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HON. MR. JUSTICE KELLY. NOVEMBER 25TH, 1912.

CHAMBERS.

REX v. COOK.

4 O. W. N. 383.

Intoxicating Liquors—Conviction for Being Found Intoxicated in a Street or Public Place—2 Geo. V. c. 55, s. 13—Hotel not Public Place—Ejusdem Generis—Defective Information and Conviction—Order of Protection.

KELLY, J., *held*, that the hallway or rooms of an hotel was not a "public place" within the meaning of 2 Geo. V. c. 55, s. 13, the term "public place" being *ejusdem generis* with "street."
Case v. *Story*, L. R. 4 Ex. 319, and other cases referred to.

Motion to quash a conviction of defendant who was, on August 8th, 1912, tried before two magistrates and convicted—according to the amended conviction—for being found upon a street and in a public place in an intoxicated condition owing to the drinking of liquor in a municipality in which what is known as a local option by-law was in force.

Two of the grounds relied upon in support of the motion were:—(1) that the information shewed no offence under the Statute, and, (2) that the accused was not found in an intoxicated condition upon a street or in a public place.

The form of information as returned was that the accused "between June 30th and July 30th, 1912, at Lions Head was unlawfully intoxicated contrary to the provisions of the Liquor License Act upon a street or in a public place in the township of Eastnor." It bore upon its face evidence of having been amended and it was clear that as first drawn it read "was intoxicated contrary to section eighty-six of the Liquor License Act," and that the amendment

made was by striking out the words "section eighty-six," and substituting therefor the words "the provisions," and by adding after the words "Liquor License Act," the words "upon a street or in a public place in the township of Eastnor."

Jas. Haverson, K.C., for the motion.

C. S. Cameron, contra.

HON. MR. JUSTICE KELLY:—From the appearance of the document the conclusion might be reached that the amendment was made after the accused had pleaded "not guilty." If the only objection to the conviction was that it does not shew an offence, I should feel disposed to quash the conviction on that ground; but I do not rest my judgment upon that but on the other ground mentioned.

Three different forms of conviction have been returned, one being "that said John H. Cook was intoxicated on a street and in a public place in the township of Eastnor on July 8th, 1912," another "that said defendant did get intoxicated in the Williams hotel in the township of Eastnor on July 8th, 1912," and the third "that the said J. H. Cook on the 8th day of July, 1912, in the township of Eastnor in the county of Bruce was found upon a street and in a public place at Lions Head in the township of Eastnor in the said county in an intoxicated condition owing to the drinking of liquor contrary to the Ontario Liquor License Act and amendments thereto, there being then in force in the municipality of the township of Eastnor a by-law passed by the municipality of Eastnor under sec. 141 of the Liquor License Act commonly known as the local option by-law."

While there is quite sufficient evidence that the accused was intoxicated, there is no evidence that he was found intoxicated on a street or in a public place, unless effect be given to the contention set up on behalf of the magistrates that the Williams hotel in Lions Head, in which the accused was intoxicated, is a public place.

The intention of the amendment to the Liquor License Act made in 1912, 2 Geo. V. ch. 55, sec. 13, was to protect the public from being met by the sight of intoxicated persons on streets, and in public places of a character similar to streets where the public generally have a right to be; and in making use of the words, "any public place" it was

no doubt intended that it should apply to a place *ejusdem generis* with a street, and not to a place such as the hotel in question.

The words used in the judgment of the Divisional Court in *Reg.* v. *Bell*, 25 O. R. 272 (at p. 273), are apt to this case, viz.: "To be within its provisions an offence must have been committed in a public place such as a street, square, park or other open place." Another case which is strikingly like the present one is *Case* v. *Story*, L. R. 4 Ex. 319. That was a case where a hackney carriage driver, standing on the premises of a railway company by their leave for the purpose of accommodating passengers by their trains, was requested by a party to drive him, and refused; and it was contended that he was bound to do so under the statute which provides that every carriage . . . which shall be used for the purpose of standing or plying for hire in any public street or road in any place within a distance of five miles from the general post office in the city of London . . . shall be obliged and compellable to go with any person desirous of hiring such hackney carriage.

Kelly, C.B., in his judgment, at p. 323, says: "We have to consider the subsequent words of the definition 'in a public street or road.' It is clear to me that railway stations are not either public streets or public roads. They are private property; and although it is true they are places of public resort, that does not of itself make them public places. The public only resort there upon railway business, and the railway company might exclude them at any moment they liked, except when a train was actually arriving or departing. For the proper carrying on of their business they must necessarily open their premises, which are nevertheless private, and in no possible manner capable of being described as public streets or roads." And at p. 324, when referring to the contention of counsel that "place" is a large term, he says: "We must take it as only meaning a place *ejusdem generis* with a street."

A perusal of the report of *Curtis* v. *Embery* (1872), L. R. 7 Ex. 369, is helpful in arriving at the meaning to be given to "a public place." There Bramwell, B., in defining the meaning of "road" which was referred to in the statute then under consideration and which was used in giving the interpretation of the word "street" used in that statute, said that it "must be a road over which the public have rights."

"Public place" in sec. 13 above, especially when taken in connection with the word "street" which precedes it, must mean a place over which the public have rights as over a street, and not a place where, as a hotel, persons are permitted to go for accommodation such as a hotel affords.

I am unable to agree with the contentions set up that the hall-way and rooms of the hotel, where alone the accused was found intoxicated at the time in question, is a public place within the meaning and intention of sec. 13 of the amending Act, and the conviction on that ground alone, apart from any others, must be quashed with costs.

Though giving protection to the magistrates I must draw attention to the loose and unsatisfactory manner in which the papers in this case, such as the information and conviction and amended convictions, were prepared.

DIVISIONAL COURT.

DECEMBER 6TH, 1912.

RE HOLMAN AND REA.

4 O. W. N. 434.

Criminal Law—Criminal Procedure—Theft—Police Magistrate—Criminal Code, ss. 665, 668, 707, 708—Police Magistrate's Act, 10 Edw. VII. c. 36, ss. 24, 31 — Place where Offence Committed — Magistrate Seised of Case—Extent of Prohibition—Crown Attorney Acting as Counsel for Party.

Motion by one Holman, the complainant in a charge of theft for prohibition to the police magistrate at St. Mary's in the county of Perth. The warrant was issued at Stratford in the same county and the accused apprehended there, brought before the police magistrate there, admitted to bail and directed to appear before the police magistrate at St. Mary's the next day. The complainant was not notified of the hearing at Stratford, and was not present, but was present at the hearing at St. Mary's the next day, and objected to the assumption of jurisdiction by the magistrate. The latter proceeded with the hearing in spite of having been served with a notice of motion for prohibition, and assumed to acquit the accused in the absence of the complainant. Complainant urged that the police magistrate at Stratford having been made seised of the matter could not commit accused for trial before another magistrate, and respondents urged that in any event as an acquittal had taken place an order for prohibition was useless.

SUTHERLAND, J., *held* (23 O. W. R. 219; 4 O. W. N. 207), that the magistrate at Stratford acted properly in giving the accused a preliminary hearing and in his discretion committing him for trial before another magistrate having jurisdiction.

Motion dismissed with costs.

DIVISIONAL COURT *held*, that once a magistrate is seised of a prosecution for an indictable offence he has no power to discharge himself or request another magistrate to act for him.

Regina v. *McRae*, 28 O. R. 569, and other cases referred to.

That prohibition will be granted at the very latest stage as long as there is anything to prohibit and in this case the issuance of a certificate of acquittal could be prohibited.

Brazill v. *Johns*, 24 O. R. 209 referred to.

Appeal allowed and order of prohibition granted with costs.

Appeal from the judgment of HON. MR. JUSTICE SUTHERLAND, dated November 2nd, 1912, reported 23 O. W. R. 219; 4 O. W. N. 207, dismissing a motion for prohibition.

An information was laid by Holman before the police magistrate at Stratford, charging Rea with the theft of a horse. A warrant was issued, and Rea was brought before the police magistrate at Stratford, when he was admitted to bail and directed to appear for trial before the police magistrate at St. Mary's.

The accused thereupon went before the police magistrate at St. Mary's, surrendered himself into custody on the charge, pleaded not guilty, and elected to be summarily tried by that magistrate. The complainant objected to the trial proceeding before the police magistrate at St. Mary's, and his counsel attended and protested against the assumption of jurisdiction; whereupon the magistrate proceeded with the trial, and the informant not appearing, the magistrate—although served with the notice of motion for prohibition—acquitted the accused. The informant had been served with a subpœna to attend, but failed to do so.

The appeal was heard by a Divisional Court, composed of the HONOURABLE JUSTICES MIDDLETON, LENNOX, and LEITCH.

F. Aylesworth, for the applicant.

R. H. C. Cassels, for the respondent.

HON. MR. JUSTICE MIDDLETON:—Upon the motion for prohibition the learned Judge took the view that the course adopted was justified by sec. 708 of the Code; his attention not having been drawn to the fact that this section is one of the group of sections, 705 to 770, relating entirely to summary convictions, and that the case in hand was a summary trial of the accused by his consent for an indictable offence.

The learned Judge also relied upon sec. 668 of the Code, which provides that "when any person accused of an indictable offence is before a Justice, whether voluntarily or upon a summons . . . the Justice shall proceed to enquire into the matters charged against such person in the manner hereinafter directed." This section, then, does not purport to confer jurisdiction, and must, I think, be confined to cases in which the accused is rightly before the Justice; in which case the procedure to be followed is pointed out.

Upon the argument counsel failed to point out any section authorizing the adoption of the course pursued in this case. The case, therefore, fails to be determined upon general principles.

Regina v. *McRae* (1897), 28 O. R. 569, determines that where an information is laid before a magistrate he becomes seized of the case, and that no other magistrate has any right to take part in the trial unless at the request of the magistrate before whom proceedings are taken. All the magistrates in the county have jurisdiction; but so soon as proceedings are taken before any one of these officers having concurrent jurisdiction he becomes solely seized of the case. The magistrate has under the statute—and possibly apart from the statute—the right to ask other magistrates to sit with him; and, if he does so, the whole Bench becomes seized of the complaint. *Regina* v. *Milne*, 25 U. C. C. P. 94.

The statute relating to police magistrates, 10 Edw. VII., ch. 36, sec. 18 recognizes this principle. So also do secs. 10 and 34, which provide that the deputy police magistrate, or, if there is no deputy, any other police magistrate appointed for the county, may proceed for the police magistrate in the case of his illness or absence. Neither of these sections gives to the magistrate any power, once he has undertaken the case, to discharge himself, save in the case of illness or absence. He has no power to request another magistrate to sit for him. Contrast the provisions of the two sections with sec 18, which provides that in the case falling within it the magistrate may so request. By sec. 31, where the case arises out of the limits of the city, the police magistrate is not bound to act; but if once he does act it appears that he must continue to the end.

This view of the statute is quite consistent with the view taken in *Regina* v. *Gordon*, 16 O. R. 64.

It is argued on behalf of the respondent that prohibition ought not now to be awarded because nothing remains to be done before the magistrate. The magistrate has acquitted. He has no jurisdiction. All that he has done is a nullity, and it may be that a more proper motion would have been for a *certiorari*, so that the proceedings taken before the magistrate might be quashed. But I think there is yet one thing that the magistrate may assume to do, and that is to grant a certificate of acquittal; therefore, prohibition may yet be awarded.

As said in *Brazill* v. *Jones*, 24 O. R., p. 209, a prohibition may be granted at the very latest stage, so long as there is anything to prohibit. From the very earliest times this has been recognized as the guiding principle. In the historic answers of the Judges to the *articuli cleri*, resulting in the statute 9 Edw. II., ch. 1 . . . found in 2 Inst. 602—it is said: "Prohibitions by law are to be granted at any time to restrain a Court to intermeddle with or execute anything which by law they ought not to hold plea of, and they are much mistaken that maintained the contrary . . . for their proceedings in such case are *coram non judice;* and the King's Courts that may award prohibitions, being informed either by the parties themselves or by any stranger that any, temporall or ecclesiastical, doth hold plea of that whereof they have not jurisdiction, may lawfully prohibit the same as well after judgment and execution as before." A statement which is referred to with approval by Wiles, J., in *Mayor of London* v. *Cox.*, L. R. 2 H. L. 239

I have the less hesitation in awarding prohibition where the magistrate proceeds with the hearing of the case having knowledge that his jurisdiction is disputed. It would be more seemly for all tribunals charged with the administration of justice to act in such a way as to avoid any suspicion that the course adopted is in any way the result of temper.

Here, the magistrate, knowing that his jurisdiction was disputed, and after having been served with a notice of motion for prohibition, dismissed the charge without having heard the informant's evidence, and apparently sought to put the informant in the position of either attorning to his jurisdiction by appearing in obedience to his summons, or risking everything upon the result of the motion. It would have been more consistent with judicial dignity to have enlarged the hearing until the question of jurisdiction had been determined.

There is no power in the Court to stay proceedings in an inferior Court pending the hearing of the motion. *Myron* v. *McCabe*, 4 P. R. 171; and this should make all inferior tribunals reluctant to act in a way that will afford any foundation for the argument here presented, that the motion is rendered nugatory by what has been done after the motion was on foot.

The citation from Coke, also answers another objection made to this motion, that the informant has no *locus standi* to apply.

I think it is my duty to draw attention to another matter appearing upon the material. In *Livingston* v. *Livingston*, the Court has spoken with no uncertain sound concerning the position occupied by local masters who are by law allowed to practice. What is there said does not apply to the full extent to the conduct of Crown Attorneys; who are—unfortunately, I think—allowed to practice generally. But what has taken place in this case serves to indicate the difficulties that all too frequently arise from this mischievous state of affairs.

Holman purchased a horse from Edgerton Rea, and paid him. William J. Rea, the father of Edgerton, brought an action of replevin to recover the horse. In that action he swore that his son had no authority to sell the horse. If his evidence is true, the son is guilty of larceny. The Crown Attorney appears in the replevin action as counsel for the father. When the information is laid, the son is taken before the magistrate, the Crown Attorney is notified, appears, and consents to the case being transferred to the other magistrate, without in any way communicating with the informant. When the informant goes before the other magistrate to protest against his jurisdiction, the Crown Attorney appears to conduct the prosecution and apparently assents to the course adopted by the magistrate in acquitting the prisoner pending the motion. When this motion is made, the Crown Attorney appears for the magistrate and argues that the Court has no jurisdiction because the prosecution is ended, and is then awarded costs against the informant. One who thinks that this indicates something wrong in the administration of justice is not necessarily an unreasonable man.

The appeal should be allowed, and the prohibition granted, with costs against the defendant and the magistrate.

HON. MR. JUSTICE LENNOX:—I agree in the result.

COURT OF APPEAL.

NOVEMBER 19TH, 1912.

REX v. PILGAR.

