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APPELLATE DIVISION.

NOVEMBER 27TH, 1914.

EPSTEIN v. LYONS.

Title to Land—Ascertainment of Boundary-line between Tiers of Lots—Evidence—Ownership of Legal Estate—Mortgage—Foreclosure—Possession — Non-user — Right of Way—Easement—Injunction—Conveyance to Assignee for Benefit of Creditors—Title Outstanding in Assignee.

Appeal by the defendants from the judgment of KELLY, J., 5 O.W.N. 875.

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

E. D. Armour, K.C., for the appellants.

G. Lynch-Staunton, K.C., and W. A. Logie, for the plaintiffs, the respondents.

THE COURT dismissed the appeal with costs.

NOVEMBER 27TH, 1914.

*ONTARIO ASPHALT BLOCK CO. v. MONTREUIL.

Vendor and Purchaser—Agreement for Sale of Land—Specific Performance — Water Lot — Conveyance—Title—Trust for Remaindermen—Costs.

Appeal by the defendant from the judgment of LENNOX, J., at the trial.

The judgment of LENNOX, J., and that of the Appellate Division upon the main questions are reported in 29 O.L.R. 534.

*To be reported in the Ontario Law Reports.

Two questions were left open, and were now disposed of by the judgment of the Court (MEREDITH, C.J.O., MACLAREN and MAGEE, JJ.A., and LEITCH, J.), delivered by MEREDITH, C.J.O.:—

This case was heard before us on the 7th November, 1913, and we gave judgment on the main points, on the 17th November, 1913 (29 O.L.R. 534), but we left open two questions: the one as to costs, and the other as to whether the appellant should be ordered to convey to the respondent the water lot which he contended was held by him as trustee for his children, although it stands in his own name.

The Court suggested to the parties that "the proper course to be taken in the circumstances is either to direct an inquiry into the title of the water lot, or to retain the action for six months in order to enable the remaindermen, if so advised, to take steps to establish their right."

Neither party desired to do anything, apparently wishing that judgment be given, when they will shape their course as they may be advised.

We think that the judgment must order the conveyance of the water lot. It is true that the appellant sets up that he is a trustee for his children. Of course, if the action were between himself and his children that would be conclusive, but in this action it has not that effect.

I should have mentioned that the number of the lot is 97, and the water lot is in front of it, on the Detroit river.

The appellant, believing himself to be the owner of the land, under the will of his father, made a lease to the respondent, for a term of years, giving the respondent an option to buy at the expiration of the term. The respondent exercised the option, and, in litigation which subsequently took place, it was determined that the appellant was not owner in fee of the land, and that under the will he was only tenant for life, and on his death the property went to the children. Judgment has, therefore, gone for specific performance, with compensation in respect of the interest which the appellant is not in a position to convey.

Then with regard to the water lot, the facts appear to be that the practice of the Crown Lands Department is to sell the water lot to the owner of the adjoining land; that the appellant, believing himself to be, under his father's will, the owner in fee of lot No. 97, applied for a patent of water lot in front of 97: that he laid before the Department of Crown Lands an abstract of title, and subsequently furnished to the Department an extract from the will, containing the devise under which it was assumed

that he took, and that the Crown, evidently under the same impression that the appellant was under, that he was the owner in fee of the land, granted the water lot to him.

We think that, under these circumstances, especially as nothing has been done by the children to assert any title to the water lot, and advantage has not been taken of the delay (now nearly a year) since our former judgment was given, to do so, the proper view is that the Crown intended to grant the water lot to the appellant, and that he is, therefore, not a trustee for the remaindermen of the remainder in fee after his life estate for his children. Of course, this decision will in no way bind the children in the event of their seeking hereafter to establish their right to it, but between the parties we determine that it has not been established that the appellant is a trustee of the remainder in fee for his children; and, therefore, specific performance in respect of the water lot will be adjudged.

As to costs, we will not disturb the disposition made by the learned trial Judge of the costs of the action, but we think there should be no costs of the appeal to either party.

NOVEMBER 30TH, 1914.

*JOHN MACDONALD & CO. LIMITED v. TEW.

Land Titles Act—Mortgage—Inability to Register—Deed of Assignment for Benefit of Creditors—Registration of—Priorities—R.S.O. 1914 *ch.* 126, *secs.* 45, 115—*Form of Judgment—Rectification of Record—Costs.*

Appeal by the defendant from the judgment of WINCHESTER, Senior Judge of the County Court of the County of York, in favour of the plaintiffs in an action in that Court.

The plaintiffs by their statement of claim alleged that in 1911 S. A. Campbell made an assignment for the benefit of her creditors to the defendant, who thereupon registered the assignment against land owned by her, which had been brought under the Land Titles Act; that on the 10th November, 1910, the plaintiffs, being creditors, obtained from her a mortgage for $600 on this lot; but, as it was in the form given by the Short Forms of Mortgages Act, they were unable to record it; that, after some

*To be reported in the Ontario Law Reports.

time, they succeeded in getting her to execute a mortgage in the proper form (23rd August, 1912), but could not record this by reason of the assignment to the defendant; that the plaintiffs then endeavoured to induce the defendant to recognise their right as mortgagees prior to his assignment, but he refused. The plaintiffs claimed: (1) a declaration that their mortgage was entitled to priority over the assignment; (2) a direction that the assignment be removed from the register or otherwise postponed to the mortgage; (3) costs.

The County Court Judge gave judgment declaring that the plaintiffs' mortgage was entitled to priority to the deed of assignment for the benefit of creditors made by S. A. Campbell to the defendant; directing that it be so recorded, and the register and records in the Land Titles office rectified accordingly; directing that the plaintiffs should value their security in connection with their claim against the estate of S. A. Campbell; that they should be entitled to add their costs of this action to their claim against the estate; and that the defendant's costs of the action should be paid out of the estate.

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

G. G. S. Lindsey, K.C., for the appellant.

A. C. McMaster, for the plaintiffs, respondents.

MULOCK, C.J.Ex.:— . . . In my opinion the decision of the learned Judge was substantially correct, and should be modified in one formal respect only. The appellant is not a transferee for value; and by sec. 45 of the Land Titles Act, R.S.O. 1914 ch. 126, "a transfer of registered land, made without valuable consideration, shall be subject, so far as the transferee is concerned, to any unregistered estates, rights, interests, or equities subject to which the transferor held the same," etc.

The Land Titles Act deals simply with the question of registration; it does not interfere with any common law or other rights of an owner of land to mortgage the same by instrument not capable of registration under the Land Titles Act. The appellant, being a volunteer, acquired by the transfer from the mortgagor to him only the mortgagor's interest, or, in other words, took subject to the respondent company's lien: National Bank of Australasia v. Morrow (1887), 13 V.L.R. 2; Jellett v. Wilkie (1896), 26 S.C.R. 282.

The mortgage in question purports to convey the legal es-

tate; and, having regard to the fact that under the Land Titles Act a security on land is to be created by a charge, the legal estate remaining in the owner, the proper course is, instead of recording the same in the books of the office as a link in the chain of title, to deposit it with the proper Master of Titles, and thereupon that officer should enter on the register the plaintiffs as owners of a charge, with such particulars to be taken from the mortgage as are required by sub-sec. 2 of sec. 30 of the Land Titles Act.

Subject to this variation, the appeal is dismissed with costs.

CLUTE, J.:—I am of the same opinion. . . . Section 115 of the Land Titles Act was passed expressly to cover a case like the present. The trial Judge properly held that the plaintiffs were entitled as mortgagees in fee. The register does not shew this, and it should be rectified in the manner suggested by the Chief Justice.

With this variation, the appeal should be dismissed with costs.

RIDDELL, J.:— . . . There are only two matters that are open: (1) what order, if any, should be made under sec. 115 of the Act R.S.O. 1914 ch. 126 or otherwise; (2) costs.

In view of the many difficulties attending amendment of the records of a Master of Titles, I think it not wise to order any change under sec. 115, when all the advantages derivable from that course can be easily and simply obtained by declaring the defendant trustee for the plaintiffs to the extent of their mortgage . . . in priority to the trusts of his assignment.

Then as to costs. On the 24th February, 1914, the plaintiffs' solicitors wrote the defendant saying that they had already pointed out to him that the plaintiffs had in 1910 obtained a mortgage from S. A. Campbell, which they were unable to register, but that recently they had procured a mortgage in proper form, and "we did not consider that your assignment could avail against this." The solicitors go on to say that the plaintiffs had sold the property and wanted to get rid of the assignment, and ask an answer whether the defendant will release the property. The very same day, the defendant answered: "On statement of facts made by you we cannot see our way to allow you to have priority over assignment." After waiting some twenty days, the plaintiffs issued their writ. That the plaintiffs were justified in asking a declaration of their right is clear. That

the defendant, in denying the right now admitted, was wrong, is equally clear.

Then when it came to the pleadings, the defendant filed a long, involved, and argumentative statement of defence, instead of plainly and unequivocally admitting the plaintiffs' claim, so that a motion for judgment could be made. I think the County Court Judge was not at all too severe on the defendant in ordering that the plaintiffs should have their costs; but rather fault might be found that they add these costs to their claim and thereby obtain only a dividend on them.

As to the costs of the appeal, the plaintiffs were substantially right; the form of the judgment was wrong. This Court has recently decided, in Watson v. Jackson (1914), 31 O.L.R. 481, a similar case, that the respondent should have his costs. That, I think, should be directed in this case also.

Some argument took place before us on the effect of the plaintiffs receiving a dividend on the hypothesis that they had no security; but there is no evidence of that fact, if it is a fact, and the principle of Clark v. Phinney (1896), 25 S.C.R. 633, and Steen v. Steen (1907), 9 O.W.R. 65, 10 O.W.R. 720, cannot be made to apply here.

MACLAREN, J.A., agreed with the opinion of RIDDELL, J.

Appeal dismissed with costs, subject to a variation in the judgment below.

NOVEMBER 30TH, 1914.

LA FORTUNE v. CITY OF PORT ARTHUR.

Street Railway—Child Run over by Car and Killed—Height of Fender — Approval of Ontario Railway and Municipal Board—Negligence—Finding of Jury—Evidence to Support—Action under Fatal Accidents Act—Parents of Child of Six—Reasonable Expectation of Pecuniary Benefit from Continuance of Life.

Appeal by the Corporation of the City of Port Arthur, the defendants, from the judgment of BOYD, C., upon the findings of a jury, in favour of the plaintiff in an action by the father of a boy who was killed by an electric street railway car operated by the defendants, to recover damages for his death.

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

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

J. M. Godfrey, for the plaintiff, respondent.

MULOCK, C.J.Ex.:—The appellants operate a street railway with two tracks on Victoria street, in the town of Port Arthur, running easterly and westerly. On the afternoon of the 14th November, 1913, one of the appellants' cars proceeding westerly was slowly approaching Syndicate street, where it was to stop. Here another car, going easterly, passed it, and, just as the east-bound car cleared the front of the west-bound car, the boy ran across the rear of the east-bound car and in front of the west-bound car, tripped, and fell on his stomach between the rails. The car is equipped with an automatic fender, which projects about four feet in front of the car, and, unless it strikes an object, or is lowered by the motorman, it retains its elevated position. If it strikes an object it immediately drops and picks it up.

The fender did not strike the boy and fall and pick him up, but, instead, it passed over him, and he was killed by the car.

The jury in their verdict say: "In our opinion the fender was too high. We exonerate the motorman from all blame." This is the only negligence found against the appellants.

The fact that the design of this fender had been approved of by the Ontario Railway and Municipal Board did not relieve the appellants of the duty of properly operating it; and the question is, whether the fender was in a proper position when the boy fell in front of the approaching car. . . .

[The learned Chief Justice set out portions of the testimony of Wilfred Sievers, motorman on the car which killed the boy, John Mallon, an eye-witness of the accident, and M. O. Robinson, traffic manager of the appellant corporation.]

According to this evidence . . . if the fender had been "an inch or so" lower it would have caught the boy and saved his life.

The witness Wallace, who was within 30 feet of the point where the accident happened, had a good view of the whole occurrence; and, if his evidence is correct, what happened was that the boy fell on the track some nine feet or more in front of the car. The fender at first was too high to touch him, but was dropped by the motorman upon him, and then dragged him till he was killed. The motorman says that he did not drop the

fender, and that it cleared the boy, and that the car was backed up from over the boy.

Up to the time when Robinson, the traffic manager, appeared on the scene, the fender had not been raised. Thus his evidence has reference to the fender after and not before the accident, and in that respect is valueless.

Having regard to the finding of the jury, it would seem that they took that view of Robinson's expert opinion. At one place in his evidence he states that the condition of the road and the oscillation of the car required the fender to be carried at a higher elevation than 4 inches above the rails, but he says that he often ran a car with the fender at that elevation, and that once it tripped. The fact that he so ran the car shews that it was not necessary to carry the fender 7 inches above rail level, its height at the time of the accident. If it had been "an inch or so" lower, the accident would not have happened. The reason assigned by Robinson was no excuse for the fender being so high. The condition of the track was under the appellants' control. If it had been "true," there would have been no oscillation of the car, and thus no need of the fender being so high. I therefore think there is evidence to support the jury's finding of negligence.

The only other point pressed on us by the appellants was, that the respondent had no reasonable expectation of pecuniary benefit from the continuance of his son's life. The lad was a healthy child, within 2 or 3 months of 6 years of age. He was an only child. The father was 58 years of age, and was working as a watchman for the Thunder Bay Elevator Company. His mother was alive, and had passed the child-bearing period. These circumstances constitute a basis of facts from which the jury might draw the inference that the father had a reasonable expectation of pecuniary benefit from the continuance of his son's life. The question is entirely one of fact, and it was for the jury to draw the proper inference, and I see no ground for disturbing the jury's finding.

This appeal should be dismissed with costs.

MACLAREN, J.A., and CLUTE, J., agreed.

RIDDELL, J., agreed that the appeal must be dismissed with costs.

Appeal dismissed with costs.

NOVEMBER 30TH, 1914.

*CAMPBELL FLOUR MILLS CO. LIMITED v. BOWES.

*CAMPBELL FLOUR MILLS CO. LIMITED v. ELLIS.

Contract — Breach — Defective Material Used in Building by Contractor—Want of Supervision by Architect—Separate Actions by Building Owner against Contractor and Architect—Actions Tried together and Consolidated by Order of Trial Judge—Judgment against both Defendants—Affirmance on Appeal—Variation in Form of Judgment—Effect of Judgment against one Defendant—Separate Contracts—Parties—Joinder—Rules 67, 134—*Damages—Costs.*

Appeals by the defendants from the judgment of LATCHFORD, J., at the trial, consolidating the two actions and directing that the plaintiffs should recover from the defendants the sum of $19,500, subject to certain deductions.

The appeals were heard by MULOCK, C.J.Ex., MAGEE, J.A., RIDDELL and SUTHERLAND, JJ.

I. F. Hellmuth, K.C., and W. A. McMaster, for the defendants Ellis & Connery, appellants.

Featherston Aylesworth, for the defendants Bowes & Francis, appellants.

H. H. Dewart, K.C., and E. T. Coatsworth, for the plaintiffs, respondents.

The judgment of the Court was delivered by RIDDELL, J.:— The plaintiffs, a milling company, employed the defendants Ellis & Connery, a firm of architects, to draw plans and specifications for a building, a feed-mill and elevator, of reinforced concrete; and they entered into a contract with the defendants Bowes & Francis, a firm of builders, to erect the same. The contract and specifications are well drawn, and, had they been adhered to, the plaintiffs would have had a satisfactory building.

The defendants Ellis & Connery were employed by the plaintiffs as architects to superintend the building, etc.; but, while the architects well knew that in any case contractors must be watched, they kept no man on the work, and the only supervision given was by one of the firm for a short time, four or five

*To be reported in the Ontario Law Reports.

mornings in the week. No laboratory tests were made of the concrete, although that was stipulated for in the specifications; the very imperfect test that was used was applied only four times; no means were taken to find out what quantities the contractors were actually using when the architect was not present, nor the kind of material, although the architect had found it necessary at different times to reject the gravel which the contractors were intending to use. In fact the architects seem to have trusted almost implicitly to the honesty and capacity of the contractors.

What might not unnaturally have been expected, occurred. After a fairly satisfactory belt of about 15 feet had been built, a belt of about twenty feet followed which was admittedly defective and dangerous. On this again was built a reasonably satisfactory superstructure.

While the work was going on, the architects gave progress certificates from time to time, and these were paid, $18,119. The plaintiffs brought the two actions, one against the contractors and the other against the architects. The writs were tested on the same day, the 16th August, 1913, and are in the order above given.

In the former action the claim is for breach of the building contract; in the latter for "negligence . . . in supervising the construction . . . negligence and improper supervision."

The contractors plead that the work was done to the satisfaction of the architects, and other defences unnecessary to notice, as they are not relevant on this appeal.

The architects plead that they were not bound to give continuous superintendence, and that the damage occurred owing to the plaintiffs' failure to employ a clerk of the works and provide continuous superintendence. They say that the work, etc., was proper so far as they were able to ascertain from their superintendence, and pleaded to damages.

When the actions were ripe for trial and after the coming into force of the new Rules, a motion was made by the plaintiffs to consolidate the two actions. This was referred by the Master in Chambers to the trial Judge. At the trial, the motion was renewed before Mr. Justice Latchford. . . .

[RIDDELL, J., then set forth what was said by the trial Judge and counsel, the result of which was that the Judge determined to try the two actions together.]

The trial proceeded accordingly. It was abundantly proved that the belt of some twenty feet was defective and dangerous,

and that this condition should have been discovered at the time by the architects. The architects are right in saying that it was the neglect of continuous supervision which caused the damage, but it is clear from the evidence that the default was not that of the plaintiffs but of the architects.

Some question was raised before us . . . as to the proper method of measuring the damages; but we disposed of that adversely to the defendants.

The two points mainly urged by the architects were: (1) that they were not called upon to exercise any supervision other than they did; and (2) that there should be no consolidation.

As to the first point, Chambers v. Goldthorpe, [1901] 1 K.B. 624, was cited as laying down the rule that an architect is not liable to an action for negligence in the exercise of his functions. An examination of that case will shew the inaccuracy of the contention. . . .

[Examination of that case and of Rogers v. James (1891), 8 Times L.R. 67; Jameson v. Simon (1899), 1 F. (Ct. of Sess. Cas., 5th series) 1211; Leicester Guardians v. Trollope (1911), 75 J.P. 197.]

The architects failed to perform their elementary duty to exercise a sufficient supervision over the building, and so broke their contract. Damage followed the breach immediately, by the builders placing defective materials in the building, and so on the land of the plaintiffs. For this an action will undoubtedly lie.

The second point is at first blush merely a matter of practice; but the objection goes much deeper. . . .

