The
Ontario Weekly Notes

VOL. VIII. TORONTO, MAY 7, 1915. No. 9

APPELLATE DIVISION.

APRIL 26TH, 1915.

LAKE VIEW CONSOLS LIMITED v. FLYNN.

Contract—Purchase of Mining Claims — Misrepresentations — Undertaking by one Vendor to Return Portion of Purchase-money in Event of Properties not Being as Represented—Position of Co-vendor — Responsibility for Misrepresentations though Innocent—Executory Contract—Rescission.

Appeal by the defendants from the judgment of LATCHFORD, J., 7 O.W.N. 322.

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

J. M. Godfrey, for the appellants.

R. C. H. Cassels, for the plaintiffs, respondents.

The judgment of the Court was delivered by MACLAREN, J.A.:—The defendants appeal from the judgment of Latchford, J., of the 27th November, 1914, condemning them, on the ground of misrepresentation, to return to the plaintiffs the sum of $15,000, being the first payment made by the latter on the purchase for $200,000 of three gold mining claims. . . . The trial Judge has found as a fact that the representations were material and untrue; and there is ample evidence to sustain his finding.

So far as the defendant C. B. Flynn is concerned, it is difficult to see how he can hope to escape liability, inasmuch as it was formally declared in the plaintiffs' letter of the 23rd December, 1910, to which he assented, that if the property should not prove to be as stated in the cable despatches handed by him to the plaintiffs, he would repay the $15,000 to them by the 1st March, 1911. . . . There would appear to be no ground for reversing the judgment as to him.

With regard to the liability of the other defendant, John P. Flynn, the case is not quite so simple. The point . . . urged

. . . was, that the statements in the cable despatches found to be material and untrue, which formed the chief ground of complaint, were made, not from his personal knowledge as facts, but solely from reports received from his son Miles and from others whose names were given in the cable despatches, and that he had correctly given the substance of such reports. . . .

The learned trial Judge has found that the material untrue statements made by John P. Flynn purported to be made with knowledge, whereas they were made by him in ignorance of whether they were true or false, and holds him liable for his deceit. With great respect, I am unable to find any evidence that would justify a finding of deceit against John P. Flynn. In the cable messages he gave the source of his information, and there is no contradiction of his evidence on this point nor anything to indicate that he had any knowledge to the contrary before the examination of the claims by the plaintiffs' engineer and his report thereon. The defendant John P. Flynn had, however, sent the glowing reports he had received from his son to Charles B. Flynn with the intention that he should use them in his negotiations with the plaintiffs; and the contracts entered into in London and in Toronto were based upon these representations. Even if John P. Flynn was not aware, at the time he made them, that they were untrue, the plaintiffs would still be entitled to rescission and to the return of the money paid by them, as the contract was still executory.

Appeal dismissed with costs.

APRIL 26TH, 1915.

*ACKERSVILLER v. COUNTY OF PERTH.

Highway—Nonrepair—Injury to Traveller—Road Assumed by County Corporation—Highway Improvement Act, 7 Edw. VII. ch. 16, sec. 19 (O.)—Duty to Repair and Maintain—Negligence—Absence of Guard-rail at Dangerous Place—Contributory Negligence—Liability of County Corporation—Limits of Road Assumed—By-law—Construction.

Appeal by the defendant the Corporation of the County of Perth from the judgment of MEREDITH, C.J.C.P., 32 O.L.R. 423, 7 O.W.N. 435.

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

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

Glyn Osler, for the appellant corporation.

R. T. Harding, for the plaintiff, respondent.

W. D. McPherson, K.C., for the defendants the Corporations of the Townships of Downie and South Easthope.

R. S. Robertson, for the defendant the Corporation of the City of Stratford.

The judgment of the Court was delivered by GARROW, J.A.:— . . . The main difficulty in the case seems to be, not so much as to what may be called the merits of the plaintiff's claim, but as to which of the four municipalities should be held responsible.

The contention by counsel for the county corporation is, that the Downie road, which runs north and south and is the township boundary-line between the townships of South Easthope and Downie, as assumed by the county corporation, ends towards the north at the southerly limit of Lorne avenue, which runs east and west and is the boundary-line between the two townships on the south and the city of Stratford on the north; and sec. 19 of the Highway Improvement Act, and the dictionaries as to the meaning of the word "intersects" in that section, were referred to before us. The meaning of that section is, I think, quite plain: "intersect" is used in the sense of "crossing" or "passing across," with the result that there is "county road" on each side of the highway so intersected. That, however, is clearly not this case; and the section has, therefore, in my opinion, no application. . . .

Nothing in the language of the by-law, in my opinion, compels us, acting upon legal principles of construction, to adopt the contention of the county corporation as to the northerly limit of the highway assumed thereby. . . .