4 O. W. N. 330.

Criminal Law—Criminal Procedure—Trial for Arson—Questions Reserved—Disqualification of Juror's Interest—Right to Challenge for Cause—Application Too Late—Ambiguous Remark by Judge—Counsel Misled Thereby—Criminal Code, sections 1014, 1022.

Certain questions reserved for the opinion of the Court by the County Court Judge of Halton County after a trial for arson at which defendant was convicted. Before the jury was called defendant's counsel intimated that he would object that any members of a certain mutual fire insurance company were disqualified as jurymen, on the ground of interest. The trial Judge replied "We will see when the question arises." The jury were then called and certain of the panel challenged peremptorily by defendant's counsel but none challenged for cause, and they were then impaneled and sworn. Defendant's counsel then requested the trial Judge to ascertain if any of the jury were members of the company above referred to, but the learned Judge ruled that the application was made too late. The questions submitted were, firstly as to whether defendant's counsel's request was made at the proper time, and secondly, if the proceedings prior to the impaneling of the jury amounted to a refusal of the right to challenge for cause.

COURT OF APPEAL (MEREDITH, J.A., dissenting), answered both questions in the negative.

MEREDITH, J.A., *held* that the trial Judge's remark "We shall see when the question arises" misled defendant's counsel into thinking that his right of challenge would be safeguarded and brought up by the Judge at the proper time, and that therefore the second question should be answered in the affirmative.

The accused was tried for arson at the Halton sessions before the County Judge and a jury, and found guilty.

The Judge reserved two questions for this Court. The facts are set forth in the stated case by HIS HONOUR, as follows:—

"At the opening of the trial, and after the defendant had pleaded, not guilty," the following conversation took place between counsel for the defendant and myself:—

"Mr. Cameron: Before they call the jury, I would like to ask each of the men who are called whether they are interested in the Halton Mutual Fire Insurance Company. If any of them are interested in that company, I submit they would not be eligible to sit on this jury.

His Honour: We will see when the question arises.

Mr. Cameron: Of course, I cannot tell without asking them."

The clerk of the Court then proceeded with the calling of the jurors. At my request the clerk asked to stand aside several of the jurymen who had served on a jury the previous day, and counsel for the defendant challenged some five jurors peremptorily. The jury was impaneled and sworn. The following conversation then took place between counsel for the defendant and myself:—

"Mr. Cameron: Would your Honour see if any of the jury are interested in the Halton Mutual Fire Insurance Company.

His Honour: It is too late, Mr. Cameron; I was waiting for it; that would be a good challenge for cause."

Exhibit 8 shews that the Halton Mutual Fire Insurance Company was actively engaged in prosecuting the fire inquest in connection with the burning of buildings for the burning of which the charge of arson was laid herein, and the affidavit of John Wilson Elliott shews that some of the jurymen who tried the defendant were interested in the Halton Mutual Fire Insurance Company.

* * * * * *

I have reserved for the opinion of this Honourable Court the following questions:—

1. Was the request of the defendant's counsel to examine the men called to serve on the jury, which was to try the defendant made at the proper time, and at the time when the question of their interest in the Halton Mutual Fire Insurance Company arose?

2. Did what took place between counsel for the defendant and myself and prior to the impaneling of the jury which tried the defendant amount to a refusal of the defendant's right of challenge for cause?"

The appeal to the Court of Appeal was heard by HON. MR. JUSTICE GARROW, HON. MR. JUSTICE MACLAREN, HON. MR. JUSTICE MEREDITH, HON. MR. JUSTICE MAGEE, and HON. MR. JUSTICE LENNOX.

D. O. Cameron, for the prisoner.

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

HON. MR. JUSTICE MACLAREN:—There is no suggestion that the usual caution was not given to the accused by the clerk of the Court before the jurors were sworn in the prescribed formula: "Prisoner, these good men whose names you shall now hear called, are the jurors who are to pass between our sovereign lord the King and you upon your trial; if, therefore, you would challenge them, or any of them, you must challenge them as they come to the book to be sworn, and before they are sworn, and you shall be heard." See Archbold (24th ed.), 207; Taschereau, p. 779.

His counsel had no right to interrogate or ask any juror any question without challenging him for cause: Archbold, p. 213. The first application, if application it can be called, was premature, as it was made before the jury were called. The second was too late, as it was made only after the jury were sworn, when the Judge had no power to grant it.

The first question must, therefore, be answered in the negative.

As to the second question, I do not see how it can be said that what took place between the Judge and counsel before the impaneling of the jury can be said to amount to a refusal of the defendants' right to challenge for cause. It was a statement that the point would be dealt with when it arose, the Judge apparently being under the impression that counsel would challenge for cause any juror whom he suspected, but did not know to be a member of the Mutual Insurance Company in question. It would appear that counsel misunderstood his Honour's expression. "We will see when the question arises," and interpreted the use of the "we" as an intimation that His Honour would do the questioning. As counsel did not challenge any juror at the proper time, it may be that the Judge thought that he knew that none of the twelve who were sworn were members of the Mutual Insurance Co. in question. As I have said, I do not think it can be construed into a refusal of the right to challenge for cause, and in my opinion, the second question must also be answered in the negative.

By sec. 1014, of the Criminal Code, it is provided that it is only questions of law that can be reserved for this Court in a stated case, and we must answer them strictly as we understand the law to be. We have no authority or jurisdiction to intervene in a case of error or misunderstanding. Section 1022 of the Code indicates where application for re-

lief should be made in such cases, namely, to the Minister of Justice.

HON. MR. JUSTICE MEREDITH:—The formal questions submitted for the opinion of this Court must be read in connection with the rest of the stated case, and must be given a reasonable interpretation with a view to meeting the real points of the case, and a strictly literal interpretation which would answer no useful purpose ought not to be applied to them, if they are fairly open to an interpretation which would meet the real needs of the case.

To interpret the questions in this case as meaning: is it regular to object to a juryman, for cause, before he is called; and did the Judge refuse to entertain an objection at the time, when the objection ought to have been made, would be to consider the reservation of this case a futile proceeding and a mere waste of time; which I am quite sure no one could have meant.

That which the Judge must have desired to know was whether he had by his conduct, in any way deprived the prisoner of the opportunity to prevent persons disqualified by interest trying him upon the very grave charge made against him, and of which the jury found him guilty; if, therefore, the questions are capable of an interpretation which will enable this Court to consider such real point, and enable it to do justice in the case, they ought to be so understood and acted upon.

It is quite clear that counsel for the prisoner was not familiar with the practice in criminal cases; but he plainly intimated, at the outset, that he desired to guard against anyone disqualified by interest acting as a juryman; and in the acknowledgement of that desire, it ought to be needless to say, he ought to have had every reasonable assistance that the Court could give.

Then what happened? At the very outset the Judge was made aware of a possibility of some of the jurymen being disqualified by personal interest; and upon being made aware of that fact said: "We will see when the question arises." Not: "You are premature, you must raise the question at the proper time. If he had said that he would probably have been asked to say when the proper time would be; and counsel would have raised the question again at the proper time. It would not be unreasonable for the prisoner, or for his counsel to rest assured, after the Judge had said, 'We will

see when the question arises," that the Court would see at the proper time that opportunity for enquiry as to disqualification of jurors was afforded. Having regard to the duty of the Court to take great care that the prisoner got a fair trial, what else could the Judge's answer to counsel, obviously, unfamiliar with the practice in this respect, mean? When the proper time came "we"—whether he meant the Court, or the Judge and counsel—did not "see" to it and consequently the man was deprived of his right of objection to any juror for cause, and so may have been tried by jurors disqualified by interest.

What took place obviously deprived the prisoner of the right of challenge for cause; and that which the Judge said was plainly the cause of that deprivation, and so I think it may be said, fairly, that which took place did amount to a substantial refusal of the right of challenge for cause. Counsel is not to be substituted for prisoner; neither the point, nor the question, is: was counsel refused? The point and the question is: Did all that took place amount to a refusal of the intended challenge? No one would call it incorrect to say that it amounted to a denial of the right; and surely that is equivalent to a refusal in the sense in what this case is stated for our opinion.

I cannot, but think and say, that it was plainly the duty of the Court under all the circumstances to have taken great care that a jury of disinterested jurors only was empannelled; to wait until it was too late to object, before saying anything, may very well have misled the prisoner out of his right, and was in my opinion an error on the part of the Court as well as of counsel.

I answer the first question, No: It is not a question which should have been reserved, for it is one about which there could be no reasonable doubt.

And my answer to the second question is: Yes, substantially.

And accordingly I would direct a new trial.

HON. MR. JUSTICE LENNOX:—The answers to both questions reserved should be "No." But at the same time I desire to add, with the greatest respect, that in my opinion it would have been much more satisfactory if the learned County Court Judge, knowing of the desire and intention of the prisoner's counsel, had, when the proper time for challenge was reached, then called counsel's attention to the

matter, and afforded him an opportunity of exercising his undoubted right. I am sure the learned trial Judge will agree with me that whatever may be the presumption as to the prisoner's guilt or innocence, and whether he is defended with skill and judgment or the reverse, it is always the duty of the presiding Judge to see to it that nothing shall prevent the prisoner from having a fair trial and British justice.

DIVISIONAL COURT.

DECEMBER 11TH, 1912.

NIGRO v. DONATTI.

4 O. W. N. 453.

Negligence—Master and Servant—Explosion of Dynamite—Negligence of Foreman—Deduction of Money Paid for Relief of Workman—Superintendence.

LENNOX, J., in an action for damages for personal injuries caused by an explosion of dynamite, alleged to have been the result of the negligence of defendant's foreman, gave judgment for plaintiff under the Workmen's Compensation Act for $1,446, being $1,500 less amounts paid by defendant for hospital and doctor's bills and costs.

DIVISIONAL COURT dismissed appeal therefrom with costs.

Appeal by defendants from judgment of LENNOX, J., 22 O. W. R. 974; 4 O. W. N. 2, in an action tried at Port Arthur, without a jury, on the 5th June last. Judgment in favour of the plaintiff for $1,446, was given on the 10th September, from which judgment the defendant appeals.

The defendant was a contractor engaged at the time of the accident in blasting rock for a sewer in one of the streets at Port Arthur. The plaintiff was in his employ assisting at the work. It would appear that the defendant with some care had selected one Galzarino, who had had a long experience in the handling of dynamite, and placed him in charge of the work.

Five holes were drilled to receive the dynamite. Numbers 1 and 2 were charged with dynamite by the foreman, Galzarino. These two charges were exploded without injury. Number 3 was also charged (it is alleged also by Galzarino) with a small amount of dynamite. This was left unexploded and without notice to the men. The plaintiff, without knowledge that the hole contained dynamite, proceeded with the defendant personally to drill the hole deeper. A short drill was used; a longer drill was required. This was

sent for. The defendant, fortunately for him, turned away from the hole when the plaintiff struck another blow. The charge was exploded, and the plaintiff received the injuries complained of.

C. A. Moss, for the defendant, appellant.

N. W. Rowell, K.C., for the plaintiff, respondent.

HON. MR. JUSTICE CLUTE:—It was strongly urged by Mr. Moss, that Galzarino, although foreman in a sense, and having the right to dismiss the men then engaged upon this job, yet did not have superintendence intrusted to him within the meaning of sec. 3, sub-sec. 2, of the Workmen's Compensation for Injuries Act.

The trial Judge found as a fact that the evidence did bring the case within the Act.

We think the evidence is clear upon this point. The defendant says: "I engaged a competent foreman of twelve years' experience, Galzarino. On the morning of the accident I had men working there. I said to them, 'This is your foreman. If this man sends a man home I stand by him.'"

"Q. Did you tell Joe that? A. Yes. I said to Joe, 'You have nothing to do with the loading or the unloading of the dynamite. I pay a man more wages than you to do that.'

Q. Who looks after the cleaning out of the holes? A. The foreman.

Q. He is the person who superintends that? A. Yes, that is his duty.

Q. He was on hand with you and superintended Joe in the cleaning out of these holes? He was there? A. Yes, he was there with the dynamite. He was standing behind."

The foreman stated that he had acted as foreman for seven years in the handling of dynamite. That he was foreman for Donatti, and was hired because of such experience. That he was in charge of the work that day, and Donatti was there also. That he loaded the two holes and exploded them. That he put a cover on the other holes. That five holes were drilled altogether and two others were covered. He further states that the holes were 2½ feet deep and 1¼ sticks of dynamite was put in or 1½.

The trial Judge has found, and we think the finding is amply supported by the evidence, that the five holes were drilled on the morning of the accident, and the drilling was only completed a few minutes before the explosion of this

hole No. 3, that the hole in question was deliberately, or at all events, intentionally, charged by someone. There was only one person who had the right to do this. This was Galzarino, the foreman, who came upon the works that morning, and who was expressly and distinctly put in superintendence of the works being carried on, and particularly of the blasting operations, and which included as incident thereto drilling, plugging, cleaning out, loading, covering, and firing. The defendant put the plaintiff under the charge of the foreman as his assistant. He assisted in exploding the first and second holes, and the foreman then set him at work cleaning out the third hole and watched him for at least part of the time he worked at this. The defendant came along and assisted the plaintiff in this work, and had only temporarily stepped aside to look for or speak to the foreman in possession of the dynamite, and swears that no one else at the works that morning had dynamite.

He further says upon the undisputed facts and circumstances given in the evidence in this case, "I am not prepared to accept Galzarino's statement that he did not put dynamite in the hole in question, although it is possible that he is saying what he believes to be true, but on the contrary, I think, that the only reasonable conclusion to be reached is, and I find it as a fact, that Frank Galzarino did place dynamite in hole No. 3."

This we think the only proper inference to draw upon the evidence, and that doing so, we have the simple case of the foreman himself partially filling the hole No. 3, and giving no warning that the same was only partially filled or contained dynamite; and having forgotten the fact, set the plaintiff to work to clean out the hole, from which work, and while so doing, the accident occurred.

It seems to us the clearest kind of a case against the defendant. It was negligence of the grossest kind by a person having superintendence within the meaning of the Act. The case also clearly falls within sub-sec. 3 of sec. 3 of the Act, as the plaintiff had been expressly told to obey the orders of the foreman, at whose instance he did the work. *Osborne* v. *Jackson*, 11 Q. B. D. 619; *Cox* v. *Hamilton Sewer Pipe Co.*, 14 O. R. 300. In *Kearney* v. *Nichols*, 76 L. T. J. 63, it was held that it is not necessary that such superintendence should be exercised directly over the workman injured or that the workman should be acting under the immediate orders of such superintendence. It is enough if the superintendent

and the workman are both employed in furtherance of the common object of the employer, though each may be occupied in distinct departments of that common object. This case was applied by this Court in *Darke* v. *Canadian General Electric Company*, 21 O. W. R. 583.