The learned trial Judge tried the cases together, and at the conclusion, when giving judgment, he said: "If there is no authority for consolidating two actions such as these, it seems to me that it is time that such authority was made; and, so far as I have power to make it, and in addition to the order which I made at the beginning of the case that the two actions should be tried together, I now order their consolidation."

The formal judgment reads:—

"2. This Court doth order that these two actions be and the same are hereby consolidated.

"3. This Court doth order and adjudge that the plaintiffs do recover against the defendants the sum of $19,500, subject however to the deduction hereinafter mentioned."

Clause 4 provides for determination by the Master of the amount of the deduction, not here in controversy.

"5. And this Court doth further order and adjudge that the defendants do pay to the plaintiffs their costs of these actions, to be taxed as the costs of one action, up to and inclusive of the judgment, forthwith after taxation thereof."

Clause 6 provides for the costs of the reference.

The judgment has the heading in both suits.

The appeal of the architects is really based upon the proposition that the plaintiffs were bound to elect which set of defendants they would sue, and that a judgment against the contractors would bar an action against the architects.

The contractors admit that they are liable, and before us complained only of the quantum. This we decided on the argument adversely to the appeal.

There are many cases in which one having a cause of action against two or more others is barred of proceedings against one by obtaining judgment against another, even without satisfaction of the judgment. These all depend upon the principle of our law that where a judgment is obtained every cause of action upon which the judgment is based is merged in the judgment and disappears—"transit in rem judicatam." This principle . . . is too firmly established for the Court to question it.

. . . .

[Reference to Curtis v. Williamson (1874), L.R. 10 Q.B. 57; Calder v. Dobell (1871), L.R. 6 C.P. 486, 499; Smethurst v. Mitchell (1859), 1 E. & E. 622; Priestly v. Fernie (1865), 3 H. & C. 977; Sullivan v. Sullivan, [1912] 2 I.R. 116; Morel Brothers & Co. Limited v. Earl of Westmorland, [1904] A.C. 11; French v. Howie, [1905] 2 K.B. 580, [1906] 2 K.B. 674; McLeod v. Power, [1898] 2 Ch. 295; In re Hodgson (1885), 31 Ch.D. 177; Hammond v. Scholfield, [1891] 1 Q.B. 453, 457; Addison on Contracts, 11th ed., p. 193; Blumfield's Case (38 & 39 Eliz.), 5 Co.R. 86 B; Vestry of Bermondsey v. Ramsey (1871), L.R. 6 C.P. 247, 251; Blyth v. Fladgate, [1891] 1 Ch. 337, 353; Drake v. Mitchell (1803), 3 East 251; Cambefort v. Chapman (1887), 19 Q.B.D. 229; Wegg Prosser v. Evans, [1895] 1 Q.B. 108; Kendall v. Hamilton (1879), 4 App. Cas. 504; King v. Hoare (1844), 13 M. & W. 494; Scarf v. Jardine (1882), 7 App. Cas. 345.]

In the present case the plaintiffs had two separate and distinct contracts, the one with the contractors, which was in writing, the other with the architects, which was, as in Jameson v. Simon, supra, not in writing, but implied from the employment. The contractors broke their contract when they put bad material into the building; at the same moment the architects broke theirs

because they allowed this to be done. Under the circumstances, the damages are the same under either contract; but that is wholly immaterial. The contracts are not the same; and, if judgment were to be obtained in the action against the contractors, it would destroy their contract quoad hoc; but it could not affect the contract of the architects, that non transit in rem judicatam, but remains a simple contract.

It is true that, if the full amount of the damages were realised out of the contractors, no action (except perhaps for nominal damages) would lie against the architects, but that is on an entirely different principle, namely, that the defendants have suffered no damage from the default of the architects.

The result is that the plaintiffs are entitled to judgment against both the contractors and the architects, and that is what the judgment in appeal gives them.

Technically, I think, the judgment is wrong in "consolidating" the actions. In strictness, actions can be consolidated only when they are between the same parties . . . Rule 320. . . . "Consolidation," "consolidate," are not uncommonly used in a looser sense, indicating the stay of one action until another is tried, and the like; but no case of the kind is made here: Kuula v. Moose Mountain Limited (1912), 26 O.L.R. 332.

The plaintiffs might have insisted on a judgment in both cases with costs, either set of defendants to be at liberty to move in the nature of an audita querela to stay their action, on payment of costs, if and when the amount was made out of the other set, and either set of defendants to be at liberty to bring an action to recover from the other any sum paid by them, etc. (I do not suggest that any such action will lie on the facts, but the defendants should not be precluded from litigating the question if so advised.) Probably the plaintiffs would consent to this being done now if the defendants desire it. If all parties agree, that may be done, and the appeal to that extent allowed; but, as the real question is decided against the defendants, they should pay the costs of the appeal.

There is, however, a better course that should be adopted. . . .

[Reference to Rule 67; Smurthwaite v. Hannay, [1894] A.C. 494; Crane v. Hunt (1895), 26 O.R. 641; Hinds v. Town of Barrie (1903), 6 O.L.R. 656; Andrews v. Forsythe (1904), 7 O.L.R. 188; Baines v. City of Woodstock (1905), 10 O.L.R. 694; Thompson v. London County Council, [1899] 1 Q.B. 840; Frankenburg v. Great Horseless Carriage Co., [1900] 1 Q.B. 504.]

The present Rule (67) was introduced to get over the difficulties and inconveniences found in the old practice by reason of such decisions; and now, if the same series of transactions, etc., give a cause of action against more than one, they can all be sued in one action, though the causes of action be not the same.

Rule 67 (2) gives power to the Court to prevent inconvenience or injustice by such joinder.

The same series of transactions gave a cause of action against the contractors because they broke their contract, and against the architects because they broke theirs. The causes of action were not, it is true, in all respects identical, but that is immaterial under our present Rule. Had, then, the actions been brought after the coming into force of our present Rule, there would have been no reason why the contractors and architects should not have been joined as defendants. That being so, Rule 134 empowers the Court to add either set of defendants as defendants in the other action and dispose of all matters in the action selected.

Unless the parties agree on the course previously indicated, we should add the architects as defendants in the first action (or the contractors in the other, as the plaintiffs may prefer) and stay the other action.

The plaintiffs should have their costs of the appeal. The same rights will be reserved to either set of defendants as if the course previously suggested were followed.

In other respects the appeal is dismissed.

NOVEMBER 30TH, 1914.

McCAULEY v. GRAND TRUNK R.W. CO.

Railway—Injury to Servant—Brakesman—Negligence of Engineer—Findings of Jury—Workmen's Compensation for Injuries Act, R.S.O. 1914 *ch.* 146, *sec.* 3 (*e*)—*Failure to Provide Efficient Appliance—Railway Act, R.S.C.* 1906 *ch.* 37, *sec.* 264 (*c*)—*Contributory Negligence—Evidence—Appeal—Equal Division of Court.*

Appeal by the defendants from the judgment of LENNOX, J., upon the findings of a jury, in favour of the plaintiff, for the recovery of $2,000 and costs, in an action for damages for per-

sonal injuries sustained by the plaintiff when working as a brakesman in the defendants' service.

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

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

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

MULOCK, C.J.Ex.:—On the 21st July, 1913, the respondent was acting as brakesman on a train of the appellant company, which was proceeding easterly from Belleville to Brockville. At Napanee, an intervening station, it was necessary to put one of the freight cars on a siding by the method called a flying shunt. The engine was heading easterly, and the car to be moved was coupled to the front of the engine. The trainmen in charge of the engine and car consisted of the engineer and his fireman, both on the engine, and the respondent, who was acting as brakesman for the car. The flying shunt was to be made by the engine shoving the car a short distance easterly of the switch, then pulling it back, the brakesman uncoupling it from the engine when both were moving together, but before reaching the switch, the engine remaining on the main track, and, when separated from the car, so accelerating its speed as to clear the point where the switch when thrown over would connect with the main rails, and thereby divert the following car from the main track to the siding. Before the car was shoved easterly, the brakesman, by direction of his superior, had taken his place on the car; and, when the engine and car had reached a certain point easterly of the switch, they came to a stop. The respondent, who up to this time had been on the roof of the car, descended and took his stand on the footboard in front of the engine, holding on to an iron rod by his right hand. He then gave to the engineer the signal to back, and thereupon the latter backed the engine and car; and, when they had proceeded a short distance westerly, the respondent signalled to the engineer to slacken speed. This signal was also complied with; and then the respondent endeavoured by means of a lever, which was on the right side of the engine, to pull out a coupling-pin which attached the car to the engine. The lever, however, would not work, and he then moved slightly forward, and, reaching over with his right hand, succeeded in pulling out the other pin, which attached the coupler to the car. When engaged in this operation, the respondent was standing on the foot-board, hold-

ing with his left hand the iron rod which was affixed to the engine. When the engine and car were thus separated, the respondent stood up, turning his face northerly and westerly towards the engine, and was about to get in position to take hold of the rod with his right hand, in order to free his left for the purpose of signalling the engineer to accelerate the speed, when, before he had made the change or given the signal, the engineer accelerated the engine's speed with a jerk which threw the respondent off the engine, and he fell on the track, and was run over and injured by the car.

The following are the questions submitted to the jury with their answers:—

"1. Were the defendants guilty of negligence causing the plaintiff's injuries? A. Yes.

"2. If you say they were negligent, in what did the defendants' negligence consist? A. (1) By using an inexperienced employee as brakesman in performing the most dangerous operation in that branch of the service, in making a flying shunt. (2) The engineer should not have moved ahead without the proper signal according to the custom of the plaintiff, which sudden jerk caused the plaintiff to fall off. (3) In making a flying shunt that could have been avoided.

"3. Did the plaintiff voluntarily undertake the shunting operation, knowing and appreciating the risk he was assuming? A. No.

"4. Could the plaintiff, by the exercise of reasonable care, have avoided the accident? A. No.

"5. If you say "yes," then how could the plaintiff have avoided the injuries he sustained?

"Damages (based on earnings, under the statute), $2,000.

"Damages at common law, $2,000."

Of the three acts of negligence found by the jury, the second alone, in my opinion, gives a cause of action. Employment of an inexperienced brakesman, when such inexperience is not the causa causans, is not actionable. The cause of the accident was the sudden jerk of the engine, not the respondent's alleged inexperience. His proper place was on the car; had he remained there, the accident would not have happened; but the engineer knew that the respondent was on the engine, and responded to signals to back the engine and to check the speed when going westerly; and, even if the respondent was negligent in being on the engine, it was the engineer's subsequent negligence that caused the accident. The engineer, being aware of the respondent's dangerous position, owed to him the duty of exercising

care in order not by a sudden and unexpected start to throw the respondent off the engine.

The jury found that the respondent was not guilty of negligence which caused the accident, but that it was caused by the sudden jerk of the engine.

I attach no significance to the words "according to the custom of the plaintiff" in the jury's answer. No matter what may have been the custom of the respondent, the engineer was not justified in negligently giving such a jerk to his engine as caused the accident, and even endangered the respondent's life. The appellants are responsible for such negligence on the part of their engineer: Workmen's Compensation for Injuries Act, R. S.O. 1914 ch. 146, sec. 3 (*e*).

I therefore think this appeal should be dismissed with costs.

CLUTE, J., was of opinion, for reasons stated in writing, that the fact found by the jury that the engineer should not have moved ahead without the proper signal constituted negligence, and that that negligence was the cause of the accident. The learned Judge referred to Cook v. Grand Trunk R.W. Co. (1914), 31 O.L.R. 183; Birkett v. Grand Trunk R.W. Co. (1904), 3 O.W.R. 892; Grand Trunk R.W. Co. v. Birkett (1904), 35 S.C.R. 296; Stone v. Canadian Pacific R.W. Co. (1912), 26 O. L.R. 121; S.C. (1913), 47 S.C.R. 634. He then proceeded:—

The evidence shews that the plaintiff was where he had a right to be. The accident arose out of the fact that the lever would not work. Providing an efficient appliance is a duty imposed by the Railway Act, R.S.C. 1906 ch. 37, sec. 264 (*c*). . . .

The statute was passed in furtherance of the safety of employees so that the cars might be coupled or uncoupled without the necessity of the men going in between the ends of the cars. It does not say "between the end of a car and the engine;" and it is obvious, I think, that the danger to the brakesman is very different where he stands on the foot-board of the engine with a rail to hold on to, and where he goes between the cars, which, if they are in motion, exposes him to great risk. . . . He would have been in the same place and subject to the same danger if the lever had worked, but the conductor had increased the speed before waiting for the signal.

I am, therefore, clearly of opinion that it was a question of fact whether in doing what he did he was guilty of contributory negligence that caused the accident. The jury have answered this question in his favour; and, in my opinion, the defendants are concluded by the answer.

I would dismiss the appeal with costs.

RIDDELL, J. (after stating the facts) :—In respect of the three findings of negligence, the third is perverse: the learned trial Judge told the jury that the defendants had the right to make a flying shunt. Of the other two, the first is wholly unjustified by the evidence. We shall see later that it is immaterial in any case. Only the second is of importance. With some hesitation, I think that there is enough to justify this finding; not, however, upon the ground on which the jury seem to have proceeded, *i.e.*, the custom of the plaintiff when he was an engineer, but upon the ground that, in the very peculiar circumstances of the case, the engineer, knowing the plaintiff to be on the pilot, and so in a dangerous place, was called upon to exercise extra care and precaution.

Then as to the contributory negligence set up. It is said, first, that the plaintiff should not have been on the pilot of the engine at all to pull the coupling-pin: it is argued that he should have remained on the car—and, no doubt, this would have been much safer. The course pursued by the plaintiff necessitated his leaving the engine when in motion and mounting the car when in motion, both of which were accompanied with danger and admittedly were forbidden by the rules. There might be much in this contention, but for the fact that the engineer saw the plaintiff at the place in question, and, knowing him to be there, even wrongly if such was the case, should have exercised care towards him so situated.

The other ground is more formidable. The plaintiff had attempted to pull the pin on the engine, and failed. He knew then that his duty was to stop the train and find out what was the matter with it, and not to have the train run on or cut it by pulling another pin. The enormous importance of this rule is manifest. . . . When any appliance is found to be defective it is most important to have the defect remedied with the least possible delay. . . .

The negligence of the engineer, ex hypothesi, caused the plaintiff to fall off the engine, but that did him no harm in itself; it merely placed him in such a position that harm might come to him from the car. If the plaintiff had done his duty according to the rules and his instructions, that car would have been stationary, and the accident would not have happened. If there were more than one causæ causantes, *the* causa causans was the car moving; and that it was moving was due to the negligence of the plaintiff—who was taking a chance, as he puts it.

It is not necessary to cite authorities for the conclusion I

have arrived at. Cook v. Grand Trunk R.W. Co., 31 O.L.R. 183, is the latest of a long line of cases. The present seems a stronger case for the defendants. . . .

There is no room here for the "ultimate negligence" doctrine. After the plaintiff by his negligence had placed himself in peril, the engineer did not know of such peril so as to be able to do anything to avoid it.

I think that the appeal should be allowed and the action dismissed, both with costs if asked.

HODGINS, J.A.:—The jury have found negligence against the appellants, in that the engineer did not wait for the respondent to signal.

It is unnecessary to consider how far this is warranted by the circumstances, if the finding of want of contributory negligence is not maintainable.

The respondent broke the rule requiring him to stop the train when the lever failed to work. This infraction of duty continued down to the time of the accident, and was not merely technical, but proved an active factor in the result, as it permitted the train to continue in motion. While so breaking the rule, the respondent put himself in a position of peril, and the accident was the result. It could not have happened but for the motion of the train, nor without the change in the respondent's position, coincident with his impulse to effect his aim in a different way from that prescribed.

I think the case is very close to Cook v. Grand Trunk R.W. Co., 31 O.L.R. 183, and Grand Trunk R.W. Co. v. Birkett (1904), 35 S.C.R. 296. It is distinguishable from Stone v. Canadian Pacific R.W. Co., 47 S.C.R. 634, in that what the workman there did was in the course of his work, and he broke no regulation in doing it as he did, his fault being merely an error in judgment in dealing with a defective appliance.

The appeal should, in my opinion, succeed.

Appeal dismissed with costs, the Court being equally divided

NOVEMBER 30TH, 1914.

*MACDONELL v. WOODS.

Innkeeper—Liability for Luggage of Inmate Lost or Stolen—Lodging House or Boarding House Keeper—Negligence—Jury—Innkeepers Act—Bailment—Want of Reasonable Care—Finding of Fact by Appellate Court—Judicature Act, sec. 27—Damages.

Appeal by the defendants from the judgment of LENNOX, J., upon the findings of a jury, in favour of the plaintiff for the recovery of $800 and costs, in an action brought for the value of a trunk and contents belonging to the plaintiff, left at the Arlington Hotel, Toronto, of which the defendants were proprietors.

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

C. M. Garvey, for the appellants.

K. F. Lennox, for the plaintiff, respondent.

CLUTE, J.:—The plaintiff alleges that in December, 1913, she engaged a room in the Arlington Hotel, and had her trunk taken there, in accordance with an arrangement previously made; that after the trunk was delivered at the hotel it was lost or stolen, as the result of the negligence of the defendants, their servants or agents. The defendants deny that the trunk ever arrived at the hotel, and also deny negligence.

It was proven by the plaintiff that she engaged the room—No. 68—a week before she delivered the trunk, and it was arranged that she should take it on the 22nd. On that day she called up the hotel by telephone and told the clerk with whom she had made the arrangement that she was going to send her trunk that day at 2 o'clock, and he said: "All right, Mrs. Macdonell; I have kept room 68 for you." This evidence is not contradicted; the clerk . . . was not called by the defendants. The arrangement was, that she was to pay $7.50 a week or $30 a month for the room—the midday dinner and other meals were to be charged extra. On the 22nd, she sent the trunk by Hearn, cartage agent. He says that he called at Mrs. Macdonell's at 2 o'clock and received her trunk from her. . . . She instructed

*To be reported in the Ontario Law Reports.

him to take the trunk to the Arlington Hotel, with a slip shewing the number of her room. He took the trunk to the hotel, and was told by the clerk to leave it inside the door, which he did.

On the following day, the plaintiff went to the hotel, and . . . found the trunk was not there. . . . The trunk has not since been seen or heard of. . . .

In the charge, the learned Judge told the jury that from the evidence there seemed to be no doubt at all that the trunk came to the hotel and was stolen—"That being so, I must instruct you as a matter of law . . . that the hotel company is liable."

No objection was taken to this charge. At the trial no question seems to have been raised or distinction drawn between the liability of a hotelkeeper where the person seeking damages for a lost article is a transient traveller, that is, the ordinary guest of an inn, and the liability where he is a permanent boarder.

On the argument, counsel for the defendants objected to the charge, and for the first time further urged that the defendants were not responsible as innkeepers, and that their damages are limited under the Innkeepers Act to $40, and further contended that the question was one of negligence and should have been submitted to the jury, and that the defendants were entitled to a new trial.