The conclusion of the learned Chief Justice, placing the responsibility for the plaintiff's injury upon the county corporation, is correct. I also agree generally with his reasoning and conclusion as to . . . the merits of the plaintiff's claim, and I have very little to add.

The one point upon which I had some doubt was, whether the conduct of the plaintiff on the occasion in question was so reasonable as to excuse him from the charge of having contributed to the result from which he suffered. The night was

dark. He, apparently, although residing in the adjoining city, was not familiar with the ground; and there is, to me at least, the suggestion of recklessness in what he did.

My doubt, however, is not sufficiently strong to justify me in dissenting from the conclusion in the plaintiff's favour upon the issue of contributory negligence.

For these reasons, I would dismiss the appeal of the county corporation with costs.

Appeal dismissed.

APRIL 26TH, 1915.

*RE SINGER.

Will—Construction—Gift of Income to Wife for Life or Widowhood "for the Maintenance of herself and our Children"—Equal Division of Corpus among Children upon Death or Re-marriage of Wife—Provision for Advancement to Sons—Obligation of Wife to Maintain Children—Forisfamiliation—Discretion—Postponement of Time for Conversion of Real Estate into Money—Effect upon Advancement—Interest upon Sums Advanced—Security.

Appeal by Annie Singer, widow, and cross-appeal by Israel and Alexander E. Singer, sons, of Jacob Singer, deceased, from the judgment of MIDDLETON, J., 7 O.W.N. 625.

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

G. H. Watson, K.C., and S. J. Birnbaum, for the appellant Annie Singer.

H. E. Rose, K.C., and J. W. Pickup, for the appellants Israel Singer and Alexander E. Singer.

C. J. Holman, K.C., for Max Singer and others, respondents.

M. H. Ludwig, K.C., for the widow of Solomon Singer, respondent.

H. H. Dewart, K.C., and G. S. Hodgson, for M. J. Singer, the surviving executor, respondent.

F. W. Harcourt, K.C., Official Guardian, for the infants.

MEREDITH, C.J.O.:— . . . Jacob Singer died on the 13th November, 1911, and left surviving him his widow, Annie Singer, and eleven children, the eldest of whom, Mrs. Miller, is forty-two years of age, and the youngest, Fannie, seventeen. Of the children, eight were sons; and three of them—Moses, Max, and Israel—have attained the age of thirty. The will is dated the 16th May, 1904, and the codicil bears date the 31st October, 1911.

The first question for decision is as to the effect of the following clause of the will: "I direct my said trustees to pay to my wife Annie Singer during the term of her natural life and as long as she will remain my widow the net annual income arising from my estate for the maintenance of herself and our children. Should, however, my said wife re-marry, then such annuity shall cease." . . .

Apart from authority, I should have no doubt as to what the testator meant or as to what the language he has used to express his wish imports, and that is, that his wife should be entitled during her widowhood to receive the income, subject to an obligation on her part to maintain the children out of it, but leaving to her discretion the manner in and the extent to which provision should be made for any child—a discretion not subject to control or interference by the Court so long as it should be exercised in good faith; and that, as I understand the decision of the Court of Appeal in Allen v. Furness (1892), 20 A.R. 34, was that Court's view of the effect of such a provision as the will in question contains. . . .

[Reference to In re Robertson's Trust (1858), 6 W.R. 405; Lamb v. Eames (1871), L.R. 6 Ch. 597; In re G. Infants, [1899] 1 Ch. 719; In re Booth, [1894] 2 Ch. 282; In re Pollock, [1906] 1 Ch. 146.]

The observations of North, J., in In re Booth, seem to indicate that, in his view, the wife took the income subject to a trust for the maintenance and education of the children; and, if that is the effect of his decision, it is opposed to Allen v. Furness, and we must follow that case in preference to In re Booth. . . .

The next question is as to whether the widow, in carrying out the object with which the income was given to her, is bound to take into consideration the need of support of children, regardless of whether or not they have become forisfamiliated or have married.

In Cook v. Noble (1886), 12 O.R. 81, it was decided by Proudfoot, J., . . . that where the right to maintenance and support is given in general terms it will cease with the marriage or forisfamiliation of a child. . . .

[Reference to In re Miller (1909), 19 O.L.R. 381; In re Booth, supra; Frewen v. Hamilton (1877), 47 L.J.N.S. Ch. 391.]

We should, I think, adopt the rule laid down in Cook v. Noble. That case was decided more than a quarter of a century ago; it is probable that during that period many wills have been drawn relying upon the law being what it was held by Proudfoot, J., to be; and for that reason, and because, in my opinion, the construction which he placed upon words similar to those which were used by the testator in this case, having regard to conditions and the mode of life in this country, gives effect to what a testator who has used such language to express his wishes really meant, that construction should be adopted.