The present case is a very much stronger case. Here the plaintiff was under the orders of the foreman doing the work in question. Of course, there must be reasonable evidence from which the inference may be drawn. Here, in our opinion, the evidence was such as to raise a necessary inference that the hole in question was charged by the foreman. See *Lefebvre* v. *Tretheway Silver Cobalt Mine Limited*, 22 O. W. R. 694; *Evans* v. *Astley*, [1911] A. C. 674, at p. 678.

The appeal should be dismissed with costs.

HON. MR. JUSTICE SUTHERLAND:—I agree.

HON. MR. JUSTICE KELLY:—I also agree.

COURT OF APPEAL.

NOVEMBER 19TH, 1912.

SINCLAIR v. PETERS.

3 O. W. N. 1045; 4 O. W. N. 338.

Way—Alleged Dedication of Highway—User—Installation of Gas-lamp by City—Equivocal Act—Property not Assessed—Reference in Deeds to Property as "Street" and "Road"—Rights of Way granted over Property—Registered Plans — Prescription—Injunction—Costs.

Action for damages for alleged trespass on property alleged to belong to plaintiff, and for an injunction restraining future trespasses. The property in question was a *cul-de-sac* some 136 feet long by some 50 feet wide, running off Sherbourne Street, Toronto. Defendant claimed it was a public street, or that in any event he had obtained a right of way over it by prescription, as his property abutted it upon the north. The evidence shewed that it had remained for a long period unfenced, and had been used to a certain extent as a roadway to the adjoining residences, but no public money had been spent upon it and sidewalks and curbing had been provided by the registered owner. A gas-lamp had at one time been placed thereon by the City at the owner's request, but the evidence shewed it was a common occurrence to place gas-lamps on private property. Since 1908 the city had not assessed the property. Certain deeds were produced in which the property was called a street or "road," but certain other deeds purported to grant rights of way over it.

SUTHERLAND, J., held that upon the above facts there was no evidence of dedication or acceptance by the city.

Simpson v. *Atty.-Gen.*, 1904, A. C. and other cases, at p. 493, referred to.

That defendant had not established a right of way by prescription.

Plaintiff granted injunction as prayed, and $10 damages, together with costs of action.

COURT OF APPEAL dismissed appeal with costs.

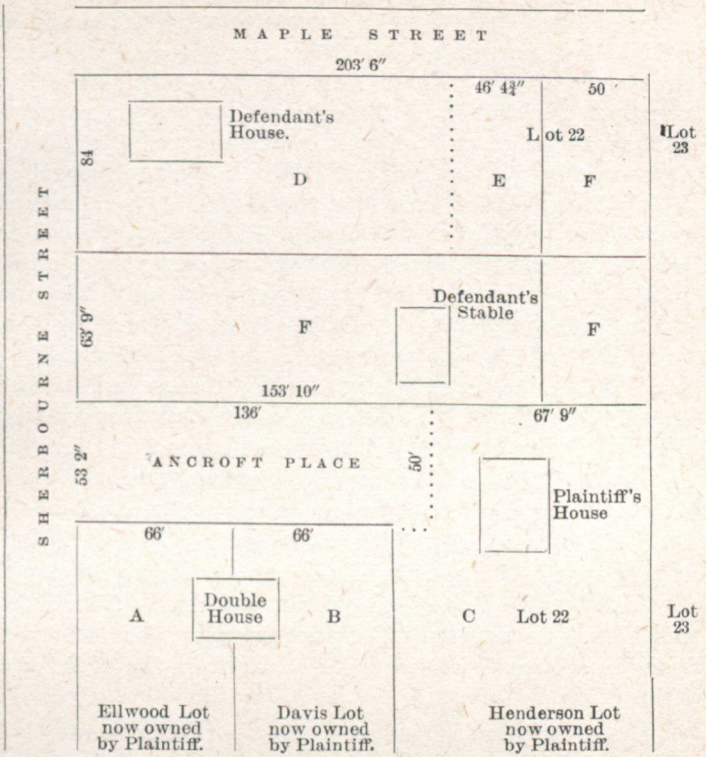
An appeal from the following judgment of HON. MR. JUSTICE SUTHERLAND.

The action was for damages on the ground that the defendant, his servants and workmen, entered upon plaintiff's lands on or prior to October 11th, 1910, and broke down and removed his fence and dug up and removed curbing, and for an injunction restraining defendant from a repetition of such acts and damages. The defendant, in answer, claimed that the acts complained of were done on land known as Ancroft Place, a public place and highway, to which he was entitled to a "free and uninterrupted user and enjoyment," and that furthermore by a deed of grant of lands to him and successive deeds of grant to his predecessors in title he was entitled to a right of way in common with others entitled thereto over the way or road known as Ancroft Place. He also claimed that he and his predecessors in title have used and enjoyed and acquired prescriptive rights of way over said Ancroft Place as appurtenant to his lands and premises by user thereof for twenty years and upwards and pleaded the Limitations Act, 10 Edw. VII. ch. 34, and its provisions. He likewise denied that plaintiff was the owner of Ancroft Place and said that he had unlawfully endeavoured to obstruct it and to prevent the defendant's full user and enjoyment thereof. By way of counterclaim he asked for an injunction restraining the plaintiff from obstructing his user and enjoyment of Ancroft Place and damages.

M. H. Ludwig, K.C., for the plaintiff.

J. D. Montgomery, for the defendant.

HON. MR. JUSTICE SUTHERLAND (12th April, 1912):—Ancroft Place is a part of lot No. 22 according to a plan of part of lot No. 20 in the second concession from the bay formerly in the township of York but now in the city of Toronto and registered as plan No. 329. It is not shewn on said plan or on any registered plan but consists of a piece of said lot about fifty feet in width and 136 feet in depth running from the east limit of Sherbourne street, easterly into said lot No. 22. Attached hereto is a rough sketch shewing Ancroft Place and the properties in question herein.



Many years ago in or near where Ancroft Place now is, there was an old trail or road termed by one witness a trespass road, and one contention of the defendant at the trial was that there had been an early dedication of the land for the purpose of a road and a continuous user since. No evidence of such dedication or that Ancroft Place corresponds in location was however offered. Lot No. 22 was formerly owned by Thaddeus Patrick, a resident of Ottawa, who died there about January 1st, 1879, having first made his will dated January 15th, 1878, wherein he devised his real estate to his wife Rachel Patrick and appointed her executrix. Letters probate were issued to her on January 20th, 1879. On December 28th, 1875, Thaddeus Patrick had conveyed to Joseph Elwell part of said lot 22 shewn on said sketch as A., and the description makes reference to "the southerly limit of a street 50 feet in width." By deed dated July 4th, 1885, reciting that a right of way over a certain road on the northerly boundary

of the lands in said deed of December 28th, 1875, was by mistake not conveyed. Rachel Patrick conveyed to Elwell such right of way in these terms "together with a right of way over a certain road 50 feet in width on the northern boundary of said lands only extending between the easterly and westerly limit of said lot." Elwell died on November 20th, 1908, and the executors of his will duly empowered thereunder by deed dated March 15th, 1909, conveyed to the plaintiff his land the description containing these words "along the southerly limit of a street 50 feet wide and known as Ancroft place." By deed dated November 8th, 1882, Rachael Patrick conveyed to one Davis that part of lot No. 22 immediately east of the Elwell piece and marked B, on said sketch. The description contains these words: "having a frontage of 66 ft. 6 in. on the southerly limit of a street 50 ft. wide." I do not understand that any right of way is contained in this deed which was not produced. Counsel, I think, suggested in argument that at a date subsequent to his deed Davis also applied for and obtained a right of way. Davis died on or about March 19th, 1895, and his widow apparently duly empowered to do so under his will conveyed his land to the plaintiff on the 27th May, 1909.

The description begins as follows:—"Commencing at a point on the southerly limit of Ancroft Place, etc.," and other references to Ancroft Place appear therein. On July 8th, 1884, Rachel Patrick conveyed to one Henderson part of said lot No. 22 shewn on said sketch as C. The description in the deed begins as follows:—"Commencing at a point in the southerly limit of a street 50 ft. wide, etc." Further extracts from it are as follows:—"The said street runs easterly from Sherbourne street to the lands hereby conveyed and is of the full width of 50 ft. measured across said street and at right angles to its northerly and southerly limits. Together with the free and uninterrupted use and right of way at all times in perpetuity to the said James Henderson his heirs or assigns and his and their servants in over and upon the said street 50 ft. wide in common with the said Rachel Patrick her heirs and assigns and the persons to whom she or her said late husband has already or may hereafter grant any part of said lot 22 abutting on said street. The said described lands hereby granted and the said street (50 ft. wide), are shewn

on the surveyor's diagram hereunto annexed." A diagram is annexed to said deed shewing the said "street" (so-called) as a piece of land open at the west end on Sherbourne street, with a width of 53 ft. 2 in. from its northerly to its southerly boundaries on that street and running back easterly into lot 22 a distance of 136 ft. and having the figures 50 ft. indicating its width at two points.

The deed proceeds as follows: "to have and to hold unto the said party of the second part his heirs and assigns to and for his and their sole and only use forever together with the right at any time after one year from the date hereof to register the plan of sub-division of said lot 22 as hereunto annexed and shewing when registered the land hereby granted to the said James Henderson and the said 50 foot street and for that purpose to use and sign the name of the said Rachel Patrick or her assigns provided, however, that such registration shall not affect the right of the said Rachel Patrick to subdivide the land owned by her lying north of said street as she may see fit." A still later clause in the deed is the following "and the said party of the first part hereby further covenants with the said party of the second part that upon any laying out or plotting of said lot 22 and upon any plan thereof whether for the purpose of registration or otherwise the said street of the full width of 50 feet shall be laid down and appear as the same is shewn on the hereunto annexed diagram." By deed dated 30th August, 1906, Henderson conveyed to the plaintiff the land marked C. on the sketch and following the description by metes and bounds is this clause: "Together with a right of way over the street known as Ancroft Place granted to the said James Henderson by the said Rachel Patrick by deed dated 8th day of July, 1884, and registered as No. 16882."

By deed dated 21st November, 1887, Rachel Patrick conveyed to Helen E. McCully the parcels of said lot No. 22, shewn on said sketch as D., E. and F. No right of way is granted over the said street, road or place known as Ancroft Place nor is any reference thereto made in said deed. The southerly limit of the description of the lands therein is however the northerly limit of Ancroft Place.

By deed dated June 1st, 1880, Helen E. McCully conveyed said parcels D., E. and F. to Margaret Dickson. By deeds dated July 23rd, 1895, and July 28th, 1897, respec-

tively Margaret Dickson conveyed to Mary E. Cockburn parcels D. and E.—On the 5th August, 1897, Margaret Dickson executed a mortgage on parcel F. to one Thomas Cole and the description thereof by metes and bounds contains the following reference to the land comprised in Ancroft Place "to a street 50 feet wide"—on the 5th June, 1889, the mortgage was assigned by Cole to the Bank of Commerce and on January 5th, 1889, the bank assigned it to C. B. Armstrong. The latter having taken proceedings under the power of sale therein contained by deed under said power dated 17th July, 1889, conveyed the lands therein described to the said Mary E. Cockburn who was then the owner of parcels D., E. and F. By deed dated 10th June, 1905, Mary E. Cockburn conveyed to the defendant parcels D. and E. and by subsequent deed dated 30th June, 1906, parcel F.—and the description in this latter deed contains the following references to Ancroft Place "thence south parallel to the said easterly limit of said lot 73 feet, 9 in. to the produced northerly limit of a street (now called Ancroft Place) thence westerly along the said produced limit and along the north limit of said Ancroft Place, and to the east limit of Sherbourne street." It thus appears that in none of the deeds through which the defendant traces his title back to Rachel Patrick is there any reference to a right of way over the land known as Ancroft Place as appurtenant to his land. It also appears that at the time the defendant purchased the second parcel of land above-mentioned and which abuts on Ancroft Place, the plaintiff had not yet purchased any of the land he now owns and abutting thereon—nor obtained the quit claim deeds of Ancroft Place hereinafter referred to. For some time prior to 1884 apparently Ancroft Place was called Rachel street probably after Mrs. Patrick's christian name and it is said that at one time there was a sign at or near Sherbourne street bearing that name. The name was changed to Ancroft Place by Henderson after he purchased. In or about the year 1894 having been annoyed by people congregating on it at a point near his property he made application to the city of Toronto for a gas light to be placed on Ancroft Place. It was put up, being connected with the main on Henderson's property, with his consent, asked for as he says by the city. During the time Henderson owned the land which he subsequently sold to the plaintiff he im-

proved the roadway or driveway on Ancroft Place leading to his residence and placed curbing on both sides of it. He also built a wooden sidewalk on the south side and later replaced it by a cement one.

It does not appear from the evidence that the city ever did any work upon it apart from the erection of the gas lamp. No individual has been assessed for the land comprised in Ancroft Place for many years nor has anyone paid taxes thereon. The secretary of the city fire department was called and said it was not unusual for the city to put up gas lamps in such places on private property and gave instances. Another official said that Ancroft Place has been assessed as a street, not a property, since 1903. No plan was ever made by Rachel Patrick of the land north of Ancroft Place subsequent to her deed to Henderson. It was in fact admitted by counsel for the purposes of this suit that it has never been shewn on any registered plan. On the 4th October, 1909, the plaintiff obtained from Rachel Patrick for a named consideration of $1 a quit claim deed of the following described property, namely: "Part of lot No. 22 according to plan No. 329 (Rosedale) filed in the registry office for the eastern division of the city of Toronto which may be more particularly known and described as follows: "Commencing at a point on the easterly limit of Sherbourne street distant 200 feet from the southerly limit of Maple avenue measured along the easterly limit of Sherbourne street, said point being the northwesterly limit of a lane commonly known as Ancroft Place thence south 85 degrees 23 minutes east along the northerly limit of Ancroft Place 136 feet more or less to the property now owned by the party of the second part, thence southerly along the property now owned by the party of the second part, 50 feet more or less to the property now owned by the party of the second part, thence north 85 degrees 23 minutes westerly along the northerly limit of the property now owned by the party of the second part 136 feet 4 inches more or less to Sherbourne street, thence northerly along the easterly limit of Sherbourne street 50 feet more or less to the place of beginning, together with the appurtenances thereto belonging or appertaining to hold the said lands and premises with all and singular the appurtenances thereto belonging or appertaining unto the use of the said party of the second part, his heirs and assigns

forever." The plaintiff actually as he testified paid for said land about $250. The value of the land freed from the rights of way theretofore given over it, would of course have been much more but subject thereto was not great.

The quit claim deed was intended by the parties manifestly to cover Ancroft Place and the description would do so with entire accuracy were it not for the fact that the point of commencement is 200 feet measured along the easterly limit of Sherbourne street from the southerly limit of Maple avenue, instead of 147 ft. 9 in. The latter measurement would make the point of commencement the north north-westerly limit of Ancroft Place while 200 ft. would make it the south-westerly limit thereof. The difficulty between the parties to this action as mentioned in the statement of claim arose on the 11th October, 1910.

