig affecting the cheque or relating to it in any way, or anything relating to the agreement he had with Harris, or of any instructions that were given by McCuaig to the solicitor or Harris, with reference to the cheque, except that he was told by Harris and the solicitor that when the agreement was signed they were to hand over the cheque," and also in view of the authorities which forbid an appellate Court to substitute its finding for that of the trial Judge, where his finding of fact is based on the credibility of witnesses, the Court should not now interfere with the finding made by the trial Judge that Sutherland had no knowledge of the equities which attached to the cheque in the hands of Harris.

Appeal dismissed with costs.

FIRST DIVISIONAL COURT. DECEMBER 20TH, 1918.

*STOTHERS v. TORONTO GENERAL TRUSTS CORPORATION.

Railway—Trustee for Bondholders and for Municipal Corporations Guaranteeing Payment of Bonds—Account—Payments Made by Trustee under Engineer's Certificates pursuant to Directions of Order of Court Made upon Summary Application—Validity of Order—Rules 938-943 of 1897—Motion by Way of Originating Notice—No Notice of Motion Served—Representation of Interests of all Parties upon Motion—Several Municipal Corporations in same Interest Represented by one—Rules 193, 358 of 1897—Contract—Mortgage-deed—Requirements as to Certificates—Duty of Trustee—Sale of Unguaranteed Bonds.

Appeal by the plaintiffs from the judgment of SUTHERLAND, J., 13 O.W.N. 290.

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

E. D. Armour, K.C., William Proudfoot, K.C., P. A. Malcolmson, and C. Garrow, for the appellants.

I. F. Hellmuth, K.C., and E. T. Malone, K.C., for the defendant corporation, respondent.

MEREDITH, C.J.O., read a judgment in which he said that the plaintiffs were Thomas Stothers, in whom the assets of the Ontario West Shore Railway Company were vested by statute, and the Municipal Corporations of the Town of Goderich, the Town of Kincardine, the Township of Ashfield, and the Township of Huron, and they sued for an account of the moneys received and paid out by the respondent corporation in connection with the railway, and payment to the plaintiffs of any money improperly paid out by the respondent corporation, and for interest, and for delivery up of bonds, etc.

The respondent, acting upon an order made by Middleton, J., on the 13th April, 1911 (Re Ontario and West Shore R.W. Co., 2 O.W.N. 104), upon summary application, paid over to the railway company the whole of the money which had come to its hands except two sums of $30.06 and $317.96.

By the judgment now appealed against the respondent was ordered to deliver to the appellant Stothers the 20 unguaranteed bonds in its hands and to pay to him the two sums mentioned; and, subject to that direction, the action was dismissed.

The action of the respondent in paying over the money that it had received was attacked on various grounds.

It was contended that the order of Middleton, J., was made without jurisdiction and was therefore of no validity.

The Rules in force in 1911 as to originating notices were Rules 938 to 943 of the Rules of 1897. Service of a notice of motion was not essential to give jurisdiction to deal with an application as upon originating notice under these Rules. The thing to be done was to bring the motion before a competent tribunal, and the notice of motion was only the form by which that was to be accomplished. If the person who, under the Rule, is the person to be served, is willing to waive that formality and to go before the Court in order that the motion may be made and dealt with, that course may properly be taken; and that was what was done in this case.

The parties were properly before the Court, and it was for the Court to determine whether any other person ought to be served, and, if so, who. What was done was, though in form a direction that one of the municipal corporations should represent the others, in reality a determination by the Judge that the corporation which was before him sufficiently represented the interests of all the corporations—as the cases of all of them were identical—and in effect a determination by the Court that it was not necessary that any other than the persons before him should be served.

In the absence of evidence to the contrary, it should be presumed that the fact that the Corporation of the Township of Ashfield had been appointed to represent the other corporations was communicated to these corporations; and, even if the order were to be considered as having been made as to them ex parte, they might have applied under Rule 358 of 1897 to rescind it. Rule 193 of 1897, as to the representative capacity of trustees, should also be referred to.

There was no doubt that the matter in controversy came within clause (*h*) of Rule 938. The only right which the municipal corporations had against the respondent was as cestuis que trust under the mortgage-deed. There was no contractual relation between them and the respondent; any contract there was, was with the railway company; but, when the bonds or the proceeds of them were handed over to the respondent, they became impressed with the trust which was declared by the mortgage-deed as to the application of them by the respondent.

The order of Middleton, J., was, therefore, a valid order and was binding on all the corporations; and, as it was the authority for what the respondent did which was attacked, the appeal failed.

The learned Chief Justice, however, considered the other grounds of attack and pronounced against them. They were:—

(1) That no payments should have been made except on progress certificates issued by an inspecting engineer appointed

either by the parties or by the Ontario Railway and Municipal Board, under sec. 162 of the Ontario Railway Act, 1906.

(2) That no payments should have been made until the unguaranteed bonds had been sold and the proceeds of the sale of them had come to the hands of the respondent, and then only pro rata out of the whole proceeds according to the amounts that had been realised from the sale of both sets of bonds.

The appeal should be dismissed with costs.

MACLAREN and MAGEE, JJ.A., agreed in the result.

FERGUSON, J.A., also agreed in the result, for reasons stated in writing.