The next question is as to the rights of the sons when they have reached the age of thirty years. The will provides as follows: "I direct my said trustees to pay to each of my sons who shall reach the age of thirty years a sum equal to half that portion of my estate to which such son is entitled under this my will upon the death of his mother, such portion to be valued at the time of each son attaining his thirtieth year the valuation to be made by my executors and trustees and shall be final. Such payment to be considered as a loan from the estate."

In order to understand the effect of this provision, it is necessary to see what provision is made as to what the sons shall be entitled to at the death of their mother, and that is to be found in the following provision of the will: "Upon the death or re-marriage of my said wife I give devise and bequeath all the rest and residue of my estate not hereinbefore specifically disposed of to my said children share and share alike and I direct my said trustees to pay to each of my said children upon his or her attaining the age of twenty-one years his or her share of my estate deducting however therefrom any sum or sums which shall already have been advanced to such child and in the event of any of my said children predeceasing my said wife without leaving lawful issue him or them surviving then his her or their share or shares shall be divided equally between my surviving children who shall attain the age of twenty-one years but in the event of my said children who shall so predecease my said wife leaving him or them surviving lawful

issue then I direct that such issue shall stand in the place of and be entitled to the share of the parent so deceased." . . .

The provision of the codicil which is relied on is the following: "10. I hereby further direct that my real property shall not be divided among the beneficiaries as directed by my will until after the lapse of ten years from my death and I further direct that the business of managing my real estate shall be carried on by my sons as it has been carried on heretofore and I direct that my sons shall receive such salaries as shall seem just in the discretion of my executors in remuneration for their services." . . .

I have come to the conclusion that the effect of clause 10 of the codicil is to postpone the right under the will of the sons who attain the age of thirty to be paid the one-half of their shares, except in so far as it may be practicable to make payments to them out of the personalty and the proceeds of such of the real property as the trustees may have sold.

It is reasonably clear that the intention of the testator was that, as far as it should be practicable to do so, his lands should be retained in specie and should be managed by his sons, and that the division of his estate, so far as the estate consisted of real property, which was to have taken place upon the death or re-marriage of his wife, should be postponed if either of these events should happen within ten years after his death, until the expiration of that period; and that, I think, is the effect of the provisions of clause 10 of the codicil.

If I am right in this view, it follows, I think, that the direction of the will as to the payment to the sons is inconsistent with it and is pro tanto repealed; and that that would be the result, apart from the provisions of clause 14 of the codicil, which directs that anything in the will which is at variance with the provisions of the codicil "shall be subservient and subject" to the codicil.

It follows also that the executors and trustees are not bound to convert any of the real estate for the purpose of making payments to the sons; and I do not think that they would be justified in converting it, unless perhaps it was prudent to do so to prevent loss by depreciation of the property or if it should be necessary to convert to pay incumbrances or debts.

If there should be money available for making payments to the sons, I do not think that they can be required to give security for what they may receive or to pay interest upon it. . . .

It is true that the effect of this view being given effect to will be to reduce the amount of the income which the widow will receive, but that is a result which follows from the dispositions the testator has made, and there is no help for it. It may well be, I think, that the testator, when he made the codicil, had in view that this would be the result of the provisions he had made by his will, and that one of his objects in providing that there should be no division of his real property for ten years after his death was to prevent that from happening by keeping his real estate, from which the bulk of the income would be derived, intact for that period. . . .

It was not proper, I think, upon the motion before my brother Middleton, to direct the inquiry which he directed to be made as to an allowance for maintenance to the children. It will be time enough after the true construction of the will and codicil has been determined, if any child thinks that the discretion of the widow has not been exercised in good faith and that he is prejudicially affected, to take such steps as he may be advised to enforce any right he may claim to have to the intervention of the Court, and it would be most unjust to the widow to make any such direction as has been made until she, with the knowledge that as the result of the litigation she will have obtained as to her rights and duties, has failed to perform any duty which may rest upon her. . . .

I do not differ from my brother Middleton as to rights of the widow and the children in respect of the annual income of the estate, except in two particulars. In my learned brother's view, the discretion which the widow is entitled to exercise as to the application of the income to the maintenance of the children is limited to deciding what amount shall be applied for the maintenance of each child, and that she is not entitled to exercise a discretion as to whether or not a child need or should receive an allowance for maintenance; while I am of opinion that she is entitled to exercise her discretion both as to whether a child needs and ought to receive an allowance for maintenance and as to the amount of the allowance if she deems the case one in which an allowance should be made, and that her discretion, if honestly exercised, is not open to review or to be overridden because a Court may happen to take a view which differs from hers. The other matter as to which we differ is as to the children whose claims for an allowance for their maintenance it is her duty to consider. As I understand my learned brother's rea-

sons for judgment, a child who has left the parental home and is living away from it has a right to have his claim considered and dealt with by his mother, while I am of opinion that he is not so entitled and that a child who is forisfamiliated or has married has no such right, and I would vary the judgment by adding to it a declaration to that effect. . . .

