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EDITOR :
WALTER E. LEAR, ESQUIRE
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VOLUME XXV.

TORONTO :
THE CARSWELL COMPANY, LIMITED
1914.

TABLE OF CASES

REPORTED IN

THE ONTARIO WEEKLY REPORTER, VOL. 25

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ERRATA.

P. 679, line 25, for "company" read "Cornish."

P. 800, for Blackwell v. "Schemman" read "Scheinman."

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THE

ONTARIO WEEKLY REPORTER

VOL. 25 TORONTO, OCTOBER 16, 1913. NO. 1

OFFICIAL ARBITRATOR.

MEYER v. CITY OF TORONTO.

Arbitration and Award—Expropriation by Municipal Corporation—Practical Obliteration of Lucrative Restaurant Business—Mode of Assessing Compensation—Capitalization of Net Profits Incorrect — Special Adaptability — Allowance for — Potentiality — Realized Possibility not to be Allowed — Allowance for Business Disturbance—Quantum of.

OFFICIAL ARBITRATOR *held*, that where a restaurant business was "practically obliterated" by expropriation proceedings, the claimant should be allowed full and fair compensation for all the assets of the business and a sum for business disturbance in addition.

That as profits of a business are contingent on efficient management and other varying elements it is an incorrect mode of arriving at the compensation due the claimant to capitalize the net demonstrated profits.

That the only practical and fair method of assessing compensation is to allow the full commercial value of the various assets of the business, taking fully into account the special adaptability and future potentialities of the land appurtenant thereto.

That having regard to the nature of the business and the circumstances of the case three years' profits should be allowed for business disturbance.

Appeal by claimants and cross-appeal by contestants from above award is pending.—Ed.

This was an arbitration brought to determine what compensation the claimants should be paid by the corporation of the city of Toronto for the expropriation of their property on the Lake Shore road in the city of Toronto. The property consisted of 353 feet 9 inches frontage on the Lake Shore road and extended southerly a distance of 660 feet to the limit of the water lot. On a portion of this land, approximately 100 feet, was erected a restaurant, a ball-room, etc., leaving 100 feet to the east of it and 153 feet 9 inches to the west of it unoccupied by buildings.

C. A. Masten, K.C., and J. R. L. Starr, K.C., for the claimants.

H. H. Dewart, K.C., and Irving S. Fairty, for the contestants.

P. H. DRAYTON, K.C., OFFICIAL ARBITRATOR:—Commencing in the year 1901 and running down to the year 1909, the business was owned and conducted by Mrs. Pauline V. Meyer. At the latter date she took into partnership John Pfister. The partnership agreement was put in as an exhibit. On cross-examination it was sought to shew that the amount of cash put in by John Pfister should be some indication of the then value of the property in the hands of the partners. Ordinarily speaking that would be the natural inference to draw, but Mrs. Meyer in her evidence swears that Pfister had been a faithful employee for a number of years and that she had promised and always intended to do something for him. As a result she brought him in as a partner, giving him a half-interest in everything, on the face of it a most generous provision. Matters moving her thereto being however much more largely of a private and personal, than of a monetary nature, I have no reason to doubt her evidence on this point, and I do not therefore look at this partnership agreement as instancing or affecting the value of the property in the year it was entered into.

The first matter to be decided by me is the principle or basis upon which I am to proceed in assessing the damage sustained by the claimants by reason of the expropriation of their property. The learned counsel for the claimants urged that I should, taking the profits as a sole basis, proceed to arrive at the value of the land by charging the buildings with six per cent. (insurance and taxes having been charged in the statement of profits filed), and after deducting this amount from those profits, arrive at the value of the land by dividing the balance of the profits by the number of feet contained in the property and capitalizing the result at four per cent., and so fix the land value; and having thus arrived at the same, to allow for all potentialities by doubling the amount so found. I have considered this method very carefully and, with deference, find myself unable to agree with it. The profits of a business are so very largely dependent upon the personal element and the business capacity of the person or persons carrying it on, that I do not think they can be looked at as by any means the sole factor in determining the value of land on which the business is carried on. A. might make a large profit; B. might fail altogether on the same land.

It is undoubtedly true that where a volume of trade may be expected, demonstrated by trades or businesses car-

ried on in a certain locality, there the land values are and must be influenced by the demonstrated adaptability of the locality. This fact, however, in my opinion, falls short of admitting that the price of a certain piece of land should be fixed by the amount of profits which a particular owner may have been able to make out of the particular business carried on there. To carry such a principle out to its full extent might, and I think undoubtedly would, in some cases have the effect of making two adjoining pieces of property on the same street of totally different values. A. is carrying on a business at 100 X street, B. in the adjoining store No. 102 is also carrying on business; A. shews large profit, B. almost none, and to follow out the proposition logically that the profits are to be the sole basis of land values, what would be the result? The question I think answers itself.

All the real estate expert evidence for the contestants is opposed to such a principle, and Mr. Pearson, one of the claimants' witnesses on cross-examination, on being asked as to whether he had ever heard of applying the principle of fixing the value of land by the amount of the profits made by the person carrying on business on it, at p. 300 of the evidence, makes the statement that "If you had taken Hanlan's Hotel at its earning value it would not have paid anything because it 'bust.'" Boulton, at p. 349 of the evidence, also a witness for the claimants, is asked in cross-examination—Q. 106. "I am asking you if you ever once knew of a single case where the proposition was considered from that standpoint?" and answers, "As to earning power?

"Q. Yes, so that you would have a different value of one and different value of the other? Isn't the land just the same? A. I want to answer you exactly according to what I think. No, I don't know that I ever did, but I don't know also that I ever came across a similar transaction to this."

Now, although I cannot concede the principle that land value should be determined by the profits as a sole factor, yet the fact that a business carried on at a certain locality has proved a highly successful one, cannot be divorced from the land. In the case before me it is a well known fact that there were other businesses being carried on in that immediate vicinity, all of them to a certain degree resembling the business carried on on the Meyer property, in that they all catered to the public for refreshments and

for boat facilities, and it is also well known that these businesses were in their several degrees successful. Under these circumstances, I think it must be taken to be abundantly demonstrated that the locality itself was specially adapted to these businesses carried on there, and the land should be dealt with having regard to that fact, but not solely.

The land occupied by the claimants herein for their business was about 100 feet and the value in use of this 100 feet to the owner has been demonstrated by the evidence. Three factors in my opinion go to make up this use: (1) the land itself, (2) an appropriate building, and (3) the business capacity of the owner carrying on the business, and I deal with the case under three heads, viz., the value of the land, (2) the buildings, plant, stock in trade, etc., (3) the loss of business which in this case counsel for the city admits to be "practically the obliteration of her business." The claimants are entitled to be paid a proper compensation for the land, for the buildings, and for the taking away of the business together with the stock in trade, plant, etc. The compensation for the buildings, stock in trade, etc., is easily arrived at; the difficulty arises as to the other two heads; land value and business disturbance, or, as it is in this case, practically business annihilation.

In the case of *Commissioners of Inland Revenue* v. *Glasgow S.-W. Rw. Co.* (1887), 12 A. C. 315, the property in question consisted of lands and buildings occupied by the owners who carried on there the business of timber merchants, and whose premises were taken under the Lands Clauses Consolidated (Scott) Act. Although the exact point in issue was not directly dealt with (it being an appeal as to whether a portion of an award made was dutiable) an examination of the case discloses that compensation was awarded under three heads, viz.: (1) the value of the lands, (2) the buildings, machinery, plant, etc., (3) loss of business. As this is, in my opinion, a precisely similar case to the one under consideration, I deal with this case in a similar manner.

It may be well to briefly review the law bearing on cases such as the one under consideration. In Halsbury's Laws of England, vol. 6, p. 35, sec. 36, it is stated that "In ascertaining the value of the land all the actual use of it by the person who holds it and all its potentialities must be

considered;" and further, "In ascertaining the value to the owner in respect of its use by him, loss of business and good will in so far as they enhance that value to him may be regarded." So too in the Encyclopedia of the Laws of England, vol. 8, p. 18, it is stated: "Where land is required under a notice to treat or is entered on and taken, the compensation payable is the commercial value to the owner at the date of the notice to treat or entry."

In *Dodge* v. *Rex,* 38 S. C. R. at p. 155, Idington, J., says: "The market value of the land taken ought to be the *prima facie* basis of valuation in awarding compensation for land expropriated. The compensation for land used for a special purpose by the owner must usually have added to the usual market price of such land a reasonable allowance measured by possibly the value of such use; and at all events the value thereof to the using owner and the damage done to his business carried on therein or thereon, by reason of his being turned out of possession." In the leading case of *Lucas* v. *Chesterfield Gas Co.* (1909), 1 K. B., Fletcher Moulton, L.J., in his judgment makes the following statement: "The principles upon which compensation is assessed when land is taken under compulsory powers are well settled. The owner receives for the lands he gives up their equivalent, i.e., that which they were worth him in money. His property is therefore not diminished in amount, but is compulsorily changed in form."

In Cripps on Compensation at pp. 112 and 113, it is stated: "The basis on which all compensation for lands required to be taken is their value to the owner at the date of the notice to treat." This is under the Lands Clauses Act. Again on p. 116: "The loss to an owner where lands are required or have been taken includes not only the actual value of such lands, but all damage directly consequent on the taking thereof under statutory powers."

In *Ricketts* v. *Metropolitan Railway Company* (1865), 34 L. J. Q. B. 257, 13 W. R. 455, the dictum of Erle, C.J., is as follows: "As to the argument that compensation is in practice allowed for the profits of trade where the land is taken the distinction is obvious, the company claiming to take the land by compulsory power expel the owner from his property, and are bound to compensate him for all the loss incurred by the expulsion, and the principle of compensation then is the same as in trespass for expulsion, and so it has been determined in *Jubb* v. *Hull Dock Company,*

9 Q. B. 443." The cases of *Riddell* v. *Newcastle Water Works; Osselinsky* v. *Manchester Corporation,* in Hudson on Compensation, p. 1546; *Tynemouth* v. *Northumberland,* 89 L. T. 557; *Gough & Aspatria* v. *Sildoth and District Joint Water Board,* 73 L. J. K. B. 228; *Lucas* v. *Chesterfield,* 1 K. B. 1909, and *Bailey* v. *The Isle of Thanet Light and Railway Company* (1900), 1 Q. B. 722, all deal with the question of adaptabilities as a matter to which weight should be given by an arbitrator.

I do not think it can be doubted, as I have before stated, that the situation lent itself especially to the line of business that was carried on by Mrs. Meyer, and afterwards Meyer & Company, and others adjoining, very especially as to the restaurant and boating ends of the business. Situate as it was some 500 feet west of the Mimico Line terminus, within another thousand feet of the point of debarkation of passengers on the King and Queen street cars, on the line of travel for passengers leaving these cars, going to High Park; on the line of travel of all foot passengers whether from the cars or otherwise, coming from the city and desiring either to walk along the Lake Shore road or to go into High Park, there is no doubt that a large concourse of people passed and repassed the Meyer premises on most days of the week, both in summer and winter. These facts go to shew that the location was well adapted for the uses to which it had been put, and I do not think that this had been seriously disputed.

A great deal has been said in the evidence as to the great business capacity of Mrs. Meyer, and rightly so said. Mrs. Meyer, however, at one time carried on a restaurant business in High Park, together with a dance hall, fish meals, etc., and she has sworn in her evidence that she could not and did not make a success of it, and this is not contradicted. She moved from there to the Lake Shore situation and made a success of it. The same personal element was present in each case, the one proved a failure, and the other a success.