HODGINS, J.A., dissented in part, for reasons stated in writing. He was of opinion that the judgment in appeal should be affirmed as to the appellants other than the Corporations of Huron and Kincardine, without costs; that the appeal of the other plaintiffs should be allowed; and that the successful appellants should recover against the respondent one half of the costs of the action and appeal—they appearing by the same solicitor as the other appellants.

Appeal dismissed (HODGINS, J.A., *dissenting in part*).

FIRST DIVISIONAL COURT. DECEMBER 20TH, 1918.

KEITH v. BROWN.

Contract—Work and Labour—Work not Completed according to Contract—Acceptance—Waiver—Costs—Deduction of Sum for Work not Completed.

Appeal by the defendant from the judgment of the Junior Judge of the County Court of the County of Essex directing that the plaintiff recover against the defendant $101 as damages for breach of contract.

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

R. L. Brackin, for the appellant.

J. H. Fraser, for the plaintiff, respondent.

FERGUSON, J.A., read a judgment in which he said that the plaintiff was a farmer; he employed the defendant, a field tile machine operator and contractor, to dig trenches and lay therein tiles for a system of drainage laid out on about 14 acres of the plaintiff's farm.

The plaintiff alleged that the trenches were to be dug and the tiles laid in a proper workmanlike and scientific manner and as to be effective for the purpose of draining the plaintiff's land; that the work was not efficiently done, the levels of some of the trenches not being proper; and parts of the drains laid were useless.

The evidence was that the work was completed on the 16th October, 1917; that the plaintiff was present while the work was being done; that during the work and after it the plaintiff and his father inspected the work, went over the grades with a spirit-level, and had the defendant return and make some alterations; whereupon the plaintiff expressed himself as satisfied, and paid the full contract price.

The evidence shewed that, had the levels been taken shortly after the work was done, the mistakes could have been rectified at an expense of not more than $25.

Had the plaintiff chosen to rely on the defendant's skill, he might have done so; but, having chosen, relying on his own skill, to inspect, pass upon, and accept the work and levels, he relieved the defendant from the work of checking up the levels, and took away from him the opportunity of correcting, at trifling expense, any mistakes he had made, and of thus protecting himself from future claims.

The learned trial Judge said that it would be against public policy to hold the plaintiff bound by his acceptance; but it would be unfair, after the conditions had so altered as to render it impossible for the defendant to rectify his mistakes, if any, to allow the plaintiff to say that he was not competent to pass upon the work, and that his approval of the work and payment therefor on the 22nd October should not be deemed an acceptance of the work and a waiver of his rights on the express or implied warranty alleged.

The appeal should be allowed and the action dismissed, both with costs; but, in view of the admission that the defendant's work was not in fact completed according to contract, there should be deducted from the costs taxed to him the sum of $25, being the sum which the evidence established, and the defendant admitted, would necessarily be expended in rectifying the faulty work had it been known prior to the acceptance and waiver.

Appeal allowed.

FIRST DIVISIONAL COURT. DECEMBER 20TH, 1918.

WILLIS v. PEOPLE'S DAIRY CO.

Restraint of Trade—Sale of Business—Covenent by Vendor not to Engage in Business of "Milk-dealer"—Action for Breach—Whether Sale of Butter and Buttermilk Included—Evidence of Understanding of Persons in Trade—Evidence of Conduct of Parties—Declaration of Rights under Agreement.

An appeal by the defendant from the judgment of COATSWORTH, Jun. Co.C.J., dismissing the counterclaim of the defendant, delivered in an action in the County Court of the County of York.

By the counterclaim the appellant claimed to recover damages for alleged breaches by the plaintiff, respondent, of an agreement entered into between the parties on the 15th February, 1916.

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

George Kerr and G. M. Clark, for the appellant.

Gideon Grant, for the respondent.

MEREDITH, C.J.O., read the judgment of the Court. He said that the respondent had been carrying on the business of manufacturing, buying, and selling butter, and manufacturing and selling ice-cream; that, being desirous of extending his business, he purchased two "milk-routes;" and, after carrying on the business of selling milk in conjunction with his other business, he came to the conclusion that the new business was not a profitable one, and so decided to sell it, and entered into negotiations with the appellant for the sale of it to him, as a result of which the agreement upon which the counterclaim was based was entered into.

In the agreement it was recited that the respondent "now carries on the business of a milk-dealer," and by the agreement there were transferred to the appellant "the milk business so carried on" by the respondent as a going concern, and certain chattels used in the business, together with the goodwill of the business and all contracts, engagements, benefits, and advantages, including the milk-routes. The respondent agreed that he would not carry on or take part in the business of a milk-dealer in the city of Toronto for 7 years, except by selling at his shop milk purchased from the appellant; and the appellant agreed to sell and supply to the respondent such quantities of milk as the respondent should require. In case of any breach of this covenant, the respondent was to pay to the appellant $200 as liquidated damages, and not as a penalty.

The appellant complained that the respondent had sold and was selling buttermilk and butter manufactured by him from cream purchased by him.

The question in controversy depended upon the construction which was to be given to the agreement, and whether, according to the true construction, what was complained of was a breach of the respondent's covenants.