By paragraph 3 of the judgment it is ordered that it be referred to the Master in Ordinary "to inquire whether any and if so what allowance for maintenance should be made to each of the children of the said Jacob Singer out of the income of the estate." An inquiry of that nature should not be directed until after the rights of the parties have been finally determined, and the widow has then had an opportunity of exercising her discretion, when any child who is entitled to have his claim considered by the widow, if he is able to establish that the widow has not honestly exercised her discretion, will be in a position, in a proper proceeding, to seek the intervention of the Court for the redress of any wrong he may have suffered.

I would also add to the 4th paragraph of the judgment a declaration that the executors and trustees are not bound to convert any part of the real estate for the purpose of making payments to the sons who have attained the age of thirty years, and ought not to do so merely for that purpose.

For these reasons, I would vary the judgment in the manner I have indicated, and I would strike out the 9th paragraph of it, which provides for the disposition of the costs of the reference directed by the 3rd paragraph; and, with these variations, I would affirm the judgment and make the same order as to the costs of the appeal as is made by it as to the costs of the motion.

MACLAREN, J.A., agreed with MEREDITH, C.J.O.

MAGEE, J.A., also agreed, except as to the effect of the codicil, which he construed as not interfering with the provision in the will for payment by way of loan to the sons on attaining the age of thirty years.

HODGINS, J.A., for reasons briefly stated in writing, agreed with MEREDITH, C.J.O.

Judgment below varied.

APRIL 26TH, 1915.

*EAST v. CLARKE.

Limitation of Actions—Possession of Land—Tenancy at Will—Statutory Title—Limitations Act, R.S.O. 1914 *ch.* 75, *sec.* 6, *sub-secs.* 6, 7 — *Payment of Taxes as Rent — Acknowledgment—Conveyance Absolute in Form Treated as Mortgage —Payment of Interest—Sec.* 23 *of Act.*

Appeal by the plaintiff from the judgment of KELLY, J., 7 O.W.N. 586.

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

N. W. Rowell, K.C., and George Kerr, for the appellant.

J. M. Ferguson, for the defendant, respondent.

The judgment of the Court was delivered by GARROW, J.A.:—

. . . The judgment proceeds upon the ground that the tenancy created by the agreement that the defendant might occupy the lands in question until a purchaser was found, he to pay the taxes in the meantime, as rent, was a tenancy at will. To such a tenancy sec. 6, sub-sec. 7, of the Limitations Act, R.S.O. 1914 ch. 75, would apply to bar the plaintiff's right of re-entry at the expiration of ten years from one year after the creation of the tenancy. The practical result would be the same if it should be held that the tenancy was or subsequently became a tenancy for a year, or from year to year, the lease having been by parol (see sub-sec. 6); the only difference being that under sub-sec. 6 the statutory period begins to run at the end of the first year, "or at the last time when any rent payable in respect of such tenancy was received, whichever last happened;" while in sub-sec. 7 nothing is said about the effect upon the operation of the statute of the payment of rent.

I agree with Kelly, J., that the proper conclusion is, that the defendant was at the beginning, as the result of the agreement, a mere tenant at will; and, in my opinion, nothing is shewn to have subsequently occurred to alter or enlarge his title. . . .

[Reference to Day v. Day (1871), L.R. 3 P.C. 751.]

The defendant paid nothing directly to the plaintiff or to her husband. What he did pay was the taxes, which he paid each year to the municipal officials. The plaintiff contends that, as there was an express agreement by the defendant to pay the

taxes as rent, no other rent having been stipulatd for, the amounts so paid were really paid as rent within the meaning of the statute, and so prevented the statutory bar from accruing. . . .

[Reference to Finch v. Gilray (1889), 16 A.R. 484.]

The defendant's obligation to pay the taxes arose only upon his being placed in possession under the agreement with the plaintiff's husband, and under that agreement the defendant expressly agreed to pay the taxes, not merely as taxes but as rent, and the only rent to be paid for the use of the land. And in paying the taxes he was, therefore, primarily at least, performing his part of the agreement, and the circumstance that in so doing he was also discharging an obligation incidentally imposed by the assessment law upon both tenant and owner seems to me to be of no consequence. It would, of course, be otherwise but for the agreement, for it may well be conceded that the mere payment of taxes by an occupant of land would not in itself be an acknowledgment of title or prevent the operation of the statute. And, giving full effect to the decision upon the facts in Finch v. Gilray, that the same result would follow where there is a specific reservation of another and different sum as rent, I am quite unable to see why, where no other sum is reserved, the parties may not lawfully agree that the tenant shall pay the taxes as rent, nor why the sum so agreed to be paid and paid should not for all purposes be regarded as rent. . . .