Can there be any doubt then that in the latter case the *situs in quo* lent itself to the energy and business capacity of Mrs. Meyer? I think not. And this exhibited adaptability of the land for the purpose for which Mrs. Meyer used it should not be overlooked in putting a value upon it.

I do not think that the comparison of Island properties for the business carried on by the claimants is of any value,

nor the comparison of possible sites there, with the locality in question. The evidence I think discloses the fact that there is no similar location to be obtained within the city limits. The land values sworn to by the claimants' experts, as I have before mentioned, were all practically based on the profits as exhibited in Clarkson & Cross' statement. These land values included business disturbance, but not the value of the buildings. Pearson, taking the profits as his basis, puts the land alone at $500 or $176,500 irrespective of the buildings, and not having brought into his estimate a future value. Frankland, taking the same basis, namely, the earning power, puts the land at $400 a foot or $141,500, and goes so far as to say that taking into consideration the capacity for expansion, he would just double this, and puts the land then at $283,000 at least. Boulton also, taking the profits as his basis, puts the land at $500, and says that he includes in the $500 the potentialities of the property, and its adaptability to future expansion. These valuations all include the business disturbance but not the buildings. I have above given my reasons why I do not think the profits of a business should be the sole factor in determining land values, but I have weighed this evidence having in view that the figures represented really business disturbance as well as land value, in fact everything except the value of the building.

In contradistinction the contestants' witnesses take as their basis the purchases made by Mrs. Meyer in 1901, 1905 and 1906, and some purchases made by the city, and the amount found in the Ardagh award. They admit that a successful business is or might be a factor to be taken into consideration, and claim that they have so done. They also admit the adaptability of the land for the business being conducted. Taking those things into consideration, they place a value of from $119 to $125 a foot on the land itself, including the potentialities and not irrespective of the business done, but not based alone on it. I do not think the city witnesses gave sufficient weight to the potentialities or the demonstrated adaptability of the land.

It is a proven fact that the highest price paid by Mrs. Meyer was $50 a foot in the year 1905, and it is a noticeable fact that in the year 1906 Mrs. Meyer was able to purchase the easterly 100 feet of her property at $40 a foot, and at this time according to Clarkson & Cross' statement her

business done for that year was within some $1,000 of the business done in 1911. These prices paid by her may be taken as some indication of the value of the land at the several dates at which she bought, but cannot have much bearing on values in 1911. What should that land be worth in 1911, bearing in mind its demonstrated use and increase all over the city? Since her purchases we have the amount awarded in the Ardagh arbitration for land considerably to the west of the land in question. The amount awarded was $37.50 a foot in 1908 as of 1907. One of the contestants' witnesses (Mara) said he thought that the Meyer property would be worth about double the Ardagh property. This would give a value of $75 a foot as of the year 1907, but notwithstanding that fact the witness declined to raise his value beyond $125 a foot sworn to as of the date of expropriation. Taking, however, this as giving a value of $75 a foot as of the year 1907, it may be looked at as some basis on which to arrive at the value in 1911. The evidence all points to a very large increase in value from such date down to the date of expropriation, and this all over the city.

Offers made by Hollinger of New York and Shorer of Woodstock to Mrs. Meyer, as also offers made by Hollinger and Mrs. Meyer to the Corporation of the City of Toronto, were put in. I do not feel able to give weight to these offers.

The claimant stated in her evidence that she was cramped for room in conducting her business in the premises occupied at the time of expropriation, and had purposed enlarging her building; and in corroboration of this statement evidence was given that she had consulted the firm of Darling & Pearson in the fall of the year 1910, having the enlargement then in view. The architect was called and gave evidence as to the fact that Mrs. Meyer had been in their office and consulted him in regard to enlarging her premises. No plans, however, were ever made, and the matter went no further, on account, according to the evidence, of the want of proper survey. I see no reason however to doubt the fact that an enlargement was contemplated. Mrs. Meyer also spoke of various other ideas she had in her mind as to the user of the balance of her land, such as an apartment house, roller skating rink, etc. These are in my opinion chimerical, and if possibilities, too remote

to be taken into consideration. See in *Re Fitzpatrick and Town of New Liskeard,* 13 O. W. R. 806.

The enlargement of her present premises I look upon as a proper and potential element to be considered. I think the evidence fairly establishes the fact that an enlargement of the present ball-room of the building, of another ball-room and the extension of her restaurant capacity would produce increased business and revenue. This potentiality would exist in probably another 50 feet of land to the west and this I take into account in fixing my values.

Counsel for claimants, in dealing with potentialities, says practically the business carried on at the time of expropriation made so much; that gave a value of so much to the land; the business can be doubled, therefore, the whole value should be doubled. He is treating the possibility as a realized possibility and giving full effect to it, which seems to me to be directly in conflict with the law as laid down in *Lucas* v. *Chesterfield Gas Company,* already referred to.

I do not think the potentialities of the westerly 103 feet 9 inches as great as the more easterly portion of the property which may be said to have been used in connection with the business, as to the extension of which I believe there was every reasonable probability that is 100 feet to the east which was kept for air space and view, 100 feet which the buildings practically occupied, and a further fifty feet to the west thereof for probable enlargement, making in all 250 feet.

Having very carefully weighed and considered all the evidence adduced, having viewed the property, having heard the arguments of counsel, and applying the principles laid down in the text books and cases cited, allowing for the potentialities and the adaptability of the land for the purposes for which it was used, I have come to the conclusion to allow $240 a foot for the easterly 250 feet; for the westerly 103 feet 9 inches the sum of $200 a foot. This will give the land compensation at $80,750, which I find is the amount to be paid for its taking.

A report, Exhibit "21," certified to by Messrs. Clarkson & Cross, was put in shewing, according to their view, the net profits of the Meyer business between the years 1909 and 1911. The data at which the results were arrived at in this report cannot be said to be by any means entirely satisfactory. A very large number of cheques filed as ex-

hibits herein were produced by the claimants, and these, with the books of account, bank book, etc., were the material upon which the report was based. Quite a large number of these cheques failed to indicate to what accounts the amounts named in them should be charged, and there were no stubs to help. Under these circumstances, the accountants, when a cheque was under consideration not ear-marking the account to which it should be charged, asked for information from Mrs. Meyer, and if she said it was private account it was not charged to the business. Mrs. Meyer's memory as to what those cheques were drawn for and her statement thereof was the only information on which the accountants had to rely as regards these unear-marked cheques.

The books, cheques, etc., were all placed at the disposal of the city for scrutiny most fairly by the claimant's counsel. In the result the sum questioned is $4,121.10 charged to personal account. At p. 160 of the evidence, question 203, counsel for the city alluding to this $4,121.10, says: "This item I am speaking of is absolutely loose, there is nothing shewn one way or the other? A. No, there is nothing in her books to indicate.

205. Q. And you drop it on the assumption that every thing that relates to the business is in the books? A. Yes."

Holmested, the accountant called by the city, takes issue with Bragg, the claimant's expert, as to this item, stating that under the circumstances he thinks it should be charged to the business; although this opinion he modifies when told that Mrs. Meyer has bought an auto, etc.

In reply, at p. 526, Mrs. Meyer is asked at question 846: "What do you say as to whether that money (i.e., $4,121.10) was an expenditure for running the business or was for personal money received by you as profits?" And her answer is: "Absolutely personal," going on to explain.

And again at p. 528, question 855: "So that you positively say that this $4,121.10 is not in any way expenses of the business? A. Absolutely nothing to do with the business."

This is practically corroborated by Pfister at p. 528. Having in view such expenditures as the purchase of a car, etc., and the sworn testimony of the claimant, I am bound to believe that these witnesses are speaking the truth; and I allow this item as represented, namely, personal expenses.

The report of Clarkson & Cross states: "That for the services of Mrs. Meyer and her partner John P. Pfister for the period under review we have no charge against the profits. As contrary to this, the profit and loss accounts have received no credit for the board of the above parties, neither has credit been taken for rental."

There is no doubt in my mind that the business should be charged with the salaries of both Mrs. Meyer and Mr. Pfister.

The question of the rent I find more difficult to deal with.

In estimating the profits of the business, it is the general rule to charge the same with a rental, and I see no reason why it should not be done in this case, especially as the business and the land are being dealt with separately. The question with me is as to the amount to be charged under the peculiar circumstances of the case. Mrs. Meyer and family having occupied some nine rooms as a residence and having lived, as to the household expenses, such as food, etc., out of the business; and as no credit has been taken for either of those items, the rentals to be charged should be reduced by the amount that might be fairly credited on both items. Holmested calculating on a four per cent. basis on a rate only of $125 a foot for the land and on 100 feet, less the building at 8 per cent., puts the rental at $2,500, deducting $500 on account of space occupied by Mrs. Meyer. This, taking into account the other items of board, I do not think is sufficient deduction, which should amount in my opinion to $1,500 to cover the two items for which no credit was taken as stated above.

In regard to the salaries which should be debited against the profits, I think that had Mrs. Meyer been obliged to employ some one with the same business acumen as herself she would have had to pay at least $1,500 a year. Consequently, that sum in my opinion, having regard to the evidence dealing with this matter, referring especially to that of Turnbull, is not too much to charge for Mrs. Meyer's services. Pfister is fixed at $1,000, which amount I find reasonable to allow.

As to depreciation, Holmested for the city makes a charge of $800 yearly against the business. The evidence of Mrs. Meyer is to the effect that things were so well looked after that there was no depreciation. This seems hardly possible and counsel for the claimant himself suggests a

yearly sum of $300. I would add $100 to this and charge $400 yearly depreciation. The result would then be as follows:

Average yearly net profits as shewn by Clarkson & Cross' statement		$9,066 00
Mrs. Meyer's salary	$1,500 00	
Pfister's salary	1,000 00	
Rent	1,000 00	
Depreciation	400 00	
	$3,900 00	$3,900 00
Which leaves a balance of net profits of		$5,166 00

For the practical obliteration of this business I allow three years' profits, or in round figures, $15,500.

For the buildings I allow the sum of $28,000, and for the amount due on stock-in-trade, etc., the sum of $4,706, being the amount agreed on by counsel for claimant and contestant.

Summing up we have:

For the land the sum of	$80,750 00
For the building the sum of	28,000 00
For the business the sum of	15,500 00
For the stock-in-trade, etc.	4,706 00

Making a total of ..... $128,956 00, with interest on the same from the date of expropriation until payment at the legal rate of interest.

As, in my opinion, this sum represents a fair and liberal compensation, I have not added anything for the compulsory taking.

I am indebted to counsel for the very able arguments put in, which have been of much assistance to me.

HON. MR. JUSTICE MIDDLETON. SEPTEMBER 30TH, 1913.

BIRD v. HUSSEY FERRIER MEAT CO. LTD., AND W. C. FERRIER.

5 O. W. N. 60.

Company — Contract on Behalf of — Power of Employee to Bind— Transaction not Ordinary Mercantile one—No Implied Authority —Misrepresentation—Lack of Ratification.

MIDDLETON, J., *held*, that a manager of a company has no implied power to bind the company other than in its ordinary mercantile dealings and that the manager of a retail meat company had no implied power to purchase lands and the goodwill of a retail meat business situate thereon.

National, etc., v. *Smith's Falls, etc.*, 14 O. L. R. 22, distinguished.

Action for specific performance of an agreement for the purchase of certain lands and premises alleged to have been entered into by the defendant Ferrier on behalf of the defendant company for damages, tried at Sault Ste Marie on the 19th September, 1913.

J. McEwan, for the plaintiff.

V. McNamara, for the defendant company.

O'Flynn, for W. C. Ferrier.