The defendant had put up an iron fence on the south side of his property on the northerly line of Ancroft Place with a gate therein. The plaintiff placed a wooden gate in front of the iron gate and this was taken down by the defendant. The writ was issued on the 13th October, 1910, and the statement of claim filed and delivered on the 24th October, 1910. The statement of defence was filed and delivered on the 29th October, 1910, and a joinder of issue on the 15th November, 1910. The plaintiff subsequently discovered the error in the description in said quit claim deed and on the 9th December, 1910, procured a further quit claim deed reciting that it was given to correct an error in the description in the first. It is similar to it, except as to recital and date with this further exception, that the point of commencement in the description, instead of being 200 feet from the southerly limit of Maple avenue, is 147 feet 9 inches, more or less.

At the commencement of the trial of the action, and in pursuance of a notice previously given by the plaintiff to the defendant, an application was made on behalf of the former to amend the statement of claim, in which in describing Ancroft Place in paragraph 2, the same description was used as in the first-mentioned quit claim deed by allowing the point of commencement in the description as set out in said paragraph 2 to read 147 feet 9 inches, instead of 200 feet. This application was opposed by the defendant, and was reserved by me until the evidence had been taken. I think it should be allowed, and do allow it. The description in the

first-mentioned quit claim deed in itself is, I think, sufficient for the purposes of this suit, notwithstanding the error. "In construing a deed purporting to assure a property, if there be a description of the property sufficient to render certain what is intended the addition of a wrong name or an erroneous statement as to quantity, occupancy, locality or an erroneous enumeration of particulars will have no effect." *Cowen* v. *Trufitt*, L.R., [1898], 2 Ch. 551, affirmed [1899] 2 Ch. 309. Reference to *Barthel* v. *Scotten*, 24 S. C. R. 367.

The plaintiff was in any event the equitable owner under said quit claim deed, he having bought the rights of Mrs. Patrick in Ancroft Place, and she having intended by her quit claim deed to convey same to him. On the property owned by the defendant, there is a residence situated towards the north-west corner, not far from the corner of Sherbourne street and Maple avenue. The property has a considerable frontage on both streets. There is a stable on it near the northerly limit of Ancroft Place and towards the rear thereof. Considerable evidence was given on behalf of the defendant to prove that in connection with the ingress to and egress from the said stable, and also in connection with repairs and improvements to the residence, there had been a continuous user of Ancroft Place as associated with or appurtenant to the defendant's property for the statutory period. I am unable to find that this has been made out. There were undoubtedly gaps in the period, and the user such as it was at best a discontinuous one. In the first instance the land known as Rachel street and later as Ancroft Place, was used and intended to be used to serve the occupants of the double house situated on the Elwood and Davis properties, and furnish a right of way thereto—and later to serve Mr. Henderson and his property. There was evidence that at one time the access to said stable was from Maple street. There can be no doubt, I think, that by far the greater part of the traffic upon Ancroft Place was in connection with the properties to the south and east thereof. There was nothing to shew that there was in connection with the land now owned by the defendant, any user of Ancroft Place to the knowledge of Mrs. Patrick or adverse to her ownership. There was no grant of right of way to the defendant or his predecessors in title on the strength of which he can claim. With some hesitation, I have also come to the conclusion that there was no dedication of the land as a public street or highway.

When Mrs. Patrick made the deed to Henderson, the latter obtained only a right of way over Ancroft Place or Rachel street, as it was then called. The reference to it in the conveyances to Henderson and Elwood as a street or road have no conclusive significance, as in each case they are in the deed shewn to have been associated with a right of way over the land, which was all the owner of it was yielding up to the grantee. Mr. Henderson testified that when he obtained his deed, there was a definite understanding between Mrs. Patrick and himself, that Rachel street was to be a private street or road, and to be kept and continued as such. He also said that after he purchased he had given instructions to his gardner to keep up the fences on the north side of Rachel street, to prevent user or trespass with respect to the said street or lane. It is true that in his deed he was by Mrs. Patrick given a right to make Rachel street (Ancroft Place) a public street, by the registration after one year of a plan in the preparation of which he could use her name. Such a plan would, of course, before it could be registered be required to be prepared with the formalities and in the manner provided by the Registry Act. He registered his deed on the 16th August, 1884. Its registration with the sketch attached could not and did not accomplish this. In the deed to Henderson, Mrs. Patrick reserved to herself the right to make a plan of the land then owned by her lying to the north of Rachel street, and now owned by defendant, and agreed that if she did she would shew said street on it—she could thereafter have made it a street if she had desired to do so—she never subsequently made or registered a plan shewing it as a street, private or public. In her subsequent deed to Helen E. McCulley of the land which was later acquired by the defendant, she made no reference to Rachel street in any way, and gave no right of way over it. Under these circumstances she still owned the fee in Ancroft Place subject to the rights of way which she had granted. I think the reference in the deed to Henderson "in common with said Rachel Patrick, her heirs and assigns, and the persons to whom she or her said late husband has already or may hereafter grant any part of said lot 22 abutting on said street," must be construed to mean abutting on said street, and to whom she would grant such right of way.

The defendant and his predecessors in title are not in that position, nor parties in any way to that deed, nor entitled to take advantage of it. Subsequent to her deed to Hend-

erson, Mrs. Patrick never did anything so far as the evidence disclosed, from which the city or anyone else could claim or infer a dedication nor inconsistent with the agreement which Henderson said they had made, that Rachel street should be continued as a private road. It is true she was not assessed nor did she pay taxes on Ancroft Place for many years. It is not much wonder that she did not volunteer to so, nor that the city, seeing the place being used as a right of way for those to the south and east of it should for a long time have overlooked its assessment. The city has never directly asserted any claim to dedication unless the alleged assessment of Ancroft Place as a street since 1903, can be so considered, and has not attempted to do corporation work on it.

Reference to *Hubert et al.* v. *Township of Yarmouth,* 18 O. R. 458, at 467. Mrs. Patrick was not called as a witness at the trial. The fact, however, that she executed the quit claim deed in favour of the plaintiff for a consideration would indicate that she considered she had not dedicated Ancroft Place as a street. There must be an intention to dedicate, and I cannot from the evidence come to the conclusion that such has been satisfactorily made out.

Simpson v. *Attorney-General,* [1904] A. C. at 493. "It is difficult, if not impossible, to establish a public right of way over a *cul-de-sac* by evidence of user alone, without proof that public money has been spent upon it." Halsbury's Laws of England, vol. 16, sec. 53: "If . . . a dedication is set up as in the case of trespass as a defence, it must be proved by defendant. "There is no presumption in favour of a dedication except in the ways of necessity."

Encyclopædia of Law and Practice, vol. 13, p. 475, and at p. 476: "A user is presumed permissive and not adverse." In this case there is no such thing as a way of necessity in question, for the reason that the defendant has abundant access to two public streets, from his property. The user of Ancroft Place has been largely in connection with properties other than the defendant's, with respect to which rights of way had been given by the owner. No one until the defendant, since his recent acquisition of the property, ever in any formal way claimed to use as of right Ancroft Place in connection with and as appurtenant to the land lying north of it. No adverse claim is shewn to have been brought to the notice of Mrs. Patrick. The mere fact that some of the defendant's predecessors in title at odd times

used this private way, lane, road, or street, without her knowledge or objection, does not establish a dedication. The plaintiff will, therefore, have as asked an injunction restraining the defendant from a repetition of any of the acts complained of. The damages which the plaintiff has suffered are slight, and I access same at the sum of $10. If either party is dissatisfied with that amount he may have a reference as to same at his risk. The plaintiff, will also have his costs of suit.

The appeal to the Court of Appeal was heard by HON. MR. JUSTICE GARROW, HON. MR. JUSTICE MACLAREN, HON. MR. JUSTICE MEREDITH, and HON. MR. JUSTICE MAGEE.

E. D. Armour, K.C., and J. D. Montgomery, for the defendant.

M. H. Ludwig, K.C., for the plaintiff.

HON. MR. JUSTICE MEREDITH (19th November, 1912) :— I agree with the learned trial Judge in his conclusion as to each of the issues joined between the parties in this action. I differ from him, only in this, that I have no hesitation, such as he expressed, on the question of dedication, of which I can indeed find no reasonable evidence.

The "street" or "place" in question was never a thoroughfare, but was merely a *cul-de-sac* for the convenience of but a few persons whose property abutted upon it, who were expressly granted a right of way over, or were the owners of it. Everything that was done regarding it, from first to last, was at least as competent with its being a private, as with its being a public, way; and some things, as for instance, granting rights of way and granting or receiving power to make it a public way, were quite inconsistent with the defendant's contention; there is in my opinion no reasonable evidence of any intention to dedicate or of any dedication and acceptance of the street or place as a public way; and no evidence whatever of its having become a public way by reason of the expenditure of public money in opening it or by the usual performance of statute labour upon it.

No grant of any right of way to the defendant is proved; nor does there appear to be any grounds for claiming a private right in any such manner.

Nor has title been acquired by user, as the trial Judge made plain in the reasons for his judgment against the appellant.

But it is said that there is power to convert this private way into a public one; the obvious answer to which, however, is, whether or not such power exists, it has not in fact been exercised, and so the plaintiff yet has this right of action. It will be time enough to deal with any such question when it can be properly, and is, raised.

So too the amendment of the statement of claim—setting up a deed given for the purpose of correcting a obvious misdescription merely—as I think, was quite properly allowed; and I also agree with the trial Judge, in the view expressed by him, that the new deed was not essential to the maintenance of this action, that the old deed covered sufficiently the place in question.

The appeal, in my opinion, should be dismissed.

COURT OF APPEAL.

NOVEMBER 19TH, 1912.

ALLAN v. GRAND TRUNK Rw. CO.

4 O. W. N. 325.

Negligence—Engineer—Backing up Locomotive — Brakeman in Control of Train—Engineer in "Charge or Control" of Locomotive—Workmen's Compensation for Injuries Act, s. 3, s.-s. 5—Liability of Employer.

COURT OF APPEAL *held*, that an engineer who is running a locomotive engine has the "charge or control" of it, even though he may be subject to the orders of a fellow-workman as to the operation of the train, and that therefore his employers are liable under s.-s. 5 of s. 3 of the Workmen's Compensation for Injuries Act if a fellow-servant is injured by his negligence.

Judgment of Boyd, C., at trial affirmed with costs.

Appeal by the defendants from the judgment at the trial before the Chancellor and a jury, in favour of the plaintiff.

The plaintiff, a brakeman employed by the defendants upon a freight train, was, while in the discharge of his duties, injured at Berlin station upon the defendants' line, on the night of the 18th August, 1911, through the alleged negligence of the engineer in charge of the engine.

The material facts were disputed at the trial, but it was conceded by the learned counsel for the defendants that for the purposes of the argument here the facts must be accepted as given by the plaintiff, from which it followed, and was also conceded, that the only question really was

as to the defendants' responsibility under the circumstances for the act of the engineer.

According to the plaintiff the circumstances were as follows: the train crew consisted of the conductor, the engineer and his fireman and two brakemen. On arriving at the station shortly after midnight the conductor directed a certain shunting operation to be made and left the management of it to the plaintiff, the rear end brakeman, while he proceeded to the station-house in the discharge of his other duties. It being dark, the movemeats were necessarily directed by means of signals with lanterns. The plaintiff gave to the engineer the "back up" signal, in consequence of which the engine under the direction of the engineer backed up. When it had proceeded as far as the plaintiff considered necessary he gave the "stop" signal, and as he says (one of the much disputed points) the backing movement ceased. Then while the engine was at rest the plaintiff proceeded between two cars to arrange a coupling, and while in that position, without any new signal having been given, the backing movement was resumed, with the result that the plaintiff was caught and injured as described.

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

R. S. Robertson, for the plaintiff.

HON. MR. JUSTICE GARROW:—By sub-sec. 5 of sec. 3 of the Workmen's Compensation for Injuries Act an employer is made responsible "by reason of the negligence of any person in the service of the employer who has the charge or control of any points, signal, locomotive, engine, machine or train upon a railway, tramway or street railway."

In *Martin* v. *Grand Trunk Rw. Co.*, not yet reported, this Court recently considered and applied to the facts in that case the sub-section which I have just quoted. That was the case of a negligent order given to an engineer by a yard helper by reason of which his foreman was run down and injured. The engineer, in that case, could not be said to have been negligent, for his duties required him to act upon the orders of the yard helper in the absence of the yard foreman. And we accordingly, Lennox, J., dissenting, held the defendants responsible for the consequences of the negligence of the yard helper in controlling the movements of the engine.

This seems a stronger case for the plaintiff, for here the result followed from the negligent act of the engineer himself in backing the engine after he had received and acted upon a "stop" signal without receiving a new signal of any kind.

The appeal fails and should be dismissed with costs.

HON. MR. JUSTICE MACLAREN:—I agree.

HON. MR. JUSTICE MEREDITH:—The only question argued upon this appeal is whether the driver of the engine in question was a person in charge or control of it in doing that which, as the jury found, caused the plaintiff's injury.

It is contended that he was not, but that the plaintiff was, because, admittedly, the plaintiff was in charge of the shunting operations in which the accident happened, and in which the engineer was subject to the directions of the plaintiff.

But an engineer, in running his engine, is, necessarily, most of the time subject to similar direction by train-despatchers, conductors, yard-masters, yardmen, brakesmen, switchmen and others; his engine could not be run safely or efficiently but for such direction; and he would seldom, if ever, be in charge or control of his own engine if such directions deprived him of it.

Physically he was in actual control of it; and so came quite within the literal meaning of the words "in charge or control"; and I can imagine no sort of substantial reason why it should not be considered he came, in the strictest legal sense, quite within the meaning of the words of the act—a person in charge or control of an engine.

A railway locomotive engine is a very powerful, and, if not very carefully managed, a very dangerous, piece of locomotive machinery; which, doubtless, was the reason for creating liability among fellow-workmen in a common employment, for the negligence of any person in charge or control of it for the employer, rather than merely for want of care in the selection of those put in charge of such machinery.

Whatever may be said regarding the person who, as train-despatcher, conductor, yard-master, yardman, brakesman, switchman, or in any other capacity, may, in the performance of his duty as such, give directions to the engineer, or other person in actual control, of the engine, there can-

not, I think, be any doubt that an engineer, when running his engine in the performance of his duty as such, or such other person so likewise engaged, as in this case, is, within the meaning of the enactment upon which the judgment in this case is based, a person in charge or control of an engine; see *Martin* v. *Grand Trunk Rw. Co.*, 20 O. W. R. 600; but it may be observed that there may have been liability any way in that case on the ground that the opening of the "point," which was held to be negligence causing the accident, was done by one in charge or control of that point and of the other point which it was held he ought to have opened instead, and so made this master liable whether, or not, he was in charge of control of the engine.

I would dismiss the appeal.