Evidence was led for the purpose of proving what, according to the understanding of persons in the trade, was meant by "milk business" and "dairy business." This evidence shewed that neither term included the purchase of cream and the manufacture from it of butter or the sale of that commodity or the purchase and sale of butter manufactured by others.

It was argued for the appellant that the only exception from that which was sold, mentioned in the agreement, was the ice-cream business carried on by the respondent; and that that was inconsistent with the intention of the parties having been to exclude from the sale any part of the business that was then being carried on by the respondent at his shop.

At first sight, this fact seemed to make in favour of the appellant's contention; but, when it was explained, as it was in evidence, that ice-cream is manufactured from milk with some other ingredients added, the force of the appellant's contention was gone. That contention also ignored the fact that the respondent was carrying on two businesses—the milk business and the butter and ice-cream business, the latter not being, according to the understanding of persons in the trade, a milk business or part of a milk business.

Another important circumstance was the fact that a butter-making machine was included in the plant and machinery used in the respondent's business, and that that machine was not taken over or claimed by the appellant, although, as the business was sold as a going concern, the machine, if the appellant was right in his contention as to what was purchased, would have passed to him. The fact that this machine was not included in the purchase, but was left with the respondent, indicated that the purchase did not include the butter business.

If the butter business was not purchased, the sale of the buttermilk, which was a bye-product of the manufacture of butter, was not a breach of the respondent's covenant.

The appeal should be dismissed with costs; but, to prevent controversy, the order of dismissal should be prefaced with a declaration of the respondent's rights in accordance with the above opinion, including a declaration that he was bound by his covenant not to buy buttermilk and not to sell any except such as was a bye-product in the manufacture of butter manufactured by him.

Appeal dismissed with costs.

FIRST DIVISIONAL COURT. DECEMBER 20TH, 1918.

FANNING v. WALES.

Sale of Goods—Action in Division Court upon Promissory Note Given for Part of Price—Warranty—Breach—Dispute-note not Setting up Counterclaim on Warranty—Verdict of Jury in Effect Awarding Damages by Deduction of Sum from Amount of Note—Judgment—Appeal—Costs.

An appeal by the plaintiff from the judgment of the Third Division Court of the County of Ontario.

The action was brought to recover $142.19, the amount of a promissory note made by the defendant; it was given for part of the price of cows of the plaintiff which were sold by auction at which the defendant became the purchaser, and the note sued on was given for the purchase-price.

It was a condition of the sale that the plaintiff warranted that the cows were sound in the udder, and that, if they were found not to be, they should, as the plaintiff contended, or might, according to the contention of the defendant, be returned.

By the dispute-note filed by the defendant, it was alleged that the cattle, or the part thereof for which the note sued upon was given, were misrepresented by the plaintiff, and the defendant said that he was not liable to pay any further sums than those he had already paid, and that he had not received value for the money claimed by the plaintiff upon the note.

The action was tried with a jury, and the verdict was: "We, the jurors, have agreed to have Mr. Wales pay $110 for the cows, and Mr. Fanning pay all costs."

Upon this verdict, judgment was entered by the Judge for the plaintiff for $110 without costs; and from that judgment the plaintiff appealed.

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

L. V. O'Connor, for the appellant.

A. R. Clute, for the defendant, respondent.

MEREDITH, C.J.O., read the judgment of the Court. After stating the facts as above, he said that it was clear that, if the contention of the respondent as to what the condition as to the return of the cows was, was right, he was not bound to return them, but it was optional with him to do so or not as he might choose.

It was equally clear that the breach of warranty was no answer to the action on the note, and that the respondent's remedy was to

counterclaim for the damages he sustained owing to the breach of the warranty.

It was contended by counsel for the appellant that the respondent had not counterclaimed, but had limited his case to a defence on the ground of failure of consideration for the note.

Although the dispute-note was not in form a counterclaim, the case was fully tried out, and what the jury in effect did was to award to the respondent, as damages for the breach of warranty, the difference between the amount of the note, $142.19, and $110.

In view of this, the Court ought not to set aside the verdict or judgment, although in form the appellant should have had judgment for the amount due on the note, and the respondent judgment for the damages awarded to him for the breach of the warranty.

The appeal should be dismissed; but, in view of the informal character of the dispute-note, and its insufficiency as a counterclaim, the dismissal should be without costs.

Appeal dismissed without costs.

SECOND DIVISIONAL COURT. DECEMBER 21ST, 1918.

*REX v. McCRANOR.

Ontario Temperance Act—Magistrate's Conviction for Offence against sec. 40—Selling Intoxicating Liquor in Hotel—Evidence of Detectives or Spies—Corroboration Unnecessary—Application of Rule as to Accomplices—Sufficiency of Evidence to Warrant Conviction—Appeal to District Court Judge—No New Evidence Taken—Magistrate's Conviction Quashed—Opinion of Judge as to Credibility of Detectives Formed in a Previous Case—Further Appeal to Appellate Division—Conviction Restored—Evidence of Prior Conviction—Questions Put to Accused on Cross-examination—Canada Evidence Act, sec. 12—Ontario Evidence Act, sec. 19 (1).