In the view I take, the question of limited damages does not arise; but, if it did, the defendants could not avail themselves of it, as it did not appear that notice as required by sec. 6 of the Innkeepers Act was duly posted up, and, if it were, they fall within the exception in sec. 4 owing to their default.

There is a distinction between the law as it relates to the duties of an innkeeper and the law as it relates to the duties of a boarding house keeper, and a further distinction as to the liability even of an innkeeper where the inmate is a guest and where he is a boarder, as to the responsibility for his goods. . . .

[Reference to Dansey v. Richardson (1854), 3 E. & B. 144; Holder v. Soulby (1860), 29 L.J.N.S.C.P. 246, 8 C.B.N.S. 254; Hollingsworth v. Nicholson and Co. (1904), Jelf & Hurst's Law of Innkeepers, addendum; Scarborough v. Cosgrove, [1905] 2 K.B. 805.]

An innkeeper is responsible to his guests for goods lost or stolen within the inn—in short he is an insurer except where such liability is limited by statute. But this liability is confined to innkeepers properly so-called, and does not extend to a lodging house keeper or boarding house keeper. . . .

[Reference to Newcombe v. Anderson (1885), 11 O.R. 665.]

In the present case, I think it clear from the evidence that

the capacity in which the plaintiff entered the Arlington was not that of an ordinary traveller or transient guest, but as a boarder under a contract for board by the week, with the intention of staying a considerable time. I take the law to be as laid down by Coleridge, J., and Campbell, L.C.J., in Dansey v. Richardson, and followed in Scarborough v. Cosgrove, and that there was a duty on the part of the boarding house keeper to take reasonable care for the safety of the property brought by the guest to the hotel; and, further, that in this case there was evidence of an express agreement by the defendants, through their clerk and servant, to take charge of the plaintiff's trunk and place the same in her room, and that it was a question of fact whether or not the defendants were guilty of neglect and want of reasonable care in this regard.

The jury were not charged on the question of negligence, but were told that, if they found that the trunk came to the premises of the defendants, the defendants were liable. I do not think this charge can be sustained; and, under the former practice, the case should, in my opinion, go back for a new trial. But under the Judicature Act, sec. 27, this is unnecessary. The principal facts are not contradicted. There can be no doubt whatever upon the evidence that an arrangement was made by the plaintiff with the defendants' clerk that the trunk should be sent to the hotel, and that on the day when it was sent the clerk was notified and promised to receive it and send it to her room. This reasonable duty so undertaken was entirely disregarded; the trunk was left in the passageway unprotected, and was taken away or stolen and lost through the neglect and default of the defendants.

I think that this is a case where the Court has the right, under sec. 27 of the Judicature Act, to find and should find as a fact that the defendants did not take reasonable care of the trunk, and that this neglect amounted to negligence upon their part and rendered them liable to the plaintiff for the loss of her trunk and contents.

The appeal should be dismissed with costs.

MULOCK, C.J.Ex.:—I agree.

RIDDELL, J., was also of opinion, for reasons stated in writing, that the appeal should be dismissed with costs.

HODGINS, J.A., agreed that the appeal should be dismissed with costs, for the reasons stated by RIDDELL, J.

Appeal dismissed with costs.

NOVEMBER 30TH, 1914.

*DUFFIELD v. MUTUAL LIFE INSURANCE CO. OF NEW YORK.

Life Insurance—Failure to Give Affirmative Proof of Death of Assured—Presumption from Long Absence Unheard of—Evidence—Admissibility—Limitation of Time for Bringing Action—Insurance Act, R.S.O. 1914 ch. 183, sec. 165—Declaration of Death.

Appeal by the defendants from the judgment of MIDDLETON, J., 6 O.W.N. 646.

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

F. Arnoldi, K.C., for the appellants.

J. E. Jones, for the plaintiff, the respondent.

MULOCK, C.J.Ex.:—The action was begun on the 16th July, 1913, by Mary Jane Duffield, the mother of James M. Duffield, to recover the sum of $2,500, the amount of an insurance policy, dated the 20th May, 1901, on the life of the said James M. Duffield, payable to her on his death. Duffield disappeared and had not been heard of for at least seven years prior to the commencement of this action; and, in consequence, the plaintiff claims that his death is to be presumed.

The defence is, that the claim is barred by the Statute of Limitations, and the defendants plead sub-sec. 2 of sec. 165 of the Insurance Act, R.S.O. 1914 ch. 183: "Where death is presumed from the person on whose life the insurance is effected not having been heard of for seven years any action or proceeding may be commenced within one year and six months from the expiration of such period of seven years, but not afterwards."

The insured, who had lived in the city of London, deserted his wife, Emily Duffield, in the year 1899, since which time she has not seen him. Duffield was of intemperate habits and gave up business in London in the year 1900, becoming a wanderer, staying for a while at different places, namely, Hamilton, Buffalo, Toronto, Detroit, and elsewhere. He was very musical and fond of theatricals and associated with theatrical people.

*To be reported in the Ontario Law Reports.

His brother-in-law, Frederick Henry Heath, had met him in August, 1903, in Toronto, when Duffield stated that he was then residing in Buffalo. Dr. J. R. McDonald knew Duffield intimately, and in 1905, when coming by train from Chicago, was told at Sarnia by the conductor that within probably six months or a year he had met Duffield at Buffalo, that he was then living in Buffalo and playing the piano at a sporting-house, that he had not reformed, but was drinking as heavily as ever. These statements were admitted without objection; and, if they are evidence, they shew that Duffield was alive in 1905.

In Jackson v. Miner (1818), 15 Johns. (N.Y.) 226, the question was whether Miner was dead. A witness swore that she heard in 1776 that he was with the New York troops, but never heard of him again until fourteen years after the war, when she was told that he had been killed, and it was held that this evidence was admissible for the purpose of shewing his death.

In Scott v. Ratcliffe (1831), 5 Peters 85, the question was when James Madison died. Mrs. Eppes, a witness, swore that she was acquainted with James Madison; that she resided in Petersburg, and that James Madison resided in Williamsburg, Virginia; that in the year 1811 she was in Williamsburg, and was told that Mr. Madison was dead. The trial Judge excluded this evidence, and an appeal was had to the Supreme Court of the United States, and Marshall, C.J., delivered the judgment of the Court, which held that Mrs. Eppes's evidence was admissible to prove the death of James Madison.

Following these cases, I think the evidence of Dr. McDonald was admissible and establishes a starting-point from which to compute the period of seven years within which Duffield may not have been heard from. On the expiry of that period the plaintiff became entitled to the insurance money, and the defendants, who plead the Statute of Limitations as a bar to the action, must shew that the death occurred more than one year and six months before writ issued, namely, before the 16th July, 1913.

In 1905, the conductor fixed the time when he had seen Duffield as being probably six or twelve months before his conversation with Dr. McDonald. Consistently with this evidence the conversation may have taken place at about the close of 1905. If so, Duffield was alive either six or twelve months prior thereto. It was for the defendants to establish affirmatively that the time in 1905 when the conductor saw Duffield was at least one year and six months prior to the commencement of the action.

This they have not done; and, therefore, their defence fails, and this appeal should be dismissed with costs.

The other members of the Court concurred; written reasons were given by CLUTE and RIDDELL, JJ., respectively.

Appeal dismissed with costs.

NOVEMBER 30TH, 1914.

McLARTY v. DIXON.

Promissory Note—Action against Makers of Joint and Several Note—Denial of Signatures—Allegations of Fraud—Effect of one Maker being Relieved—Bills of Exchange Act, sec. 49—Findings of Fact of Trial Judge—Appeal.

Appeal by certain of the defendants from the judgment of KELLY, J., sub nom. McLarty v. Havlin, 6 O.W.N. 33.

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

T. N. Phelan, for the appellants.

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

MULOCK, C.J.Ex.:—On the 5th December, 1911, the Quebec Bank discounted a promissory note for $1,400, purporting to be signed by fourteen makers, payable to the order of the defendant Havlin, and paid the proceeds to Havlin, who at once deposited the same to the credit of the Social Order of the Moose.

Mr. Strickland, the bank manager, was aware that the note was for the accommodation of the Order. It was not paid at maturity, and Mr. Strickland paid it, became the holder, and transferred it to the plaintiff, who brings this action for Mr. Strickland's benefit.

Lacey, one of the defendants, whose name appears as a maker, swore that he did not sign the note nor authorise his signature thereto, and the action was dismissed as against him.

The appellants contend that his discharge discharges them, and that the evidence shews that his name was forged, and that in consequence the note was void under the Bills of Exchange Act, sec. 49.

The note in question is a joint and several note, and is equivalent to thirteen separate notes, each independent of the others. Each maker may be sued separately from the others: Beecham v. Smith (1858), E.B. & E. 442; Owen v. Wilkinson (1858), 5 C.B.N.S. 526.

The bank acquired what may be regarded as thirteen separate notes; and the circumstance that what purported to be a fourteenth note, made by Lacey, and also delivered to the bank, proved to be invalid, cannot affect the validity of the other thirteen. They were entered into irrespective of Lacey's connection with the transaction. It is not as if the thirteen had signed as accommodation makers for the Order upon the faith of Lacey also signing, in which case Lacey's not signing might have relieved them: Awde v. Dixon (1851), 6 Ex. 869; Rice v. Gordon (1848), 11 Beav. 265.

There is no evidence whatever shewing any agreement or understanding that Lacey was to be a party to the instrument; and the bare fact that some unauthorised person may have subscribed his name to it may be regarded as of no effect.

The appeal should be dismissed with costs.

CLUTE and SUTHERLAND, JJ., concurred.

RIDDELL, J.:—We saw no reason to disagree with the learned trial Judge on the question of fact; and it remains to consider the effect of the finding that Lacey did not sign the note. . . .

There is no evidence that the liability of any one signing the note was conditional upon Lacey also being liable, nor is there any evidence that any one signed the note being induced thereto by the fact that Lacey was to be or had become a joint maker. The only point upon which an argument can be hung is . . . that Lacey's name appears as a maker without his authority.

The position of one of these defendants is different from that of others. He signed before the name of Lacey was signed —that is, the inference is in that sense from the position of his name, and there is no evidence to the contrary. When he signed, there was a joint and several note; and, while such a note may be considered a joint note, and also the several note of each of the makers for some purposes, it is still one contract; for example, an alteration which affects the liability of one maker violates the entire instrument: Gardner v. Walsh (1855), 5 E. & B. 83, 91. Consequently, if the note had been intended to be discounted, etc., without the name of Lacey being added as a maker, the note would have been voided by adding his name.

But there is no evidence to that effect. It seems fairly apparent that what was intended was, that Havlin should get all the names he could to the note. The addition of a name without authority could have no possible effect on the liability of any maker.

The position of the other defendants is not more, but, if anything, less, favourable. They sign a note knowing what they are doing, and no change is made in it thereafter. They do not pretend to say that they knew of Lacey's name to the note; and, so far as they are concerned, that name may be considered as never having been there, and of no more effect than a blot.

I have been considering the case on the hypothesis that the name of Lacey was actually forged; but there is no finding of any forgery, and no evidence upon which such a finding could be based. . . .

Even if forgery were found, there is no evidence to fix Havlin with the crime, and he has not been found guilty by the learned trial Judge. Nor is he shewn to have known of the defect in the signature. So that, even if Havlin were the agent of the bank—and I think he was not—the bank would not be affected with concurrence in or notice of the unauthorised signature.

The Bills of Exchange Act, R.S.C. 1906 ch. 119, does not assist the defendants. By sec. 49 . . . the bill is not made wholly void; but it simply stands as though the unauthorised signature had never been placed thereon.

I am of opinion that the appeal should be dismissed with costs.

Appeal dismissed with costs.

NOVEMBER 30TH, 1914.

*RE RUNDLE.

Infant—Guardian of Estate—Trust Company—Encroachment on Capital for Infant's Maintenance and Education—Allowance to Guardian on Passing Accounts—Disallowance on Appeal—Benefit of Infant—Costs of Action Brought against Company—Loan and Trust Corporations Act, R.S.O. 1914 *ch.* 184, *sec.* 18, *sub-sec.* (*e*)—*Powers of Trust Companies—Compensation of Guardians.*

Appeal by Clarence A. Rundle, Rosa A. Clarke, and W. S. Anderson, from an order of WINCHESTER, Judge of the Surrogate Court of the County of York, on the passing of the accounts of the Trusts and Guarantee Company as administrators of the estate of Lily Rundle, deceased, who died intestate on the 13th November, 1907.

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

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

Casey Wood, for the company, the respondents.

The judgment of the Court was delivered by MULOCK, C.J. Ex.—Mrs. Rundle at the time of her death was a widow with one child, Clarence, a boy of nineteen years, less two weeks. For the two years preceding his mother's death, he had been employed in . . . a store . . . at a weekly wage of $3, and he and his mother boarded together, maintaining themselves on his earnings and the income of the mother, derived from her estate, which amounted to about the sum of $9,000 capital.

Clarence was a lad of somewhat weak nature, but with no bad habits, not studiously inclined, and had not been to school for two years, but his mother had contemplated his taking a course later at a commercial college.

The day after his mother's death, he called on his mother's former solicitor, who took him over to the office of the respondent company, and there introduced him to them, and secured his consent to the company being appointed administrators of his mother's estate. . . .

*To be reported in the Ontario Law Reports.

Subsequently the company were appointed administrators of Mrs. Rundle's estate and guardian of Clarence's estate, one of their staff, Mr. Warren, being appointed guardian of his person.

In January, 1908, on the advice of Mr. Warren, Clarence became and continued to be a boarding pupil at St. Andrew's College until the end of January, 1909, when he left. He then attended a commercial college for a few days only, then idled until May, then went to Calgary, apparently for the purpose of living on a ranch in the North-West, but in June returned to Toronto, where he got a position with one John D. Lucy, with whom he stayed for two weeks only, then went to Muskoka, and appears to have idled his time thereafter until he attained his majority on the 26th November, 1909.

The gross income of his estate, from the time of the company's appointment as administrators until his majority, was $890.68, during which time the company paid out of the principal and interest of his estate the following sums: $525.95 to St. Andrew's College for board and tuition there; $75.70 for medical fees; $238.36 for expenses of his trip to Calgary and return; and $1,148.70 to Clarence himself for clothing, maintenance, pocket-money, and other purposes.

During the year 1908, when Clarence was a boarder at St. Andrew's College, the company, in addition to paying his board and school fees (and including the $100 above mentioned), paid $176 for clothing and made cash allowances to him, amounting in all to $361.

Until his mother's death, he had been an industrious, steady boy, but the sudden transition from a life of thrift, where he had to work a week in order to earn $3, to one of ease, when spending money came for the asking, his character changed. He became a frequenter of a hotel, and acquired drinking, idle, and unsteady habits, which may, I think, be fairly attributable to the excessive amount of spending money which the company continuously paid out to him. I fail to see that his reasonable necessaries called for such allowances.

In the following year, which was one of almost continual idleness, the company, in addition to paying his expenses to and from the North-West, paid him for maintenance various sums exceeding $500. He was then a young man, nearly of age, and not incapacitated for work. He had trouble with one of his wrists, but till his mother's death it had not incapacitated him for work. The company's unwise action in supplying him so

freely with money seems to have removed from him all stimulus to industry and enabled him to stray from the paths of virtue and sobriety. All these expenditures, if allowed to the company, would encroach on the capital of the estate by more than $1,100; and the learned Judge deemed it proper to approve of such encroachment.

Wtih respect, I am unable to share his view. The Court does not sanction the employment of the corpus of an infant's estate for maintenance unless satisfied that such course is more beneficial to the infant than that of preserving his property intact until he comes of age: Goodfellow v. Rannie (1873), 20 Gr. 425, 427.

The rule is stated even more strongly by Boyd, C., in Crane v. Craig (1886), 11 P.R. 236, where he says: "It is a primary rule that the principal of the infants' estate is not to be encroached upon, unless for unavoidable reasons falling little short of necessity: Walker v. Wetherell (1801), 6 Ves. 473; Ex p. McKey (1810), 1 B. & B. 405."

Had the company made application to the Court for sanction to such expenditure out of capital previous to its being made, and frankly informed the Court as to the infant's situation in life, and other circumstances that should be considered, such sanction would, I think, have been refused, except to the extent of a reasonable allowance whilst the infant was at college. The company, however, made the expenditures without previous sanction and at their own risk. A large portion thereof was not necessary or in the infant's interests, but, on the contrary, proved hurtful, and should not be approved of by the Court. It would be reasonable to sanction payment to the infant during the time that he was at St. Andrew's College to the extent of $100.

With this exception, there should be no encroachment on the capital in respect of the various sums allowed or paid by the company to the infant for maintenance, and to this extent the appeal is allowed.

With reference to that branch of the appeal which seeks to charge the company with the loss of certain assets of the estate, consisting of books, wearing apparel, jewelry, furniture, and other household effects, the evidence does not shew that any such property came to the company's hands, or that it was guilty of negligence in not obtaining possession thereof. Therefore this branch of the appeal fails.

Another item of appeal is in respect of the costs in the action of Rundle v. Trusts and Guarantee Company. That action was

brought to set aside a release from Clarence Arthur Rundle to the company, and also an order of Judge Winchester passing the company's accounts, and asking that an account be taken of the dealings of the company with the estate. By consent, the release and order in question were set aside, and it was ordered that the company bring in their accounts into the Surrogate Court, and that the same be audited and passed by Judge Winchester, and that after he had, as Judge of the Surrogate Court, dealt with the accounts, he should dispose of the costs in that action. The learned Judge of the Surrogate Court, having audited and dealt with the accounts, ordered that the costs of the action and the reference should come out of the estate of Lily Rundle.

I do not agree with this disposition of the costs of that action. It has borne fruit to the extent of relieving the corpus of the estate from payment of a large sum of money improperly disbursed by the company; and the plaintiff, I think, is entitled to the costs of the action.

There will be no costs of the reference or of this appeal to either party.

Perhaps the company would not have made the unwise expenditures in question if the spirit of the Loan and Trust Corporations Act, R.S.O. 1914 ch. 184, had not been departed from. That Act declares what are the powers of trust companies, subsec. (*e*) of sec. 18 enumerating in careful detail the offices of trust which a trust company may fill. It does not include the office of guardian of the person of an infant, and it was not competent for the company to be appointed such guardian, and the appointment of an officer of the company was an evasion of the spirit of the Act. Evidently the policy of the Legislature is that the guardian of the person of an infant shall be one standing in loco parentis towards him, a person who will exercise quasi-parental control and care of the infant. A corporation which acts only through its employees is incapable of properly discharging such duties.