HON. MR. JUSTICE SUTHERLAND. NOVEMBER 19TH, 1912.

POWELL-REES LIMITED v. ANGLO-CANADIAN MORTGAGE CORPORATION.

4 O. W. N. 352.

Contempt of Court—Motion to Commit—Refusal to Answer Questions on Examination—Order of Divisional Court—Scope of—Con. Rules 902, 910—Officer of Corporation—Provisional Director.

Motion for an order committing one Reynolds, by reason of his alleged disobedience of an order of Divisional Court herein (see 26 O. L. R. 490), in refusing to answer certain questions put to him on his examination ordered by the said order.

Reynolds contended that the order should be given a very strict construction as he claimed it was made under Con. Rule 910.

SUTHERLAND, J., *held*, that under the order of the Divisional Court, Reynolds could be examined as fully as if an officer of the company, and directed him to attend at his own expense and answer such questions as should be put to him.

An application for an order to commit Edwin R. Reynolds, for contempt in failng to comply with the directions and terms of an order of the Divisional Court, dated 23rd September, 1912, see 26 O. L. R. 490; and in refusing to answer satisfactorily certain questions alleged to have been properly put to him on his examination and to produce certain documents as therein required, or in the alternative for an order that he do attend at his own expense and submit to be further examined pursuant to the provisions of the said order.

Paragraph 2 of the order referred to was as follows: "2. And this Court doth under the provisions of Rule 910 in that behalf order that the said E. R. Reynolds, upon

being served with an appointment issued by one of the special examiners of the Court do attend before such examiner and do submit to be examined upon oath by or on behalf of the plaintiff as to the names and residences of the shareholders in the defendant corporation, the amount and particulars of stock held or owned by each stockholder, and the amount paid thereon and as to what debts are owing to the defendant corporation and as to the estate and effects of the defendant corporation and as to the disposal made by it of any property since contracting the debt or liability in respect of which judgment has been obtained by the plaintiff in this action."

C. A. Masten, K.C., for the plaintiff.

E. R. Reynolds, in person.

HON. MR. JUSTICE SUTHERLAND:—On the motion it was contended on behalf of the plaintiffs in the action that the examination of Reynolds was intended, under the said order, to be as wide as in the case of an officer of the defendant corporation.

Mr. Reynolds, who appeared in person, contended for a very strict construction of the terms of the order which he said was made under Rule 910. He seemed to rather contend that the order as drafted had gone farther than it should have gone or was intended. By a reference to paragraph 2 already quoted, it would seem to have been made under the provisions of Rule 910, but when Rule 902 is referred to the remaining part of said paragraph 2 seems to have been drawn so as to make the order applicable under that section also.

I was not referred by either counsel to any written judgment of the Divisional Court. It appears that the reasons for the judgment were delivered orally at the time. A written judgment was, however, handed down later, which contains the following statement: "We agree with the judgmen in review that a director is an officer who may be examined under the provisions of C. R. 902. If there could be any possible doubt as to the correctness of this, the case is one in which an order might well be made for examination under C. R. 910."

It seems to me that the plain intention of the order of the Divisional Court was that Reynolds should be examined

in as wide and full a manner as though he were an officer of the company. It appears that he was one of its provisional directors, and there has been no meeting held for the regular organization of the company. Under these circumstances, I think, the motion must succeed. Reynolds is ordered to attend and be further examined at his own expense, and to pay the costs of this motion.

PRIVY COUNCIL.

NOVEMBER 19TH, 1912.

McPHERSON v. TEMISKAMING LUMBER CO. LTD.

Timber—Crown Timber Act—R. S. O. 1897, ch. 32—License to Cut—Execution against Licensee — Seizure of Cut Timber — Rights under License Exigible—Interest in Land—Notice.

An interpleader issue to determine the ownership of certain sawlogs seized by plaintiffs as execution creditors of A. McGuire & Co., and claimed by defendants as assignees of the execution debtors. It was admitted that defendants had notice of the executions at the time of the assignment, but it was argued that a timber license and the rights, privileges and interests of the licensee thereunder, as long as the timber stood, were unattachable by an execution creditor.

TEETZEL, J., *held* (18 O. W. R. 319, 811; 2 O. W. N. 553, 854), that the execution of plaintiff McPherson must prevail over defendants' claim, as defendants' assignors were enjoined, by order of the Court, from assigning at the time of such alleged assignment, but that the executions of the other defendants could not attach as the property was not exigible.

Can. Pac. Rw. Co. v. *Rat Portage Lumber Co.*, 10 O. L. R. 273; 5 O. W. R. 473, followed.

COURT OF APPEAL, *held* (20 O. W. R. 13; 3 O. W. N. 36), that the injunction referred to in the judgment of the learned trial Judge could not operate any further than as notice to defendants and that, therefore, defendants must prevail as against all the plaintiffs, the property in a timber license not being exigible.

Judgment of TEETZEL, J., reversed in part, and action dismissed with costs.

PRIVY COUNCIL *held*, that under the Crown Timber Act, the position of the holder of a timber license is: (1) that he is the possessor of an asset in the nature of land; (2) that that asset is, accordingly, subject to execution; (3) that the execution does not interfere with the property of the debtor or his power to assign or transfer, subject only to the security of the execution creditor not being impaired; (4) when there is cut timber on the land at the date of execution, that timber is, of course, the instant subject of seizure; (5) should the timber be cut subsequent to the date of the execution, it is then instantly attached, and the execution cannot be defeated because the cutting operations had been made by an assignee or transferee to whom, in the interval between the laying on of the execution and the cutting of the timber, the licensee had transferred his rights, and (6) the only exception to this is the case of a title being acquired by a third party in good faith, and for valuable consideration, and without notice of the writ having been delivered to the sheriff and remaining unexecuted.

Certain dicta in *Can. Pac. Rw. Co.* v. *Rat Portage Lumber Co.*, 10 O. L. R. 273; 5 O. W. R. 473, disapproved of, and the case distinguished.

Glenwood Lumber Co., Ltd. v. *Phillips*, [1904] A. C. 408, approved.

Appeal allowed, and judgment for plaintiffs entered with costs in all Courts.

An appeal by the plaintiffs from a judgment of the Court of Appeal for Ontario, reported 20 O. W. R. 13.

The appeal to the Judicial Committee of the Privy Council was heard by the EARL OF HALSBURY, LORD MACNAGHTEN, LORD ATKINSON, LORD SHAW, of Dumfermline, and SIR CHARLES FITZPATRICK.

Wm. Laidlaw, K.C., and Hon. Wallace Nesbitt, K.C., for the appellants.

Sir Robt. Finlay and Lawrence, K.C., for the respondent.

Their Lordships' judgment was delivered by

LORD SHAW:—This appeal arises out of interpleader issues. As put in the question for trial, the issue was whether certain goods and chattels consisting of saw-logs seized in execution by the sheriff of the district of Nipissing in the province of Ontario, under the writs of *fieri facias* after mentioned, "for the having in execution of the judgments" upon which the writs were issued, "were at the time of the seizure by the said sheriff exigible under the said execution of the said execution creditors as against the said claimants The Temiskaming Lumber Company Limited."

The execution creditors were the appellants, Allan McPherson and William Booth. Executions had been issued upon judgments recovered by these appellants respectively, the judgments being for the amounts of debts due by A. McGuire and Company, who were or had been lessees or licensees of certain timber lands in the district of Nipissing, in the province of Ontario. The writs dealt with by the trial Judge were three in number and were duly received by the sheriff as follows, namely: (1) at the instance of McPherson, received on the 2nd December, 1909, this being for the sum of $3,961; (2) and (3), at the instance of Booth, received on the 26th February, 1910, for $729 and $317, respectively. These two latter appear to have been repetitions of previous executions for the same amounts received by the sheriff on the 16th June, 1909.

The material circumstances of the case so far as the McGuires are concerned, are as follows: Annie McGuire, wife of Cornelius McGuire, obtained a timber license in ordinary form from the Government of Ontario of certain parcels of land in the townships of Bryce and Beauchamp, on the 11th January, 1907. The license was subsequently renewed until

the 30th April, 1912. Annie McGuire was the sole partner of A. McGuire and Company, and she appointed Cornelius McGuire, her husband, as manager. She obtained advances from, and incurred debts to, the appellants, who obtained judgments therefor. Writs of *fieri facias* were issued and delivered in regular form for payment of the moneys due against (to use the exact language of the writs) "the goods and chattels, lands and tenements, of A. McGuire and Company, in your bailiwick." In the course of the months of January, February, and March, 1910, considerable cutting operations were made and the logs cut were placed on the ice and floated down the rivers to Lake Temiskaming. The sheriff acting under the execution took exclusive possession of these logs on the 11th June, 1910. The interpleader order was issued on the 22nd of that month.

There is no objection to the form of these proceedings. By the Execution Act in force in Ontario at their date, namely, the Consolidation Statute of the 13th April, 1909. "A writ of execution shall bind the goods and lands against which it is issued from the time of the delivery thereof to the sheriff for execution. Provided that subject to the provisions of the Bills of Sale and Chattel and Mortgage Act, no writ of execution against good shall prejudice the title to such goods acquired by any person in good faith and for valuable consideration, unless such person had, at the time when he acquired his title, notice that such writ had been delivered to the sheriff and remains in his hands unexecuted."

There is no dispute in this case that the repondents, The Temiskaming Lumber Company, Limited, had at least full knowledge of the writs of execution at the instance of the appellant McPherson. (The position of the company with regard to the rights of Booth and of McGuire's indebtedness in general is hereafter dealt with). Accordingly, no question arises as to the application of the proviso, it being an admission that The Temiskaming Lumber Company, thus charged with notice of the execution and proceedings, is in no better position to resist legal effect being given to these than the original debtors, Messrs. A. McGuire and Company, would have been. The point, however, which has been taken by the respondents in this, that while it is conceded that under the law of Ontario execution may proceed against both the goods and the lands of a debtor, a timber license and all rights, privileges, and interests of the licensee thereunder, constitute, so long as the timber stands, neither the

one nor the other, but form an unattachable legal entity. This point, and it is accordingly of much importance to the province, gravely affects the rights of timber licensees, their mercantile credit, and the security which they are able to afford in commercial dealings.

It is, therefore, expedient to consider the position of those holding timber licenses under the law of Ontario, in view of the contention that, valuable as these licenses may be to the licensees, they nevertheless constitute no source of legal credit, because they are unavailable to excution creditors.

The statute regulating the effect of timber licenses in Ontario is that of 1897, ch. 32, of the Revised Statutes, known as the Crown Timber Act. After making provisions for the grant of licenses to cut timber on the ungranted lands of the Crown, at such rates and subject to such conditions, regulations, and restrictions as may be established by the Lieutenant-Governor in Council, sec. 3 provides:—

"(1) The licenses shall describe the lands upon which the timber may be cut, and shall confer for the time being on the nominee the right to take and keep exclusive possession of the lands so described, subject to such regulations and restrictions as may be established.

(2) The licenses shall vest in the holders thereof all rights of property whatsoever in all trees, timber, and lumber, cut within the limits of the license during the term thereof, whether the trees, timber, and lumber are cut by authority of the holder of the license, or by any other person, with or without his consent.

(3) The licenses shall entitle the holders thereof to seize in revendication or otherwise, such trees, timber, or lumber where the same are found in the possession of any unauthorized person, and also to institute any action against any wrongful possessor or trespasser, and to prosecute all trespassers and other offenders to punishment, and to recover damages, if any."

Provisions are made for the continuation of the grant to licensees, sec. 5 of the statute being to the effect that "license holders who have complied with all existing regulations shall be entitled to have their licenses renewed on application to the commissioner." A variety of provisions occurs with reference to the obligations of licensees, who are bound, *inter alia*, to keep, and keep open to inspection, such records and books as may be required, and to furnish satisfactory proof

of the number of pieces and descriptions of timber, saw-logs, etc. It should be added that, in respect of these rights, the licensee comes under liability to taxation and assessment.

With reference to the land itself, the right of the licensee therein is clear and distinct, namely, it is a right to take and keep exclusive possession of the lands described, with, in the second place, a power to cut and remove timber therefrom. As regards the timber, the property therein, when cut, is vested in the licensee, and this vesting takes place whether the operations of cutting are carried out with or without the licensee's consent.

In the present case, Meredith, J., observes: "I am still unfortunate enough to be unable to understand why the interest in land of a licensee under the Crown lands timber license is not an interest in land liable to seizure and sale under a writ of execution as well as liable to assessment for the purpose of taxation." Their Lordships find themselves in the same position. The learned Judges of the Court of Appeal, however, hold that the matter is concluded by authority, and, in particular, by the authority of *C. P. R. Company* v. *Rat Portage Lumber Co.*, in 1905, reported in 10 O. L. R., p. 273. This case will be immediately referred to. But it is important to note that the scheme of the Execution Acts of the province of Ontario was plainly meant, and, in their Lordships' opinion, it is fitted, to attach not only goods and chattels, but also landed rights. In their Lordships' view, the observation of Lord Davey in *The Glenwood Lumber Company, Limited* v. *Phillips* (A. C. 1904, p. 408), is applicable to the present case. The Act there being construed was a Newfoundland statute of a character similar to that now under construction. It was decided that, in ascertaining what was the nature of the rights under such a statute, the question was not one of words, but of substance. "If," said Lord Davey, "the effect of the instrument is to give the holder an exclusive right of occupation of the land, though subject to certain reservations, or to a restriction of the purposes for which it may be used, it is in law a demise of the land itself. . . . It is enacted that the lease shall vest in the lessee the right to take and keep exclusive possession of the lands described therein, subject to the conditions in the Act provided or referred to, and the lessee is empowered (amongst other things) to bring any actions or suits against any party unlawfully in possession of any land

so leased, and to prosecute all trespassers thereon. The operative part and *habendum* in the license is framed in apt language to carry out the intention so expressed in the Act; and their Lordships have no doubt that the effect of the so-called license was to confer a title to the land itself on the respondent." All this language is applicable in terms to the statute of Ontario now being dealt with, similar provisions occurring therein. Their Lordships see no reason to doubt the soundness of the view thus expressed by Lord Davey, or its applicability to rights of a similar character in the province of Ontario. In their opinion, a title to the land itself, subject, of course, always to the restrictions, conditions, and limitations laid down in the license, is in the licensee of timber lands.

When, accordingly, the Execution Act of Ontario (9 Edw. VII., ch. 47), already referred to, states that a "writ of execution shall bind the goods and lands against which it is issued, from the time of the delivery thereof to the sheriff for execution," it would appear not open to doubt that timber lands and the rights of a licensee therein under a timber license are included under this description. This view appears to be expressly confirmed by sec. 32 of the Execution Act, which provides that any estate, right, title, or interest in land shall be liable to seizure and sale in execution in the same manner and on the same conditions as land. But apart from that section the nature of the title of a licensee is a title (it may be limited in character) to the land itself, and in their Lordships' opinion, accordingly, it falls within the scope of the Execution Act. In the Court of Appeal, however, the learned Judges did not apparently feel free, if they entertained this view, to give effect to it, on account of the decision in the *Rat Portage Case,* above referred to.