The real question, it seems to me, is, was the payment made under circumstances which amounted unequivocally to an acknowledgment of the plaintiff's title? And, having regard to the agreement between the parties, of that there ought to be no reasonable doubt in this case.

I am therefore upon the whole of the opinion that the contention of the plaintiff's counsel that this case does not fall within the decision in Finch v. Gilray is well-founded; and that, consequently, the plaintiff ought to succeed in this appeal.

A new point was raised on the hearing before us . . . namely, that the conveyance from the plaintiff's husband to William Dennis, the plaintiff's father, although absolute in form, was in fact intended to be a mortgage given to secure a loan of $1,000 by William Dennis to the husband, upon which the husband paid the interest for many years, and also a part of the principal. After the death of William Dennis, his executors, on the 15th October, 1913, conveyed the land to the plaintiff—

the husband, the mortgagor, consenting. And it is contended that, while the mortgagee's title was outstanding and payments being made, the statute was inoperative as against the mortgagee or any person claiming under him. See sec. 23. That result would, of course, clearly follow if the conveyance had been in form a mortgage. And I am not able to see a good reason why, where the fact is admitted or is established, as it is here by the evidence, it should not also be so in such a case as this. The defendant has no merits. He is seeking to obtain under cover of the statute what would not otherwise belong to him, and we are not, in such circumstances, in my opinion, called upon to be astute to find reasons for assisting him.

The case is easily, I think, distinguished from the case recently before us of Noble v. Noble (1912), 27 O.L.R. 342. . . .

I would allow the appeal, and direct judgment to be entered for the plaintiff for the recovery of the land in question; and the defendant should pay the costs throughout.

Appeal allowed.

APRIL 26TH, 1915.

*JONES v. TOWNSHIP OF TUCKERSMITH.

*RE JONES AND TOWNSHIP OF TUCKERSMITH.

Highway—Closing and Sale of Unopened Portion of Street as Shewn on Plan—By-law of Township Council—Survey — Plan—Common and Public Highway—Effect of Exemption of Municipal Corporation from Obligation to Keep in Repair—Surveys Act, 1 Geo. V. ch. 42, sec. 44—Municipal Act, 1903, secs. 601, 607, 637 (1)—Sale of Lots according to Plan—Easements — Effect of Non-user — By-law not Passed in Public Interest—Evidence of—Bona Fides of Council——Exclusion of Land-owners from Access to Lands —Municipal Act, 1903, sec. 629 (1)—Authority of Council to Sell Portion of Road Closed without Offering it to Abutting Owners—Sec. 640 (11) of Act—Quashing Part of By-law.

Appeal by the Corporation of the Township of Tuckersmith, defendants in the action and respondents to a motion to quash a by-law, from the judgment of LATCHFORD, J., 7 O.W.N. 579.

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

R. S. Robertson and R. S. Hays, for the appellants.

William Proudfoot, K.C., for the plaintiffs and applicants, respondents.

The judgment of the Court was delivered by MEREDITH, C.J.O.:— . . . The first question to be considered is, whether or not the part of Mill street which is in question was a common and public highway. It was laid out on a plan of survey made for the owner of part of a farm lot in the township of Tuckersmith, and the plan was registered on the 13th August, 1873. Prior to the 13th April, 1897, the provisions of what is now sec. 44 of the Surveys Act, R.S.O. 1914 ch. 166, did not apply to townships; but, by 60 Vict. ch. 27, sec. 20, they were made to extend to townships; and, by sec. 44 of 1 Geo. V. ch. 42, which was the Act in force when the by-law in question was passed, it is provided that, "subject to the provisions of the Registry Act as to the amendment or alteration of plans, all allowances for roads, streets, or commons surveyed in a city, town, village, or township, or any part thereof, which have been or may be surveyed and laid out by companies or individuals and laid down on the plans thereof, and upon which lots fronting on or adjoining such allowances for roads, streets, or commons have been or may be hereafter sold to purchasers, shall be public highways, streets, and commons" (sub-sec. 1.) . . .

By the Municipal Act of 1858 (22 Vict. ch. 99), sec. 323, from the roads, streets, bridges, and highways which the corporation is required to keep in repair are excepted "any road, street, bridge, or highway laid out without the consent of the corporation by by-law, until established and assumed by by-law;" and this provision, somewhat altered in form, has continued to form part of the Municipal Act down to the present time. . . .

[Reference to the Consolidated Municipal Act, 1903, sec. 607; R.S.O. 1914 ch. 192, sec. 490 (6).]

This provision was also introduced as a proviso to sec. 62(1) of the Surveys Act, R.S.O. 1887 ch. 152, but was dropped from that Act in the consolidation of it by 1 Geo. V. ch. 42. . . .