In this case, the company being guardians of his estate, and one of their officers being guardian of his person, resulted in the duties of the latter being at times delegated to other of the company's officers as effectually as if the company had been in fact appointed guardians of the infant's person. To the company as administrators of the estate of Mrs. Rundle and guardian of the infant's estate, and to the officer appointed guardian of his person, the Surrogate Court Judge has allowed one sum of $500 as compensation. It is not a case in which any allowance

should be made to the guardian of the infant's person. If he were entitled to any allowance, I would consider $50 a year a reasonable sum, and will assume that the Surrogate Court Judge has included that amount, say $100, in the $500 in question. Inasmuch, however, as the guardian of the person is not in this case entitled to compensation, such sum of $100 will be deducted from the $500 allowed as aforesaid.

NOVEMBER 30TH, 1914.

COFFIN v. GILLIES.

Contract—Sale of Valuable Animals — Selection by Vendor—Failure to Deliver—Construction of Agreement—"And"—"Or"—Action for Breach of Contract.

Appeal by the defendant from the judgment of LATCHFORD, J., 6 O.W.N. 643.

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

W. M. Douglas, K.C., and J. E. Thompson, for the appellant.

E. E. A. Du Vernet, K.C., and D. C. Ross, for the plaintiff, respondent.

MULOCK, C.J.Ex.:—Appeal from the judgment of Latchford, J., who awarded to the plaintiff $1,750 damages and costs of action.

This action is for damages for breach of contract, because of the non-delivery by the defendant to the plaintiff of two black foxes. By a written contract dated the 15th May, 1913, the defendant agreed to sell to the plaintiff "2 black foxes, silver tips, male and female, whelped in 1913, on the ranch of the vendor. . . . The said foxes to be the offspring of certain foxes purchased by the vendor from Charles Dalton and W. R. Oulton, in the year 1911, and to be a fair average pair selected by the vendor, at and for the price or sum of $12,000, and on the terms and conditions hereinafter contained."

Then follow certain conditions, two of which are as follows:—

"1. The vendee shall pay to the vendor for the said foxes the sum of $12,000, payable as follows, namely, 10 per cent. of

the said purchase-price net at Arnprior aforesaid upon the execution of these presents, and the remainder of the said purchase-price net at Arnprior aforesaid, on or about the 10th day of September next, 1913.''

''4. In case the vendor shall be unable, by reason of any unforeseen occurrence or accident, to deliver the said foxes by the time hereinbefore mentioned, the said deposit of 10 per cent. of the said purchase-money shall be returned forthwith upon such occurrence or accident rendering the vendor unable to make delivery as aforesaid to the vendee, and this agreement shall *ipso facto* be cancelled and rendered null and void.''

At the time of the making of this contract, the defendant owned one pair of foxes purchased from Charles Dalton and another pair purchased from W. R. Oulton. Each pair in the year 1913 produced one litter, but the litter from the Oulton strain died. Thereupon the defendant contended that the meaning of the contract was, that he was to deliver to the plaintiff a pair of foxes, one of which was to be the progeny of the Dalton pair and the other of the Oulton pair, that the death of the Oulton litter made it impossible for him to deliver the two foxes contracted for, and that the death of the Oulton litter was an unforeseen occurrence within the meaning of condition 4, which rendered the defendant unable to make delivery according to the meaning of the contract, whereby the same was cancelled and became null and void.

The plaintiff, however, contends that the contract means that the two foxes may be either the progeny of the Dalton pair or of the Oulton pair, or one from each pair.

This is not what the contract says. The foxes are to be the offspring of the two pairs purchased from Dalton ''and'' Oulton; that is, one from each pair. To interpret it otherwise, the word ''or'' must be substituted for the word ''and.''

In Elliott v. Turner (1845), 2 C.B. 446, 461, the question was, whether ''or'' might be read as ''and,'' and Parke, B., says: ''The word 'or,' in its ordinary and proper sense, is a disjunctive particle; and the meaning of the term 'soft or organzine' is, properly, either one or the other; and so it ought to be construed, unless there be something in the context to give it a different meaning, or unless the facts properly in evidence, and with reference to which the patent must be construed, should shew that a different interpretation ought to be made.''

In Caledonian R.W. Co. v. North British R.W. Co. (1881), 6 App. Cas. 114, at p. 131, Lord Blackburn quotes with ap-

proval the words of Lord Wensleydale in Grey v. Pearson (1857), 6 H.L.C. 61, at p. 106, that, in construing "all written instruments, the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified, so as to avoid that absurdity and inconsistency, but no further."

To construe the word "and" as here used by the parties in its ordinary sense leads to no absurdity, repugnance, or inconsistency with the rest of the instrument, but to interpret it as meaning "or" would give to the contract a meaning materially different from that of the words when used in their ordinary sense.

The parties having in their own language said what they meant, we are not entitled to disregard their own words and to substitute therefor other words which would impart to the contract a meaning to which in its plain language it is not open.

I, therefore, with respect, find myself unable to agree with the interpretation placed upon the contract by the learned trial Judge, and think that this appeal should be allowed and the action dismissed with costs.

The plaintiff is entitled to a return of his deposit, out of which, if desired, the defendant's costs may be first paid.

SUTHERLAND, J., agreed with the opinion of MULOCK, C.J. Ex.

CLUTE, J., agreed in the result, for reasons stated by him in writing.

RIDDELL, J., also agreed in the result, for reasons stated by him in writing, in which he referred to Wright v. Kemp (1789), 3 T.R. 470, 473; Boag v. Lewis (1845), 1 U.C.R. 357, 358.

Appeal allowed.

NOVEMBER 30TH, 1914.

*WINNIFRITH v. FINKLEMAN.

Vendor and Purchaser — Agreement for Sale of Land—Time Fixed for Closing Sale—Extension of Time—Payment of Money by Purchaser to Vendor—Repudiation by Vendor—Time of Essence—Right of Vendor to Treat Agreement as Terminated and to Recover Money Paid—Equitable Relief.

Appeal by the defendant from the judgment of MIDDLETON, J., 6 O.W.N. 432.

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

G. H. Watson, K.C., and A. L. Fleming, for the appellant.

D. L. McCarthy, K.C., for the plaintiff, respondent.

MULOCK, C.J.Ex.:—By a written agreement between the defendant, Finkleman, and one Vanderwater, Finkleman agreed to sell and Vanderwater agreed to buy certain lands owned by Finkleman, situate in the city of Toronto. Thereafter, by a written agreement between Vanderwater and the plaintiff, the former agreed to sell the said lands to the plaintiff, who agreed to purchase the same.

By the terms of this latter agreement the sale was to be completed on or before Saturday the 15th November, 1913, and time was made of the essence of the agreement. The title to the land was in Finkleman, and the plaintiff was directed by Vanderwater to complete the purchase directly with Finkleman. Accordingly, negotiations to that end were carried on between the solicitors for the plaintiff and Finkleman, and by the 14th November the title had been accepted, the deed approved of, executed by Finkleman, and deposited with his solicitor for delivery on the closing of the transaction.

On the 15th November, the solicitors for all parties met for the purpose of closing the purchase. All that remained to be done was for the plaintiff to pay over his purchase-money and for the defendant to deliver to him the executed conveyance. The plaintiff, however, was not ready with the whole of his purchase-money, and it was agreed between all the parties that on

*To be reported in the Ontario Law Reports.

the plaintiff paying to Finkleman's solicitor $1,000, on account of the purchase-money, the time for the completion should be extended until Monday the 17th November, on which day the purchase-money was to be paid and Finkleman was to deliver the deed.

In pursuance of this agreement, the plaintiff then paid to Finkleman's solicitor the $1,000. On Monday the 17th November, the plaintiff had his purchase-money ready to pay over, tendered it to Finkleman's solicitor, to Finkleman himself, and to Vanderwater, but each refused to accept it, and he was unable to obtain the conveyance. On the previous Saturday, it was in the custody of Mr. Smith, Finkleman's solicitor, but, on Monday, Mr. Smith said that it had passed out of his custody into that of Finkleman.

The evidence justifies the inference that by design and not by accident Finkleman refused to deliver the conveyance on the Monday. On the following day, the plaintiff's solicitors, by instructions from the plaintiff, notified the solicitors for the defendant and for Vanderwater that the refusal to complete the purchase on the previous day was regarded as a refusal to carry out the contract, and that in consequence the plaintiff withdrew from it and demanded a return of the moneys paid on account. Subsequently, the defendant expressed a willingness to complete the sale, but the plaintiff contended that the contract was then at an end, and brought this action to recover the $1,000 from Finkleman.

Whilst there was no contract for the sale by Finkleman to the plaintiff, what happened on Saturday the 15th November created a contract between them, whereby, in consideration of $1,000 then paid by the plaintiff to Finkleman, the latter agreed to deliver to the plaintiff, on Monday the 17th November, the executed conveyance then held in escrow by his solicitor, subject to the defendant's order. The defendant refused to deliver the conveyance, and in such case the question is, whether his acts and conduct evinced an intention not to be bound by the contract made between him and the plaintiff: Freeth v. Barr (1874), L.R. 9 C.P. 208; Mersey Steel and Iron Co. v. Naylor Benzon & Co. (1884), 9 App. Cas. 434.

The inference drawn by the learned trial Judge from the defendant's conduct was, that it amounted to an absolute refusal to perform the contract. I do not see what other interpretation could be placed upon it. Where one party to a contract absolutely refuses to perform his part within the time fixed for such purpose the other party may accept that refusal

and rescind the contract: Danube and Black Sea R.W. Co. v. Xenos (1861), 11 C.B. N.S. 152.

This the plaintiff has done, and, treating the contract between him and the defendant as at an end, is entitled to a return of the $1,000.

The appeal should be dismissed with costs.

CLUTE and SUTHERLAND, JJ., agreed.

RIDDELL, J., also agreed, giving reasons in writing, in which he referred to Canadian Westinghouse Co. v. Murray Shoe Co. (1914), 31 O.L.R. 11, 13; Broom's Legal Maxims, 7th ed., pp. 491 et seq.; Wilde v. Fort (1812), 4 Taunt. 334, 341; Sansom v. Rhodes (1840), 6 Bing. N.C. 261, 267, 268; Noble v. Edwardes (1877), 5 Ch. D. 378, 393, 394.

Appeal dismissed with costs.

NOVEMBER 30TH, 1914.

JONES v. NEIL.

Deed—Settlement by Mother in Favour of Son—Action by Executrix of Mother to Set aside—Acquiescence—Estoppel—Mental Capacity of Settlor—Improvidence — Security for Advances—Evidence—Admissions of Son — Statements of Mother.

Appeal by the plaintiff from the judgment of BOYD, C., dismissing the action.

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

A. J. Russell Snow, K.C., for the appellant.

A. A. Macdonald, for the defendant, respondent.

The judgment of the Court was delivered by MULOCK, C.J. Ex.:—This action is brought by the executrix of one Celia Ann Neil to set aside a deed bearing date the 7th June, 1910, whereby Celia Ann Neil conveyed certain lands in the city of Toronto to one Augusta Louisa Gentle to the use of the said Celia Ann Neil

for her lifetime, and on her death to the use of her son, the respondent, in fee.

The learned Chancellor dismissed the action, and the appeal is from his decision.

For many years prior to and at the date of the execution of the deed in question, Mrs. Neil was a widow, residing alone, amongst strangers, in Toronto, her five living children, four sons and one daughter, all residing long distances from her, the plaintiff in British Columbia, two of the sons in New Jersey, another in Kansas, and the defendant in the town of Corning, in the State of New York.

The only property which she owned consisted of a house and lot on Henry street, in Toronto, worth about $3,000. The house was old, frequently in need of repair, and tenantless. The income therefrom was insufficient to support her, and her son, the respondent, John Neil, out of his own moneys, had for years kept the house in repair and supplied his mother with a large part of her means of living. He was also in the habit, at much inconvenience, expense, and loss in his own business, of frequently visiting her in Toronto.

His total disbursements during these years ran up to many hundreds of dollars, but he kept no account of such expenditures, never regarding them as creating any indebtedness on his mother's part. His conduct throughout seems to be that of a most worthy, devoted, and affectionate son.

The only contribution towards the mother's sustenance from any of the other children was the sum of $10 from one of the other sons. Mrs. Neil frequently wrote asking him to come and see her. In time the travelling expenses began to bear seriously upon him, and he wrote on one occasion informing her that with his own family to support he could not afford to continue to incur the expense of such frequent visits to Toronto. To this letter she replied urging him to come, as she had something important to communicate to him. Accordingly, he again visited Toronto, when she informed him that she wished to deed the Henry street property to him for his own benefit, subject to her enjoying it for her life; and, at her request, he accompanied her to the office of her solicitors . . . for the purpose of having the necessary conveyance prepared.

There they met Mr. Foulds, one of the firm, and a general conversation took place, from which Mr. Foulds learned what was desired, and that he was to prepare the necessary conveyance for execution at a future date.

The respondent shortly afterwards left Toronto for his home at Corning. Some days later Mr. Foulds wrote Mrs. Neil informing her that the deeds were ready for execution. Thereupon, accompanied by her friend, Miss Gentle, she attended at Mr. Foulds' office, and executed the deed which is in question in this action. Mr. Foulds explained the matter fully to her, and she thoroughly understood its effect.

By this deed she conveyed the property to Miss Gentle, under the Statute of Uses, for her own use for life, with remainder to her son, the respondent, in fee. He was at his home in the United States when his mother executed the deed, and had had no communication with Mr. Foulds upon the subject after the interview above-mentioned. . . .

The respondent continued, as formerly, to keep the property in repair and to contribute to his mother's maintenance and comfort. She died on the 25th April, 1912, without having made any legal attack on the conveyance. . . .

The grounds of attack on the conveyance to the respondent are: mental incapacity of Mrs. Neil; improvidence; and that, at most, the conveyance should only stand as security for money owed by the deceased to the respondent. I agree with the learned Chancellor's finding that Mrs. Neil was quite capable of understanding, and did fully understand, the transaction when she entered into it and its full effect.

As for its being an improvident disposition of her property, if it were such, it would be voidable only, and only at the instance of the settlor. A person may be unwilling to seek relief from an improvident act. I do not here suggest that Mrs. Neil's disposition of her property was improvident. It is not necessary to determine that question; but, even if it was, she did not seek to set it aside. For nearly two years, fully understanding the nature and effect of the transaction, she took no steps to disturb it, and died without impeaching it. If she had brought an action to set it aside, it would have been open to her at any time before judgment to ratify the transaction.

For nearly two years she allowed her son to remain in the belief that the conveyance was irrevocable, and to continue his numerous kindnesses towards her, supplying her with money with which to maintain herself in Toronto, taking her into his own home in Corning, where she lived for a while, and paying for her maintenance when she lived with other of her children up to the time of her death. During a substantial portion of this time, the house was vacant and a source of expense, and the de-

fendant during this period supported her almost entirely out of his own means.

Such conduct on her part constituted at least acquiescence, and her executor is not entitled to do what she, during her lifetime, was unwilling to do: Mitchell v. Homfray (1881), 8 Q.B.D. 587, 591; Empey v. Fick (1907), 15 O.L.R. 19.

Further, it might, with much force, be argued that, having accepted all these benefits from her son, with the knowledge that, unless he were ultimately to become owner of the property, he could ill afford such serious drafts upon his resources, she would, in any action brought by her to set aside the conveyance, be held to have estopped herself from attacking it. Had she done so, it might have abated her son's care for her.

It is sufficient, however, for the purpose of disposing of this branch of the appeal, to say that the settlor not having repudiated the transaction her executrix cannot do so.

The remaining ground of attack is, that the deed was intended as a security only and should be reformed accordingly. For the plaintiff, Miss Gentle gave evidence of statements by Mrs. Neil prior to the conveyance as to her intention. I do not see how these statements are admissible in the plaintiff's favour.

. . .

It was argued that statements in certain letters of the respondent, put in at the trial, were admissions that the conveyance was intended to be a mortgage only. They are not, however, in my opinion, open to such construction. The plaintiff's solicitor had written various letters to the respondent calculated to make him, a layman, fear that there was some question as to his being entitled to hold the property absolutely, and the thought occurred to him that he might at least have the right to hold it to recoup his expenditures; but these statements are not admissions that the conveyance was intended as a mortgage security for moneys owed by his mother to him. It could not be a security of that nature, for she owed him nothing. All of his contributions to or for her were absolutely gifts from an affectionate son, and in her gratitude she frequently expressed her intention of repaying him for his kindness, and this intention she carried out in her own way by making the conveyance to him. Absolute in form, it negatives the contention that it was intended to be a mortgage, and the appellant has failed to discharge the onus which was on her of proving that it was entered into as a security only.

For these reasons, this appeal fails and should be dismissed with costs.

At the trial it was shewn that, by a conveyance dated the 18th April, 1912, registered on the 20th July, 1912, between the said Augusta L. Gentle and the said Celia A. Neil, after reciting that Augusta L. Gentle was the owner of said lands in fee simple, and that the deed under which she held it did not set forth the true intentions of the parties, and that Celia A. Neil had requested her to reconvey the land to her free from all trusts, the said Augusta L. Gentle purported to grant to the said Celia A. Neil the said lands in fee simple free from all trusts. At this time Celia A. Neil was lying on her deathbed, and there is nothing to shew any request from her for such a conveyance. Even if there was, it was improper for Augusta L. Gentle to have executed such an instrument. It having been registered, a purchaser might regard it as a cloud on the defendant's title; and, to remove it, the judgment should be amended by declaring that the deed last-named from Augusta L. Gentle to Celia A. Neil was, and is, null and void, and that nothing passed thereunder.

Appeal dismissed.

NOVEMBER 30TH, 1914.

*SHIPMAN v. PHINN.

Ships—Collision in Inland Waters—Action for Damages—Jurisdiction of Supreme Court of Ontario—Negligence—Evidence—Findings of Fact of Trial Judge—Appeal—Damages—Both Vessels at Fault — Canada Shipping Act, R.S.C. 1906 *ch.* 113, *sec.* 918.

Appeal by the plaintiff from the judgment of BOYD, C., at the trial; and cross-appeal by the defendant from that judgment and from the judgment of MIDDLETON, J., 31 O.L.R. 113, 6 O.W.N. 73, affirming the jurisdiction of the Supreme Court of Ontario to entertain the action.

The appeals were heard by MULOCK, C.J.Ex., CLUTE, RIDDELL, and SUTHERLAND, JJ.

F. King, for the plaintiff.

H. A. Burbidge, for the defendant.

*To be reported in the Ontario Law Reports.

The judgment of the Court was delivered by CLUTE, J.:— This is an action for damages arising out of a collision between the plaintiff's schooner and the defendant's mudscow, at a bend in the Napanee river. The plaintiff's schooner, loaded with coal, was being towed from Deseronto to Napanee by the steam tug "Ray Stanton," and, while proceeding upon the Napanee river, met the defendant's scow, which was being towed down the river by a tug, "Maggie R. King," in the employ of the defendant. The plaintiff charges that the defendant "so improperly and negligently navigated his tug and mudscow that said mudscow came in collision with the plaintiff's said schooner, and the corner of said mudscow struck the schooner on the port bow with such force as to cut the said schooner down from below the rail to a point in her hull below the water, so that she shortly after sank." The defendant denied the jurisdiction of this Court over the subject-matter of the action, and that question was decided by Middleton, J., 31 O.L.R. 113, 6 O.W.N. 73, in favour of the plaintiff, prior to the trial of the action, the order providing for an appeal to be taken with any appeal from the judgment at the trial of the action.