James McCranor, who kept an hotel in the city of Fort William, appeared before the Police Magistrate for that city, on the 26th October, 1917, on a charge of having sold intoxicating liquor on the 27th September, 1917, at his hotel, contrary to the provisions of the Ontario Temperance Act, 6 Geo. V. ch. 50, sec. 40. He pleaded "not guilty," but was convicted by the magistrate. As it was a second offence, he was sentenced to 6 months' imprisonment. He appealed to the District Court Judge, who allowed the

appeal and quashed the conviction (1st March, 1918). The prosecutor (an inspector) obtained the certificate of the Attorney-General under sec. 94 (1) of the Act, and now appealed to this Court.

The appeal was heard by MULOCK, C.J.Ex., CLUTE, RIDDELL, LATCHFORD, and SUTHERLAND, JJ.

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

J. W. Bain, K.C., for the defendant, respondent.

RIDDELL, J., read a judgment in which he said that the evidence was that of two "whisky detectives" employed by the Ontario Liquor License Department. They swore that they went into the defendant's bar, and that one of them bought a bottle of Scotch whisky from the defendant, paying therefor $3.

The defendant was called as a witness on his own behalf, and said he did not remember selling the whisky.

Except in extraordinary circumstances, no magistrate would be justified in refusing to convict upon such evidence; the magistrate acted properly in convicting as he did.

The evidence for the prosecution was assailed because it was the evidence of detectives and not corroborated. But the detective or spy is in law wholly different from the accomplice. The rule that the evidence of an "approver" or accomplice requires corroboration is a rule of practice, not of law (except in certain cases where the statute is express), and juries may disregard it and convict notwithstanding the absence of corroboration.

But even this rule does not apply to persons who have joined in or even provoked the crime as agents of the police or of the authorities, as ordinary spies or informers: Wigmore on Evidence, vol. 3, sec. 2060 (*b*); Regina v. Mullins (1848), 3 Cox C.C. 526, 7 St. Tr. N.S. 1110; Regina v. Dowling (1848), 3 Cox C.C. 509, 516; Rex v. Despard (1803), 28 How. St. Tr. 346, 489; and American cases in note 9 to sec. 2060, Wigmore, supra.

The English cases cited do not quite cover the present case, as in them the crime was being committed independently of the spy, and he took part in the transaction simply to expose the crime of others. But Rex v. Bickley (1909), 73 J.P. 239, is directly in point; see also Rex v. Baskerville (1916), 12 Cr. App. R. 81.

It was said that evidence that the accused was previously convicted was given at the hearing by the magistrate before the conviction was made in the present case; but that was an error. The complaint was as to the questions on the cross-examination of the accused, which were plainly allowable: see sec. 12 of the Canada Evidence Act, R.S.C. 1906 ch. 145, and sec. 19 (1) of the Ontario Evidence Act, R.S.O. 1914 ch. 76.

There being no objection to the manner in which the case was conducted, and no necessity for corroboration, the District Court Judge was in error in allowing the appeal.

Upon the appeal before the Judge, he had the power to hear evidence; had he done so and given judgment upon the credibility of witnesses before him, this Court should have paid the utmost respect to his decision. But he did not do so, and he should have dealt with the case as an appellate Court deals with a case which comes before it on the reported evidence; and, if he found that the magistrate had sufficient evidence upon which to base his decision, the Judge should not have reversed it.

It was said that the Judge had had the witnesses for the prosecution before him in another case, and did not believe their testimony then given. But the law will not allow a witness's credit to be attacked by proof that he had been disbelieved in another case, or even that he had sworn falsely in another case. It is unjudicial to import into one case an opinion, on anything but law, formed in another case.

But, in any case, this Court was in quite as good a position as the Judge to adjudicate upon the evidence.

The appeal should be allowed; costs throughout to be paid by the defendant.

LATCHFORD and SUTHERLAND, JJ., also read judgments. They agreed that the appeal should be allowed.

CLUTE, J., read a dissenting judgment in which MULOCK, C.J.Ex., concurred.

Appeal allowed (MULOCK, C.J.Ex., *and* CLUTE, J., *dissenting*).

SECOND DIVISIONAL COURT. DECEMBER 21ST, 1918.

*McCALLUM v. COHOE.

Husband and Wife—Liability of Wife on Promissory Note and Agreement Signed for Benefit of Husband—Consideration—Undue Influence — Independent Advice — Evidence — Onus—Duress—Threat—Agency of Stranger for Person in whose Favour Note and Agreement Executed—Findings of Trial Judge—Appeal.

Appeal by the plaintiff from the judgment of FALCONBRIDGE, C.J.K.B., 42 O.L.R. 595, 14 O.W.N. 109, in so far as it relieved

the defendant Martha K. Cohoe from liability and refused to order the defendants to execute certain mortgages.

The appeal was heard by MULOCK, C.J.Ex., RIDDELL, SUTHERLAND, and KELLY, JJ.

G. N. Shaver, for the appellant.

J. W. Payne, for the defendant Martha K. Cohoe, respondent.

MULOCK, C.J.Ex., read a judgment, in which, after setting out the facts, he said that the defendant Martha K. Cohoe's defences were: (a) duress on the part of the plaintiff; (b) undue influence of her husband and the absence of independent advice; (c) no consideration for the note.