In the *Rat Portage Case* the execution debtor was the holder of a permit to cut and remove railway ties from Crown lands. He entered into partnership with another person, the object of the partnership being to remove the ties in order to fulfil a contract with a railway company. Undoubtedly the object of the partnership was that the ties when cut should be the property of the concern.

In the Court of Appeal it rather appeared that the broad question now to be determined was—by reason of a concession made at the bar—not one upon which a judgment was really asked. It was conceded by the council for the execution creditor that the writ "was not a lien or charge upon

any of the timber embraced in the Crown timber permit until it had been severed from the soil." But the contention was that, once severance of the timber took place, the execution attached, notwithstanding any agreements in respect of the timber made before the severance. The parties do not appear to have entered into actual contest upon the question of the real nature of the right of the timber licensee, in so far as the land itself was concerned, or in so far as affected the comprehensive rights of a licensee in land. In these circumstances their Lordships do not feel that the true issue under the existing Execution Act of Ontario has been fully dealt with. It is interesting to observe from the dictum of the learned Chief Justice Moss, that "if an agreement is not entered into with a colourable purpose, or with an intent to defeat or defraud creditors, as by a mere pretended partnership, but is entered into with the *bonâ fide* intention of forming a partnership and carrying on a business, it is not open to attack at the instance of creditors." If this dictum points to the impossibility of defeating the execution creditor's rights by the colourable device of partnership or other contract effecting a change of title, so formed as to defeat the execution, their Lordships agree with it. But the right of an execution creditor in no case interferes with the proprietary interests of the execution debtor, except to the effect that, while the execution debtor is free to deal with his property, the property so dealt with remains subject to the rights of the execution creditor therein; these last remain unaffected and unimpaired. The circumstances of the present case in this regard, and the dealings of A. McGuire and Company, with their rights as licensees, while the execution stood, will be presently referred to. But when the learned Chief Justice states that "the interest transferred by the debtor is not one exigible under a writ of execution, and is not affected by any lien or charge arising therefrom; there is nothing to affect the debtor's interest, and by no process could he be compelled to use it for the benefit of his creditors," their Lordships find themselves unable to agree with these propositions. In practice they would seem to operate greatly to the diminution of the credit otherwise available to timber licensees, and they would manifestly destroy the security for advances upon timber lands, however valuable, until actual severance of the timber. But this consideration might, of course, be counter-balanced by others, and in any view would have to yield to the fair construction of the

words of the Execution Act. These words have been already cited. The subject of execution being land, in the broad sense already referred to, there seems no reason to question the comprehension within that term of timber licenses, in accordance with the principle set forth by Lord Davey in the *Glenwood Case*.

It seems not improbable that a judgment in the above sense would have been pronounced by the learned Canadian Judges had they not felt themselves foreclosed by this authority. In their Lordships' view, however, the construction of the statute is clear. Under the Act the position of the holder of a timber license, is (1) that he is the possessor of an asset of the nature of land; (2) that that asset is, accordingly, subject to execution; (3) that the execution does not interfere with the property of the debtor or his power to assign or transfer, subject only to the security of the execution creditor not being impaired; (4) and when there is cut timber on the land at the date of execution, that timber is, of course, the instant subject of seizure, (5) should the timber be cut subsequent to the date of the execution, it is then instantly attached, and the execution cannot be defeated, because the cutting operations had been made by an assignee or transferee to whom, in the interval between the laying on of the execution and the cutting of the timber, the licensee had transferred his rights, and (6) the only exception to this is the case of a title being acquired by a third party in good faith, and for valuable consideration and without notice of the writ having been delivered to the sheriff and remaining unexecuted. It seems to their Lordships that if these principles are violated the way is opened up to the defeat of the execution creditor's rights, and, as the circumstances of this case very plainly shew, to transactions of a questionable nature under which debtors would endeavour to avoid their just obligations.

The principles now set forth, are in entire accord with familiar law. That law was expressed thus by Baron Parke in what still stands as the leading case of *Samuel* v. *Duke* (3 M. & W. 622: "Now it is perfectly clear to me, both upon the decided cases and the reason of the thing, that if a writ of execution has been delivered to the sheriff, the defendant may convey his property, but that the sheriff has a right to the execution notwithstanding the transfer . . . the right . . . speaks from the time of the delivery of the writ upon the receipt of which the sheriff is to levy.

But, subject to the execution, the debtor has a right to deal with his property as he pleases, and if he transfers it in market overt, the right of the sheriff ceases altogether."

Under the Execution Act of Ontario the right of the execution creditor is only defeated if the purchaser has acquired a title in good faith and for valuable consideration without notice of the execution, and has paid his purchase-money. The only question, therefore, remaining in this case is whether the Temiskaming Lumber Company, the respondents, so acquired in good faith and for valuable consideration and without notice. It is really unnecessary—the documents and admissions of parties standing as they do—to enter upon this question in detail. So far as the McGuires are concerned, they appear to have deliberately set themselves to defeat the rights of the appellants as judgment creditors, and, in their Lordships' opinion, in this attempt they obtained the active assistance of one Murphy, of the Traders Bank, and of the respondents. The scheme was to make a transfer of the license before any timber was cut, but to make the transfer in such a way that very substantial interests would still remain to McGuire. The scheme was to develop, and has devloped, so that, after the transfer was made, the cutting thereof was to be ascribed to the transferees, and when the execution was levied upon the timber so cut, the execution was to be defeated on the plea that the property in the cut timber was by that time in the transferees, who were not the execution debtors. These, namely, McGuire and Company, would thus slip out of liability by the transfer of the license for valuable consideration, and by having divested themselves of the right to cut timber and invested others who could cut and remove it but yet would not be bound by the execution. This operation, which is essentially a transaction of bad faith, so far as the execution debtors were concerned, might, of course, have been possible on the footing that the rights of the licensee were not a title to land and were unattachable by execution. Such a state of the law facilitated an operation by which the execution debtor could evade the rights of his creditors by simply standing aside from the active operations of cutting timber under his license and by assigning his license, with the right to cut timber, to somebody else. What happened in the present case was upon this lines, and, without entering upon the matter at large, their Lordships think that the whole series of transactions was simply a juggle to defeat the rights of

the execution creditors of McGuire. Teetzel, J., appears to be well justified in his observation: "As respects the company and Murphy, both of whom had notice of the injunction, it is perfectly plain that, while the agreement for sale may not be impeachable as fraudulent as against creditors, the method of carrying it out was primarily adopted for the purpose of enabling McGuire and Company to evade the injunction and to circumvent the plaintiff McPherson in his efforts to realize his judgment out of McGuire and Company's interest in the license and the right to cut timber thereunder, and I must say that upon this record the course pursued by the Traders Bank was such as without which the dishonest purpose of McGuire and Company could not have been so nearly accomplished."

So far as the respondents, The Temiskaming Lumber Company, are concerned, their position does not appear to be one whit better. By the time of the formation of the company in January, 1910, things had reached the stage of legal proceedings against A. McGuire and Company, and an injunction had been obtained against that firm against parting with its property. When, accordingly, the offer to sell to the Temiskaming Company, dated the 11th January, 1910—that is to say, more than a fortnight before even the first meeting of provisional directors—was considered, "it was resolved that said offer be accepted subject to this: that the transfer of said license shall not be made until the pending injunction against A. McGuire and Company, restraining the transfer of the said license, shall have been disposed of, but in the meantime that the company shall go upon the limits and carry on the operation of cutting and removing timber therefrom." The pending injunction was not disposed of *in foro contentioso,* but, as narrated in the appellants' case, "a bond with sufficient sureties was executed by and on behalf of the respondents, and approved by the Court for the sum of $10,000, to secure an approximate amount sufficient for the payment of all the said writs of execution (*i.e.,* both McPherson's and Booth's), and the logs were taken possession of by the respondents."

Their Lordships incline to the opinion that, with reference to the particular matter in issue in this suit, namely, the cutting of the timber and the rights therein, McGuire and Company simply continued as before the formation of the Temiskaming Company, so far as the transaction of transfer was concerned, Annie McGuire took the entire purchase-

price in $9,000 of stock allotted to her in the Temiskaming Company. But this ostensible transaction made no real difference to the working of the license. For although the company was constituted in January, 1910, a document is produced, namely, the oath of Cornelius McGuire, furnishing a statement "of the total number of pieces of saw-logs, boom timber, and other timber, got out by or for the said A. McGuire and Company, or otherwise acquired by them, during the past winter." This statement was made in terms of the Crown Timber Act, and is dated the 28th May, 1910. It is in these circumstances impossible, in their Lordships' view, for the respondents to set up the plea that they acquired the rights of McGuire and Company in good faith, and are so entitled to defeat the execution laid on at the instance either of McPherson or of Booth. As already mentioned, it was upon the timber so cut that execution was levied, and to relieve the execution upon it and to meet the issue in this action an arrangement as to the setting aside of $10,000 was made. In their Lordships' opinion, the whole circumstances are such as to shew that there has been an attempt to defeat the rights of the execution creditors, and that the respondents were aware of this attempt, and have pusued a course of conduct with a view to its success.

In the result, their Lordships are of opinion that the rights of both of the appellants under the three executions referred to fail to be satisfied out of the $10,000 secured by the bond, and that the appellants should be found entitled to the costs of this appeal and in the Courts below.

Their Lordships will humbly advise His Majesty that the judgments appealed from should be reversed, that the cause be remitted to the Court of Appeal to dispose of the actions in accordance with this judgment, and that the costs should be dealt with as above stated.

COURT OF APPEAL.

NOVEMBER 19TH, 1912.

RUDD v. CAMERON.

4 O. W. N. 321.

Defamation—Slander—Brought about by Action of Plaintiff—Privilege—Malice—Quantum of Damages.

Plaintiff, a contractor, having heard that slanderous statements were abroad concerning him, employed two detectives to trace their origin. They approached defendant, a physician, and told him they were desirous of building a club-house in the vicinity and that plaintiff wished to secure the contract for building it. Defendant thereupon uttered slanderous statements concerning plaintiff.

BRITTON, J., at trial, entered judgment for plaintiff for $1,000, upon the finding of the jury in favour of plaintiff, the false statements having been spoken in reference to plaintiff's business or calling. Defendant appealed on the ground, chiefly, that the speaking of the words complained of having been brought about by the action of plaintiff himself, there was no publication in law.

DIVISIONAL COURT, 21 O. W. R. 860; 3 O. W. N. 1003; dismissed appeal with costs, following *Duke of Brunswick* v. *Harmer*, 14 Q. B. 185.

Review of authorities.

COURT OF APPEAL, *held*, that as plaintiff had not actually sent the detectives to defendant, but merely instructed them to trace the origin of the scandalous rumours afloat, the cases relied on by defendant were distinguishable, and the judgment for plaintiff should not be interfered with.

Further review of authorities.

Appeal dismissed with costs.

The plaintiff a merchant and building contractor was awarded by a jury $1,000 for damages sustained by him on account of the defendant having slandered him in his business and calling. On appeal to the Divisional Court the judgment was upheld. See 21 O. W. R. 860; 3 O. W. N. 1003.

The appeal to Court of Appeal was heard by HON. MR. JUSTICE GARROW, HON. MR. JUSTICE MACLAREN, HON. MR. JUSTICE MEREDITH, HON. MR. JUSTICE MAGEE and HON. MR. JUSTICE LENNOX.

W. M. Douglas, K.C., for the defendant.

E. F. B. Johnston, K.C., for the plaintiff.

HON. MR. JUSTICE MACLAREN:—The ground of appeal most strongly urged before us was that the defendant was entrapped by the plaintiff into using the language he did and, induced to utter the alleged slanderous words by de-

tectives employed by plaintiff and sent for that purpose and that under the circumstances it was the same as if he had spoken the words to the plaintiff himself and at his request, and that consequently there was no publication of the slander and that the occasion was privileged. Counsel relied upon *King* v. *Waring*, 5 Esp. 13, and *Smith* v. *Wood*, 3 Camp. 323, and upon a number of American cases and authorities which had adopted and followed the rule down in England in the above cases.

As to the question of publication the Divisional Court relied largely upon the case of the *Duke of Brunswick* v. *Harmer*, 14 Q. B. 185, where it was held that the purchase of a single copy of the newspaper containing a libel by the agent of the plaintiff sent for that purpose was sufficient proof of publication. They also refer to the fact that Odgers (5th ed.), at pp. 179 and 180, says that so far as the question of publication is concerned *King* v. *Waring* and *Smith* v. *Waring* must be taken to be overruled by the *Duke of Brunswick Case*. It is also pointed out that Sir Frederick Pollock, in his note to *Smith* v. *Wood*, 14 R. R. 752, says that the ruling in that case does not seem consistent with the *Duke of Brunswick* v. *Harmer*.

I am of opinion, however, that in this case we do not need to discuss whether the two English cases first named and the American cases in which they have been followed are or are not good law. The evidence in the present case does not come up to the requirements of these authorities. The detectives were not sent by the plaintiff to the defendant. The evidence is that the plaintiff, finding that such damaging reports were being circulated in the town and not knowing who were doing so placed the matter in the hands of a detective agency who sent two of their employees to investigate. They were not told or asked by the plaintiff to go to the defendant. In speaking of the plaintiff to the detectives as he did the defendant, in my opinion, both in fact and in law published the slanders he uttered and he is not in the same position as if he had spoken the words to the plaintiff himself. It may be noted that it has been held that a publication induced by the prosecutor is sufficient in a criminal case: *Reg.* v. *Carlisle*, 1 Cox C. C. 229.

I think the defence of privilege also fails. The defendant was under no obligation and owed no duty that justified him in using such language as he did. He did not go into

the box and testify that he believed what he said to be true or that he uttered it in good faith. He went far beyond what was suggested to him or what he was invited to say by the detective. His own examination for discovery shews that he had no ground for making the statements he did. There is abundant evidence of malice and this would be sufficient to destroy any such qualified privilege as is claimed even if it had existed. Further it would not in any case apply to the slanders voluntarily uttered to the plaintiff's stenographer.

The jury gave a verdict that included a finding of malice after a charge that was not objected to by the defence either at the trial or in the argument before us. As pointed out to tne jury it was a case in which they might give exemplary damages if they found certain facts. Having found these facts they exercised their discretion and I am not aware of any proper ground on which we can declare it to be excessive.

The appeal in my opinion, should be dismissed.

HON. MR. JUSTICE GARROW:—I agree.