The Chancellor, who tried the case, found that both parties were equally to blame, and dismissed the claim and counterclaim without costs. From this judgment both parties appeal.

The plaintiff contends that where both vessels are found in fault, as they were by the judgment in question, the rule applicable by virtue of the Canada Shipping Act, R.S.C. 1906 ch. 113, sec. 918, requires that the damages shall be borne equally by the two vessels. The defendant's cross-appeal is both upon the facts and upon the law, claiming that the Exchequer Court alone has jurisdiction in the premises: and that the defendant's vessel was in no way in fault, and, if it were, such fault did not in any way contribute to the collision; that the plaintiff's vessel was alone at fault, and that sec. 918 has no application to this case.

All questions of law were disposed of upon the argument, the Court holding that it had jurisdiction to try the case, and that sec. 918 applied.

The only question reserved was one of fact. Upon the argument it was conceded by the plaintiff that there was negligence on his part. The defendant contended, however, that, although the captain did not blow the first blast, as required by art. 29, yet that neglect was not the cause of the accident. . . .

An examination of the evidence makes it clear that the find-

ing of the Chancellor on the question of negligence on the part of the defendant is well supported by the evidence. . . .

As there is ample evidence to support the findings of the Chancellor as to the negligence of the defendant, aside from the omission to blow a long blast as required by law on approaching the point of danger, it is unnecessary to decide the question as to the effect of the defendant's default in that regard, or whether the plaintiff had made out a primâ facie case of negligence on the part of the defendant so as to shift the burden of proof, unless he was able to prove that *that* negligence in no way contributed to the loss. See Marsden's Collisions at Sea, 6th ed., p. 29; Inman v. Reck, The "City of Antwerp" and The "Friedrich" (1868), L.R. 2 P.C. 25; Cayzer Irvine & Co. v. Carron Co., "The Margaret" (1884), 9 App. Cas. 873; Ayles v. South Eastern R.W. Co. (1868), L.R. 3 Ex. 146. The Chancellor states that there is no evidence that the plaintiff would have changed his course in any way if the whistle had been sounded. It might have been necessary to consider whether, the defendant being admittedly in default in respect of a statutory duty, it did not devolve upon him to satisfy the Court that, had the whistle been blown, it would have made no difference; but consideration of this question becomes unnecessary owing to the other findings, upon sufficient evidence, of the defendant's negligence.

The result is, that the plaintiff's appeal is allowed with costs and the defendant's appeal is dismissed with costs.

As the parties have agreed upon the place of reference, it is referred to the Master at Kingston to assess and apportion the damages, having regard to sec. 918 of the Shipping Act, with power to deal with the costs of the reference.

NOVEMBER 30TH, 1914.

*DANIS v. HUDSON BAY MINES LIMITED.

Master and Servant——Injury to Servant Working in Mine—Explosion—Negligence — Want of System of Inspection and Reporting—Findings of Jury—Evidence—Mining Act, R.S.O. 1914 *ch.* 32—*Workmen's Compensation for Injuries Act, R.S.O.* 1914 *ch.* 146—*Statutory Duty—Contributory Negligence.*

Appeal by the defendant company from the judgment of KELLY, J., in favour of the plaintiff, upon the findings of a jury,

*To be reported in the Ontario Law Reports.

in an action for damages for injury sustained by the plaintiff in the defendant company's mine.

N. W. Rowell, K.C., for the appellant company.
A. G. Slaght, for the plaintiff, the respondent.

CLUTE, J.:—The plaintiff on the 20th May, 1913, was engaged in running a drilling machine in the defendants' mine, and was injured by an explosion from a loaded hole which had been fired but had not exploded.

The story of what occurred is given by the plaintiff and another witness. It would appear from the evidence that the defendants had let a contract to sink a shaft of a hundred feet and then drift six or seven hundred feet upon a property about a mile and a half from their principal mine.

The witness Poisson says that there was an arrangement that he was to have $10 a foot, and, if that amounted to less wages than $3.50 per day, the defendants were to pay him and his men at that rate; and, when he ran behind, the company paid the wages accordingly of him and the one who worked with him. The superintendent of the mining company was one Brown, and the captain one Macmillan. Brown came and inspected the work once or twice a week. There was no special mine captain assigned to this mine. It seems to have been worked in connection with the company's mine at Cobalt, the inspection and oversight being by officers of the defendants. He states that there was no special captain or shift boss at this mine.

The plaintiff states that he got his powder from the defendants, brought there by their team. On the 19th, after drilling four or five holes, he loaded these holes and those drilled by the previous shift, making nine holes loaded by him. The nine holes were fired, but there were only eight reports. That was about three o'clock in the afternoon. The plaintiff and his partner did not go back to drill further on that day; there was too much smoke; it would take a couple of hours before the smoke would come out, which would bring it to about five o'clock, which was the regular quitting time. The night shift was going on at seven o'clock. Before leaving the mine, the plaintiff left a note there stating that a hole had missed fire; the note was left by the candlestick which the next shift would take, "so that they would see the paper." That was the practice. The plaintiff told the blacksmith and the hoist-man that they might mention it also to the next shift.

The next morning, when the plaintiff returned to take his shift after the night shift had come off, the hoist-man, Poisson, and the blacksmith were all there, but he received no message from any of them with reference to the missed hole. The plaintiff and his helper went down to the face of the drift, looked it over, and started to drill. Some work had been done during the night. The drill was set up ready to work; there had been three holes drilled during the night. There was some muck at the bottom of the drift. He examined the face of the drift with a candle. He found a piece of rock (called a "toe") sticking out further than the rest of the drift. They saw no indication of a missed hole. After they had drilled in about two feet, an explosion took place, and the plaintiff received the injuries complained of. He states that, if he had been warned that there was any hole not exploded, he would not have drilled. The plaintiff's partner was killed. The plaintiff states that no mine captain or shift boss had reported to him anything in connection with the fact that there was a missed hole on the work he had taken up. He states that when there is a missed hole the practice is to shoot that over again before starting to drill other holes. In answer to a juryman, he stated that part of the muck had been cleared away, but some muck had fallen down after they started to drill. He states further that, supposing the night shift had found the missed hole and shot it over again, and muck had fallen from that, they would have cleared it back.

The plaintiff's position would appear to be that, notice having been given that there was a charged hole that had missed fire, it became the duty of the defendants so to manage their mine under the Act that he would be notified if it had not been fired, and in that case he would not have commenced drilling on the face of the drift where there was still a charged hole.

The following are the questions submitted to the jury and their answers:—

"1. Was the injury to the plaintiff the result of negligence or was it a mere accident? A. Negligence.

"2. If the injury to the plaintiff was the result of negligence, was there negligence on the part of the defendants which caused or contributed to the injury? A. Yes.

"3. If there was such negligence on the part of the defendants, state fully and clearly what were the acts or act or omissions or omission of the defendants which caused or contributed to the injury? A. 1st. Omitting having any system or reporting from one shift to another. 2nd. As the company had no

agreement with Poisson for being liable for any accident, *it was there* (sic) *duty to have the work inspected daily, and reported on to the proper officials.*

"4. Could the plaintiff, Danis, by the exercise of ordinary or reasonable care, have avoided the accident or injury? A. No. He took every precaution that could be expected of him.

"5. If so, what should he have done or omitted to do to avoid the accident or injury?

"6. If, on the answers you give to the above questions, the Court should be of opinion that the plaintiff is entitled to damages, what amount of damages do you assess? A. $6,000.

"7. What do you find to be the earnings of a person in the plaintiff's grade of employment for the three years preceding this happening? A. $3,375."

The negligence found is in effect that the defendants had no system of reporting from one shift to another, and that they neglected to have proper inspection, and, under the circumstances under which the plaintiff was engaged to do the work, it was their duty to have the work inspected daily and reported on to the proper officials. . . .

The grounds taken in the notice of appeal are: (1) that the judgment was against law and evidence; (2) that the findings of the jury were perverse and unwarranted by the evidence.

Having carefully read the evidence, I think it amply supports the findings of the jury. The mine seems to have been run in a very haphazard manner, with very slight, if any, oversight or direction from the defendants. It was urged, however, that the defendants were in no way responsible for this, and that the plaintiff's remedy, if any, was against Poisson.

The case turns, I think, upon the requirements of the Mining Act, R.S.O. 1914 ch. 32, and of the Workmen's Compensation for Injuries Act, R.S.O. 1914 ch. 146. . . .

[Reference to sec. 164 of the Mining Act, sub-secs. 14, 15, 40, 98; secs. 157 to 175.]

Reading sec. 174 and other sections of the Act, I am of opinion that the duty of seeing that the provisions of the Act in its application to mining be carried out is imposed upon the mine-owner as well as upon others, and that in this case the defendants are responsible for a disregard of their statutory duty in the working of this shaft where the plaintiff was injured.

According to Poisson's evidence there was no shift boss or captain or superintendent other than Brown, who was superintendent at another mine of the defendants. There was no offi-

cial or mine captain or boss there that night or at the time Poisson went off duty the night before the accident, and he said that there had been none before that; that there was no superintendent or shift boss or mine captain there for two or three days before the accident; he further says that Brown, the superintendent at the other mine, would come down and give orders as to what he was to do, and that he was under his orders; he further says that shift bosses did not work. In view of the evidence, I do not think it important whether the plaintiff may be regarded as working under Poisson or for the company, by whom he was paid. It was the company's duty to see that the requirements of the statute were carried out. The plaintiff, I think, was properly acquitted of negligence. The jury declared that he could not, by the exercise of ordinary care, have avoided the accident, and that he took every precaution that could be expected of him. The evidence warrants this finding. The trial Judge took especial care to bring before the jury the requirements of the Act, and their findings must be regarded with reference to the charge. There was, I think, ample evidence to support the findings. . . .

[Reference to Grant v. Acadia Coal Co. (1902), 32 S.C.R. 427; Vancouver Power Co. v. Hounsome (1914), 49 S.C.R. 430.]

The maxim *volenti non fit injuria* is not applicable in relief of a defendant guilty of a violation of a statutory duty such as is imposed by the Factories Act: McClemont v. Kilgour Manufacturing Co. (1912), 27 O.L.R. 305.

Where the defendants employed a contractor to construct a bridge in conformity with the provisions of an Act of Parliament, but before the works were completed the bridge, from some defect in its construction, could not be opened, and the plaintiff's vessel was prevented from navigating the river, it was held, that the defendants were liable for the damage thereby caused to the plaintiff: Hole v. Sittingbourne and Sheerness R.W. Co. (1861), 6 H. & N. 488. . . .

[Reference also to Britannic Merthyr Coal Co. v. David, [1910] A.C. 74; Butler v. Fife Coal Co., [1912] A.C. 149, 159, 166.]

In the present case, the duty imposed by statute upon the mine owner is clear and positive. There was not only no evidence on the part of the defendants that they had discharged their duty, but, on the contrary, there was positive evidence that they had not; nor did they carry on their business in such a manner that the requirements of the statute could be carried out. The meaning of the jury's finding, having regard to the

statute, is, that their system was faulty in not making provision for a system of reporting to cover the danger arising in the case where a charged hole had not exploded.

I think the judgment as directed to be entered upon the findings of the jury is right, and that this appeal should be dismissed with costs.

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

RIDDELL, J.:—I have read the judgment of my brother Clute, which is concurred in by my Lord and my brother Sutherland.

I cannot say that I am at all sure that the statute is correctly interpreted in that judgment or the judgment appealed from. It seems to leave too heavy a burden upon the owners of the mine under a statute at best doubtful.

Gravely to doubt is to affirm. And I do not feel strongly enough against my brethren to dissent formally.

It is to be hoped that the statute may be made clear either by the Supreme Court or by legislation.

Appeal dismissed with costs.

NOVEMBER 30TH, 1914.

*HURST v. MORRIS.

Mechanics' Liens—Material-man—Time for Registering Lien—Mechanics' Lien Act, R.S.O. 1914 *ch.* 140, *sec.* 22(2)—*Time when "Last Material" Furnished—Trifling Item—Contract.*

Appeal by the defendant from the judgment of an Official Referee in a proceeding for the enforcement of a mechanic's lien.

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

J. M. Langstaff, for the appellant.

H. H. Shaver, for the plaintiff, respondent.

The judgment of the Court was delivered by RIDDELL, J.:—One Arthur Bell had a contract for the brickwork on a building being erected for the defendant. The plaintiff supplied Bell

*To be reported in the Ontario Law Reports.

with certain materials to be used in his contract. The plaintiff was not paid, and on the 25th February, 1914, he registered his claim of lien. The matter came on for trial before Mr. Roche, Official Referee, who gave judgment in favour of the plaintiff. The defendant now appeals.

The account of the plaintiff is for lime. It begins with the 5th November, and, with very frequent, indeed almost daily, items, comes down to the 23rd December; then there is no item till the 26th January, when two bags of hydrated lime were delivered, worth 85 cents. Admittedly, unless this item gives the right to enforce a lien, there is none, as the rest of the account was too early to satisfy the statute.

There are three contentions by the defendant in this appeal: (1) that the material mentioned in the item in question was not applied on the contract which Bell had with the defendant; (2) even if it was, that the amount is too trifling to extend the time for filing a claim; and (3) that in any event the lien is only for 85 cents, the amount of the item. Each of these contentions will be considered, although it will be seen from what appears in this judgment that the first two are wholly immaterial.

(1) The evidence of the contract is not very satisfactory. The contract is not produced, nor the tender, but it sufficiently appears that the contract was to do the brickwork on the building, including in this the forming of certain recesses for radiators. Some time after the work was thought to be complete, Start, who was acting for the owner as architect, discovered that the radiator recesses were much too wide. There were also certain holes in the side of the building which had been placed too low. He called upon Bell to make the recesses narrower and fill up the other holes higher. Bell did so without demur, and did not charge anything for this work, nor did the defendant or Start offer or suggest any payment. There is no pretence that Bell could now collect any remuneration for this work. Start says "it is a matter of opinion" whether Bell's work could be said to have been completed before these matters were made right. It was for this work the lime was supplied. James Bell, who seems to have been doing Arthur Bell's work, says explicitly that the lime was used on that contract, "finishing the job." There is no contradiction of this; and I think it sufficiently appears that the work thus done was in fact finishing the job, and was part of the contract.

(2) Then we are pressed with certain cases which, it is contended, lay down the principle that a small amount of work done

under a contract, some time after most of the work has been done, will not extend the time for filing a claim. . . .

[Reference to Neill v. Carroll (1880-1), 28 Gr. 30, 339; Summers v. Beard (1894), 24 O.R. 641; Day v. Crown Grain Co. (1906), 16 Man. L.R. 366, 39 S.C.R. 258; Crown Grain Co. v. Day, [1908] A.C. 504; Dole v. Bangor Auditorium Association (1901), 94 Me. 532.]

Without expressing any opinion on these cases, it is obvious to me that they are far from establishing a rule "that 'a completion' means substantial completion." Materials or machinery already placed are not displaced by a trifling addition to or subtraction from it; but, unless the maxim de minimis non curat lex applies, the fact that material supplied later than the bulk is none the less material supplied within the meaning of the Act.

Most of the difficulties under the old Acts were got rid of by the Act of 1896 (50 Vict. ch. 35), which made a clean sweep of the old legislation and made the law consistent and reasonable: Barrington v. Martin (1908), 16 O.L.R. 635; Cole v. Pearson (1908), 17 O.L.R. 46. Now the provision is that a claim for a lien for materials supplied may be filed within 30 days after the furnishing or placing of the last material so furnished or placed, and no difference between a large and a small amount.

(3) But it is contended that, even if a lien does attach and is enforceable, it is only for the 85 cents.

For this are cited a number of cases, the first being Morris v. Tharle (1893), 24 O.R. 159, which is supposed to lay down the proposition that, in the absence of a prevenient arrangement, each parcel of goods supplied must be taken by itself. A perusal of the judgment of the Chancellor, especially on p. 164, will shew that no such principle was laid down. . . .

[Reference to Chadwick v. Hunter (1884), 1 Man. L.R. 39.]

It is not necessary to express an opinion on the soundness of this decision. We do not know all the facts; but, if it were a case in all respects like the present, I should say that I prefer the reasoning of the Chancellor in Morris v. Tharle, 24 O.R. at p. 164, and the English cases—Ex p. Aykroyd (1847), 1 Ex. 479; Wood v. Perry (1849), 3 Ex. 442; Bonsey v. Wordsworth (1856), 18 C.B. 325.

The change made in our statute in 1896 has rendered such cases wholly inapplicable. Now the claim of lien is not to be filed as provided by R.S.O. 1887 ch. 126, sec. 21, "within 30 days from the completion thereof" (i.e., of the work) "or from the supplying or placing of the machinery;" but a new provision is

made, 59 Vict. ch. 35, sec. 21(2); R.S.O. 1914 ch. 140, sec. 22(2): "A claim of lien for material may be registered . . . within 30 days after the furnishing or placing of the last material so furnished or placed:" Barrington v. Martin, 16 O.L.R. 635, at p. 638. Thus it becomes wholly immaterial whether the material is furnished under but one contract or fifty; and it will be seen that this is independent of the completion of the work. Most of the difficulty in this case arises from not considering the language of the statutes.

I am of opinion that this appeal should be dismissed with costs.

NOVEMBER 30TH, 1914.

*SOPER v. CITY OF WINDSOR.

Limitation of Actions—Possession of Land—Claim under Purchase at Tax Sale by Prior Owner of Land—Title—Possession Prior to Tax Deed—Subsequent Possession—Character of Possession—Evidence.

Appeal by the defendants from the judgment of LENNOX, J., 6 O.W.N. 697.

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

J. H. Rodd and F. D. Davis, for the appellants.

D. L. McCarthy, K.C., for the plaintiff, respondent.

CLUTE, J.:—The plaintiff claims the land in question by possession for a period exceeding twelve years prior to the 23rd April, 1914, and states that during the whole of the said period the lands have been enclosed with other lands belonging to the plaintiff by a fence erected by the plaintiff; that on the 23rd April, 1914, the defendants broke down the plaintiff's fence and otherwise committed trespass; and claims damages and an injunction.

The defence states that on the 25th May, 1910, the defendants purchased from one Pulling the lands in question; that Pulling purchased the said lands on the 15th January, 1902, and remained in continuous possession down to the time of the de-

*To be reported in the Ontario Law Reports.

fendants' purchase; and further claims that any acts of ownership over the lands by the plaintiff were by the leave and license of said Pulling and the defendants, and denies that the plaintiff has acquired any title or interest by his alleged occupation of the lands.