HON. MR. JUSTICE MIDDLETON:—The defendant company is incorporated, under the Ontario Statute, for the purpose of carrying on a wholesale and retail business as dealers in live stock, meats, produce, etc. Its affairs were carried on with extreme laxity. The charter was dated April 3rd, 1911, and the usual organization meetings were held early in May. Mr. Hussey was elected president, Mr. A. B. Ferrier vice-president, and these two, with Mr. Robinson and Mr. Drury, were elected directors. These four gentlemen practically constitute the company.

Although the company at once went into business and had substantial transactions, no directors' meeting appears to have been held until July 30th, 1912, when a meeting was held to pass a formal resolution relating to a bank advance.

In the meantime it had been arranged between the directors of the company that the active management of the business should be divided between the different directors, Mr. A. B. Ferrier being placed in charge of that part of the business centering around Thessalon; the object of

the company being to establish a series of stores in Sault Ste. Marie, Thessalon, and other western towns, and to obtain, if possible, practically the control of the entire retail butcher's business of the district.

The plaintiff was carrying on business in Nesterville, a village near Thessalon. Mr. W. C. Ferrier had been employed by the company, and Mr. A. B. Ferrier, in pursuance of the general policy of the directors, instructed Mr. W. C. Ferrier to negotiate with Bird for the purchase of his business. Ferrier undertook the negotiation, and finally arrived at an agreement dated the 4th June, 1912, by which he agreed to purchase the lands used in connection with the plaintiff's butcher business for $1,500, payable $250 at the time of the execution of the agreement, $50 in thirty days, and the balance in monthly instalments of twenty dollars with interest at eight per cent. This agreement was entered into by Ferrier in his own name, and is under seal. Although the agreement relates solely to the lands, the intention was to purchase the entire business.

Ferrier, at the time of the execution of this agreement, paid five dollars of his own money. This was afterwards refunded to him by the company, and the company paid the first two instalments, amounting to $300; and Ferrier took possession on behalf of the company.

Subsequently an agreement was made, dated the 13th June, 1912, between Ferrier and the company, by which Ferrier was employed to take charge of this particular business at Nesterville upon a salary. Contemporaneously, a document was drawn bearing date 13th June, 1912, reciting the agreement of the company to take over Ferrier's agreement with Bird and undertaking to indemnify him with respect thereto.

Some evidence was given at the hearing indicating that a copy of this agreement had been signed; but as it was not produced, and the evidence was unsatisfactory, I am unable to find that it ever was executed.

The business was carried on by Ferrier on behalf of the company for some months; and during that time payments were regularly made of the monthly instalments as they fell due; the last payment being that falling due in October.

A fire then took place, which destroyed the building and contents; and, on Bird looking to the company to continue the payments, it repudiated the entire transaction; taking

the position that Mr. A. B. Ferrier had no authority to enter into the arrangement made.

It appears that Mr. A. B. Ferrier entirely misrepresented to his co-directors the agreement that he had entered into. They understood he had purchased the business and fixtures for $300 and had rented the premises at twenty dollars per month.

Under these circumstances it is impossible to find any ratification on the part of the company by anything that was done, and the case must be determined upon other grounds.

The plaintiff relies upon the judgment of Garrow, J.A., in *National, etc.* v. *Smith's Falls, etc.*, 14 O. L. R. 22, where it is said (p. 28): "The board of directors would certainly, I think, have power to bind the company by entering into such an agreement; and if the board could lawfully have done so they could also, I think, have authorized the manager to do so for the company. And in the total absence of bad faith or notice, the plaintiffs were entitled to assume that he had been duly clothed with the real authority which he was ostensibly exercising in entering into the contract in question."

This does not mean that the manager of a company is presumed to have authority to enter into any contract *intra vires* of the directors, but was spoken of the contract there in question—a mercantile contract for the manufacture of goods. The distinction is well shewn in *Gartnell's Case*, L. R. 9 Ch. 691, where the principle is confined to cases "of an individual or body corporate, carrying on business in the ordinary way, by the agency of persons apparently authorized by him or them, and acting with his or their knowledge. The case differs in no respect from the ordinary one of dealings at a shop or counting house; the customer is not called upon to prove the character or authority of the shopman or clerk with whom he deals; if he is acting without or contrary to the authority conferred upon him by his employers it is their own fault." And it is further said: "The plaintiffs could only know that the directors had power to appoint persons to perform the duties they appeared to be doing; and they had a right to assume that they were duly and properly appointed."

The Court in that case refused to extend the application of the principle to a matter outside of the ordinary

dealings of the company, although the transaction was one clearly within the authority of the directors.

But there is another and more fundamental difficulty in the plaintiff's way. In this case there was no holding out, and there is no room for the application of the principle relating to apparent authority; for the contract was not with the company but with W. C. Ferrier; and when the plaintiff alleges that Ferrier was acting as agent for the company, and seeks to hold the company liable upon a contract entered into with the agent, he must establish an agency in fact. He has failed to do so, and he cannot therefore enlarge the obligation of W. C. Ferrier upon which he was content to rely when he made the agreement in question.

W. C. Ferrier remains liable upon that agreement. He could only be relieved by something amounting to a novation. This is not established.

Judgment will therefore be for the plaintiff against W. C. Ferrier for the amount due, with costs; and the action as to the company will be dismissed without costs.

HON. MR. JUSTICE MIDDLETON. OCTOBER 1ST, 1913.

CITY OF TORONTO v. DELAPLANTE.

5 O. W. N. 69.

Municipal Corporations—By-law to Restrain Location of Garages—"To be Used for Hire or Gain"—Meaning of—Garage Space to be Let to Tenants of Apartment House.

MIDDLETON, J., *held*, that where a proprietor of an apartment house erected a garage and let space therein to the tenants of the apartment house, it was not a garage "to be used for hire or gain" within the meaning of by-law 6061 of the City of Toronto.

An action by the city of Toronto for an injunction to restrain the erection of "a garage to be used for hire or gain," and to direct the pulling down of so much of the building as has already been erected; the city alleging that this building is in violation of By-law No. 6061, passed under the authority of sub-sec. (c) of sec. 541a of the Municipal Act and its various amendments. This statute authorizes cities "to prohibit . . . the location on certain streets, to be named in the by-law, of . . . garages to be used for hire or gain."

The by-law in question follows the wording of the statute.

Irving S. Fairty, for plaintiff.

C. S. McInnis, K.C., for defendant.

HON. MR. JUSTICE MIDDLETON:—I have come to the conclusion that the garage in question is not a garage to be used for hire or gain within the meaning of the statute. The scheme of the owner is the construction of a garage to be used by the tenants of an apartment house. He has done a good deal to complicate the case by the agreements which he has made. In essence he is doing nothing more than leasing sections of this garage to the tenants of the apartment house. This is not the thing that is prohibited by the statute, which is aimed rather at a livery where an automobile may be kept by any transient or traveller.

A garage which is rented yields no doubt to the landlord an income. The renting of a garage is not prohibited. The prohibition applies to the erection of a garage which is to be used for hire or gain; and I think this indicates a use of the garage quite different from the occupation and use of it by a tenant under a lease.

This being my view, the action fails, and I need not consider the other important and difficult matters discussed upon the hearing.

HON. MR. JUSTICE MIDDLETON. OCTOBER 1ST, 1913.

RE BLACK AND THE MUNICIPAL CORPORATION OF THE TOWN OF ORILLIA.

5 O. W. N. 67.

Municipal Corporations—By-law Granting Bonus—Industry "Already Established" in another Municipality—Meaning of—Ten Months' Location in Rented Factory—By-law Quashed.

MIDDLETON, J., *held*, that where a manufacturing company had carried on its operations for 10 months in one municipality in a rented factory pending the passing of a bonus by-law which was defeated by the ratepayers of such municipality, that such industry was "already established" in such municipality within the meaning of s. 591 (12) (e) of the Municipal Act 1903, and a by-law of another municipality granting such industry a bonus was invalid.

Motion by a ratepayer of the town of Orillia to quash By-law No. 569, being a by-law to raise by way of debentures the sum of twenty-five thousand dollars to be lent to

the C. N. W. Shoe Company, Limited, as a bonus to assist them in establishing and operating a boot and shoe factory at Orillia.

W. A. Boys, K.C., for the applicant.

D. I. Grant, for the town.

HON. MR. JUSTICE MIDDLETON:—The only substantial objection to the by-law is the statement that it violated sec. 591 (12) and (e) of the Municipal Act, 1903, because it grants a bonus to an "industry already established" in London.

The company in question was incorporated in December, 1912, or January, 1913. Negotiations took place between the officers of the company and members of the municipal council of the city of London, looking to the establishment of the company at London and the granting of a bonus by that municipality. The municipal council of London was entirely favourable to the granting of a bonus, and, relying upon this, a factory was rented in London and the business of the company has been carried on in London since December, 1912, about forty-five men being employed.

When the by-law was submitted to the London ratepayers in January, 1913, the ratepayers rejected it. Legislation was then sought enabling the council to pass the by-law against the will of the ratepayers. This was refused. The company then entered into negotiations with representatives of Orillia, looking to the granting of a bonus by that municipality.

The earliest letter produced is May 21st, 1913, wherein the president of the company speaks of his desire to move from London, so that the company might be in a position to handle a much larger business, as "in our present premises we find it impossible to attend to the business which we can secure." These negotiations finally resulted in the submission of the by-law in question to the ratepayers of Orillia on the 21st July. The by-law was then carried by a majority of fifty-five, and on the following day, July 22nd, a by-law was passed by the company "to sanction the removal of this company's factory from London, Ont., to the town of Orillia, Ont."

It is contended on behalf of the company that its business was not "established" in London within the meaning

of the statute, because, although the business is carried on there it is carried on in rented premises in a way that indicates that its location in London was of a temporary character, pending completion of the contemplated arrangement for a bonus from that municipality, and that, this arrangement having fallen through, the company ought to be at liberty to move its business to any municipality ready to grant the desired bonus.

Mr. Grant urged with great force that the word "established" should be given its dictionary meaning of "set up on a secure and permanent basis," and ought not to be construed as equivalent to "carried on."

After considering the matter as carefully as I can and bearing in mind the history of the object of the legislation, I am unable to give effect to Mr. Grant's contention, notwithstanding the sympathy I have for his clients, arising from the circumstances above set out. The restriction upon the bonusing power had its origin in 63 Vict. ch. 36, sec. 9, sub-secs. (d) and (e); and the word in question is found in both these sub-sections in that Act and in the present statute. The amendments since made all indicate the policy of the Legislature and that its intention was to prohibit one municipality from offering a bonus to an industry which was being carried on in another municipality.

I do not think I can read into the legislation the interpretation of the word "established" suggested by Mr. Grant. Apart from the difficulty incident to so doing, the suggested meaning appears to me inadmissible, particularly with reference to sub-sec. (d), and the word must have the same meaning throughout the two sub-sections. Little assistance can be found in any of the American cases, as there the context is different.

The fact that the business of the company has been carried on in London for now almost 10 months amounts to an "establishment" in that city within any meaning that can fairly be given to that word. The location in London may not be permanent, but it is in no sense transitory in its nature.

The by-law must, I think, be quashed. I do not think it is a case for costs, particularly in view of the failure of other objections.

FIRST APPELLATE DIVISION. SEPTEMBER 25TH, 1913.

RE KETCHESON AND CANADIAN NORTHERN ONTARIO RW. CO.

5 O. W. N. 36.

Railways—Arbitration and Award—Appeal from Award—Capitalization of Annual Loss Incorrect Method—Right of Appellate Court to Examine Evidence—Award Sustained on other Grounds—Interest—Arbitrators without Jurisdiction as to.