HON. MR. JUSTICE MEREDITH:—If the plaintiff had by subterfuge induced the defendant to speak defamatory words of him merely for the purpose of having an action for damages, I cannot think that such an action would be: where one gets no more than he seeks asks for and induces, what great right has he to $1,000 in addition? If one by a trick induces another to arrest or imprison him, can he recover damages in an action complaining of that which his own fraud brought about, and which he designed? The general rule is that one cannot take advantage of his own wrong; neither can be recover damages for that which had his leave and license. And that which one procures another to do for him, may be said, very properly, to be done by himself, in fishing for actions as well as in other things. But that is not this case; it was the case supposed to by Lord Avanley in his ruling in *King* v. *Warden*, 5 Esp. 13.

It is quite a different thing for one who has been defamed by a secret enemy, and who in honest and not unusual or unreasonable endeavours to discover the wrong-doer, is again defamed—by one whom he suspected of the secret defamation—to bring such an action as this—even though

the new slanders were published only to detectives employed by him and under false statements made by them in such an endeavour. And that is this case: and was very like the case of *Duke of Brunswick* v. *Harmer*, 14 Q. B. 185; see also *Griffiths* v. *Lewis*, 7 Q. B. 61.

The plaintiff was not seeking a new defamation of his character with a view to recovering damages because of it; he was seeking knowledge with a view to putting a stop to the secret slanders which he neither desired nor had induced: and so, in this action, is not taking advantage of his own wrong, or answered by a defence of leave and license.

The action therefore lies; but the defendant has, I think, a right to stand upon the same ground as if the statements of the plaintiff's detectives had been true; another instance of the rule against anyone taking advantage of his own wrong; and that being so the words uttered would have been privileged but for the actual malice of the defendant found by the jury on evidence upon which reasonable men could so find.

This was the view of the case taken, and acted upon, by the trial Judge; and confirmed in the Divisional Court.

And, having regard to all the facts and circumstances of the case, it cannot be cnsidered that the damages are so great as to warrant the granting of a new trial on that ground.

HON. MR. JUSTICE MIDDLETON. NOVEMBER 29TH, 1912.

RE HAMILTON MFG. CO. LTD., HALL'S CASE.

4 O. W. N. 421.

Company—Liquidation—Purchase of Assets—Alleged Misrepresentations by Agent of Liquidator—Report of Master—Authority of Agent—Purchaser Relying on Own Judgment—Attempted Variation of Agreement—Parties at Arms' Length.

Appeal by liquidator, and cross-appeal by Hall, an alleged creditor, from report of Local Master at Peterborough, awarding Hall $36,000.51 against the liquidator. On April 27th, 1907, Hall made an offer of $192,000 for the assets of the business, which offer was accepted on May 10th, 1907, and a purchase agreement executed. With some delays the purchase was carried out, and the purchase moneys paid. In August, 1909, Hall claimed that he had been grossly deceived by one Smith, acting for the liquidator, as to the extent and value of the assets of the business, and claimed repayment of part of the purchase-money. Smith was the manager appointed by the liquidator to manage the business as a going concern, but he had nothing to do with the negotiation of the sale of the business, although he had furnished Hall, at his request, a statement of its assets. Hall's claim was referred to the Local Master for adjudication, who made the report above referred to.

MIDDLETON, J., *held*, that upon the facts, Hall had as much opportunity as anyone to discover the value of the assets of the business; that he relied upon his own judgment and knowledge in making his offer, and not upon any information or statements furnished by Smith, who, in any case, had no authority to give such information, and that, therefore, Hall's claim for re-payment of any of the purchase-moneys should not be given effect to.

Semble, that had the facts been otherwise, as a matter of law, in the case of a former agreement entered into under authority of the Court, the purchaser would have no right to set up or attempt to import into the agreement any such term as that suggested by him.

Mowat v. *Provident*, 32 S. C. R. 147, referred to.

Appeal allowed, and cross-appeal dismissed, with costs.

Appeal and cross-appeal from the report of the Master at Peterborough, dated August 28th, 1911; argued on the 10th, 11th, 12th and 13th of June last.

A winding-up order was made on the 11th December, 1906. On the 27th of April, 1907, Mr. R. R. Hall signed, addressed to the liquidator, a formal "offer to purchase all the assets and property of the William Hamilton Manufacturing Company Limited which have come or may hereafter come to your hands and which were and are within your power and control as liquidator of the company since the liquidation . . . at or for the price or sum of $192,000." The terms of payment are then set out: $5,000 being payable as a deposit, the other payments being spread over a time terminating on the 15th of December, 1907.

This offer was taken by the liquidator before the Master for his approval, on the same day; and the Master directed it to be submitted to a meeting of creditors. This meeting was held on the 10th of May; and, creditors approving, the offer was accepted.

On the 3rd September a further formal agreement was made, reciting the contract, certain payments on account thereof, the purchaser's default, and request for a modification of the terms of payment. The agreement then provides that the purchaser guarantees the collection by the liquidator, out of the accounts receivable, of certain sums particularly specified, and the receipt of other sums from the sale of goods, and provides for the continuance of the business as a going concern in the meantime, the liquidator remaining in possession.

This agreement has been supplemented by further agreements, under which the business has been carried on in a somewhat similar way, and the moneys received have been credited by the liquidator upon the purchase price; the balance due according to the contract being in this way brought down to a comparatively small sum.

This was the position of affairs when in October, 1909, Mr. Hall presented a petition, complaining that the contract had been induced by certain misrepresentation on the part of the liquidator and its agents, and asking that he be credited on account of his purchase-price with $33,540 for short delivery with respect to merchandise, etc., $15,000 in respect to damages with regard to incumbrance on patterns, $2,000 for non-delivery of what has been called the Bertram Rolls, $1,429 for liens for freight, $446 lien for duty, $15,000 with respect to accounts receivable, and "such general or unstated amounts as this Honourable Court may deem just."

During the course of the reference the first claim, as to short delivery with respect to merchandise, etc., was increased to $45,013.79. By an order of the Honourable Chief Justice of the Common Pleas this petition was referred to the Master at Peterborough for adjudication.

The learned Master, after hearing a vast amount of evidence, found in Mr. Hall's favour in respect of most of his contentions; and has awarded him $25,000 as damages in respect of the non-delivery and misrepresentation in relation to the merchandise account, about $11,000 in connec-

tion with the Kenora account, and a number of small sums in connection with minor matters; so that in the result the Master finds that Mr. Hall has overpaid the liquidator on account of his purchase $36,000.51, which sum he directs the liquidator to refund. It is from this judgment the liquidator appeals. The cross-appeal seeks to increase the award against the liquidator.

Jas. Bicknell, K.C., and F. R. Mackelcan, for the liquidator.

R. J. McLaughlin, K.C., for Hall.

HON. MR. JUSTICE MIDDLETON:—The learned Master has set forth his findings and reasons in a carefully prepared and very elaborate judgment.

After the best consideration I can give to the matter, I find myself unable to agree with him; and, as I think he has approached the matter from the wrong standpoint, it will be necessary for me to give my reasons, and the facts as they appear to me, at some considerable length.

William Hamilton was the main shareholder of the company in liquidation. Smith was, before the liquidation, the general manager and secretary of the company. He had been connected with the company since July, 1901, having then been employed as secretary-treasurer. He did not become general manager until August, 1905. Hamilton himself was the man who had the real charge, oversight and supervision of the company and all its affairs. He was its president; and Smith, notwithstanding his titles, was little more than an employee of Hamilton.

Mr. R. R. Hall was the solicitor for Hamilton; and very shortly before the liquidation he was retained to conduct negotiations by which it was hoped to reorganise the company, and was from the beginning of these negotiations contemplating taking some interest in the company himself.

The liquidation order was made on the 11th of December, and we find that on the 12th of December Mr. Hay, Mr. Hall's accountant, wrote him at Ottawa with reference to the company: "I expect to have the information you require out by Monday night."

On January the 1st, 1907, Hall wrote to Mr. Stewart, of the Bank of Montreal, who, as curator of the Ontario Bank—the chief creditor of the company—had an important voice in the liquidation.

"On behalf of the syndicate of which Mr. William Hamilton and his co-shareholders will be members, I beg to state that I have made a full investigation into the affairs of the company, and I find that the balance sheet of the company hereto attached exhibits its financial position as of the 12th of December, 1906, being the date on which the liquidation order was granted. You will notice that this balance sheet does not assume to write off anything from the company's former statement of assets for bad debts, depreciation, etc., beyond what the company has heretofore done, although it is self-evident there are many reasons to do so."

The letter then proceeds to make an offer for payment of the preferential claims in full and to pay the general creditors sixty cents on the dollar in addition to the expense of liquidation.

Simultaneously another letter was written by Hall to Stavert as curator of the Ontario Bank, also purporting to be an offer of compromise on behalf of the syndicate of which William Hamilton and his co-shareholders will be members. He says:—

"In accordance with the conversation which I have had very fully into the affairs of this company and its operations during this last number of years, and I beg to submit for your consideration the following reasons which may fairly be taken into consideration in arriving at a compromise which appeals to the members of the syndicate as being fair and just and which I am satisfied will give the bank larger returns than they could possibly realise in liquidation proceedings." "Re Merchandise: Under this item this amount of $110,030.25 consists of stock in trade and raw material. In analysing this amount I find that there are a number of rejected machines included in it. There is also a large amount of raw material which cannot be used for any contract which the company have in hand or to fill contracts which the company are likely to obtain.

"Re Accounts Receivable: The accounts receivable stand in the books of the company at $52,040.24, after providing a reserve of $9,717.99. In looking through the correspondence of the company I am inclined to think that the reserve is not sufficient, because some customers have declined to pay in full until certain changes are made in the goods supplied. I have not gone through every one of the

accounts, but I am satisfied that the amount reserved is quite insufficient.

"I feel perfectly satisfied that upon investigating this whole matter you will come to the conclusion that it will be impossible to obtain, under the winding-up order, anything like the amount offered, namely, sixty cents on the dollar. I trust therefore that this will receive the very favourable consideration of the numerous parties interested in it."

It is not without significance that the draft of this letter produced contained the statement: "there is ample room for revision of value in the statement of assets."

These letters were not replied to by Mr. Stavert until the 26th of January, 1907. Mr. Stavert then thought that he ought to have more than sixty cents on the dollar on the unsecured claim; he thought that the assets, goodwill, etc., should mean a hundred cents on the dollar upon reorganisation; but he was not averse to a compromise which would leave a profit to the syndicate on a reorganisation.

On the 29th of January Mr. Hall wrote:—

"I have given a great deal of consideration to this matter, and whilst I recognise that in a liquidation proceeding the assets could no doubt be purchased more cheaply at a regular sale, yet at the same time such a course would materially depreciate the value of the assets as a going concern. . . . I have again discussed the matter with the parties interested, and in order to bring the matter to a final conclusion"—He amends the offer by increasing it to 65 cents on the unsecured claims.

On the 30th of January Mr. Stavert telegraphed, not purporting to bind the other creditors, expressing the bank's readiness to accept the sixty-five cents.

In the beginning of February negotiations took place looking towards the completion of the purchase; but nothing was completed. On the 2nd February Mr. Hall wrote Mr. Stavert that he had had an interview with the solicitor for the liquidator, and "I think that an offer on the lines of purchase of the entire assets would work out to the mutual satisfaction of all parties concerned."

On the 4th of February a written offer was made by Mr. Hall—assented to by Mr. Hamilton on behalf of all the shareholders of the old company—to purchase the assets at $185,000.

On the same day a letter was also sent by Mr. Hall to Mr. Stavert pointing out wherein this offer differed from that previously made and how it could be compared.

Mr. Bicknell, for the bank and liquidator on the 5th wrote:—

"This offer is much worse than the former offer made by you, and we, therefore, do not think the offer will be considered." He points out that it would mean forty cents on the dollar to the unsecured creditors.

Some suggestion was made that this offer should be increased to $200,000. This was not acceptable to Hall; and on the 10th of February, he declined to increase, and withdrew his former offer, demanding a return of the $5,000 cheque that had accompanied it. Some controversy then arose as to Mr. Hall's right to withdraw the offer, and a draft advertisement for sale was prepared and sent to him.

Negotiations were then continued. The details do not appear to be material. Verbally the offer was increased to $190,000. The liquidator desired the costs of the liquidation in addition. Apparently some further compromise was suggested by which two thousand dollars was to be paid on account of the costs.

On the 12th of April Mr. Warren, the manager of the liquidator, wrote Hall as follows:—

"I have taken the matter up with Mr. Bicknell, telling him that you had intimated to me your willingness to increase your offer of $190,000 by another $2,000, to be applied on account of costs of liquidation. I told him that I had stated to you that I would recommend the acceptance of this offer, but that you wanted a couple of weeks within which to complete your arrangements to carry it through. Mr. Bicknell requested that your offer should be amended so as to be a definite offer of $192,000 and that it should be re-dated as of the 10th of April."

Mr. Hall was then out of town, and did not reply to the letter until April 20th. He then said that before making the definite offer of $192,000 it was necessary that he should consult "several parties whom I propose to have interested in the company."

On the 22nd Hall again wrote, urging delay, as he was still in negotiation with those to whom he looked for financial assistance. Finally, on the 27th the definite offer

was made, which after being submitted to the creditors, was accepted.

It subsequently transpired that Mr. Hall failed to secure the financial assistance he expected. He consequently found the burden of carrying out the transaction he had entered into a very heavy one; and he had to ask, time and again, for an extension of time for the making of payments. The matter was nursed along, with the assistance of the liquidator and its officers, until the greater portion of the price was realised from the sale and collection of the assets of the company; Hall actually putting up a comparatively small portion of the purchase-price.

On the 10th of August, 1909, over two years after this purchase, and when the price had almost been realised in the way described, Mr. Hall woke up to the fact that he had been, as he describes it, "grossly deceived by Mr. J. C. Smith acting for the liquidator." He based his claim upon the statement that he understood from Mr. Smith at the time he commenced negotiation for the purchase of the property in December, 1906—which would be before the liquidation—that the statement of the 31st October, 1906, was the result of a regular stock taking and that the stock in trade and raw material were taken on the following basis, namely, the raw material and supplies were taken at cost, and, wherever cost exceeded the market value, at market value, etc.: that part of the stock, consisting of old parts of machinery, was taken on scrap basis, etc. Since the liquidation he has ascertained that this stock list was inflated, the merchandise account was valued up to the extent of $8,000, $24,000 of merchandise account was transferred to accounts receivable at $27,000. Mr. Smith is said to have represented that during the liquidation the business was making money. This claim was verified by the production of several statements signed by Mr. J. C. Smith in the name of the liquidator, the Trusts and Guarantee Company.

Before considering the circumstances under which these statements were given it is necessary to understand clearly, if possible, the relation of Smith to the liquidator. As already stated, Smith was, nominally at least, the general manager of the company, and had held that position for a short time. When the liquidation began, a re-organisation was hoped for. It is common ground that it was neces-

sary that the business should continue as a going concern. It was necessary that some one should be placed in charge of the business with authority to supervise it. Smith was chosen, and was given the letter of December 12th; to which, rightly, the Master attaches the greatest importance. This letter is as follows:—

"December 12th, 1906. J. C. Smith, Esq., Peterboro, Ont. Dear Sir:—You are hereby given authority to act as our representative in connection with the liquidation of the Wm. Hamilton Mfg. Co. Ltd. Your remuneration will be such as is allowed by the Court and will be arranged with you definitely within the next week or ten days.