It appears from the evidence that Pulling bought the lands at a tax sale on the 21st December, 1900, and received a statutory deed dated the 15th January, 1902. Pulling had previously owned the land, but, owing to some defect in the registered title by reason of a mortgage not being discharged which had in fact been paid off, and the difficulty of obtaining such discharge, he allowed the lands to run in arrear for the taxes with a view of clearing the title. It is contended that the effect of this act upon his part, in buying in his own lands, was, that the tax deed was not effective to give a new start to his title as against possession. The plaintiff claims that he has been in possession a sufficient length of time since the tax deed to give him title.

It has long been held in our own Courts that there is no objection to the prior owner of the land buying it at a tax sale: Stewart v. Taggart (1871), 22 U.C.C.P. 284. This view of the law has been followed in numberless cases and ought not now to be disturbed. Pulling, I think, had a right to purchase as he did. The land itself is charged with the taxes and creates a special lien on such land, which has preference over all other claims except of the Crown: R.S.O. 1897 ch. 224, sec. 149 (now R.S.O. 1914 ch. 195, sec. 94). As was said by the Chancellor in Tomlinson v. Hill, 5 Gr. 231, "it follows that a conveyance . . . in pursuance of a sale for arrears of taxes operates as an extinguishment of every claim upon the land, and confers a perfect title." In my opinion, any possession by the plaintiff prior to the tax title deed cannot run in his favour; the deed creates a new commencement of title freed from any such possession. It remains, therefore, to consider whether the plaintiff could shew sufficient possession subsequent to the tax title deed. . . .

I think the evidence wholly fails to shew possession by the plaintiff for ten years subsequent to the tax deed.

In the view I take, it is unnecessary to consider whether the possession could run against the defendants, who held the land in question in trust under a statute, for public use.

The appeal should be allowed and the plaintiff's action dismissed with costs.

MULOCK, C.J.Ex., and SUTHERLAND, J., concurred.

RIDDELL, J., agreed in allowing the appeal, for reasons stated in writing, in which he referred to Black on Tax Titles, 2nd ed., paras. 273, 419 et seq.; Bannon v. Brandon (1859), 34 Pa. St. 263; Owens v. Myers (1852), 20 Pa. St. 134; Branham v. Bezanson (1885), 33 Minn. 49, 21 N.W. Repr. 861, 862; Stewart v. Taggart, 22 U.C.C.P. 284, 290; Broom's Legal Maxims, 7th ed., p. 114; Coxe v. Gibson (1856), 27 Pa. St. 160, 165; R.S.O. 1914 ch. 195, secs. 4, 154, 157, 163, 179-189; R.S.O. 1914 ch. 109, sec. 10; Smith v. Midland R.W. Co. (1884), 4 O.R. 494, 495-499; Donovan v. Hogan (1887), 15 A.R. 432; Grand Trunk R.W. Co. v. Valliear (1904), 7 O.L.R. 364; McMahon v. Grand Trunk R.W. Co. (1908), 12 O.W.R. 324; Essery v. Bell (1909), 18 O.L.R. 76; R.S.O. 1914 ch. 195, sec. 178.

Appeal allowed.

NOVEMBER 30TH, 1914.

*WOOD v. TROMANHAUSER.

Limitation of Actions—Promissory Note—Acknowledgment in Writing.

Appeal by the defendant from the judgment of COATSWORTH, Junior Judge of the County Court of the County of York, in favour of the plaintiff, in an action to recover $310.13, the amount of a promissory note made by the defendant and another, payable to the order of the plaintiff.

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

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

J. P. MacGregor, for the plaintiff, respondent.

MULOCK, C.J.Ex.:—The promissory note is in the following words and figures:—

"$310.13. Fonda, Iowa, Nov. 1st, 1903.
100

"One year or sooner after date we or either of us promise to pay to A. S. Wood or order at Pocahontas County Bank of Fonda, Iowa, three hundred ten and $\frac{13}{100}$ dollars.

"J. B. Tromanhauser,
"J. H. Tromanhauser."

*To be reported in the Ontario Law Reports.

The writ was issued on the 5th November, 1912. The appellant relies on the Statute of Limitations as a bar to the claim; and the sole question is, whether he has, within six years before action begun, made any written acknowledgment of the debt from which a promise to pay may be inferred: Tanner v. Smart (1827), 6 B. & C. 603; Green v. Humphreys (1884), 26 Ch. D. 474.

The respondent relies on the following letter written by the appellant to the respondent:—

"Goderich, Ont., Nov. 8, 1906.

"A. S. Wood, Esq., Cashier, Pocahontas County Bank, Fonda, Iowa.

"Dear Sir: Your letter of 27th inst. sent to Minneapolis has been forwarded here and only recently received. In reply would say that I thought that note matter was settled long ago. I will write my brother John for details and on receipt of his reply you will hear from me again.

"Yours truly,

"J. H. Tromanhauser."

The letter of the 27th October is not produced, but it may be assumed that it referred to the note in question. I am unable to discover in the letter of the appellant of the 8th November, (a) any acknowledgment from which the law infers a promise to pay, or (b) any promise to pay. On the contrary, its plain meaning is, that there is no existing indebtedness.

Further, to say that "I thought that note matter was settled long ago" is not even an admission of an original indebtedness. An unfounded claim may be settled by its abandonment. The concluding part of the letter, that the appellant would write to his brother for details, and on receipt of his reply would write the respondent again, is simply a promise to write two letters. Nothing else can be read into the words.

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

CLUTE and SUTHERLAND, JJ., concurred.

RIDDELL, J., agreed that the appeal should be allowed, for reasons stated in writing, in which he referred to Firth v. Slingsby, 58 L.T.R. 485; Green v. Humphreys, 26 Ch. D. 474; Halsbury's Laws of England, vol. 19, pp. 63 et seq.; Humphreys v. Jones (1845), 14 M. & W. 1; McGuffie v. Burleigh, 14 Times L.R. 319; Lightbody's Time Limit on Actions, p. 345.

Appeal allowed.

NOVEMBER 30TH, 1914.

*TURNER v. EAST.

Master and Servant—Injury to Servant—Negligence of Foreman of Works—Findings of Jury—Absence of Finding as to what Negligence Consisted in—Finding by Appellate Court on Facts—Judicature Act, R.S.O. 1914 ch. 56, sec. 27 (2)—Workmen's Compensation for Injuries Act, R.S.O. 1914 ch. 146, sec. 3 (c) — Contributory Negligence — Causa Causans.

The plaintiff, a workman in the employ of the defendants, was injured by the walls of a trench falling in on him. He brought this action in the District Court of the District of Rainy River against his masters; and, after a trial before the District Court Judge and a jury, he obtained judgment for $500 and costs. The defendants appealed.

The questions and answers were as follows:—

1. What was the cause of the injury to the plaintiff? A. By weight of earth falling on him.

2. Were the defendants guilty of negligence causing that injury? A. Yes.

3. If so, state in what such negligence consisted? A. Negligence on part of foreman.

4. If you find any defects in ways or appliances used, had the defendants or their foreman knowledge of the defect or should they have had knowledge? A. We believe they had.

5. Was foreman McLeod one whose orders the plaintiff was bound to obey? A. Yes.

6. Was the plaintiff in work in the ditch under the orders of foreman McLeod, or did he go there of his own accord and without orders? A. We believe he had orders.

7. Was the plaintiff himself guilty of any negligence which led to the accident? A. No.

8. If so, state in what such negligence consisted.

9. Assuming that the plaintiff is entitled to recover, what sum do you think fair for the defendants to pay? A. We believe the amount asked for reasonable—$500.

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

*To be reported in the Ontario Law Reports.

H. E. Rose, K.C., for the appellants.
Casey Wood, for the plaintiff, respondent.

The judgment of the Court was delivered by RIDDELL, J.:— There is nothing in the answers to shew what the negligence of the foreman consisted in, and the charge does not assist; it is of the most meagre and perhaps misleading kind. Possibly the matter had been so fully discussed in the addresses of counsel that the learned District Court Judge thought it unnecessary to charge at any length on the point. At all events what he said is as follows: "The third question, 'If so, state, in what such negligence consisted?' depends on whether you find the defendants guilty of negligence or not."

In Phillips v. Canada Cement Co. (1914), 6 O.W.N. 185, at p. 188, it is said: "If the answer of the jury is open to the objection . . . that it does not indicate wherein the negligence of the foreman consisted, the case is one in which we should exercise the powers conferred on us by the Judicature Act, and, instead of sending the case back for a new trial, find the facts which the jury have omitted to find." The same course was pursued in Smith v. Northern Construction Co. (1914), 30 O.L.R. 494, and in many other cases.

The statute referred to is now R.S.O. 1914 ch. 56, sec. 27 (2); the powers therein conferred upon the Court will be exercised whenever a clear case is made out.

Of the acts of negligence that might be and are complained of, there is only one which, in my view, is so clearly proved as to justify us in applying the statute; and, if that should fail, there should be a new trial.

A main contest at the trial was whether the plaintiff was at the place where the accident happened by the order of his foreman, McLeod, or at his own wish. The jury have found that it was by the order of the foreman. The criticism by Mr. Rose that the finding is only that he was in the trench by such order cannot, in view of the course at the trial, and especially the finding as to want of contributory negligence, receive any countenance. The learned District Court Judge in his charge on contributory negligence says: "Was the plaintiff himself guilty of any act of negligence which led to the accident? That is, if a man goes into a position where he has no business to be, a position which places him in danger, the law says he is guilty of contributory negligence." And the jury have given an answer in the negative.

There was no dispute as to the nature of the place; it was dangerous, but that is not enough. Workmen are daily and hourly sent into a place of danger without liability placed on the master. Some places are necessarily dangerous, and yet workmen must go to and work in these very places. But the defendant himself says that on the morning of the accident he ordered two men (he says the plaintiff and another, but, in view of the jury's finding, he must be mistaken as to the plaintiff) out of that place, "told them to get out or I would fire them." "I thought it was'nt a fit place for a man to be if he couldn't see danger." McLeod says: "I . . . saw Mr. Turner . . . I called to him to jump out of there . . . because that was no place for a man." On that evidence no jury would be allowed to find a verdict that it was not negligence of the grossest kind to send the plaintiff to work at this spot; and we should find the foreman negligent in this respect.

The Workmen's Compensation for Injuries Act, R.S.O. 1914 ch. 146, sec. 3 (*c*), renders the master liable "where personal injury is caused to a workman by reason of . . . the negligence of any person in the service of the employer to whose orders or directions the workman at the time of the injury was bound to conform and did conform, where such injury resulted from his having so conformed." It will be seen that the Legislature wisely refrained from using the technical or quasi-technical terminology "where his having so conformed was the cause of the injury;" the looser and more comprehensive "by reason of" and "resulted" is employed. This enables the Court to avoid giving a technical interpretation to the sub-section, and to say that the obedience to the order need not be the *causa causans* of the accident. The difficulties arising from the distinction between *causa causans* and *causa sine quâ non* are illustrated in the recent case of Wadsworth v. Canadian Railway Accident Insurance Co. (1914), 49 S.C.R. 115 (28 O.L.R. 537 and 26 O.L.R. 55). . . .

[Reference to Wild v. Waygood, [1892] 1 Q.B. 783.]

This case has not been overruled or questioned, and I think it should be followed.

We should, therefore, find the specific negligence of the foreman as has been indicated, and dismiss the appeal with costs.

NOVEMBER 30TH, 1914.

*SMITH v. GRAND TRUNK R.W. CO.

Railway — Injury to Servant—Conductor of Freight Train—Negligence—Contributory Negligence—Findings of Fact of Trial Judge—Appeal—Defective Ladder on Car Forming Part of Train on Way to Repair-shop—Breach by Railway Company of Statutory Duty—Railway Act, R.S.C. 1906 *ch.* 37, *sec.* 264(5)*—Proximate Cause of Injury—Servant's Disobedience of Rules of Company.*

Appeal by the defendants from the judgment of FALCONBRIDGE, C.J.K.B., at the trial of the action without a jury, in favour of the plaintiff.

The plaintiff, on the 18th December, 1913, was conductor of a freight train proceeding from Belleville to Brockville over the defendants' railway. When the train was a short distance from Napanee, the plaintiff, in walking over the tops of the cars composing the train, to reach the caboose, attempted to climb down a ladder on one of the cars; when he stepped on the ladder, it gave way, and he was thrown to the ground in such a manner that the train ran over his left arm, injuring and crushing it so severely that it had to be amputated.

This action was brought to recover damages for the injury. The plaintiff alleged that the ladder was unsafe and defective, and that his injury was occasioned by its condition.

The defendants denied negligence, and said that if the injury was in any way caused by the negligence of a person in the service of the defendants, it was the act of a fellow-servant, and that the injury was caused solely by the plaintiff's own neglect and want of care.

The Chief Justice found that the plaintiff's injuries were caused by the defective ladder, which was part of the equipment of the train; that the plaintiff's infraction of the rules in boarding the train when it was in motion was not the immediate and proximate cause of his injuries, for he got on the train in safety; that the defendants had not succeeded in establishing that the plaintiff was guilty of negligence without which the accident would not have happened; and he gave judgment for the plaintiff for $4,000.

*To be reported in the Ontario Law Reports.

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

W. N. Tilley, for the appellants.

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

CLUTE, J.:—. . . The plaintiff's train consisted of 42 cars, among which and forming part of the train, next to the caboose, was a damaged car which had been in an accident. It was not carried upon its own trucks, and appeared to be in a damaged condition, and was being sent forward to Montreal for repairs. The ladder from which the plaintiff fell was upon the north-east corner of this car, and had been damaged and rendered unfit for use. Bunton, employed by the defendants, who was car foreman and had charge of car repairs, car inspectors, and car cleaners, states that the car was inspected . . . the day before it was taken out. . . .

There can be no doubt at all that the ladder was dangerous and unfit to be used. Bunton . . . says that the ladder might have been boarded up, as is sometimes done; that is, a board put over it to prevent it being used as a ladder. . . . He did not consider that necessary because he took away the only steps by which a man could possibly get on the ladder, and the end ladder was in good condition to get over the top. . . .

The two points upon which the defence was mainly rested were: (1) that it was in breach of the rules to climb on the car while in motion; (2) that it was the plaintiff's duty to inspect the car; and if he did not discover the defect it was his own fault.

As to his boarding the car while in motion, the defendants' rule 254 provides that every employee is required to exercise the utmost care to avoid injury to himself and to his fellows . . . Jumping on or off trains or engines in motion is forbidden. It is not forbidden to be on the top of the car. The plaintiff was not injured in mounting the car while in motion . . . and when he reached the top of the car he was rightfully there. . . . His boarding the train while in motion was not the proximate cause of his injuries.

As to the duty of the plaintiff as conductor to inspect the train . . . rule 107 declares that conductors and brakesmen must know that the cars in their train are in good order before starting, and inspect them whenever they have an opportunity to do so, particularly when entering or leaving sidings or waiting for other trains. . . . The plaintiff says that he did make inspection of the cars of his train and took the number, and did

not notice or know of the defect in the ladder. Bunton did know of the defect . . . ; he says he did what he thought necessary in regard to the ladder, but he did not notify the plaintiff of its dangerous condition.

Whether the plaintiff discharged his duty, in the circumstances, in a reasonable and proper manner, is a question of fact; and, in the opinion of the learned trial Judge, the defendants have not succeeded in establishing that the plaintiff was guilty of negligence without which the accident would not have happened. There is evidence to support this view; and, if the finding . . . that the ladder was a part of the equipment of the train is right, as I think it is, then there is a breach of statutory duty on the part of the defendants in sending out the car with a defective ladder, contrary to the Railway Act, R.S.C. 1906 ch. 37, sec. 264, sub-sec. 5. . . . This statutory duty was not performed, and that was the proximate cause of the injuries sustained by the plaintiff. . . .

[Reference to Warmington v. Palmer (1902), 32 S.C.R. 126; Fawcett v. Canadian Pacific R.W. Co. (1901-2), 8 B.C.R. 393, 32 S.C.R. 721; Truman v. Rudolph (1895), 22 A.R. 250; Deyo v. Kingston and Pembroke R.W. Co. (1904), 8 O.L.R. 588; Muma v. Canadian Pacific R.W. Co. (1907), 14 O.L.R. 147; Grand Trunk R.W. Co. v. Birkett (1904), 35 S.C.R. 296; Cook v. Grand Trunk R.W. Co. (1914), 31 O.L.R. 183; Stone v. Canadian Pacific R.W. Co. (1912-3), 26 O.L.R. 121, 47 S.C.R. 634.]

The present case is more nearly like the Stone case, and should, I think, be governed by it. The trial Judge has found in favour of the plaintiff; and there is evidence which, in my judgment, supports the finding. To put it shortly, the plaintiff acted reasonably throughout; assuming that, even under the circumstances detailed by him, he had no right to get on the car while in motion, his so doing was not the proximate cause of the injury. When he had once reached the top of the car, the danger aimed at by the rule was past. He had the right to go where his duty called him, which was to the caboose, and to do so to pass over the cars and to avail himself of the ladder in question. This car made up and formed part of the train. Its defect was known to the inspector, whose duty it was to remedy the defect to the extent that it should not be dangerous if used. This he attempted to do by removing the lower step, but left the remainder of the ladder in the dangerous condition in which it was at the time of the accident. The plaintiff made a reasonable inspection of the train, he going down one side and his brakes-

man the other. The morning was dark, and the defect was not discovered. The question of contributory negligence was one of fact for the trial Judge, who has disposed of it in favour of the plaintiff. I see no ground upon which to interfere.

The appeal should be dismissed with costs.

MULOCK, C.J.Ex., and LENNOX, J., concurred.

RIDDELL, J. (dissenting) :— . . . Remembering that there is no such thing as negligence at large, but that actionable negligence must be breach of a duty owed to the person complaining, it seems to me, with great respect, that a statement of the facts should be sufficient to shew that the plaintiff should not succeed. That it was not negligence to take the body of the car for repair elsewhere must be obvious: otherwise, a car when damaged must be scrapped or repaired on the spot, which is absurd. It was not represented as a perfect car or as a vehicle to be used as an ordinary car; on the contrary, it was plainly a damaged article, and so represented—not really part of the "plant," but being taken for repair, in circumstances like the present.

There was nothing in the plaintiff's employment calling for him to run along the top of the cars to get to his caboose, and the defendants had no right to expect that he would do so. I fail to see negligence toward the plaintiff, nor have, as I think, the regulations requiring ladders on cars any reference to a car being taken for repair, in a circumstances like the present.

Every necessary precaution was taken that the plaintiff should know, and he did know, all that was necessary about the car.