SUP. CT. ONT. (1st App. Div.) *held*, that in estimating the damage done a farm by the expropriation of a railway right of way through the same it was improper to arrive at the amount of the damage by capitalizing the estimated net annual loss suffered therefrom.

That, however, the Court were entitled to disregard the method adopted by the arbitrators and to examine the evidence to see if the evidence would justify the award on other grounds.

That arbitrators under the Railway Act, R. S. C. c. 37, s. 192, 199; 8 and 9 Edw. VII. (Dom.) c. 32, s. 3, have no right to deal with the question of interest.

Appeal from award dismissed with costs.

Appeal by the railway company from an award of the Board of Arbitrators, dated Nov. 11th, 1912, awarding the three Ketcheson claimants $3,328 for lands expropriated by the company.

The appeal to the Supreme Court of Ontario (First Appellate Division) was heard by HON. SIR WM. MEREDITH, C.J.O., HON. MR. JUSTICE MACLAREN, HON. MR. JUSTICE MAGEE and HON. MR. JUSTICE HODGINS.

W. C. Mikel, K.C., for the railway company.

I. F. Hellmuth, K.C., and E. Guss. Porter, K.C., for the Ketchesons.

HON. MR. JUSTICE HODGINS:—A great deal of strong, and to my mind, justifiable criticism, was directed by Mr. Mikel against the basis of the award, shewn in the reasons given by a majority of the arbitrators. In several cases the estimated time lost and the amounts fixed, are excessive, and no allowance appears to have been made for the fact that the work of the farm will, after a time, get back into more or less normal channels, and the present inconvenience will be largely minimized. Even the cattle-passes and the drainage can and will inevitably be put right by a com-

paratively small capital expenditure which will prevent the danger and difficulty sworn to. Apart from that, the method of capitalization of the yearly loss is hard to take seriously, if it is an endeavour to ascertain the present value of items distributed over many years to come and subject to many contingencies.

A majority of the arbitrators have taken the total loss by inconvenience, etc., at $151.85 per annum, and have allowed a sum as damages which will produce for all time that annual amount. If the award had to be dealt with in these aspects alone, it could not, in my judgment, be supported. Most of the elements which these items represent have been held to be proper to be considered in arriving at compensation in similar cases (*e.g., Re Davies & James Bay Railway Co.,* 20 O. L. R. 534), but only when shewn to reduce the actual value of the land affected. As presented to the arbitrators, they represented only separate and distinct matters of inconvenience to the owner. The proper way of regarding them is pointed out in *Idaho & W. Railway Co.* v. *Coey,* 131 Pac. Repr. 810, where it is said that the inconvenience of transporting the crop from the part of the land separated from the buildings, the inconvenience of transferring machinery and farm implements and the like from one part of the premises to another, the inconvenience in farming and cultivating the land occasioned by the construction of the railroad, in so far as these elements entered into any depreciation of the market value of the land not taken, may properly be considered in estimating the damages.

This is further enforced by the direction in that case that "in estimating the damage to the land not taken it was proper to consider the entire tract of land as one farm, and to determine the damages upon the basis of how the construction of the railroad would affect the whole body of land as one farm. In other words, the jury should consider two farms, one without any railroad across it as it now exists, and the other with a railroad across it, as it will exist when respondent's line is built and in operation. This is the rule where as here the whole farm is in one continuous tract and is used and farmed as one body of land."

In this case the Court has to consider all the evidence which has come before the arbitrators in order to ascertain

if the amount allowed is just. The Court cannot, it seems to me, deal merely with the evidence which appears to have impressed the arbitrators if there is other evidence upon which the award can be properly supported. In other words, I think this Court is entitled and bound to come to its own conclusion upon all the evidence, and is also entitled to disregard the reasoning of the arbitrators if it does not agree with it, or to adopt it if it so desires, or to support the award on any ground sufficient in law, whether or not that ground is relied on by the arbitrators, provided that the Court pays due regard to the award and findings and reviews them as it would that of a subordinate Court. See *Atlantic & W. Railway Co.* v. *Armstrong*, [1895] A. C. 257; *Re James Bay & Armstrong*, C. R., [1909] A. C. 285.

The majority award of $3,328 is based upon exact figures, $151.85 estimated annual loss—"capitalized at five per cent., $3,037"— which total, added to the value of the 2.16 acres taken, $216, and the cost of a bridge across the water course south of the railway track, $75, makes up the amount of $3,328. The arbitrators add to the schedule of figures this paragraph:

"Taking the evidence as to the value of the farm and the depreciation thereto by reason of the railway, there is ample evidence to support a finding of $4,000 in favour of the landowners, but the arbitrators have placed their finding at $3,328 after considering the general evidence as to capitalization of the annual loss as well as depreciation to the value of the farm."

The evidence to support a finding of $4,000 consists of two divisions: one founded wholly upon detailed annual inconvenience and its capitalization, and the other giving a lump sum without being tied down to items as forming its basis. No doubt it is to the latter class that the arbitrators refer in the sentence just quoted.

The claimant, H. L. Ketcheson, and the witnesses, Donald Gunn, Francis Wilson, and Herbert Finkle, make the damage $4,000 and base it upon detailed and valued inconvenience capitalized. Counsel for the respondent meets the objection taken to this method of arriving at the result by urging that the general evidence referred to in the reasons for the award would support it.

I have gone over the evidence to see if an award of $3,328 could be properly based upon it; and it appears to

consist of what the following witnesses say, namely: Ransom Vandervoort, James Boyd, Merritt Finkle, Harvey Hogle, Geo. Gunn, Geo. Ostrum, and Morley Potter. It cannot be said that there is any divergence of views among these witnesses. Indeed, the unanimity with which they agree on $4,000 is somewhat remarkable. But no evidence was called by the railway company, except as to the trustworthiness of the calculations of some of the witnesses. No one has, on behalf of the railway company, called in question the general fact of depreciation. Indeed, this evidence appears in the testimony of one of the company's witnesses, Frederick F. Clarke, an Ontario land surveyor.

"Q. Has there ever been a time since the railway was constructed, to your knowledge, that the cattle could go through? (the cattle-passes). A. Not to my knowledge."

As I have said, I think the objection to some of the items and to their method of presentation is well founded, and that the method of arriving at a capital sum cannot be defended. Nor can I, after perusing the evidence, disabuse my mind of the conclusion that the views of the different witnesses are the result of more or less communication among themselves, and that these views represent more a consensus of opinion, educated upon the subject, and backed up by a general agreement, than the individual views of men who have independently arrived at a conclusion.

I cannot say that this is wrong. Much evidence before the Court is insensibly coloured in just the same way. Had there been a reasonable amount of evidence on behalf of the railway company that the depreciation was represented by a far smaller figure than $4,000 it might have been possible to reduce the award. But to do so on the present evidence could only be accomplished by disregarding the general evidence already mentioned and then attempting a criticism of the detailed figures; which would lead to no good result if, as I have indicated, they represented calculations which are no true basis for an award of this nature.

While not satisfied with the amount awarded nor with the method by which it has been arrived at, I do not think we can find any safe ground for refusing to accept the uncontradicted evidence of those who have given their opinion as to the amount of depreciation suffered by this farm.

The result is that the award must be sustained, but upon grounds which did not receive the principal share of the arbitrators' attention.

Upon the question of interest, I think the arbitrators have no jurisdiction to give interest as part of their award. The right to interest and costs is statutory (R. S. C. ch. 37, secs. 192, 198, 8 & 9 Edw. VII. (D.) ch. 32, sec. 3); and as payment of the award is in some cases necessary to vest title in the railway company, nothing more should appear in the award than what the arbitrators have jurisdiction to fix. The provision as to it should be struck out. *Re Clarke and T. G. & B. Rw. Co.* (1909), 18 O. L. R. 628. I do not think that the judgment of this Court in *Re Davies & James Bay Rw. Co.*, 20 O. L. R. 534, intended to lay down any rule to the contrary.

In taxing the costs, regard should be had to the fact that the evidence given of settlement with other parties for parts of other farms taken, was not relevant evidence. Both parties participated in it: and although the railway company first introduced it, that did not give its opponent a right to reply in kind. *Rex* v. *Cargill* (1913), 2 K. B. 271.

The direction for payment to the life tenant and remaindermen, if improper—and I do not say that it is—cannot override the provisions of the Railway Act which enable the railway company to protect itself against apprehended claims. See secs. 187, 210, 213, 214.

The provision as to interest will be struck out, otherwise the appeal will be dismissed with costs.

HON. SIR WM. MEREDITH, C.J.O., HON. MR. JUSTICE MACLAREN, and HON. MR. JUSTICE MAGEE, agreed.

HON. MR. JUSTICE KELLY. SEPTEMBER 20TH, 1913.

REX v. McLEAN.

5 O. W. N. 53.

Intoxicating Liquors — Motion to Quash a Conviction under Liquor License Act—Dismissal of.

KELLY, J., dismissed a motion to quash a conviction for selling liquor without a license, holding that there was sufficient evidence to justify the same.

Application to quash a conviction registered against defendant for selling liquor without a license.

H. S. White, for the applicant.

J. R. Cartwright, K.C., contra.

HON. MR. JUSTICE KELLY:—The applicant's right to succeed depends on whether there was evidence before the magistrate on which the conviction could be based. For McLean it is contended there was not. As I read the record I am convinced there was evidence on which the magistrate could properly convict. It is true the evidence is, in some respects, conflicting, but the magistrate, with the witnesses before him, is the one to judge as to which side weight is to be given. Under these circumstances, and finding as he did, I do not think the conviction should be disturbed. The application is dismissed with costs.

J. A. C. CAMERON, OFFICIAL REFEREE. SEPT. 18TH, 1913.

COOK v. COOK.

5 O. W. N. 52.

Costs—Security for—Defamation—9 Edw. VII. c. 40, s. 19 — Con. Rule 373 (g)—Worthless Plaintiff.

CAMERON, Official Referee, ordered the plaintiff to give security for costs in an action for defamation under 9 Edw. VII. c. 40, s. 19, and Con. Rule 373 (g).

Application by the defendant for an order for security for costs under ch. 40, sec. 19, statutes of 1909, and under C. R. 373, sub-sec. (g).

J. W. McCullough, for the defendant.

W. C. Davidson, for the plaintiff.

J. A. C. CAMERON, OFFICIAL REFEREE: — It was contended by the plaintiff's counsel that the action brought was not covered by sec. 19, as the words complained of did not impute unchastity.

I find that the words complained of are covered by the section referred to. Having made this finding the order for security will go as a matter of course.

It was also contended that the defendant should not only disclose a *prima facie* defence, but must shew the nature of

this defence. This has been done. The plaintiff's counsel admitted on the motion that the plaintiff was not possessed of property sufficient to answer the costs of the action if the verdict was given in favour of the defendant. This fact was also admitted on the examination of the plaintiff. See *Lancaster* v. *Ryckman*, 15 P. R. 199; *Paladino* v. *Gustin*, 17 P. R. 553. There will be the usual order for security for costs with costs of this application.

HON. MR. JUSTICE MIDDLETON. OCTOBER 1ST, 1913.

RE BOTTOMLEY AND A. O. U. W.

5 O. W. N. 83.

Insurance — Life Insurance — Designation of "Wife"—Second Marriage of Insured—Second Wife to Take—Costs.

MIDDLETON, J., *held*, that "wife" in an insurance policy meant the last wife of the insured.
Re Lloyd, 5 O. W. N. 5, followed.

Motion for payment out of insurance money paid into Court by the company.

Thomson, for the second wife.