I do not see any room for question as to the meaning and effect of sec. 44 of 1 Geo. V. ch. 42. The language used is plain—"shall be public highways, streets, or commons"—and the provision exempting the municipal corporation from the obligation

to keep them in repair, until established or assumed, was not intended to take away from them the character of public highways or streets, unless and until they should be established or assumed, and has, in my opinion, no such effect.

There have always been provisions for altering or amending registered plans. . . .

[Reference to 12 Vict. ch. 35, sec. 41; the Registry Act, R.S.O. 1914 ch. 124, sec. 86; 1 Geo. V. ch. 42, sec. 39.]

In my opinion, the Council of the Township of Tuckersmith had jurisdiction over Mill street, it being, by force of sec. 601 of the Consolidated Municipal Act, 1903, vested in the corporation of that township; and, under sec. 637 (1), the council had power to pass a by-law for stopping it up. . . .

[Reference to Gooderham v. City of Toronto (1895), 25 S.C.R. 246; Roche v. Ryan (1892), 22 O.R. 107; Sklitzsky v. Cranston (1892), 22 O.R. 590; In re Morton and City of St. Thomas (1881), 6 A.R. 323, 328, 331; Armour on Real Property, p. 71.]

In the case at bar, as I understand the evidence, all the lots fronting on Mill street were sold and are still owned by those who purchased them or by persons who derive title from the purchasers, and it is only the street that has been fenced in with the farm which VanEgmond, for whom the survey was made, and those claiming under him, have ever since occupied.

Unless, therefore, when the section was amended so as to include townships, the purchasers of these lots or their assigns had lost their rights or easements over Mill street, that street became a public highway upon the coming into force of the amendment.

It was argued . . that the non-user of these rights or easements, and the occupation of the street as part of the farm of the adjoining land-owner ever since the plan was registered, have resulted in the loss of these rights or easements; but I am not of that opinion. . . .

[Reference to Armour on Real Property, p. 480; Halsbury's Laws of England, vol. 11, pp. 278, 279, 280, para. 552; Ward v. Ward (1852), 7 Ex. 838, 839, 86 R.R. 852, 853; Crossley v. Lightowler (1867), L.R. 2 Ch. 478, 482; James v. Stevenson, [1893] A.C. 162; Arnold v. Stevens (1851), 21 Pick. (Mass.) 106.]

Applying, then, the principle of these cases to the facts of the case at bar, the proper conclusion is, I think, that the re-

spondents had not lost their right to Mill street. . . . These private rights or easements, of course, came to an end when Mill street became a public highway, and cannot, therefore, be relied upon as a bar to the right of the municipal council to close the street. See Sklitzsky v. Cranston, 22 O.R. at p. 595.

The conclusion being that the part of Mill street which is in question had become a highway, vested in a public corporation, it is undoubted that its council had power to close it: Consolidated Municipal Act, 1903, sec. 637 (1).

There is nothing, I think, in the contention that the opponents of the by-law were not afforded an opportunity to state their objections to its being passed. . . .

There is more difficulty as to the question whether, in the circumstances, the by-law is not open to the objection that it was not passed in the public interest, but was passed in the interest of the appellant Kruse, and ought therefore to be quashed; but I have come to the conclusion that there was nothing adduced in evidence to warrant the Court in quashing the by-law on that ground. . . .

[Reference to United Buildings Corporation v. City of Vancouver, [1915] A.C. 345.]

In my opinion, what is or is not in the public interest, in a case such as this, is a matter to be determined by the judgment of the municipal council; and what it determines, if in reaching its conclusion the council act honestly and within the limits of its powers, is not, and in my humble judgment ought not to be, open to review by any Court. Whether the judgment of the Judicial Committee was intended to go as far as this, I do not know; but . . . it affords satisfactory ground for holding, as I do, that the by-law in question is not open to attack upon the ground that it was not passed in the public interest or in good faith.

The third ground of attack is based on the prohibition contained in sub-sec. 1 of sec. 629 of the Consolidated Municipal Act, 1903. . . .

[That clause forbids the closing up of a road so as to exclude any person from ingress and egress to and from his own land, except upon compensation being made and a way of access provided.]

All the respondents, except Jones, whose lot abuts on Mill street, and Dickson, who does not own any lot on that street, own the lots behind their Mill street lots, which abut on Centre

street, and the two lots are occupied as one property, and they have never used Mill street as a means of access to the Mill street lots, but their access to their property is and has always been by way of Centre street, which . . . is and has been for many years an open and travelled road. The effect of the by-law will not, I think, be to exclude these persons from ingress to and egress from their lands . . . within the meaning of sub-sec. 1 of sec. 629, as a similar provision was interpreted by the Court of Appeal in In re McArthur and Township of Southwold (1878), 3 A.R. 295. . . .