The plaintiff was going to the caboose (his proper place when the train was in motion) by a way not contemplated by the defendants, and which was used only because he had already violated the law. . . . This may not be conclusive as to contributory negligence. But in doing this he used a ladder which had been out of commission and its use forbidden by the bending up of the stirrup—and that was the direct and immediate cause—causa causans—of the accident.

Aside from the violation of the implied orders, I think we should find the act of so using an appliance on a damaged car, without any examination, contributory negligence.

The cases do not seem to me to be helpful—the matter is one of principles undoubted and uncontroverted.

If the learned Chief Justice finds differently, the finding should be reversed. . . . .

I think the appeal should be allowed with costs and the action dismissed with costs.

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

DECEMBER 2ND, 1914.

WIRTA v. VICK.

Unincorporated Society—Property of Society—Dissident Members — Ultra Vires Action of Majority — Breaking-up of Society into Factions—True Line of Succession—Election of Directors.

Appeal by the plaintiffs from the judgment of BOYD, C., 6 O.W.N. 599.

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

W. T. J. Lee, for the appellants.

J. H. Clary, for the defendant, respondent.

THE COURT, upon consent of counsel, directed that the society in regard to the property in respect of which the action was brought should elect seven directors; the local Sheriff or Police Magistrate to act as returning officer, and to certify the result to the Court. The funds and property of the society to be used only as provided by the rules of the society. The returning officer's remuneration or costs to be fixed by the Registrar and paid out of the moneys in Court to the credit of the cause. Further directions reserved for disposition by RIDDELL, J.

DECEMBER 4TH, 1914.

LADUC v. TINKESS.

Fraud and Misrepresentation—Sale of Farm—Inducement to Purchase—False Representation as to Amount of Drainage Taxes Charged on Land—Evidence—Damages—Compensation for Existing Loss—Anticipated Relief from Taxes—Findings of Fact of Trial Judge—Appeal.

Appeal by the defendant from the judgment of BRITTON, J., ante 31.

The appeal was heard by MEREDITH, C.J.O., CLUTE, RIDDELL, and SUTHERLAND, JJ.

D. B. Maclennan, K.C., for the appellant.

G. I. Gogo, for the plaintiff, respondent.

THE COURT dismissed the appeal with costs.

HIGH COURT DIVISION.

KELLY, J. NOVEMBER 30TH, 1914.

SCOTT v. HYDRO-ELECTRIC COMMISSION OF CITY OF HAMILTON.

Municipal Corporation—Appointment by Council of Commission to Manage Electrical Power Works—Injury to Workman—Status of Commission—Agent of Municipal Corporation—Liability in Action for Negligence—3 & 4 Geo. V. ch. 41, sec. 34 (O.)

Action for damages for personal injuries sustained by the plaintiff by the negligence of the defendants, for whom he was working when injured.

The action was tried by KELLY, J., and a jury, at Hamilton.

G. S. Kerr, K.C., for the plaintiff.

S. F. Washington, K.C., for the defendants.

KELLY, J.:—By by-law No. 1536, passed on the 28th October, 1913, the Council of the Corporation of the City of Hamilton, under the provisions of 3 & 4 Geo. V. ch. 41, sec. 34, established a Commission for the control and management of the construction, operation, and maintenance of all works undertaken by the Corporation of the City of Hamilton for the distribution and supply of such electrical power and energy as the corporation had entered into a contract with the Hydro-Electric Power Commission of Ontario to supply.

On and prior to the 20th March, 1914, the Commission so appointed had the control and management of the operation and maintenance of the works for this distribution and supply, and the plaintiff was an employee under the Commission. On the 20th March, he sustained injuries from a motor truck in use

by the defendants, in respect of which injuries this action is brought. At the trial, the jury failed to agree on the question of negligence.

The case, however, must be dealt with on another ground, going to the root of the plaintiff's right to maintain the action against the defendants—a ground involving the relationship of the defendants to the Corporation of the City of Hamilton.

In Young v. Town of Gravenhurst (1910), 22 O.L.R. 291, the Board of Commissioners who had charge of and operated the electrical plant of the defendants was appointed under the provisions of R.S.O. 1897 chs. 234 and 235, and it was held by the trial Judge, Mr. Justice Riddell, that it was but the agent and the corporation of the town the principal—that the Board was a statutory agent acting for the corporation.

The Act by virtue of which the defendants are constituted does not go further in this respect than to authorise the council to entrust to the Commission (the defendants) authorised by the Act to be appointed, the construction of the works and the control and management, instead of itself exercising these functions for the corporation. The Act does not contemplate putting the Commission in any different position in that respect than that occupied by the council itself, namely, that of agent for the corporation for the control and management of the construction, operation, and maintenance of all works undertaken by the corporation for the distribution and supply of electrical power and energy, etc.

The judgment of Riddell, J., in Young v. Town of Gravenhurst was unanimously affirmed by the Court of Appeal (1911), 24 O.L.R. 467, in which the reasons for judgment expressly declare that the Board of Commissioners when constituted and elected is a body which assumes, not the ownership, but the management and conduct, of the works, etc., and that it is merely the statutory agent to carry out, for the corporation of the municipality, works and operations which the Legislature has placed under the corporation's management and control.

The Act under consideration in that case gave to the Commission only the status of agents; the Act by virtue of which the defendants were constituted does not give them a position higher or more independent than that of agent for the municipal corporation.

I see no ground for distinction between the two cases in respect of the status intended to be given to the Commission.

The action must be dismissed with costs.

KELLY, J. NOVEMBER 30TH, 1914.

PEMBERTON v. HAMILTON BRIDGE CO.

Master and Servant—Injury to Servant—Negligence—Course of Employment—Order of Foreman of Works—Evidence—Findings of Jury.

Action for damages for personal injuries sustained by the plaintiff, a workman employed by the defendants, in the course of his employment, by reason of the negligence of the defendants.

The action was tried by KELLY, J., and a jury, at Hamilton.
M. J. O'Reilly, K.C., for the plaintiff.
S. F. Washington, K.C., for the defendants.

KELLY, J.:—On the evidence submitted by the plaintiff, the defendants moved for a nonsuit, subject to which I directed the case to proceed. The defendants called no evidence. The jury found negligence by the defendants, and negatived any by the plaintiff. The defendants, in addition to contending that there was no evidence to go to the jury, argued that what the jury found to be negligence was not such, mainly on the ground that the plaintiff, at the time of the happening, was engaged in helping Kraus, as employee of another company, in the street, outside of and some distance from the defendants' premises. Kraus had come to the defendants' premises for steel beams for his employers. His lorry was not sufficiently long to carry the beams properly, and he obtained from Bowman, a foreman of the defendants, a two-wheeled truck (or buggy, as witnesses have called it), which was placed beneath the rear end of the beams, the other end being on Kraus's lorry; the beams being thus loaded, Kraus drove from the defendants' premises. Having failed in his attempt to turn at the corner of two streets, Kraus procured a longer waggon, or lorry, more suitable for carrying the beams; and he returned to the defendants' yard, and asked the plaintiff and a fellow-workman of his to come out and assist in transferring the beams to the lorry which he had so procured.

The uncontradicted evidence is, that the plaintiff referred Kraus to the foreman, Bowman, who directed him and his fellow-workman to go with Kraus and assist. They obeyed; and,

while engaged in the work of transferring the beams, the plaintiff was injured.

I do not agree with the position taken by the defendants that the plaintiff, in the circumstances, was not in the performance of duties for his employers; or, on the other hand, that the findings of the jury do not disclose negligence for which the defendants are liable. The plaintiff says his work was that of helper and shipper in the defendants' yard, with Bowman as his foreman; that he had, in performance of his regular work, helped Kraus to load the beams in the yard; and, when requested by the latter to assist in transferring them outside of the defendants' premises, he acted, not on his own authority or responsibility, but referred the request to the foreman, and complied with his express directions. It can be taken that the foreman used his judgment and exercised a discretion in helping his employers' customer in furtherance of the act of removing the beams obtained from the defendants—not an unnatural or an improper thing to have done in the exercise of a reasonable discretion in his employers' interests. The jury have in effect found that the plaintiff, at the time of the accident, was acting as the defendants' employee, the finding of negligence being that the defendants "sent the plaintiff to help in transferring the girders without investigating as to the nature of the work to be done and supplying help to do the same," and that "the men were sent to assist in the work without being supplied with any equipment for handling the same."

There was evidence that the beams were very heavy; that they weighed about one ton each; and that it would require about six men at each end to lift them.

While at first I entertained some doubt of the defendants' liability, I have on more deliberate consideration arrived at the conclusion that there was evidence properly submissible to the jury, and that the jury's findings entitle the plaintiff to succeed. The damages were assessed at $500, "clear of legal and medical expenses." I do not recall that any evidence was given that any medical charges are chargeable against the plaintiff; but, if there are any such, and if the parties cannot agree on the amount, the matter may be submitted to me.

Judgment will be for $500, and any medical expenses that may be found to be so payable, and costs.

KELLY, J. NOVEMBER 30TH, 1914.

BLOCH v. MOYER.

Negligence—Collision of Vehicles on Highway—Cause of Collision—Findings of Fact of Trial Judge—Injury to Traveller in Hired Vehicle Driven by Servant of Owner—Liability of Owner of other Vehicle in Absence of Negligence—Rule of Road—Highway Travel Act, R.S.O. 1914 *ch.* 206, *secs.* 3 (1), 5 (1)—*Reasonable Care.*

Action for damages for personal injuries sustained by the plaintiff in a collision between two vehicles upon a highway, by reason, as the plaintiff alleged, of the negligence of the persons in charge of the defendant's vehicle.

The action was tried by KELLY, J., without a jury.

W. H. Wright, for the plaintiff.

H. G. Tucker, for the defendant.

KELLY, J.:—The plaintiff, on the afternoon of the 11th March, 1914, engaged from the proprietor of a livery stable a horse and cutter, with a driver, to drive him from Hepworth to Shallow Lake. The driver was a boy, Walker, fourteen years of age.

On the way, while going southerly on a country highway, the cutter came into contact with the defendant's wood-sleigh, going northerly, which was drawn by two horses in charge of the defendant's two sons, aged respectively nineteen and eighteen years. The sleigh was loaded with wood. . . . The day was very cold, and the defendant's sons, to protect themselves from the north wind, were walking on the road behind the sleigh, the reins with which they had been driving being fastened between two nails on the top of the load and then extending about half way to the back of the load. The horses were tractable, well-broken, and obedient to their driver's verbal orders. . . .

A very short distance to the south of the place of the accident there is a rise of ground with a moderate incline from it both to the north and to the south. The plaintiff contends that this rise of ground prevented him and his driver from seeing the defendant's horses and sleigh until they had come within a short distance of each other, though he admitted that he saw

them when they were forty or fifty feet distant, and his driver says he saw them when about forty feet from him. The evidence as to the grade of the incline, especially to the south of the rise of ground is somewhat conflicting; but I have no difficulty in finding that any person driving as the plaintiff and his driver were driving could have seen the defendant's horses and sleigh at a distance much greater than fifty feet, and much more than was requisite to negative any possible inference that the sleigh came upon them so suddenly that they could not have protected themselves. . . .

The roadway was such as is found in country places at that season of the year when the ground is covered with considerable snow, there being a beaten way for a sleigh or cutter, each runner of which runs in a beaten track, with here and there a turning-out place. . . . At the immediate place of the accident there was no such turning-out place; there is evidence, however, that one existed about eight rods to the north. . . .

The plaintiff takes the position that the defendant's negligence was responsible for his injuries; that such negligence consisted in the driver of the sleigh not having been in his proper place on the sleigh to guide the horses and have a clear view of the plaintiff's conveyance; in not having hold of the reins and being without control of the team; in disregarding the request of the plaintiff and his driver to stop; in failure to turn off so as to give the plaintiff's vehicle part of the road; in not stopping when a collision was inevitable; in allowing the team to proceed after the collision; and in failing to stop as required by the Highway Travel Act. . . .

As between the evidence of the chief actors . . .—the plaintiff and his driver on the one hand and the defendant's sons on the other—I might have had some difficulty in determining, were it not that the latter's testimony is borne out by some circumstances. There is no doubt of the fact, sworn to by the defendant's sons, that the cutter struck the defendant's horse; it is in evidence and not contradicted that the horse was marked by the stroke, so that up to that time the horse and cutter were not clear of the beaten track—they were still in motion; and I find that they did so continue until the cutter collided with the rack of the sleigh, and that this it was that caused the defendant's horses, then at a standstill, to go forward, dragging the cutter with them. . . .

But it is argued that, even if it is found that there was negligence on the part of his driver contributing to the accident, the plaintiff, being merely travelling in a conveyance of the

person who employed the driver, is not disentitled to recover; that he was not so identified with the driver as to make the driver's negligence his negligence. That proposition of law is sound if it is shewn that there was negligence, on the part of the driver or owner of the other vehicle, which caused the accident. The test of liability in such cases is: was there negligence on the part of the driver of the vehicle which collided with that in which the plaintiff was travelling which wholly or in part caused the accident? It is so laid down in Halsbury's Laws of England, vol. 21, p. 452, para. 764, where the author cites Mills v. Armstrong, The Bernina (1888), 13 App. Cas. 1, and Matthews v. London Street Tramways Co. (1888), 5 Times L.R. 3, both of which are relied upon by the plaintiff. . . .

In the latter of these it is stated that the proper question for the jury in such cases is: "Did the negligence of those in charge of the vehicle other than that in which the plaintiff was, in whole or in part cause the accident?"

Applying these tests, I am of opinion that the plaintiff cannot succeed. Whatever negligence the defendant may have been guilty of ended with the stopping of his horses when the cutter was from fifteen to twenty feet distant. With reasonable care the plaintiff's conveyance could then have been stopped. . . .

Nor is he helped by the provisions of the Highway Travel Act, R.S.O. 1914 ch. 206. The obligation cast upon the driver of a vehicle by sec. 3 (1), when meeting another vehicle, to turn out to the right of the centre of the road, is modified by sec. 5 (1), where it is provided that "where one vehicle is met . . . by another, by reason of the weight of the load on either of the vehicles so meeting . . . the driver finds it impracticable to turn out, he shall immediately stop, and if necessary for the safety of the other vehicle, and if required so to do, he shall assist the person in charge thereof to pass," etc.

Here the driver was not required to assist those in charge of the other vehicle to pass; the only communication by the latter to the defendant's sons was by shouting, which I find was not until the vehicles had collided.

There remains to be considered the question whether the defendant's vehicle was too late in being stopped. I take the Act to mean that the stopping must be at such time as will enable the driver of the other vehicle, with reasonable care, to protect himself and his conveyance and the occupants thereof, and to afford him sufficient opportunity of calling upon or requiring the other driver to give assistance in passing without damage. My view is, that the defendant did not fail in this respect. I

think that he was negligent when the horses were permitted to travel on the public highway without the proper guidance of the driver, and in the driver not being in a position to observe others lawfully on the road; but that negligence ended before the accident happened, so that it was no longer a contributory cause of the plaintiff's injuries. If the driver of the cutter had exercised reasonable caution and care from the time that the defendant's horses came to a standstill, and if he had also stopped, as it was in his power to have done, the accident would not have happened.

The action should be dismissed with costs.

In case the action should proceed further, I assess the plaintiff's damages at $600. . . .

LENNOX, J., IN CHAMBERS. DECEMBER 1ST, 1914.

SCHMIDT v. SCHMIDT.

Appeal—Leave to Appeal from Order of Judge in Chambers—Debatable Question—Pleading—Statement of Claim—Addition of Cause of Action not Endorsed on Writ of Summons—Rule 109—*Leave to Join two Distinct Claims—Parties—Rules* 67, 68, 73.

Motion by the plaintiff for leave to appeal from the order of LATCHFORD, J., in Chambers, ante 257, affirming the order of the Master in Chambers, ante 228, striking out the claim for alimony made in the statement of claim, but not endorsed on the writ of summons.

A. McLean Macdonell, K.C., for the plaintiff.
George Wilkie, for the defendant Schmidt.

LENNOX, J.:—If the only question proper to be considered on the defendant Schmidt's motion was whether, upon the endorsement of the writ of summons, as it is, the plaintiff had a right to set up a claim for alimony, I would say, if I may do so without offence, that I entirely concur in the judgment pronounced. By Rule 109, the plaintiff may in his statement of claim "alter, modify, or extend his claim as endorsed upon the writ." But "alter, modify, or extend" does not mean that the plaintiff can,

without amendment of the writ, introduce into her statement of claim a new and distinct claim or cause of action, such as her claim for alimony manifestly is. This is the only point decided by the Master in Chambers; and this, if I judge by the argument addressed to me, was the only point raised or directly dealt with in Chambers or upon appeal.

It is to be noted, however, that incidentally, and as supporting the conclusion reached, the learned Judge says: "The matter is further complicated by the fact that the writ was issued against defendants other than the husband. If the test of the impropriety of enlarging upon the claim made in the writ is, as I think it is, that such a new and distinct cause is set up as would not be consolidated by the order of any Judge with the cause or causes of action originally stated, then the learned Master is right. . . . There is nothing to prevent that plaintiff from issuing a writ claiming alimony, but the cases in that event could not, I feel sure, be properly consolidated." This is clearly the test as to whether the plaintiff should be allowed to proceed in the way proposed.

But, with great respect, I am unable to concur in the opinion of the learned Judge that it is not a case for consolidation of claims, distinct causes of action as they certainly are, or that to combine them in the endorsement of the writ would not have been proper. The defendant the National Trust Company, although a necessary party to the action as originally launched, has no financial interest in the result, has no interest whatever in the additional cause of action, and will probably not take any active part in the trial of the action, whether it is fought out upon the lines originally planned or as now proposed; but "it is not necessary that every defendant to an action should be interested in all the relief claimed, or in every cause of action included therein:" Rule 68. I am, therefore, unable to conclude that any embarrassment is likely to arise from this cause.

As to combining causes of action, Rule 68 provides that "a plaintiff may unite in the same action several causes of action." There is no difference of opinion as to the desirability of avoiding, as far as may be, multiplicity of suits. The alleged desertion of the plaintiff by the principal defendant, the conduct and character of these parties, and the proper custody of the children, goes to the root of the whole controversy, will be more or less involved in the trial of both issues, and much of the evidence upon each will, I would think, be common to both. Rules 67 and 73 make ample provision for separating the issues or parties for trial if found more convenient when this stage is reached. For

the determination of these not very complicated questions between husband and wife, all probably traceable to one common origin, in which they are practically the only parties interested, is it necessary that there should be separate writs, separate sets of pleadings, and separate examinations for discovery, and ultimately two hearings in the appellate Court, even if later on it should be thought convenient to postpone the trial of the case against the trust company until after the trial of the main issues in the action?

I of course express no final opinion. That is necessarily for the consideration of the Court of Appeal. But I am, with great deference, of opinion that the question is at least so reasonably debatable, and is of sufficient importance in itself, to justify the granting of the application. There will be leave to appeal.