J. M. Ferguson, for children of the deceased.

HON. MR. JUSTICE MIDDLETON:—By the policy, the insured directed the money to be paid to his wife. The wife died, and the insured married again. I reserved judgment, pending the decision of the Court of Appeal in *Re Lloyd*. That decision, p. 5 O. W. N. 5, makes it plain that the claim of the second wife must succeed.

It was conceded that $70, which had been paid by Mr. Ferguson's clients for premiums, should be refunded to them. The order will so provide. Following the decision in *Re Lloyd*, there will be no costs.

HON. MR. JUSTICE MIDDLETON. OCTOBER 1ST, 1913.

LANGE v. TORONTO & YORK RADIAL Rw. CO.

5 O. W. N. 64.

Discovery—Examination of Officer of Corporation—Motion for Leave to Examine Second Officer — Full Discovery Already Had—Discovery not to be Had of Material Witnesses—Con. Rule 327.

MIDDLETON, J., *held*, that an examination of a second officer of a corporation for discovery should not be permitted where the first officer examined has given adequate discovery of the case the examining party will have to meet.

Judgment of Holmested, Senior Registrar, reversed.

Appeal by the defendants from the order of the Senior Registrar sitting for the Master-in-Chambers, dated 24th September, 1913, directing the examination of John Break, a servant of the defendant company, for discovery notwithstanding the prior examination of one Thomas Walker, also an employee of the defendants.

F. Aylesworth, for the defendant.

A. W. Burk, for the plaintiff.

HON. MR. JUSTICE MIDDLETON:—Rule 327 precludes the examination of a second officer or servant of a corporation without leave. This action is an ordinary accident case. The plaintiff claims that she was injured by the premature starting of a street car. The conductor of the car has been examined for discovery. He was present at the time of the accident, and has answered satisfactorily all questions put to him, and has given a clear and intelligent account of what took place.

It appears that Break happened to be near the car at the same time, and he also saw the occurrence. He was not in charge of the car nor was he in any way concerned with its operation. He was merely an eye-witness of the accident. There is no suggestion that the discovery afforded by the examination already had is not adequate and does not completely disclose to the plaintiff the case she will have to meet. Under these circumstances I can see no justification for the further examination.

In my view, leave should not be granted to have a second examination unless for some reason the examination already had has failed to give to the party seeking it the discovery

to which he is entitled. It is not enough to establish that the person whose examination is sought may be a most important witness at the trial.

The appeal will therefore be allowed, with costs here and below to the defendant in the cause in any event.

HON. MR. JUSTICE HODGINS. SEPTEMBER 25TH, 1913.

RE MINISTER OF PUBLIC WORKS AND BILLINGHURST.

5 O. W. N. 49.

Crown — Expropriation of Lands by — Application for Warrant of Possession—R. S. C. c. 143, s. 21—Acceptance by Crown of Rent under a Lease—Absence of Waiver—Warrant Given—One Month's Respite—Terms.

HODGINS, J.A., *held*, that under the circumstances of this case, the acquirement of the fee in certain lands and the acceptance of rent under a lease thereof, after the expropriation of such lands by the Crown, did not constitute a waiver by the Crown of its right to proceed with the expropriation proceedings and to obtain immediate possession from the lessee of such lands.

McMullen v. *Vanatto*, 24 O. R. 625, and *Manning* v. *Dever*, 35 U. C. R. 294, referred to.

Motion for immediate possession on behalf of the Crown of certain lands and buildings situate on Spadina Avenue, Toronto.

N. B. Gash, K.C., for the Minister of Public Works.

W. A. Proudfoot, for the respondent.

HON. MR. JUSTICE HODGINS:—It was urged that the Judge giving the direction for service under sec. 21 of ch. 143, R. S. C., is the one intended by the statute to deal with the issue of the warrant thereunder; consequently, I dispose of this motion.

Counsel for the respondent contended that the Crown had, subsequently to the notice of expropriation, become owner of the lands of which the respondent was and is tenant, and had received rent from him, and was therefore estopped from proceeding further with the expropriation of his leasehold interest. I am unable to see how the Crown has disabled itself from taking the leasehold by acquiring the fee of the lands and entering into the receipt of the profits thereof. It is expropriating the leasehold interest,

whether it or the former landlord is entitled to receive the rent until possession is given up.

It is all in the respondent's interest that he should remain undisturbed as long as possible. But if the receipt of rent implied a waiver of any prior proceedings to get possession, then it can be, and is, in these proceedings, satisfactorily explained. See *McMullen* v. *Vanatto*, 24 O. R. 625, and per Morrison, J., in *Manning* v. *Dever*, 35 U. C. R. 294 (the latter case cited by Mr. Proudfoot).

I do not say that the Crown can be bound by waiver, but I deal with the application as argued.

Negotiations have gone on since possession was demanded many months ago; the parties cannot agree, and the matter must be settled by arbitration. Meantime, possession is required immediately, as sworn to on behalf of the department affected.

I think the warrant must issue; but I exercise any discretion I have by delaying its execution for a month on condition that the tenant repay now the rent refunded and pay from the date of his last payment, until the expiration of the month of respite, rent at the rate reserved in his lease. This will enable him to look around for a place to which his business may be transferred. If he can agree on the compensation it can be paid to him. If not, I do not see that I can fix it, or order it to be paid into Court. See sec. 8, sub-secs. 2 and 3, secs. 22, 26, 28.

The costs will be reserved to be dealt with under sec. 32.

HON. MR. JUSTICE LATCHFORD. OCTOBER 1ST, 1913.

EVERLY v. DUNKLEY.

5 O. W. N. 65.

Costs—Scale of—Claim within Supreme Court Jurisdiction—Set-off not Pleaded or Admitted—Supreme Court Scale Proper Scale.

LATCHFORD, J., *held*, that where a set-off exists to a plaintiff's claim which would bring the same within the County Court jurisdiction and the same is not pleaded or admitted, the action is one within the competence of the Supreme Court.

Caldwell v. *Hughes*, 24 O. W. R. 498, referred to.

Judgment of Local Master at Chatham reversed.

Appeal from the ruling of the Local Registrar at Chatham determining that the plaintiff is entitled only to County Court costs under the judgment as settled by counsel for

the parties, and — though never formally entered as used upon the appeal to a Divisional Court, reported (1912), 23 O. W. R. 415; and that his taxation must proceed accordingly—the defendants to be entitled to tax their costs as between solicitor and client on the former High Court scale, with right of set-off and allowance as provided by C. R. 1132, 1897, now C. R. 649.

The judgment declared the plaintiff to be "entitled to recover from the defendants $422.09, being $542.17, the amount sued for, and interest on $416.92 from 15th April, 1912, to the date of the judgment, less $125.25 paid by the defendant Dunkley for funeral expenses and doctor's bills.

Shirley Denison, K.C., for the plaintiff.

H. S. White, for the defendant.

HON. MR. JUSTICE LATCHFORD:—I think the learned Registrar erred. He evidently treated the amount awarded by the judgment as the test of whether the action was within or in excess of the jurisdiction of the County Court. There are indeed many cases where that is the test. But there are many others in which it is not. This case is one where the amount of the judgment is not conclusive as to the proper jurisdiction.

The sum claimed exceeded $500. The set-off of $125.25 allowed by the trial Judge was not pleaded. It was not assented to by the parties so that in law it constituted a payment. In the absence of such an assent, "a plaintiff" —to use the language of Middleton, J., in the late case of *Caldwell* v. *Hughes* (1913), 24 O. W. R. 498—"having a claim against which a defendant may, if he pleases, set up a set-off, must sue in the Superior Court; for he cannot compel the defendant to set up his claim by way of set-off, and he cannot, by voluntarily admitting a right to set-off confer jurisdiction upon the inferior Court."

The appeal is allowed with costs.

HON. MR. JUSTICE MIDDLETON. OCTOBER 1ST, 1913.

SULLIVAN v. DORE.

5 O. W. N. 70.

Landlord and Tenant—Action to Forfeit Lease—Alleged Breach of Covenant against Waste—Alterations in Premises for Purpose of Business—No Notice Given by Lessor—Forfeiture—Relief against —Buildings to be Returned to Former Condition on Expiry of Lease—Payment into Court to Ensure—Costs.

MIDDLETON, J., *held*, in an action to forfeit a lease for breach of the covenant against waste that mere alterations to make the building more suitable for the business carried on therein were not a breach of the covenant and that in any case relief against any such forfeiture would be granted upon payment into Court of such amount as would ensure a return of the premises to their old plight and condition at the expiration of the lease.

Hyman v. *Rose*, [1912] A. C. 623, followed.

Holman v. *Knox*, 25 O. L. R. 588, modified.

Action by the executors of the late John Sullivan for forfeiture of a lease made to defendant, dated January 15th, 1913, on the ground of breach of covenant and for damages; tried at Hamilton, on the 17th June, 1913.

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

G. L. Staunton, K.C., and Lazier, for the defendants.

HON. MR. JUSTICE MIDDLETON:—In this action, unfortunately, the bitterness of the dispute and the difficulty of the solution are quite out of proportion to the subject matter involved.

The late John Sullivan carried on a livery business in the premises in question at the corner of Cannon and McNab streets, Hamilton. On the 15th January, 1912, he sold the business to the defendant Dore for $3,500, agreeing to lease to him the premises for five years with the privilege of extending the term for a further period of five years. In pursuance of this arrangement the lease in question, dated 15th January, 1913, was executed. This lease contains statutory covenants to repair, reasonable wear and tear and damage by lightning, fire and tempest only excepted, and that the lessor may enter and view the state of repair, and that the lessee will repair according to notice in writing, reasonable wear and tear, etc., only excepted. Sullivan died on the 6th February following. The plaintiffs in this action are his executors.

The building was old and in bad repair. Dore desired to make in it alterations enabling him in his view the better to conduct the business carried on. No doubt he spoke to Mrs. Sullivan with reference thereto, but I find against his contention that she assented to the making of the changes. Nevertheless, he made the changes, acting, I think, in good faith in regarding them as matters of little importance, and thinking that no objection would be taken on the part of the lessors.

The insurance premium upon the premises has been raised five dollars per annum. The lessors attribute this to the structural changes. The evidence of the agent shews that the change was really by reason of the change of occupancy, the risk being regarded as greater when a tenant is in occupation than when the owner is in occupation. Restoration of the wall by the closing of the opening complained of would not bring about a restoration of the former insurance rate. Nevertheless, this, I think, is the real cause of the whole trouble, and this action has been brought for the forfeiture of the lease and for damages.

I do not think there has been a proper notice under the statute to enable the landlord to enforce the forfeiture, if forfeiture there has been; and upon this ground I think the action would fail.

What has been done in this case was such a change as falls within the principle laid down in *Hyman* v. *Rose* [1912] A. C. 623, and is a mere alteration for the purpose of making the building suitable for the trade carried on. Having regard to its age and condition, the building has not been so materially altered as to constitute waste or a breach of the covenant involving forfeiture.

I think the landlord has the right under the covenant to have the building restored at the end of the term to the same plight and condition in which it was at the time of the demise. The case already referred to indicates that relief should be granted from any forfeiture upon deposit of a sufficient sum to secure the restoration of the building at the end of the lease to its former condition. In my view $200 would be ample in this case; and, although I am bound to dismiss the action upon the technical ground that no formal notice under the statute has been given, I suggest to the parties the desirability of consenting to a judgment relieving from forfeiture upon deposit of this sum or upon

security being given to that amount, for the restoration of the buildings. This will prevent further unprofitable litigation.

The decision of the House of Lords in *Hyman* v. *Rose* must be taken to modify to some extent what was said by the Divisional Court in *Holman* v. *Knox*, 25 O. L. R. 588.