The lot of the respondent Jones is lot 40, and its only means of access is by Mill street, but he acquired his lot from persons who owned the lot behind it, which fronts on Centre street, after the passing of the by-law. It was said that there had been a verbal arrangement for the sale of the lot to Jones before the by-law was passed; but, if there was, it was made after notice of the intention to pass the by-law was given, and the fact of its having been given had come to the knowledge of Jones; and I strongly suspect that his purchase was made for the purpose of making it impossible to pass the by-law or to pass it without providing some other means of access to the lot. In these circumstances, the respondent Jones does not, I think, stand in any better position than the other respondents; and the case must be dealt with as if his lot, at the time of the passing of the by-law, had been still owned by the persons who sold to him.

The respondent Dickson . . . does not own any land on Mill street, and he has other means of access to his property.

The by-law is, however, in my opinion, open to the objection that the council had no authority to sell the situs of the road without first offering it to the abutting owners at a price fixed by the council, and that it is only in the event of the abutting owners declining to purchase that authority is given to sell to any one else. . . . This is clearly the effect of sub-sec. 11 of sec. 640 of the Consolidated Municipal Act, 1903. . . . .

It is contended by counsel for the appellants . . . that the by-law was passed, not under the authority of sub-sec. 11 of sec. 640, but of sub-sec. 1 of sec. 637 . . . and that the provisions of sub-sec. 11 of sec. 640 are permissive, not obligatory. . . .

It is clear, I think, that sub-sec. 11 is applicable whether the by-law is based upon it or upon the other sub-section. It is

also clear, I think, that—while the sections are permissive in the sense that it is optional with the council to sell or not to sell—if it determines to sell, the council is bound to sell in the manner prescribed by sub-sec. 11. . . .

It does not follow, however, that the whole by-law must be quashed. The sale of the street is provided for by sec. 2, and its provisions are severable from the rest of the by-law.

The result is, that, in my opinion, sec. 2 of the by-law should be quashed, and the conveyance to the appellant Kruse should be set aside and the registration of it vacated, and the action and the motion, so far as sec. 1 of the by-law is concerned, should be dismissed.

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

APRIL 26TH, 1915.

*BALDWIN v. CHAPLIN.

Water — Invasion of Riparian Rights — Obstruction Placed on Waters of Navigable Lake in Front of Plaintiffs' Land—Lease from Crown of Lands Covered by Water—Reservation of Rights of Navigation and Access from Shore—Navigable Waters' Protection Act, R.S.C. 1906 *ch.* 115, *sec.* 4—*Illegal Obstruction—Interference with Navigation and Right of Access—Right of Action—Special Damage—Order in Council—Compliance with—Costs.*

Appeal by the plaintiffs and cross-appeal by the defendants (as to costs) from the judgment of LATCHFORD, J., 7 O.W.N. 637.

The appeal and cross-appeal were heard by MEREDITH, C.J.O., GARROW, MACLAREN, MAGEE, and HODGINS, JJ.A.

J. G. Kerr, for the plaintiffs.

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

The judgment of the Court was delivered by HODGINS, J.A.:—The appellants, the plaintiffs in the action, are owners and lessees of lot 185 on the Talbot road west, in the township of Romney, the patent of which from the Crown runs to and along the water's edge of Lake Erie, and contains a reservation of an

allowance for road one chain in width along the top of the bank of Lake Erie and free access to the shore for all vessels, boats, and persons. They have also a fishing license in front of this and other lots.

The respondents have erected and are now maintaining a pier in the waters of Lake Erie opposite this lot. . . This structure is situated about 250 feet from the shore line, and is said to be an obstruction to the appellants' access to the lot, the frontage of which on the lake is 300 feet. . . .

The respondents are or represent the lessees from the Crown in right of the Province of Ontario of the land covered by the waters of Lake Erie in front of Talbot road, lots 181 to 187 inclusive. . . .

The questions to be decided are:—

(1) Has the erection complained of interfered with the right of access to which the appellants as riparian proprietors are entitled, or with any other right of the appellants in respect to navigation, having regard to the fact that they do not question the right of the Ontario Government to grant the recited lease of the water lot in front of lot 185?

(2) Assuming compliance with the stated conditions, does the permission of the Governor-General in Council to erect the obstruction absolve the respondents from liability, in view of the fact that the Navigable Waters' Protection Act, R.S.C. 1906 ch. 115, is confined to dealing with obstructions to navigation solely?

At the trial, a plan, exhibit 6, was put in, and evidence was given that if the dock shewn therein was erected it would be difficult of access while the pier in question was maintained and while it remained without lights or bell. . . .