There was no evidence that, in procuring the note from Mrs. Cohoe, McLachlin acted as the plaintiff's agent. On the contrary, the evidence clearly established the absence of agency. McLachlin knew that Mrs. Cohoe's joining in the note would save the bank from any claim by the plaintiff, and his intervention was solely in the interests of the bank. As said in Leake on Contracts, 6th ed. (Can. notes), p. 285, duress, to affect a contract, "must be the act of the party himself, or imposed with his knowledge and taken advantage of by him, for the purpose of obtaining the agreement; duress by a third person would not avoid a contract made with a party who is not cognizant of it: see 1 Rolle, Abr. 688." It was not until several days after the note had been given to McLachlin for the plaintiff, that the latter learned of the circumstances which occurred at the Cohoe house which induced Mrs. Cohoe to sign the note. In his reasons for judgment, the learned trial Judge said (42 O.L.R. at p. 597): "The plaintiff, after receiving this information, never repudiated or disavowed the transaction. I think that under these circumstances McLachlin was an agent so as to bring the case within the rule." The moment the note was delivered to McLachlin it became the property of the plaintiff, and the contract between him and Mrs. Cohoe was then complete. McLachlin, not having been the plaintiff's agent to obtain the note, the plaintiff was not affected by any duress which he may have exercised upon Mrs. Cohoe; and his subsequently ascertaining from McLachlin the circumstances of the interview could not affect the validity of the note, which up to that time was unassailable Thus the defence of duress failed.

As to that of undue influence by the husband and the absence of independent advice, the onus was on Mrs. Cohoe to establish that defence: Hutchinson v. Standard Bank of Canada (1917), 39 O.L.R. 286. This she had not attempted to do, nor could she hope to establish it, for her husband told her before she signed

the note: "You need not sign that if you don't want to. Do not sign on my account."

As to the defence of no consideration: Mrs. Cohoe agreed to sign the note if the plaintiff would agree to extend the payment over three years, and he agreed to do so, and this constituted valuable consideration. The note was intended to operate as collateral security that the husband would pay the amount of his liability, limited to $1,500, when ascertained by the arbitrators, and the plaintiff should have based his claim on the note, as well as the submission and award, and should have leave so to amend his statement of claim.

The appeal should be allowed and the judgment set aside, and judgment should be entered for the plaintiff for $500, and ordering the defendants to execute and deliver to the plaintiff a mortgage as claimed in the statement of claim; the plaintiff to be entitled to costs throughout, including those of this appeal.

SUTHERLAND and KELLY, JJ., agreed with MULOCK, C.J.Ex.

RIDDELL, J., for reasons stated in writing, agreed in the result.

Appeal allowed.

HIGH COURT DIVISION.

MASTEN, J. NOVEMBER 7TH, 1918.

ROUNTREE v. WOOD.

Contract—Underwriting Preference Shares of Company—Consideration—Commission Paid in Part in Ordinary Shares—Undertaking of Promoters to Buy Shares from Underwriter at Reduced Price—Alternative Provision as to Sale of Shares in Event of Underwriter Retaining them—Election—Evidence—Continuing Right—Construction of Contract—Receipt—Reasonable Time for Making Request to Buy—Oral Evidence of Surrounding Circumstances.

Action to recover $15,956.25 for 925 shares of ordinary stock of the Guardian Realty Company of Canada Limited, sold by the plaintiff to the defendants at $15 per share, $13,875, and interest, $2,081.25.

Before the 10th December, 1913, the plaintiff had, at the defendants' request, underwritten $250,000 worth of the preferred shares of the Guardian company, which was being promoted by

the defendants; and, by a letter written to the plaintiff by the defendants, on that day, they acknowledged their obligation to pay him a commission. In this letter the defendants referred to the underwriting contract, and said: "In consideration of which we agree to pay you in cash . . . $14,000, and, in addition, 925 ordinary shares . . . You are to have the privilege of selling to us all or any part of the said 925 ordinary shares at the price of $15 per share. Any of the said shares you do not sell to us and retain for yourself are not to be offered except through us for a period of 6 months from October next."

The payments on the underwritten shares were said to have been completed in July, 1914; 300 shares were delivered to the plaintiff in March, 1914; and the remaining shares were said by the plaintiff to have been received by him early in October, 1914.

The action was tried without a jury at a Toronto sittings.

J. R. Roaf and A. C. McMaster, for the plaintiff.

Wallace Nesbitt, K.C., and A. W. Holmested, for the defendants.

MASTEN, J., in a judgment delivered at the sittings, said that the first defence was, that, upon the true construction of the letter of the 10th December, 1913, the option or right to sell the 925 shares to the defendants was a unilateral right which the plaintiff might without formality forgo at any time, but which, in any event, upon the proper construction of the agreement, expired at latest on the 1st October, 1914, after which the plaintiff's only right, during the succeeding 6 months, was to sell the shares to the public through the medium of the defendants—but the right to require the defendants to take them was gone; and the defendants contended that the plaintiff did declare his election to keep the shares, in a conversation which he had with the defendant L. M. Wood in or about the month of May, 1914, at which time he said he was going to keep the shares; and that on the 5th November, 1914, by taking the shares in his own name, instead of leaving them in the name of a broker for convenience of sale, he further manifested an intention to keep the shares himself, and exercised his election against selling them to the defendants.