In any event in the case, I do not think costs should be awarded, partly owing to the fact that both parties are, I think, in the wrong, and partly owing to the confused state of the law.

HON. MR. JUSTICE KELLY. SEPTEMBER 29TH, 1913.

REX EX REL. WHITESIDES v. HAMILTON.

5 O. W. N. 58.

Municipal Corporations — County By-law Regulating Pedlars — Offence on Boundary Road — No Jurisdiction over—3 & 4 Geo. V. c. 43, s. 433—Conviction Quashed.

KELLY, J., *held*, that a county by-law regulating the peddling of goods did not apply to a boundary road between one county and another and that 3 and 4 Geo. V. c. 43, s. 433, did not confer such jurisdiction.

Conviction quashed with costs, protection order to magistrate.

Application to quash a conviction for peddling and selling goods in the county of Huron contrary to a by-law of that county.

J. G. Stanbury, for the defendant's motion.

W. Proudfoot, K.C., for Albert Whitesides the informant.

HON. MR. JUSTICE KELLY:—The only evidence taken on the investigation before the magistrate was that of the defendant, who admitted that, being a non-resident of the county of Huron, he did on August 5th, 1913, go from place to place on the boundary road between the township of Tuckersmith (in the county of Huron) and the township of Hibbert (in the county of Perth) with a team of horses and a waggon drawing goods, etc., and that he did then on that boundary road sell goods, etc., and that he did not then hold a license from the county of Huron as required by the by-law of that country relating to the licensing and regulation of hawkers, pedlars, etc.

Under the authority of sub-sec. 14 of sec. 583 of the Consolidated Municipal Act, 1903 (3 Edw. VII. ch. 19) the municipal council of the county of Huron, in 1906, passed a by-law (which was amended in 1913) requiring all hawkers, pedlars and petty chapmen and other persons carrying on petty trades within the county, to procure, in the manner herein provided, a license before exercising such occupation or calling.

R. S. O. (1897) ch. 3, sec. 16, sets forth that the county of Huron shall consist of the townships, towns and villages therein enumerated.

Defendant's contention is that the boundary road on which he sold the goods is not within the county of Huron and that therefore he did not offend against the by-law. There is nothing in the Municipal Act as it stood prior to the passing of the Act of 1913 (to which reference is made below) expressly or by inference making a boundary road such as this a part of the county, or which would have the effect of extending the operations of the by-law over it. It therefore becomes necessary to consider the effect of the Municipal Act of 1913, 3 and 4 Geo. V., ch. 43. By sec. 433 of that Act it is enacted that unless otherwise expressly provided, the soil and freehold of every highway shall be vested in the corporation or corporations of the municipality or municipalities, the council or councils of which for the time being have jurisdiction over it under the provisions of this Act; and sec. 439 declares that the councils of the local municipalities between which they run shall have joint jurisdiction over all boundary lines, whether or not they form also county boundary lines, which have not been assumed by the council of the county, etc.

Plaintiff contends that sec. 433 enlarges the jurisdiction of the county of Huron over the boundary road in question in such a manner and to such extent as to make the by-law applicable to this road, and so constitute the acts of the defendant, for which the conviction was made, a breach of that by-law.

I am of opinion that that contention cannot prevail. It has not been shewn that the county council has taken any steps to obtain for itself alone control and jurisdiction over this road, such as by assuming it as a county road under the provisions of sec. 446, sub-sec. 3, in which event it would have acquired the jurisdiction conferred by sec. 436, sub-sec. 1 (a),

consequent upon which the soil and freehold would have become vested in the corporation of the municipality (sec. 433). In the absence of some such action on the part of the county, I do not think that under the circumstances as they appear, the Act of 1913 has the effect of extending the limits of the county of Huron so as to make the by-law operative over the road in question. If the effect of sec. 439 is to confer joint jurisdiction on the two counties, then joint action on their part would become necessary; but it is not shewn that there is in existence any by-law of the county of Perth dealing with the licensing or regulation of hawkers, etc.

The only conclusion I can arrive at is that defendant was not liable to conviction for selling as he did.

The conviction should, therefore, be quashed with costs, but with a protection order to the magistrate.

HON. MR. JUSTICE MAGEE. SEPTEMBER 26TH, 1913.

RE FREDERICK KENNA.

5 O. W. N. 40.

Costs—Security for—Ordered in Habeas Corpus Proceedings—Order Made after Judgment where Appeal Brought—Past Costs may be Included — Dilatoriness of Applicant — Discretion to Refuse—Quantum of—Terms.

MAGEE, J.A., *held*, that security for costs can be ordered in habeas corpus proceedings.

Re Giroux, 2 O. W. R. 385, followed.

That where a defendant has been successful at the hearing security can be applied for after judgment.

Hately v. *Merchant's Despatch Co.*, 12 A. R. 640, referred to.

That security may cover past as well as future costs.

Brocklebank v. *King's Lynn S.S. Co.*, 3 C. P. D. 365, and *Massey* v. *Allen*, 12 Ch. D. 807, followed.

Security for past costs refused on account of dilatoriness in applying and plaintiff required to pay $60 into Court or give a bond for $120 as security for future costs.

Albert Breckon and his wife, the present custodians of the infant, apply for an order that security for their costs already or hereafter incurred be given by Phillip Kenna, the infant's father, who throughout the proceedings has been and still is resident out of Ontario. His application in *habeas corpus* proceedings for the custody of the infant was dismissed (see 24 O. W. R. 690), but he has given notice of appeal from that dismissal.

H. F. Parkinson, for respondent.

T. L. Monahan, for appellant.

HON. MR. JUSTICE MAGEE:—I think the decision of Ferguson, J., in *Re Giroux* (1903), 2 O. W. R. 385, upholding a *præcipe* order for security issued in such *habeas corpus* proceedings must govern me as to the original right to obtain security, and see *In re Pinkney* (1902), 1 O. W. R. 715.

In *Small* v. *Henderson*, 18 P. R. 314 (1899) Osler, J.A., considered the practice to be that security could be applied for and obtained at any time before judgment and the judgment having been in the plaintiff's favor he refused to order security when the defendant was appealing: and see *Gledhill* v. *Telegram Printing Co.*, 14 O. W. R. 1, 1909.

In *Hately* v. *The Merchants Despatch Co.*, 12 A. R. 640, the plaintiff after obtaining judgment. was held not entitled to have his bond for security given up to him for cancellation as the defendants were appealing and hence the final judgment had not been given. The effect is, I think, that the proceedings are still continuing and judgment has not been given and the defendant who has been successful is entitled yet to ask for security as the old rules with regard to early application do not, under the present general rules, apply. See *Martano* v. *Mann*, 14 Ch. D. 419 (1880), and *Smerling* v. *Kennedy*, 5 O. L. R. 430 (1903). In *Lydney &c., Co.* v. *Bird*, 23 Ch. D. 358, Pearson, J., said if the defendant may apply from time to time for an increase of the amount of the security why may not his original application be made at any time?

Then should the security be for past as well as future costs? That it may be required to cover both was held in *Brocklebank* v. *King's Lynn SS. Co.*, (1878) 3 C. P. D. 365, and in *Massey* v. *Allen*, 1879, 12 Ch. D. 807, but in both cases the application was made promptly after the happening of the circumstance entitling to make it. Here the applicants knew of the non-residence throughout. From whatever motive they chose not to apply for security, and I do not think they should in a case such as this be now entitled to obtain it as to the costs which they knowingly ran the risk of being unable to recover. I therefore, as a matter of discretion in this case, limit the security to costs which have been or may be incurred in or by reason of the appeal, and I fix the amount at $60 if paid into Court or

$120 as the penalty if a bond be given. The security to be given within four weeks or the appeal to be struck out, a corresponding reasonable extension of time to be given the appellant in his appeal proceedings which, if not agreed upon I will fix.

Costs of application to be costs in the cause.

APPELLATE DIVISION. SEPTEMBER 15TH, 1913.

KELLY v. STEVENSON.

5 O. W. N. 10.

Contract—Consignment of Goods for Sale—Evidence as to Terms of Contract—"Guaranteed Advance"—Appeal—Costs.

SUP. CT. ONT. (1st App. Div.) dismissed an appeal by defendants from the judgment of the Judge of the County Court of the United Counties of Durham and Northumberland, awarding plaintiff $488.58 for apples consigned by them to defendants.

Appeal by defendant from the judgment of the Judge of the County Court of the united counties of Northumberland and Durham awarding the plaintiffs $488.58 and costs in an action brought by a firm of apple-dealers carrying on business at Colborne, Ontario, against a commission merchant of Glasgow, Scotland, to recover $581.92, the price of 242 barrels of apples shipped the defendants.

The appeal was heard by HON. SIR WM. MEREDITH, C.J.O., HON. MR. JUSTICE MACLAREN, HON. MR. JUSTICE MAGEE, HON. MR. JUSTICE HODGINS, and HON. MR. JUSTICE LEITCH.

W. L. Payne, K.C., and W. F. Kerr, for the appellant (defendant).

J. B. McColl, K.C., for respondent (plaintiff).

HON. MR. JUSTICE HODGINS:—The learned County Court Judge has rejected all the evidence extrinsic to the written memorandum of the 4th October, 1911, as being either equivocal or too conflicting to prove a safe guide.

Neither party asserts that the written document contains all the terms of the agreement.

The respondents shipped their apples direct to the appellant's firm in Glasgow, where they were sold. The earliest account sales is dated at Glasgow, October 27th, 1911, and the appellant enclosed it in his letter to the respondents of November 9th, 1911 (Exhibit 3), together with a cheque for $847. The terms of the letter indicate that the payment was not intended to be a settlement except subject to the ascertainment of the correct number of No. 3 apples. I do not think the consent to the use of the account sales is as narrow as counsel for the respondents contends; and the appellant should still have the right to reduce the advance to $1 per barrel on the true number of grade 3 shewn in the account sales. This is 292 barrels as against 194 estimated in Exhibit 6. The number of barrels shipped up to November 9th, 1911, was 2,202, and after that date 242; a total of 2,444. of which 2,152 were No. 1 and No. 2, and the balance No. 3. Worked out on the basis of the contract, this would require advances of $5,772, of which the appellant has paid $5,214, leaving $558 still unadvanced.

Apart from the oral testimony bearing on the terms of the contract, the course of dealing between the parties may be considered. An earlier transaction, of which the account sales is dated October 4th, 1911, was on the basis of an advance of $2 per barrel, and either a division of profits or payment of the whole profits to the shippers. According to the appellant, the losses were to be borne equally by both parties; and he claims that a small loss was incurred, for which he did not make a claim.

In the account sales referring to this transaction a charge is made for "commission and guarantee" at the rate of 5 per cent.; and it is after deducting this percentage, as well as the freight, sale expenses, etc., and insurance, that the net amount of £75 8s. 10d. is arrived at.

In all the accounts sales relating to the contract now in question the same deduction is made for "commission and guarantee," and these documents were sent by the appellant to the respondents, and were put in at the trial as fixing the latter with knowledge of what had been realized from the apples and how the proceeds had been dealt with. The appellant, in answer to the question "Your firm . . . would sell them out just as they like, then sent them a statement and they were obliged to accept it"? answered "That is so." To the learned trial Judge the appellant says, "An

advance is purely an advance; but a guaranteed advance is a different thing, quite. It means they will never be called on to pay the deficit; there will never be any loss to the shipper." Further, when asked whether anything was said that would put it beyond question—*i.e.*, whether it was or was not a guaranteed advance—the answer is "I don't know. I would not like to swear to that"; and then he goes on to suggest that the respondents' knowledge of the apple business would suffice to tell him if it were so. The appellant says he told the respondents what commission he charged, and this the respondents admit.