But, as the plaintiff delivered the statement of claim without amending the writ, and has not yet put herself right by applying for leave to amend; but, on the contrary, judging by the argument before me, has always contended that the statement of claim contains only one claim or cause of action and is no departure from the writ—an argument to my mind wholly untenable—the costs of the application for leave to appeal will be costs in the cause to the defendant Schmidt in any event.

BOYD, C. DECEMBER 2ND, 1914.

CARDINAL v. PROCTOR.

Vendor and Purchaser—Agreement for Sale of Hotel—Neglect or Inability of Vendor to Carry out—Damages—Return of Money Paid—Sum to Cover Expenses—Claim for Prospective Profits—Interest—Costs.

Action for the return of $300 paid by the plaintiffs to the defendant on an agreement for the sale of hotel premises and for damages for the defendant's refusal to carry out the agreement.

The action was tried without a jury at Fort Frances.

L. McMeans, K.C., and W. McBrady, for the plaintiffs.

H. A. Tibbetts, for the defendant.

BOYD, C.:—I found at the trial that the whole difficulty in carrying out this transaction (so far as the evidence shewed)

was that the defendant was not ready or able to place the plaintiffs in possession at the date fixed for completion, viz., the 1st May, 1914.

The hotel in question was then occupied by a man called Lipke, lawfully in possession, and with whom no arrangement had been made by the vendor to vacate the premises for the entrance of the purchasers.

I suspect that the whole trouble arose out of the inaction of the vendor and his relying on all the details being attended to by his tenant, Mr. Lucy. The vendor undertook to sell the fee simple, but he had only an agreement to purchase from the registered absolute owner, one O'Neill, under an agreement, the last payments on which were to be made, of $1,000 on the 1st October, 1914, and $1,000 on the 1st October, 1915. This kind of title was not accepted by the purchasers, and might have occasioned further trouble had the premises been vacated.

Proctor had leased the place to Lucy on the 4th November, 1913, for three years, with a right to sublet and with the privilege of purchasing for $3,500. On the next day, Lucy sublet to Lipke (the person now in possession) for the residue of the term. The sublease contained this proviso: "The lessor" (Lucy) "may have the privilege of selling the property at any time upon payment of $500 to Lipke and on giving him 30 days' notice."

On the 5th March, 1914, the agreement to sell now in controversy was negotiated and made by Lucy and afterwards ratified by Proctor. By private agreement between them, Lucy was to get $1,000 out of the $2,000 to be paid on the 1st May, 1914, the day fixed for delivery of possession, and, by further private arrangement, out of this $1,000 received by Lucy he was to pay $500 to Lipke.

Accordingly, on the 19th March, 1914, the 30 days' notice was given to Lipke that the place had been sold, and that he was to give up possession and receive the $500.

Lipke did not like the situation; for, as he said in evidence, he had expended $500 in permanent repairs; and, to protect himself, he bought out Lucy and obtained an assignment of the Proctor lease, on payment to Lucy of $400. This was on the 17th April, 1914, but was not made known, apparently, to Proctor, till some time afterwards. But at this point Lucy disappears, and no longer actively intervenes, and the defendant's evidence is that he relied on Lucy and took no steps to deal with the man in possession. When the plaintiffs applied to Lipke, on or before the 1st May, he said that he would not go out of posses-

sion, and that no arrangement had been made with him as to leaving the place. In answer to me, Lipke said that it never got so far with him by the vendor or Lucy as to finding out on what terms he would leave; but that he would have gone out if he had been paid $1,000.

But these details were for the vendor to look after, and to have all the necessary preliminaries provided for fully by the 1st May. The plaintiffs were ready with the rest of the purchase-money, but the defendant could not let them in. The plaintiffs brought their action promptly, and are right on all points; the whole source of trouble is in the inertness of the defendant, who neglected to have all matters so adjusted that the sale could have been closed and possession given on the 1st May.

Large damages are claimed in the way of prospective profits. I was against this at the hearing; but I think that the defendant should repay the down-payments of $75 and $225, with interest from the 7th March, 1914, to the date of judgment, and with costs of action on the Supreme Court scale, and pay the sum of (say) $50 for expenses and outlay incurred by the plaintiffs in the premises. There was no precise evidence given to warrant my going further in the way of damages.

MIDDLETON, J., IN CHAMBERS. DECEMBER 4TH, 1914.

WAINBURGH v. TORONTO BOARD OF EDUCATION.

Infant—Next Friend —Married Woman—Practice — Rules of Court.

Appeal by the plaintiff from an order of the Master in Chambers staying proceedings until the appointment of a new next friend for the plaintiff, an infant.

A. Cohen, for the plaintiff.
E. P. Brown, for the defendants.

MIDDLETON, J.:—The Master in Chambers has determined that the plaintiff, an infant, is not entitled to sue by her mother, a married woman, as next friend.

I have read with interest the very complete argument presented by Mr. Cohen, but I find myself unable to agree with the

conclusion at which he arrives. The incapacity of a married woman to act as next friend has long been recognised, and it is now too late to enter into a discussion of the sufficiency of the reasons which were deemed adequate for the establishment of this rule. The cases referred to, In re Duke of Somerset (1887), 34 Ch. D. 465, and Mastin v. Mastin (1893), 15 P.R. 177, conclude me; and, notwithstanding all that is suggested, I may respectfully say that I agree with the conclusions there arrived at, and do not think that the many changes in the law by which the disabilities incident to coverture have been removed are in any way sufficient to displace these authorities.

Reliance is placed upon changes made in the last revision of the Rules of Practice. These changes, it appears to me, do not affect the question. Formerly a married woman, because she was under disability, could not sue for the purpose of asserting her rights without the aid of a next friend. The Legislature relieved her from this disability, and it is no longer necessary to make any reference to this in the Rules. The former Rule that has been omitted had become obsolete. It is provided that infants and lunatics, because they are under disability, may sue by a next friend; and, although a married woman has been given the right to assert her own cause of action in the Court, the Legislature has refrained from authorising her to act as the next friend of others under disability. The former Consolidated Rules made reference to the former practice of the Court of Chancery. No good purpose was served by this, and this reference was omitted; but the former practice of the Court of Chancery affords a safe guide in the interpretation of our Rules, and it goes to shew that the Court ought to exercise large control over those who undertake to represent infants; so that, if the matter was one resting in discretion, I would hesitate long before allowing what is now sought to succeed. The case, however, does not rest in discretion, but on the well-established incapacity of a married woman.

For this reason I think the appeal fails and should be dismissed with costs.

MIDDLETON, J. DECEMBER 4TH, 1914.

RE LEBLOND.

Will—Construction—Gift of Property to Trustee and Executrix—Failure to Name Beneficiary—Blank Left in Will—Wills Act, sec. 58—Trust as in Case of Intestacy.

Motion by Eliza Davis, the executrix and trustee under the will of Edith Rose Leblond, deceased, for an order declaring the proper construction of her will.

G. N. Shaver, for the applicant.

C. B. Henderson, for Thomas Leblond, the husband of the testatrix.

MIDDLETON, J.:—This is another of the rapidly growing list of cases in which the filling up of a printed will form by one unskilled in work of that kind defeats the intention of the testator. In this case the printed form itself is one in which phraseology is used that is entirely foreign to our law, it being probably an adaptation from some Scotch form.

Stripped of technical and meaningless verbiage, the testatrix gives her property to her mother as trustee, and she appoints her her executrix, and directs her to pay her debts. Then follow the words: "(2) I give devise and bequeath unto" Following this is a blank in which it is intended that the whole operative part of the will should be written. It is intended in this space to name the beneficiary and the property disposed of; but, unfortunately, all that is written is, "everything I have clothes money etc." and no beneciary is named.

The mother asks that I should read into the will some word or words which would indicate that she takes the property not only as trustee but as beneficiary. I find myself unable to yield to this, notwithstanding the very capable argument presented by Mr. Shaver on her behalf.

The rule which governs is, I think, very clearly expressed in the case of In re Harrison (1885), 30 Ch. D. 390. There, Lord Esher, after determining that the original will may be looked at, says (p. 393): "Looking at the will in the present case, it is impossible not to take notice of the fact that part of it is a common form, not drawn up for the purpose of this particular will. The blank spaces were not left by the testatrix herself, but were

left for the purpose of being filled up by any testator who might happen to use the form. When the form is filled up as a will it must be read according to ordinary loose English grammar and ideas. There is one rule of construction, which to my mind is a golden rule, viz., that when a testator has executed a will in solemn form you must assume that he did not intend to make it a solemn farce—that he did not intend to die intestate when he has gone through the form of making a will. You ought, if possible, to read the will so as to lead to a testacy, not an intestacy. This is a golden rule."

In that case the Court found it possible to give a meaning to the words used, notwithstanding the existence of a blank in the document; but here no such result follows, and I am governed by what is said by Sir W. Page Wood in Hope v. Potter (1857), 3 K. & J. 206, 210: "The question is, whether the Court can find, on the face of the will, enough to enable it to give a sensible meaning to the words; for, if it cannot, the Court is not at liberty to avail itself of this hazardous course of supplying words; nor do I see, supposing I had been put in that difficulty, how I could safely have supplied the words which have been suggested. That some words have been omitted seems to be very probable . . . but I must have a clear conviction, amounting to necessary implication, that the words which I am called upon to supply are the proper words, otherwise I am not at liberty to supply them."

As put in the leading case of Abbott v. Middleton (1858), 7 H.L.C. 68, by Lord St. Leonards, at p. 94: "You are not at liberty to transpose, to add, to subtract, to substitute one word for another, or to take a confined expression and enlarge it, without absolute necessity. You must find an intention upon the face of the will to authorise you to do so. When I say, 'upon the face of the will,' you are, by settled rules of law, at liberty to place yourself in the same situation in which the testator himself stood. You are entitled to inquire about his family and the position in which he was placed with regard to his property." . . .

[Reference also to Taylor v. Richardson (1853), 2 Drew. 16.]

In the case in hand it may be that the testatrix intended to give everything to her mother; but she has not said so. I cannot infer from the fact that the mother is named as trustee and as executrix an intention that she should take everything beneficially; and that is all that appears upon the face of the will.

The argument was made that, the mother being appointed executrix, and there being no disposition of the beneficial inter-

est in the estate, she would as executrix take beneficially. This ignores the provision, . . . now found as sec. 58 of the Wills Act, which enacts that as to any residue not disposed of the executor shall be deemed to be a trustee for the persons who would be entitled to the estate upon an intestacy, unless it appears by the will that the executor was intended to take the residue beneficially. The effect of this statute, as applied to this will, is, to compel me to declare that the mother takes in trust as in the case of an intestacy.

Costs out of the estate.

BOYD, C. DECEMBER 4TH, 1914.

*SHORT v. FIELD.

Infant—Money Paid as Deposit on Agreement for Sale and Purchase of Land—Consideration—Absence of Fraud—Infant not Entitled to Recover.

Action to recover $200 paid by the plaintiff (an infant) to the defendant on the purchase of a house and land, and for damages for misrepresentation.

The action was tried without a jury at Sarnia.

J. Cowan, K.C., for the plaintiff.

D. S. McMillan, for the defendant.

BOYD, C.:—This action is by the plaintiff, an infant, suing by his father as next friend, in respect of an agreement made by him to purchase from the defendant for $1,400 a lot of land in Sarnia called and known as lot 501, Confederation street. The dimensions of this lot, which has a house on it, were 40 feet by 60, and it is so described in tax papers and other documents in evidence. The plaintiff alleges that the size of the lot was misrepresented by the defendant as being in effect 47½ by 72; and, for this reason and on account of his infancy, he gave notice to avoid the transaction. His father had been the agent in negotiating the sale and matters connected therewith, and the father had paid on the son's account $200 as a deposit at the time the contract was signed. The evidence negatives any misrepresentation on the part of the defendant, and shews that the

*To be reported in the Ontario Law Reports.

purchaser was aware of the lot being a small one and its dimensions 40 ft. by 60. The plaintiff alleges that he received no consideration for the money paid, and that he did not take possession. This position is hardly accurate. There was a tenant in the house at the time of sale (7th February, 1914), Mrs. Bell, paying $11 a month, who was perfectly satisfactory to the defendant. The plaintiff, after buying, brought many people to see the house, and directed it to be sold, at an advance of $100, by a land agent. The disturbance of these inspections caused Mrs. Bell to leave; and the plaintiff's agent—the father—rented the place to another person at an advanced rent, without reference to the defendant. It cannot be said that the plaintiff did not interfere with the possession and occupation of the place in consequence of his becoming the purchaser from the defendant.

Given these facts, how stands the law? And upon that there is somewhat of obscurity so far as authoritative decisions go. The only direct case I have found is a nisi prius decision reported as Wilson v. Kearse (1800), Peake Add. Cas. 196. It is quoted in a note to Fry on Specific Performance, 4th ed. (1903), p. 204, as holding that an "infant cannot recover a deposit paid on the contract, except on the ground of fraud." This note appears in the same terms in the 1st edition of Fry (1858), p. 133. . . .

[Reference to Simpson on Infants, 3rd ed. (1909), p. 64; Earl of Buckingham v. Drury (1761), 2 Eden 60, 72; Holmes v. Blogg (1817), 8 Taunt. 35, 2 J.B. Moore 552; Ex p. Taylor (1856), 8 DeG. M. & G. 254; Dart on Vendors and Purchasers, 7th ed., p. 33; Sugden on Vendors and Purchasers, 14th ed., p. 209; Cyprian Williams on Vendor and Purchaser, 1st ed., vol. 2, p. 801; Corpe v. Overton (1833), 10 Bing. 252; Hamilton v. Vaughan-Sherrin Electrical Engineering Co., [1894] 3 Ch. 589; Everett v. Wilkins (1874), 29 L.T.N.S. 846.]

Here there was no lack of consideration. By the transaction the infant became, while the contract lasted, potential owner of the place. He entered upon it by the land agent and the subsequent intending purchasers at an advance price, and he changed the manner of occupation by the admission of a new tenant at an increased rent, which enured to the plaintiff's benefit. His purchase was on the 7th February, and his action was not till the 23rd April, 1914.

It is my duty to accept Wilson v. Kearse as a correct decision; and I, therefore, have to dismiss the plaintiff's action with costs.

BARTLEFF v. NORTHERN ONTARIO LIGHT AND POWER CO.—LENNOX, J.—NOV. 30.

Fatal Accidents Act — Damages—Apportionment—Persons Entitled—Divorced Wife—Infant Children — Custody — Maintenance—Allowance out of Fund in Court.]—This action was brought by the administrator of the estate of George Rowe, deceased, under the Fatal Accidents Act, to recover damages for his death. After the trial of the action had been begun, a settlement was made by the parties and approved by LENNOX, J., the trial Judge, by which the defendants were to pay the plaintiff's costs (fixed at $250) and $2,000 damages. Judgment was pronounced accordingly, and it was directed that the $2,000 should be paid into Court. The question whether Margaret Rowe was entitled to share in the fund, and the question of the apportionment of the fund, were reserved; and judgment was now given thereon. It appeared by an affidavit of Margaret Rowe that she and the deceased George Rowe were married in the State of Michigan, many years ago, and that two children, Emma, aged 16, and May, aged 11, were born of the marriage. It was also shewn that these children were now living with and being cared for and supported and educated by their mother. The learned Judge finds that Margaret Rowe is not entitled to share in the fund, and the two children named are solely entitled, inasmuch as Margaret Rowe obtained a decree of divorce from her husband, in the State of Michigan, in November, 1911; but that Margaret Rowe is a proper person to have the custody, care, and education of her children. He directs that, with the privity of the Official Guardian, an allowance of $175 be paid out of Court every half-year to Margaret Rowe for the support of her two daughters so long as she continues to support and provide for them, or until further order, and that the first of these sums be paid forthwith. A. G. Slaght, for the plaintiff. H. E. Rose, K.C., for the defendants.

LEACH v. LINCOLN ELECTRIC LIGHT CO.—MIDDLETON, J., IN CHAMBERS—NOV. 30.

Jury Notice—Motion to Strike out—Action under Fatal Accidents Act—Delay of Trial.]—This action was brought by a widow to recover damages under the Fatal Accidents Act for the death of her husband by electrocution. The defendants served and filed a jury notice. The plaintiff, desiring an early trial, moved to strike out this notice. MIDDLETON, J., said that the action was not one in which the service of a jury notice could be regarded as vexatious, nor could he say that the action ought not to be tried by a jury. The death took place only on the 7th October, 1914, and the action could not have been brought to trial at the St. Catharines non-jury sittings had it been held upon the day fixed; it had, however, been postponed until the 14th December. The solicitor and manager of the defendants swore that the jury notice had been given in good faith and not for the purpose of delaying the trial. The learned Judge was unable to find grounds upon which he could safely interfere; but his action now must not prejudice any course that the trial Judge might deem it advisable to take. Motion refused; costs in the cause. Featherston Aylesworth, for the plaintiff. A. W. Langmuir, for the defendants.

HULL v. SENECA SUPERIOR SILVER MINES LIMITED—LENNOX, J. —DEC. 1.

Master and Servant—Death of Servant—Action under the Fatal Accidents Act—Negligence — Evidence — Findings of Jury—Damages.]—Action under the Fatal Accidents Act to recover damages for the death of Regis Hull while working for the defendants in their mine, by reason of the negligence of the defendants, as alleged. The questions left to the jury were answered in favour of the plaintiff. LENNOX, J., said that there was evidence to go to the jury as to how Regis Hull came to his death. He charged the jury very carefully upon this point. It was not objected, when the jury brought in their findings, that question 5 or any question was not answered or not fully or properly answered. It was peculiarly a case for a jury; and upon the answers the plaintiff was entitled to judgment. Counsel agreed that the amount proper to be assessed under the stat-

ute was $2,100, and the jury were directed to assess damages only at common law. They fixed the damages at the same sum. Judgment for the plaintiff for $2,100 with costs. A. G. Slaght, for the plaintiff. H. E. Rose, K.C., for the defendants.

BAUSCH v. WILLIAMS—LENNOX, J.—DEC. 4.

Trespass to Land—Title—Damages—Loss of Timber—Quantum.]—Action for a declaration of the plaintiff's title to land and damages for trespass by the defendant and cutting and burning timber thereon. The plaintiff was the locatee of the land, and at the trial the defendant disclaimed any intention to question the plaintiff's title. It was, therefore, found and declared that the plaintiff was entitled to maintain the action; and the learned Judge deals with the question of damages in a written opinion of some length, and assesses the damages at $350, for which amount he gives judgment, with costs according to the tariff of the Supreme Court. He disallows the plaintiff's claim for damages for bush burnt, but assesses the damages on this head, for the benefit of the plaintiff if he should prosecute a successful appeal, at $250. D. W. O'Sullivan, for the plaintiff. George Ross, for the defendant.