The second defence was based on the terms of a receipt signed by the plaintiff, dated the 24th September, 1914, as follows: "Received from J. & L. M. Wood 650 ordinary shares of Guardian Realty Company of Canada Limited in full of my underwriting commission on sale of preference shares and *all claims in respect thereof*." The defendants' contention was, that the concluding words of the receipt, apart from anything else, cancelled

and released any right which the plaintiff had to sell these shares to the defendants.

As to the first contention, the learned Judge said that the somewhat casual conversation referred to in the defendants' evidence was insufficient to cancel the legal right then existing, particularly when the date of the conversation (May, 1914) was considered. The alleged statement of the plaintiff was voluntary, and there was no such consideration or such solemnity attached to it as would make it binding upon him. None of the other acts or circumstances relied on by the defendants afforded a sufficient manifestation of an election to release or cancel the right given to the plaintiff in the letter of the 10th December, 1913.

As the Royal Bank building, for the erection of which the Guardian company was formed, was not to be completed till the 1st October, 1914, the more natural and reasonable view was, that the plaintiff was not obliged to make his election till a reasonable time after that date; and there was no difficulty in holding that, for a reasonable time after the 1st October, the plaintiff possessed two concurrent rights: (1) to sell to the public through the defendants; (2) to require the defendants to take the shares at $15.

Upon the true interpretation of the receipt of the 24th September, 1914, it did not operate as a discharge of the plaintiff's claim. The contract was a continuing contract in this respect, that it precluded the plaintiff from offering the shares for sale except through the defendants; it was also a continuing contract in respect of the right conferred on the plaintiff to require the defendants to take the shares at $15; and the concluding words of the receipt had no application to that right.

Evidence in regard to the surrounding circumstances was admissible for the purpose of shewing the subject-matter to which the documents applied; but there was no such ambiguity in the written documents as rendered evidence of the conduct of the parties admissible to explain them. If evidence was admissible for that purpose, the evidence given was overborne by the documents themselves and by the considerations referred to. The parties may not have been ad idem; but, whether they were or not, the written documents must be given superior weight.

The right of the plaintiff to require the defendants to purchase these shares at $15 was a general right, to be exercised within a reasonable time; it did not come to an end on the 1st October; and the plaintiff's request to the defendants to buy these shares was made within a reasonable time.

There should be judgment for the plaintiff for $13,875, without interest, and with costs.

MIDDLETON, J. DECEMBER 5TH, 1918.

SILKS LIMITED v. IRONS.

Partnership—Action to Recover Debts of Partnership from Alleged Partner—Class Action—Rule 75—Creditors.

Action by Silks Limited, suing on behalf of themselves and the other creditors of the estate of the Leader Waist Company, to recover the sum of $3,000.

The plaintiffs, by their statement of claim, alleged:—

(1) That the Leader Waist Company began to do business as manufacturers and sellers of wearing apparel, in June, 1916, and on the 8th March, 1918, made an assignment for the benefit of creditors to G. T. Clarkson, and thereafter ceased to do business.

(2) That the plaintiffs were creditors of the Leader Waist Company.

(3) That on the 5th February, 1917, one W. J. Cordwell, who had been previously conducting the affairs of the Leader Waist Company in conjunction with one Varnell, executed a partnership agreement, under the terms of which the defendant contributed $500 in cash to the partnership business and became a partner therein.

(4) That, although the partnership agreement was not registered, it remained binding as between the parties.

(5) That the defendant had never withdrawn his money from the business, and had admitted that he had signed the agreement and paid the $500.

(6) That, after the 5th February, 1917, the defendant had held himself out to various creditors as a partner in the business.

The plaintiffs asked to have it declared that the defendant was a partner in the Leader Waist Company, and liable for the unpaid debts of the company; and claimed from the defendant $3,000, "approximately the amount of the unpaid liabilities of the Leader Waist Company."

The action was tried without a jury at a Toronto sittings.

D. J. Coffey and W. A. Sadler, for the plaintiffs.

J. R. Roaf, for the defendants.

MIDDLETON, J., held:—

(1) That the plaintiffs' claim did not come within Rule 75.

(2) That, even if such a class action could be brought, the plaintiffs had not proved that they were creditors of the Leader Waist Company during the period in which the defendant was, as alleged, a partner.

(3) That the plaintiff could not, in any event, have judgment for the amount of all the indebtedness of the Leader Waist Company.

Action dismissed with costs.

MIDDLETON, J. DECEMBER 17TH, 1918.

HOLLAND v. TOWN OF WALKERVILLE.

Municipal Corporations—Negligence—Injury to Building in Town by Water Flowing into Alley—Cause of Flow of Water—Construction of Pavements and of Buildings Adjoining Alley—Excavation Made in Soil of Street by Owner of Injured Building.

Action for damages for injury to the plaintiff's building by water, by reason of the negligence of the defendants, the Municipal Corporat on of the Town of Walkerville, as the plaintiff alleged.

The action was tried without a jury at Sandwich.