"Any monies that come in, you will deposit in the Bank of Montreal, in the name of the Trusts & Guarantee Co. Ltd., liquidators of the Wm. Hamilton Mfg. Co. Ltd. No further deposit will be made in the current account with the Ontario Bank or the Bank of Montreal.

"All correspondence that comes to the office will be answered in the ordinary course but will be signed The Trusts & Guarantee Co. Ltd. per J. C. Smith. As our representative, you have authority to control all the other employees at work in connection with the plant and office.

"You will submit to us, any proposed contracts for new work, before dealing with the same. It is understood, however, that any small repair jobs offering, may be done at your discretion. Yours truly, The Trusts and Guarantee Co. Limited, James J. Warren, Manager, Provisional Liquidators."

This letter did not constitute Smith agent of the liquidator for any purpose other than the conduct of the business at Peterboro. He had no authority to sell the business or to do anything leading up to a sale. This was clearly understood by Hall, as all the negotiations were conducted direct with the officers of the Trusts & Guarantee Company and the solicitor at Toronto. What is of more importance is the fact that Hall knew that this was Smith's position. He says that he was told by Mr. Stratton "that he (Smith) was appointed to take charge of the work" (p. 173.)

Much is made of an interview by Hall with Stratton, the exact date of which cannot well be fixed. Mr. Stratton was the president of the Trusts & Guarantee Company: but he had also large interests in Peterboro, and was

not personally taking any part in the affairs connected with this liquidation. He was an intimate friend of Hall. and a business friend of Hamilton. Before the company went into liquidation Hamilton consulted him as to reorganisation. Mr. Stratton referred him to his friend Mr. Hall. While Hall was arranging the proposed reorganisation, Stratton and Hall met in the latter's office. Hall disclosed his plans to Stratton, and asked him to subscribe for stock. This conversation was not with Stratton as representing the liquidator in any way, and appears to have been of the most informal character.

Hall was then seeking information as to the financial position of the company, for the purpose of re-organization; and it may well be that Stratton said to him "you can get all this from Smith;" but I think that this was rather indicating Smith as the repository of all knowledge relating to the company than any indication that Smith had authority to make representations which would be in the nature of a warranty by the liquidator as to the position of the company's financial affairs.

At this time it is quite clear that the Trusts & Guarantee Company had not yet acquired any independent information. The liquidation was just beginning. The negotiations opened up by Hall were based not upon a purchase of the assets at so much or at a lump sum, but upon the line of paying the creditors so much on the dollar on their claim. Either before or after this interview, Hall and Hamilton procured from Smith, the balance sheets of the company, including a balance sheet made out as to the date of the liquidation, for the purpose of bringing up to that date the balance sheet of the previous October. Whatever information the liquidators had, was derived from Smith, as the one who had had charge of the company's financial affairs.

Bearing in mind that this information was being afforded to Hall, the solicitor for Hamilton, as representing a syndicate, formed of Hamilton and his friends, it seems to me absurd to suppose that the Trusts & Guarantee Company was putting forward Smith in any way as representing them, or that more was contemplated than that Hall and his associates were to have full liberty to refer to the common source of knowledge and information.

Hall employed a competent accountant. He was afforded every means of investigating the company's books and affairs.

He did investigate; he formed his own opinion; he knew that the statements were in many respects inaccurate and inflated. His letters appear to me to shew that up to this stage, at any rate, he was buying in reliance upon his own judgment and investigation and that the parties were at arms' length; he was with his superior knowledge seeking to drive a hard bargain with the liquidator.

It is of the greatest significance to bear this in mind, when one comes to consider the precise misrepresentation which Smith is said to have made; because although the offer originally made was formally withdrawn, the whole negotiations leading up to the purchase, began in December, had really never ceased until they culminated in the offer which was finally accepted.

As already mentioned, an affer was originally made to pay the creditors 60 cents on the $1; this was increased to 65 cents; an offer was substituted of $185,000 at the beginning of February; this was withdrawn, then verbally renewed, and finally increased verbally to $190,000, and afterwards to $192,000. It clearly appears that this was the figure verbally agreed upon by the 12th of April, and it was after this that Smith is said to have misled Hall. I think it plain that the delay in reducing the offer to writing, from that date to the date of the formal offer of the 27th of April, was occasioned, not by what was going on between Hall and Smith, but by Hall's desire to be satisfied as to the likelihood of his securing for the flotation of the scheme the financial assistance for which he was then negotiating.

Smith's alleged misrepresentation arose in this way:—

For the purpose of satisfying itself as to the real value of the assets, the liquidator had instructed a valuation to be made by Pendrith. The result of his valuation was disappointing. He reported that the stock on hand was not of the value shewn by the company's balance sheet. This report was made pending the negotiation. Smith had learned of the report by the 15th of April. Apparently Hall had also learned of this report, and was informed of the amount of the valuation. Without in any way disclosing his action to the officers of the liquidator or to its solicitor, with whom he was negotiating, Hall (as he says) asked Smith to prepare for him a statement of the company's affairs based upon Pendrith's valuation. A statement was prepared, but it was not based upon this valuation, but upon the old balance

sheet. This fact could have been very easily ascertained by any investigation, even a superficial one. Nothing was said of the statement to the liquidator or its representative. After its receipt, the written offer was amended by increasing the price, as already verbally arranged, and this offer was ultimately accepted.

Much might be said as to the propriety of Hall, at this stage of the negotiation, seeking to obtain any statement from Smith behind the back of Smith's employers; but I prefer to attribute an entirely innocent meaning to the conduct of Hall. I think that he was simply utilizing, for his own purposes, to aid him in the flotation of the company, the man who had the most knowledge.

What then happened is also of moment. Hall took charge of the company's operations, although not in full possession; and in August, 1907, found himself unable to carry out his contract. He wrote the liquidator on the 10th of August, announcing this fact, and stating: "I have gone carefully into the accounts, and find that since the liquidator has been in charge, you have not made money, but you have also lost money. I have had the best expert advice in the matter, I can get. I am advised that the company could not under any circumstances be made a success without spending at least fifty to sixty thousand dollars on the plant." He then urged the closing down of the plant, as it could not be operated save at a loss.

After this investigation and after this lapse of time, although it was plain that a loss might be expected, there is not the first suggestion of misrepresentation or any complaint against the liquidator.

The plant was then shut down; Hall sided in the realization; and his first complaint is that contained in the letter already referred to, written about a year later. The terms of that complaint are of moment, because he bases his complaint entirely upon the merchandise account, and says nothing as to the accounts receivable.

The debts due to the company amounted to a large sum. When these came to be collected it was found that the customers were in some cases dissatisfied with the way in which the company had fulfilled its contracts, and payment was refused. The most important instance was the case of the town of Kenora. A large amount was due from this municipality. Litigation took place, finally resulting in a com-

promise; the claim of the company being cut down by some $10,000. Hall was consulted as to all this, and approved of the compromise. This compromise was made before Hall's letter of August, 1908.

Hall now contends that he is entitled to be allowed not erely damages by reason of the merchandise appearing at a figure based upon the company's old balance sheet instead of on the Pendrith valuation, but that he is entitled to an allowance by reason of the existence of a counterclaim or defence to the claim against Kenora, and similar allowances with respect to other claims. The Master has given effect to these contentions, and has allowed $25,000 in respect of the former claim, and the $10,000 with respect to the Kenora claim.

I am quite unable to agree with the Master in his finding that any representation made by Smith induced the contract; and I do not think that Smith was put forward by the liquidator as its agent in any such sense as found by the Master. I think Hall purchased on his own judgment; and while he may have used, and doubtless did use, Smith as a source of information, he did not regard any information he so acquired as a statement by the liquidator. This information was sought and obtained quite apart from the negotiations for purchase, and was not embodied in the contract, because it formed no part of it.

I having arrived at this conclusion, the report cannot stand; and it becomes unnecessary to discuss other findings of the Master. I am not at all satisfied with the way in which he views the evidence, and I do not think that the statements as to Smith and Cameron are justifiable.

Had I found otherwise upon the facts I would have felt much difficulty in allowing the purchaser from a liquidator at a Court sale to import into the offer made to the liquidator, with the knowledge and intention that it should be considered by the Master and by the creditors, any such term as that now set up by the purchaser. He knew that all preliminary negotiations were to be embodied in a formal offer, to be considered by those beneficially interested; and the case is one for the application of the rule laid down by the Supreme Court in *Mowat* v. *Provident,* and in numerous other cases, that where parties deliberately reduce a bargain to writing they must be taken as intending to include in the writing all the terms of the bargain.

The offer which was considered by the creditors was one which would give them 40 cents on the $1 upon their claim. The effect of the abatement allowed by the Master from this price is to reduce this to less than ten cents. The time for rescission has long since gone, and the Master by his judgment has made a new and entirely different bargain for those beneficially concerned.

The claim put forward as to the book debts seems to me equally unjustified. I cannot believe that on the sale of the assets of the company in liquidation the vendor, in the absence of any stipulation, undertakes that there is no defence to the claims appearing in the books, based upon defects of workmanship or breach of contract, by the defunct company. The purchaser takes his chances. He buys the business as a going concern, for better or for worse. If the vendor was to guarantee the debts and the value of the merchandise, why should he sell at 40 cents on the $1? If the debts were all good, and the merchandise account worth its face value, there was no insolvency.

The compromise of the claims was not only actually approved by Hall, but, by the agreements executed by him when extensions were granted, he expressly empowered the liquidators to compromise. I fail to appreciate the argument that this meant to compromise undisputed claims against insolvent debtors, and not to compromise disputed claims against solvent debtors. Nor can I understand the contention that the debtors' right to an abatement of the price by reason of defective work or of the company's default is an "incumbrance" within the meaning of the contract.

The claim on the "Bertram Rolls" falls under the same head. The purchase was of the assets of the company as a going concern; the purchaser took the property subject to all contracts. The only stipulation is that the property shall be "free from incumbrances." This does not mean that this going concern is not to have contracts affecting its goods and property, but that there is to be no charge upon or hypothecation of the assets.

Upon this principle I think the Master ought not to have allowed the amounts due for freight and duty. These may have been liens upon the property, but they do not seem to me incumbrances within this contract.

This also applies to the cross-appeal as to the patterns. The company had the right to use these upon certain terms. The asset vested in the purchaser was this right.

I do not think I should interfere with the Master's ruling with regard to the expenses of carrying on the business.

Finally, it is said that the Court ought to allow the sums in question upon the principle of the cases of which *Re Tylor*, [1907] 1 K. B. 865, is an example. If my view is right there is no foundation for the contention, as I can find no moral right in the petitioner; but the cases do not warrant any such wide general proposition as that contended for.

In the result, the appeal of the liquidator should be allowed (save as to the matters covered by the 9th ground), and the cross-appeal should be dismissed, both with costs. If the account cannot be re-adjusted there must be a reference back.

CHAMBERS.

HON. MR. JUSTICE SUTHERLAND. NOVEMBER 29TH, 1912.

RE VINE.

4 O. W. N. 408.

Administration—Application for Payment Out—Claimant to Portion of Estate—Payment out of Portion of Moneys—Issue Directed as to Remainder—Costs.

Application by certain next-of-kin to be paid out their shares of a sum of $5,418.35, paid into Court by the administrators of an estate. An unrecognized claimant claimed to be the daughter of the intestate and entitled to a one-quarter share in the fund.

SUTHERLAND, J., permitted $3,000 to be distributed among the recognized next-of-kin and directed that the balance should await the outcome of an issue which he directed, in which the claimant above referred to should be plaintiff, and the next-of-kin defendants, as to whether the plaintiff was the daughter of the intestate as claimed.

Costs of application to be disposed of by Judge trying the issue directed.

Application for an order for payment out to William Vine and William Connon of their shares in the estate of Frances Penton Vine who died on the 22nd January, 1910, intestate, in Toronto, owning certain real estate on Broadview avenue, and leaving the following persons alleged by the applicants to be all the heirs entitled to share in the administration of her estate, viz., a son, William Vine; a daughter, Mary Seagriff; the following children of a deceased daughter, Sarah Ann Hibbitt, viz., Henry Hibbitt,

George Hibbitt, James Hibbitt, Florence Crump, Edward Hibbitt, Frances Waring, and Edith Robertson, and three infant children of Charlotte Sorace, a deceased daughter of the said Sarah Ann Hibbitt, whose names are not mentioned in the material filed upon the application, but who were represented on the motion by the Official Guardian.

One William Connon, has purchased the shares of the said George Hibbitt, James Hibbitt and Florence Crump in the estate. The Trust & Guarantee Company Limited were appointed administrators of the estate.

It is said that all the assets of the estate have been realised and the accounts passed by the Surrogate Court of the county of York. The administrators have paid into Court to the credit of the estate under Rule 1258 the sum of $5,418.35.

J. M. Godfrey, for the administrators and William Vine and William Connon.

R. U. McPherson, for Mary Seagriff.

T. Hislop, for Ellen Agnes Haughton.

E. C. Cattanach, for the infants.

HON. MR. JUSTICE SUTHERLAND:—A difficulty has arisen as to the amounts to which the respective heirs are entitled. It appears that in addition to the heirs hereinbefore mentioned one Ellen Agnes Haughton claims to be a daughter of the intestate and entitled to a one-fourth share in the estate. It was suggested on the application that one-quarter of the said $5,418.35 be allowed to remain in Court together with an additional $500 and that the balance be paid out to the parties claiming to be entitled, other than the said Ellen Agnes Haughton, and that an issue be directed to determine whether she is a lawful heir. I think that perhaps for the present all the money above $3,000 may well be retained in Court and that that sum may be paid out as follows:—

$1,000 to William Vine; $1,000 to Mary Seagriff, and $1,000 among the representatives of Sarah Ann Hibbitt in the proper portions to which they are entitled, the applicant Connon to be paid the shares of the said George Hibbitt, James Hibbitt and Florence Crump.

I direct an issue to determine the fact whether or not the said Ellen Agnes Haughton is a lawful daughter of the intestate and in such issue she will be the plaintiff.

The contest now is really between her and the heirs. If the latter can agree upon some one of them to appear and represent all of such heirs such person may be appointed for that purpose. If not, then all the heirs will be the defendants. The money being now in Court the administrators have practically no further interest in the matter. If it were not for the contention of Ellen Agnes Haughton the difficulty in the way of the administration of the estate and distribution of the money would not have arisen and the other heirs would be entitled to receive the money. Under these circumstances the costs of the application may well and properly be left, I think, until the determination of the issue and then disposed of by the Judge who tries the same.