In the absence of any finding as to the relative merits of the conflicting versions of the real contract, this Court must do its best to ascertain which is most consistent with what the parties actually did.

The basis of the earlier dealing is not agreed upon by the parties. The appellant, who claimed that there was a loss, part of which was to be borne by the respondents, made no mention of it to them. His action in this regard is more consistent with the respondents' account of it than with his own. If, then, the earlier contract was, as the respondents contend—and as the appellant treated it and as the account sales clearly indicate—"a guaranteed advance," it was incumbent upon the appellant to shew that the subsequent agreement was upon a different basis, and was one under which the respondents agreed to become responsible for the whole possible loss upon the shipment of their entire crop of apples in the Picton district. He admits that he cannot establish that the respondents understood this position. In the account sales his Glasgow house consistently treat it as a guaranteed advance, and each commission deduction specifically includes a charge for "commission and guarantee." The appellant told the shippers that the commission was 5 per cent.; and by the written statements it is shewn that a commission at that rate included a guarantee. This, coupled with the duty, as I view it, of the appellant to have explained to the respondents the difference between the basis of the present bargain and that of the earlier one, should turn the scale in this case.

As enforcing this view, it is evident that up to November 11th the appellant treated the contract as one requiring him to make advances irrespective of the result of the sales. On November 9th he says he had one account sales only, namely, that for 691 barrels, which shewed a loss. Yet the stipulated

advance is made on all the other shipments. Nor is it suggested in his letter of 1st December, 1911, that he is absolved by losses from making advances; although the letter of the respondents' solicitor, to which it is an answer, distinctly claimed the remaining advances as a right. His suggestion of arbitration, too, is hardly consistent with the appellant's present position.

Taking all the circumstances into consideration, I think the appellant has failed to shew enough to satisfy an Appellate Court that the judgment is so erroneous that it should be set aside.

The judgment should be affirmed, and the counterclaim formally dismissed. The learned trial Judge was correct in deducting the number of barrels shewn to grade as No. 3.

The respondents should have the costs of the appeal. I think there should be no costs up to and including the trial; as the litigation has been induced either by the carelessness of both parties in the making of their contract, or, if the view of the learned trial Judge is adopted, by a deliberate intent on both sides to leave the terms of the contract at large until they should be determined by a Court.

HON. SIR WM. MEREDITH, C.J.O., HON. MR. JUSTICE MAGEE, HON. MR. JUSTICE MACLAREN, JJ.A., and HON. MR. JUSTICE LEITCH agreed.

HON. MR. JUSTICE KELLY. SEPTEMBER 18TH, 1913.

ST. CLAIR v. STAIR.

5 O. W. N. 28.

Discovery—Further and Better Affidavit on Production—Privilege—Grounds of—To be Set Out Specifically—Dates and Authors of Reports—Not Compulsory to Give—Sufficient Identification Necessary—Appeal—Leave to Granted.

KELLY, J., gave plaintiff leave to appeal from judgment of Falconbridge, C.J.K.B., 24 O. W. R. allowing appeal of defendants, "The Jack Canuck Publishing Company, Limited," from judgment of the Master-in-Chambers ordering the said defendant to file a further and better affidavit on production.

Swaisland v. *Grand Trunk Rw. Co.*, 3 O. W. N. 960, considered.

Application for leave to appeal from an order of the Chief Justice of the King's Bench of July 4th, 1913, 24 O. W. R. allowing an appeal by the defendant, the Jack Canuck Publishing Co., Ltd., from an order of the Master in Cham-

bers of June 9th, 1913, 24 O. W. R. 707, requiring the Company to file a further and better affidavit on production.

To support his application, plaintiff relied on two grounds: (1) that the claim of privilege for the documents in question is defective and insufficient in law, and (2) that the dates of the reports (the documents referred to) and the names of the authors should have been given.

S. H. Bradford, K.C., for the motion.

R. McKay, K.C., contra.

HON. MR. JUSTICE KELLY:—The application is not sustainable on the latter ground. In the schedule to the affidavit on production the documents are described as "a quantity of reports fastened together numbered "1" to "77" inclusive, initialled by this defendant." This falls clearly within the authority of the three cases cited in the judgment of the learned Chief Justice of the King's Bench, namely, *Taylor* v. *Batten*, 4 Q. B. D. 85; *Bewicke* v. *Graham*, 7 Q. B. D. 400, and *Budden* v. *Wilkinson*, 1893, 2 Q. B. 432. In the last named of these, where the description of the documents was to the same effect as used here, the Court adopted the principle of decision laid down in *Taylor* v. *Batten, supra*, "that the object of the affidavit is to enable the Court to make an order for the production of the documents mentioned in it, if the Court think fit so to do, and that a description of the documents which enables production, if ordered, to be enforced is sufficient," and held the affidavit in that respect to be sufficient. Following these cases, the reports mentioned in Rogers' affidavit are sufficiently identified.

On the other ground, however, I think it desirable that the leave asked for should be granted. Plaintiff relies upon *Swaisland* v. *Grand Trunk Rw. Co.*, 3 O. W. N. 960, where Mr. Justice Middleton expressed the view that the claim for privilege should have been more clearly and specifically stated and that the affidavit should have stated that the reports there referred to were provided solely for the purpose of being used by the defendants' solicitors in the litigation, etc. The rule requiring the use of the word "solely" is not of universal application; and while it may be argued that the present case is distinguishable from *Swaisland* v. *Grand Trunk Rw. Co.* I am of opinion that that decision, coupled with the fact that the learned Chief Justice

of the King's Bench from whose order it is sought to bring the appeal, is reported to have expressed some diffidence in reaching his conclusion, gives ample ground for granting the leave.

Costs of the application to be disposed of on the appeal.

HON. R. M. MEREDITH, C.J.C.P. SEPTEMBER 22ND, 1913.

NIAGARA NAVIGATION COMPANY v. TOWN OF NIAGARA.

5 O. W. N. 46.

Way—Highway—Claim of Municipal Corporation that Certain Lands were—Dedication — Evidence as to Unsatisfactory — Statutory Appropriation as Harbour—Trespass—Damages—Costs.

MEREDITH, C.J.C.P., *held*, in an action for trespass upon lands claimed by defendants to be a public highway that there was no sufficient evidence of dedication as such and that in any case the lands in question had been appropriated for harbour purposes by statute.

Action for trespass. Defendants in reply alleged that the lands upon which they were alleged to have trespassed were part of a public highway.

W. C. Chisholm, K.C., and A. E. Knox, for the plaintiffs.

A. C. Kingstone and F. Aylesworth, for the defendants.

HON. R. M. MEREDITH, C.J.C.P.:—Two important questions are involved in this litigation: (1) whether the place in question ever was a highway, and, if so, (2) whether it has ceased to be such by reason of the exercise of the power conferred by an Act of Parliament.

The difficulties involved in the first question are much greater than they ought to be, by reason of the lack of evidence regarding the original laying out of the locality in question into lots and ways.

If one have regard only to the ground itself and any work upon it, the evidence is altogether against the defendant's contention—altogether against any motion that the very place in question ever was a way of any kind. By reason of its low lying character it was not suitable for a road; and has never been used as such. On the contrary, in earlier days, the way, of which the defendants contend it is a continuation, was always fenced off from it by a close board fence, with a gate only in it, used to "shoot" logs

through; and there are yet indications, in broken posts, of a fence which enclosed the place in question and the adjoining property from all use as a way. And for a great many years past the plaintiffs and those through whom they claim, have had the whole piece of property enclosed by a wire fence, built in the line of the old posts, and taking the place of the old fence. Such few acts of user as were proved afforded no evidence of a highway; they were but such acts as are common upon, and evidence of, vacant land being passed over without objection by the owner.

If one have regard to such plans as were produced at the trial, and of what would have been probable in laying out land ordinarily, no peculiar circumstances intervening, it might well be held that the place in question was originally laid out as an allowance for road. But there are some special circumstances: the low lying character of the place, and the fact that from early days it was looked upon as the place of a shipyard and harbour; things of vastly greater importance, then, than another of the several ways to the river in that locality.

If obliged to determine this question in this action, my ruling would be that the onus of proof is on the defendants, and that they have not satisfied it.

But on the other ground my ruling must also be in favour of the plaintiffs; and upon this question there are not so many difficulties arising from lack of evidence, though little was adduced directly respecting it.

The great importance of a dock, and a shipyard, at the head of the great lake Ontario, at the river, is made very evident by the fact that an Act of Parliament was passed, conferring large rights in, and powers over, the locality in question, upon individuals undertaking the work.

Assuming that the place in question had been laid out as, or had, in any manner, become a road allowance in which the public had acquired a right, then under the enactment before mentioned there was power to appropriate it for harbour and shipyard purposes; and it was, as I find, so appropriated, and title to it was acquired under the Act.

It is true that the harbour basin does not include all of it; but it is equally true that a large part of it is actually covered by the waters of the dredged and wholly artificially made harbour; so much so that, judging by the maps alone in the absence of any other evidence on the subject, it seems

very improbable that the water of the river Niagara could be reached now, in any manner, by means of this supposed public way, without crossing some part of the artificially constructed harbour. There can be no doubt that the public would have no right to make use of the harbour in any way, against the will of the owners, even if the way extended to the water's edge; but it does not. The embankment is part of the work authorized by, and done under the Act of Parliament, and so has become the private property of the shipyard and harbour owners. It is necessary for their reasonable and proper use in repairing and maintaining, and carrying on business in, the harbour; and it so encroaches upon the place in question that it would be idle to say that its usefulness as a road, its existence as a place for a highway, is not gone, having been rightly acquired under the Act of Parliament, which, it ought not to be needful to say, is something more than a grant from the Crown.

Admittedly, if any part of the place in question remain a highway, it would be the duty of the defendants to safeguard the public, lawfully using it, from the danger which the harbour would cause: *Toronto* v. *Canadian, &c.* (1908), A. C. 54; and, admittedly also, it is the right of the plaintiffs to make any reasonable use of the harbour embankment, which covers so much of the place in question, and to enclose it, things quite inconsistent with any use of the place in question as a highway.

I have dealt with the case from the defendants' standpoint, and, thus dealt with, it fails; and so it becomes unnecessary to consider the plaintiffs' claim of ownership of the land extending from the waters of the harbour a considerable distance beyond the place in question.

It is satisfactory to know that the loss of the place in question as a road—if it ever were an allowance for road—is not a very serious loss; there are several other roads to the river, not far off, and, if another nearer be desired it could be had at no great cost; it would be a much more difficult thing to move any part of the harbour to make room for a road in the place in question.

There will be judgment for the plaintiffs and $25 damages, for the trespasses complained of, with costs of action on the High Court scale, without set-off.

No injunction, or other relief, is needed.

G. S. HOLMESTED, K.C. SEPTEMBER 24TH, 1913.

COLUMBIA GRAPHOPHONE CO. v. REAL ESTATES CORPORATION, LIMITED.

5 O. W. N. 53.

Pleading—Particulars — Statement of Claim — Items of Damage—Right of Defendants to.

HOLMESTED, K.C., ordered particulars of damages alleged to have been suffered by the plaintiffs, lessees of certain premises, by reason of alleged breaches of covenant on the part of their lessors.

Motion for better particulars of statement of claim in an action by lessees against their lessor to recover damages for breaches of agreements contained in the lease as to furnishing electric energy and steam power to the plaintiffs for the purpose of their business. Various grounds of loss and damage were stated in general terms in the statement of claim and a demand was made by the defendants for particulars of some of the allegations. This demand was answered by the plaintiffs, but the defendants contended that the answer was insufficient.