J. H. Rodd, for the plaintiff.

R. L. Brackin and J. Sale, for the defendants.

MIDDLETON, J., in a written judgment, said that the plaintiff owned land at the corner of Assumption street and Lincoln road in Walkerville. On this he erected a large building with stores below and flats above, extending east along the south side of Assumption street from Lincoln road to an alley in the rear. Early in the construction, the rear-wall along the alley fell in and had to be rebuilt and then fell in a second time and was again rebuilt. It was said that this was caused by rain and surface water which was caused to flow into the alley by reason of the pavement constructed by the municipality upon Assumption street, and by water cast upon the alley from adjoining buildings across the alley—the "corporation was negligent in permitting the buildings to be constructed so as to cast waters upon the alley in considerable volume."

When the claim was first put forward, it was alleged that the wall had been carried away three times, instead of twice, and traces of this dishonesty persisted in the evidence adduced at the trial.

The learned Judge said that he had come to the conclusion that the view he expressed at the trial should prevail—that the falling of the wall was not to be attributed to anything for which the defendants were responsible.

When the plaintiff started to build, he intended the brick foundation-wall to go to the boundary of his property; and, to enable this to be erected, without any colour of right he excavated the soil of the street and the alley some distance beyond his property-line. On the alley side some soil fell in and had to be removed, and, when the wall was built, he filled in earth in this excavation. This earth, lacking cohesion when wet, exerted very substantial pressure inward upon the wall, which was not fully hardened, and which lacked weight and support, and so it fell. The cause was satisfactorily given by the defendants' witnesses.

Assumption street was graded downward from the lane from the point where the alley entered it; and the alley, now paved, was then unpaved, and sloped to the street from a point about 50 feet from the street line. Where the kerb was cut away to afford an entrance to the alley from Assumption street, there seemed to be a hollow in the pavement which caught the rain as it fell and which was imperfectly drained, but this was not the cause of the so-called "rush of water." In the heavy rain there was water in the lane upon the surface from the natural drainage and from the roof of the shed and barns. This, no doubt, settled into the soft earth of the excavation in the lane, unlawfully made by Holland, and was ample to accomplish the result. There was no great flood, just an ordinary heavy thunder-shower.

Action dismissed with costs.

MIDDLETON, J. DECEMBER 17TH, 1918.

*ANDERSON v. TOWNSHIPS OF ROCHESTER AND MERSEA.

Highway—Nonrepair—Traveller in Motor-vehicle Killed—Vehicle Skidding and Sliding into Ditch at Side of Travelled Road—Negligence of Municipal Corporations—Absence of Fence or Guard—Ditch Constructed for Drainage Purposes under Legislative Sanction—Responsibility of Municipality—Negligence of Driver of Vehicle—Husband of Person Killed and Plaintiff in Action for Damages for Death—Evidence.

Action for damages for the death of the plaintiff's wife in an automobile accident, caused, as the plaintiff alleged, by the negligence of the defendants in regard to the condition of a highway forming the boundary between the two townships.

The action was tried without a jury at Sandwich.

T. Mercer Morton, for the plaintiff.

J. H. Rodd, for the defendants.

MIDDLETON, J., in a written judgment, said that the plaintiff was driving a heavy car along the road, his wife, her brother and sister, and some children, being in the car, on the 30th June, 1918, about midday, when it started to rain and soon rained very heavily. He was about to turn into the premises of one Desmarais for shelter, when the car skidded and slid on the clay to the side of the road (as travelled), the wheels going into the ditch, the car was overturned, and the plaintiff's wife was instantly killed.

A drain had been constructed along the road, at the instance of residents in the adjoining township (Gosfield), for the purpose of draining lands in that township; and the sole function of the drain was to afford the waters from Gosfield an outlet in Silver creek, a stream crossing Mersea and Rochester. The drain was constructed under the sanction of the law and under the supervision of a competent engineer, over whom the defendants had no jurisdiction. The use thus made of the highway was an abnormal use, permitted and approved by the Legislature having jurisdiction in the premises. The ditch was necessarily wide and deep to carry the water to the outlet, and manifestly any one who left the travelled way and fell into the ditch might sustain injury. The road ran beside the ditch, and was formed of the natural clay, graded and kept in fair condition. The crown of the road was 11 inches—less than the height necessary under the "good roads" requirements of the Highway Improvement Act, R.S.O. 1914 ch. 40.

So far as the road itself was concerned, it was admitted that there was no negligence. It was contended that the neglect to provide an adequate guard or fence along the course of the ditch was such negligence as to create liability, and that the accident was caused by this negligence.

The defendants not only denied their liability, but contended that the accident was the result of the plaintiff's fault.

There was no concealed trap—the danger was obvious and known to the plaintiff.

The plaintiff's heavy car, without chains on the wheels, required most cautious and skilful handling to make the turn into Desmarais' lane. What the plaintiff did was to depart from the crest of the road so as to make the turn on a wide curve, and it was when he did so that the fatal skid occurred.

The proximate cause of the accident was the plaintiff's omission to do the things which, in the circumstances, he ought to have done, and his doing the things he ought not to have done—this in law being negligence.

The drain or ditch at the side of the road was not one which the defendants were required to guard or fence. The situation was not such as reasonably to call for this protection. It was not like the case of a hole in a sidewalk or in the permanent pavement of a travelled road. Nor was it a peril arising from work done by the municipality upon its own road. It was the case of part of a road-allowance having been taken by legislative authority for the construction of a work of public or quasi-public character. The peril, if any, arose from the nature of that work; and the law which permitted its construction did not require it to be fenced or guarded. As soon as that part of the highway was taken for the public use, the municipality was, quoad that work, relieved from responsibility.

The situation was not essentially different from that arising where a railway crosses a highway upon the level, or a telephone company places poles upon the highway. The railway or telephone company creates, under legislative sanction, that which would be an obstruction or a danger. This does not impose a duty upon the municipality to guard the crossing or to place lights upon the poles. See Holden v. Township of Yarmouth (1903), 5 O.L.R. 579.

The action should be dismissed—the defendants might well be generous enough to forgo costs.

RIDDELL, J. DECEMBER 18TH, 1918.

RE ARMSTRONG.

Will—Construction—Devises to Children with Remainders to Grandchildren—Grandchildren Taking per Stirpes—Child Dying without Children—Intestacy as to Remainder.

Motion by the executors of the will of Mary Ann Armstrong, deceased, for an order determining a question which was not raised upon a previous application: see Re Armstrong (1918), ante 148.

The motion was heard in the Weekly Court, Toronto.

Grayson Smith, for the executor.

F. W. Harcourt, K.C., for the grandchildren of the testatrix.

RIDDELL, J., in a written judgment, said that of the six children named by the testatrix in the devise, three, namely, Susan Richardson, Emily Detroer, and Thomas Edwards, had died, leav-

ing children; one, Maria Myers, had died, without children; one, Annie Lamb, was living, with children; and Alice Lefor was living, without children. Of the two last-named it was not necessary to speak. The learned Judge was asked to decide what became of the shares of those who were dead.

(1) Both on principle and authority it was clear that the children of the deceased took per stirpes, not per capita: Theobald on Wills, Can. ed., p. 787; Willes v. Douglas (1846), 10 Beav. 47; Waldron v. Boulter (1856), 22 Beav. 284; Re Bauman (1909-10), 1 O.W.N. 293, 493, 15 O.W.R. 4, 423; Re Laverick's Estate (1853), 2 W.R. 113, 18 Jur. N.S. 304.

(2) The share of Maria Myers, who was dead, without children, was not disposed of; and this remainder was to be divided as on an intestacy.

Costs out of the estate.

PROCTOR v. DÉCARIE—LENNOX, J.—DEC. 17.

Vendor and Purchaser—Agreement for Sale of Land—Action for Balance of Purchase-price—Deductions—Interest—Costs.]—Action to recover $971.10 alleged to be the balance due to the plaintiff of the purchase-price of land and a stock of merchandise and store-fixtures sold by the plaintiff to the defendant. The action was tried without a jury at Fort Frances. LENNOX, J., in a written judgment, said that the defendant was put into possession of all the property, real and personal, covered by the agreement of sale and purchase, shortly after its execution on the 8th May, 1916. The total consideration was $5,000, of which $1,000 was paid on the execution of the agreement. There was a safe upon the premises, which was included in the contract. The defendant asserted that the plaintiff had not a good title to the safe, and that he (the defendant) was compelled to pay one O'Neill $180 in order to protect the title to the safe. Upon the evidence there was a dispute about the safe and certain other matters, which the learned Judge discussed at length and determined in favour of the plaintiff. He directed that judgment should be entered for the plaintiff for $1,000, less $89.65 paid by the defendants into a Division Court upon garnishing proceedings taken therein, and any additional sum which the defendant might pay before judgment, and less $10.80 for taxes (if still owing), with interest at 8 per cent. on $1,000 from the 8th August, 1917, to the commencement of the action, and at 5 per cent. thereafter, and the costs of the action. The defendant is to pay into Court a sufficient sum with that already in Court to make up $1,000 with interest, less

the deductions, and the costs of the action, and the money is to be paid out to the plaintiff upon execution and delivery to the defendant's solicitor of a proper conveyance or transfer of the land. A. G. Murray, for the plaintiff. C. R. Fitch, for the defendant.

GARRISON v. EASTWOOD—LENNOX, J.—DEC. 17.

Slander—Action for, Tried without Jury—No Actual Damage Sustained—Small Sum Assessed as Damages—Lump Sum Allowed for Costs.]—An action for slander, tried without a jury at Kenora. LENNOX, J., in a written judgment, said that slander actions as a rule are not to be encouraged; and this action did not come within the range of exceptional instances in which the party defamed is compelled to come into Court to vindicate his character and to refute widely published and necessarily injurious slanders. In this case the slander was published only to one man, and he knew that the charge made against the plaintiff was unfounded, and said so. On the other hand, the allegation of theft certainly involved the imputation of serious wrongdoing, and the offence was greatly aggravated by the defendant's refusal to withdraw the charge and apologise when the plaintiff requested him to do so. No actual damage was sustained, and the defendant had already been punished in some degree by payment of costs of an adjournment—unnecessarily and improperly asked. His solicitor had waived trial by jury, and the defendant should have stood by it. The plaintiff said, very reasonably, that he did not want to make a profit out of the action. There should be judgment for the plaintiff for $25 damages, with costs—inclusive of the costs of adjournment—fixed at $100. J. F. MacGillivray, K.C., for the plaintiff. J. A. Kinney, for the defendant.