J. G. Smith, for the defendants.

O. H. King, for the plaintiffs.

GEO. S. HOLMESTED, K.C.:—When the matter was being argued it occurred to me that what was really wanted was particulars of the damages which the plaintiffs allege they sustain and that as it was improbable that on the trial of the action the Court would go into the question of the quantum of damages, but would probably refer that question to a Master, it might be regarded as a premature proceeding now to require the plaintiffs to deliver the required particulars. If this were a plaintiff seeking particulars from a defendant in reference to the plaintiff's damages, that might be so, but on further consideration I have come to the conclusion that where a defendant is applying for particulars from the plaintiff of his alleged damage the case is different and that what in the case of a plaintiff might not be proper to grant, may be quite proper to grant in the case of a defendant. The inquiry into the particulars of the plaintiffs' alleged damage appears to be necessary before trial to

enable a defendant to say whether or not he will pay money into Court in satisfaction of the claim and for that purpose he is entitled to be put in possession before a trial of such particulars of the plaintiffs' claim as will enable him to form an estimate of its character. Usually plaintiffs are careful to claim at all events enough to cover the injury of which they complain, but in the present case the plaintiffs appear, according to the particulars which they have furnished, to have suffered over $16,300 damage and yet have only claimed $15,000. This leads to the conclusion that the plaintiffs themselves have not a very definite idea of their alleged damages. But when a suitor comes into Court he ought at least to be in a position to furnish to his opponent reasonable and definite information of the damage of which he complains. Applying these considerations to the answers of the plaintiffs to the defendants' demand, I have come to the conclusion that in some respects complained of they are insufficient and I direct further and better particulars to be given in respect of the following matters:—

1. Name of person who made the representation referred to in the 5th paragraph of the statement of claim.

2. Particulars demanded by 4th paragraph of demand.

3. Better and more detailed particulars of the two items of $8,000 each, in the plaintiffs' answer, numbered 6.

4. Particulars of the number of gramophones and records respectively which the plaintiffs claim the plaintiffs were prevented from making owing to the matters complained of in the 9th paragraph of the statement of claim.

5. Further and specific statement of the expenses of the electric motor and the quantity and cost of the electric energy referred to in 10th paragraph of statement of claim.

6. Particulars of loss of custom—prestige and profits and orders refused or not fulfilled, in consequence of matters complained of in statement of claim.

I do not think any further particulars should be given in reference to the 8th paragraph of the statement of claim and except as to those I have above dealt with I do not understand the defendants to claim any.

The costs of the motion will be costs to defendant in the cause.

HON. MR. JUSTICE KELLY. OCTOBER 1ST, 1913.

COOPER v. JACK CANUCK PUBLISHING CO.

5 O. W. N. 66.

Pleading—Motion to Strike out Statement of Claim—Action for Libel —Plaintiff Member of Class—Right to Sue—Alleged Misjoinder—Time to Plead—Costs.

KELLY, J., refused to strike out a statement of claim in a libel action, holding that a member of a class can sue on behalf of the class, if defamed.

Le Fanu v. *Malcomson*, 1 H. L. C. 637, and *Albrecht* v. *Burkholder*, 18 O. R. 287, followed.

Motion by defendants for an order that the statement of claim be struck out, on two grounds (1) that it discloses no cause of action, and (2) misjoinder of parties.

A. R. Hassard, for the defendants.

J. G. Farmer, K.C., for the plaintiffs.

HON. MR. JUSTICE KELLY:—On neither ground do I think defendants are entitled to succeed.

Without reviewing the authorities or discussing fully their effect or application here, the first ground of the present application is met by such cases as *Le Fanu* v. *Malcomson* (1848), 1 H. L. C. 637, and *Albrecht* v. *Burkholder* (1889), 18 O. R. 287. In the former of these Lord Campbell (at pp. 667 and 668) says:

"The first objection is that this libel applies to a class of persons and that therefore an individual cannot apply it to himself. Now, I am of opinion that that is contrary to all reason, and is not supported by any authority. It may well happen that the singular number is used; and where a class is described, it may very well be that the slander refers to a particular individual. That is a matter of which evidence is to be laid before the jury, and the jurors are to determine whether when a class is referred to, the individual who complains that the slander applied to him is, in point of fact, justified in making such complaints. That is clearly a reasonable principle, because whether a man is called by one name, or whether he is called by another, or whether he is described by a pretended description of a class to

which he is known to belong, if those who look on, know well who is aimed at, the very same injury is inflicted, the very same thing is in fact done as would be done if his name and Christian name were ten times repeated." *Albrecht* v. *Burkholder, supra,* is to the same effect.

Defendants' second ground is that there is misjoinder of parties. Holding as I have held above, and it not appearing that the joinder of the plaintiffs will embarrass or delay the trial of the action, I am of opinion that under Rule 66 plaintiffs are not improperly joined.

Defendants ask, in the alternative, that portions of paragraph 3 of the statement of claim be struck out as irrelevant and embarrassing. The portions objected to are sufficiently connected with the other published statements in respect of which the action is brought, and they should remain as part of the record. It is difficult to see how they can cause embarrassment or interfere with the proper trial of the action.

The application for particulars of the name of the Controller referred to in paragraph 3 of the statement of claim is also refused. Disclosure of the name of the person whom the author and published of the article complained of, or one or other of them, had in mind, is, or should be, within the power of defendants or some one of them. Defendants are not therefore in that respect prejudicially affected in making their defence.

The motion is dismissed with costs.

Defendants will have eight days from this date within which to deliver their statement of defence.

G. S. HOLMESTED, K.C. SEPTEMBER 24TH, 1913.

OWEN SOUND LUMBER CO. v. SEAMAN KENT. CO.

5 O. W. N. 55.

Pleading—Statement of Claim—Motion for Particulars — Contract—Order Granted.

Coyne, for the defendants.

H. S. White, for the plaintiff.

GEO. S. HOLMESTED, K.C.:—I think the plaintiffs should deliver particulars to the defendants of the contract in the third paragraph mentioned, stating whether or not it is in writing and the terms thereof. I think the plaintiffs should also deliver particulars as demanded by pars. 2, 3, and 4 of the demand, and I so order. Costs of application in the cause to defendants.

HON. MR. JUSTICE KELLY. SEPTEMBER 27TH, 1913.

TOZMAN v. LAX.

5 O. W. N. 51.

Vendor and Purchaser—Objections to Title—Construction of Will—Quit Claim—Vendor Instructed to Procure—Terms of Agreement—Refusal to Permit Purchaser to Withdraw.

KELLY, J., refused to give effect to the purchaser's objections to the title of the vendor of certain property, but ordered a quit claim to be procured to clear up a possible cloud on the title.

Application under the Vendors and Purchasers Act.

A. Cohen, for the purchaser.

HON. MR. JUSTICE KELLY:—The main objection to the title made by the purchaser is that arising from the conveyance made on April 15th, 1887, by George Trolley as trustee under the last will and testament of Elizabeth Trolley, deceased, to Martha Ann Gray. Elizabeth Trolley by her will dated June 6th, 1881, and which was registered in the Registry Office on June 7th, 1882, appointed her husband George Trolley, the sole executor thereof, with full power to sell or dispose of any or all of her real estate, should he think it to the interest of her children to do so; she having earlier in the will devised her real estate to be equally divided among her children when the youngest became of age. Probate of the will not having been issued, the purchaser makes objection to the vendor's title which is derived through the above mentioned deed. From a careful consideration of the whole matter as submitted, I do not think the title on that ground is objectionable.

In a further objection the purchaser asks that a quit claim deed be obtained from the Confederation Life Asso-

ciation to whom, more than a year after they had become mortgagees of the property, a quit claim deed was made by one Macdonald, who was owner of or interested in the property before the mortgagor acquired title. The mortgage has since been discharged, but I think a quit claim deed should also be obtained from the association, so as to remove what otherwise might hereafter be set up as a cloud on the title.

As to the requisition that the vendor give title to a right of way of one foot six inches in width (instead of one foot five inches), the contract for sale does not expressly refer to this right of way nor its extent, nor it is shewn by survey or otherwise what is the width of the strip of land over which the purchaser is to have a right. In the absence of this information I am unable to say what is its width, or that the vendor is bound to give such right over one foot six inches.

The only matter remaining to be disposed of is, what are the terms of payment of the purchase money. On the argument it developed that since the contract was made the vendor had paid $50 on account of the principal of the $2,900 mortgage then on the property, thus leaving $2,850 of the mortgage to be assumed by the purchaser; this with the $50 deposit already paid, the further payment of $550 to be made on closing the transaction, and the giving of the $500 mortgage provided by the contract, removes any doubt about the manner of payment.

The question raised by the purchaser as to the terms of renewal of the existing mortgage is not one occasioning any difficulty of entitling him to reject the title.

There will be no costs of the application.

HON. MR. JUSTICE KELLY. SEPTEMBER 20TH, 1913.

RE CANADIAN GAS POWER & LAUNCHES LIMITED, RIDGE'S CLAIM.

5 O. W. N. 43.

Company — Assignment—Winding-up — Assignment of Promissory Notes to Bank—Collateral Security—Bank Entitled to an Assignment of—Judgment of Master-in-Ordinary—Variation of.

KELLY, J., *held*, that where a company transferred certain notes held by it to a bank, the latter was also entitled to an assignment of any collateral security, such as mortgages, that was given with such notes by the debtor.

Central Bank v. *Garland*, 18 A. R. 438, followed. Judgment of Master-in-Ordinary varied.

Appeal from report of Master-in-Ordinary.

G. L. Smith, for the Bank of British North America.

S. G. Crowell, for the liquidator.

H. C. Macdonald, for Ridge, claimant.

HON. MR. JUSTICE KELLY:—The Master has found, and I think properly, that the bank became the holder for value of Ridge's notes without notice of any defect in the payees' title and is entitled to enforce payment against Ridge. He also held that there was and is no debt due by Ridge to the company (now insolvent) and, therefore, the bank has no right to an assignment of the mortgage made by Ridge to the company as collateral security for the notes. With this latter finding I disagree. Except that the time for delivery was not expressly stated, there was a distinct and definite agreement in writing, signed by Ridge, for the purchase of the launch, for part of the price of which the notes and mortgage were given, a cash payment having been made on account of the contract price. The agreement itself was not before the Master when he had the claim under consideration, although there was evidence of its existence. Had it been produced, his conclusion might have been different. It is now produced, and no exception is taken to it by Ridge's counsel. It expressly provides that the giving of the mortgage is collateral to the notes; and it is clear that the mortgage was given accordingly.

My view is that the Master was in error in ruling that the bank is not entitled to an assignment of the mortgage.

This case is not in that respect distinguishable from *Central Bank* v. *Garland*, 20 O. R. 142 (affirmed in appeal, 18 App. Rep. 438), where the learned Chancellor, stating the law as drawn from authorities which he then cited, held that the hire receipts there in question were accessory to the debt, that there was no right to separate the two things (the hire receipts and the notes) and that in equity the transfer of the notes to the bank was a transfer of the securities (the hire receipts). That applies here. The company could not, and the liquidator cannot, resist the claim of the bank to have the mortgage accompany the notes. The liquidator should not discharge the mortgage but assign it to the bank to be held as collateral security to Ridge's notes.

The liquidator's counsel appeared on the motion and submitted to whatever ruling the Court might make. Costs of the bank and of the liquidator of this application will be payable out of the estate.

Had there been any dispute or contention on Ridge's part as to the existence of the contract for the purchase when it was produced on the application I might have thought it proper to refer the matter again to the Master for re-consideration. But there is no denial of the agreement in the form in which it now appears, and I therefore deal with the matter without so referring it.