The evidence . . . shews that what is being asserted in this action as a private riparian right of access is in reality a public right of navigation. The right to land on the present beach is not in question; it is not used; if it were, an obstruction 250 feet out in the water would form no barrier to landing on the strand at any part of it. What is really set up is that if and when a dock is built, at a suitable place on the appellants' lot, and if and when in the operations of a fishery it becomes necessary to get in to this dock with the present fishing outfit of vessels, access will be rendered difficult. But the difficulties and dangers apprehended are in reality those common to all who navigate Lake Erie, and are to be met and guarded against only by skilful navigation. If the dock were in actual existence and use, it

would still be a question whether the right would be in any wise different in kind, because the effect of leeway in stormy weather, the proper angle of approach, the effect of the shoal parallel with the line of the beach, the distance to be kept and the danger caused by the want of bell and light, are all pure questions of navigation, or perils to be guarded against from that point of view.

The general principle is thus stated in Halsbury's Laws of England, vol. 28, p. 395, sec. 752: "Interference with the private right of access is actionable without proof of special damage; but if the interference complained of is an interference with the right of navigation which thereby affects the right of access, then special damage must be proved, for interference with the right of navigation which only renders access more difficult, but not impossible, is an interference with a public and not a private right, and special damage must be proved by the riparian owner who complains of such interference." . . .

[Reference to Lyon v. Fishmongers' Co. (1876), 1 App. Cas. 662, at p. 684; Attorney-General v. Conservators of the Thames (1862), 1 H. & M. 1; Orr Ewing v. Colquhoun (1877), 2 App. Cas. 839, 853, 854; Bickett v. Morris (1866), L.R. 1 Sc. App. 47; Coulson & Forbes, Law of Waters, 3rd ed., p. 134; Bell v. Corporation of Quebec (1879), 5 App. Cas. 84.]

I do not think that the appellants' position is helped by the cases which hold that an obstruction at some distance from the shore may afford a cause of action if they render access more difficult. Those decisions when examined shew clearly that it is only when the obstruction, though distant, affects the present convenient user just as essentially as if close at hand, that the right is held to be infringed. . . .

[Reference to Bell v. Corporation of Quebec, 5 App. Cas. at p. 100; Farnham on Waters, vol. 1, p. 437, para. 95a; Brayton v. City of Fall River (1873), 113 Mass. 218, 229; Drake v. Sault Ste. Marie Pulp and Paper Co. (1898), 25 A.R. 251, 256, 257; Caledonian R.W. Co. v. Walker's Trustees (1882), 7 App. Cas. 259, 285; O'Neil v. Harper (1913), 28 O.L.R. 635; Re Taylor and Village of Belle River (1910), 1 O.W.N. 609, 15 O.W.R. 733; Rex v. McArthur (1904), 34 S.C.R. 570.]

In all these cases, it will be observed, the present and practical deprivation of access by distant obstructions may give a right of action. But here this element does not, as I have mentioned, exist, and hence these decisions do not further the appellants' case.

It must be borne in mind as a cardinal principle that whether the obstruction amounts to an interference with the riparian right of access is a question of fact, to be determined by the circumstances of each particular case: Bell v. Corporation of Quebec, 5 App. Cas. 84; Drake v. Sault Ste. Marie Pulp and Paper Co., 25 A.R. 251, 257, per Moss, J.A. And the existence of special damage must likewise be so determined.

Applying these considerations to the case in hand, it appears to me to be clear that the appellants cannot sustain their action on the point that there is in fact interference with their riparian right of access, and that the suggested user of their lot cannot support, under present conditions, a claim for damage.

There remains the further question, namely, whether the order of the Governor-General in Council, under the Navigable Waters' Protection Act, absolves the respondents from liability. The appellants do not deny the power of the Province to lease the water lot in front of lot 185. That lease reserves to the Province the right to grant parts of the lot for wharf purposes, i.e., to the appellants or to any one else, and prohibits the respondents from interfering with navigation or with the use of any docks or wharves that may be hereafter constructed, or with the right of access to the water by the riparian proprietor. Such a grant to the appellants of the privilege of building a wharf out into the water may again bring the appellants and respondents into collision; but, as I have said, that question does not arise now. The Dominion order in council, resting as it does upon an Act of Parliament, supplies the authority necessary to validate the respondents' acts if they have carefully observed its provisions: Toronto Electric Light Co. v. City of Toronto (1915), ante 87. They cannot, however, use this grant of the land under the water as an excuse for putting up erections interfering with the right of riparian access or the larger right of navigation: Warin v. London and Canadian Loan and Agency Co. (1885), 7 O.R. 706, 12 A.R. 327; London and Canadian Loan and Agency Co. v. Warin (1886), 14 S.C.R. 232; Cullerton v. Miller (1894), 26 O.R. 36; Wood v. Esson (1884), 9 S.C.R. 239; Seely v. Kerr (1909), 4 N.B. Eq. 184, 261; Kerr Co. Limited v. Seely (1910), 40 N.B.R. 8; San Francisco Savings Union v. R. G. R. Petroleum and Mining Co. (1904), 144 Cal. 134.

It is clear that the respondents had not in fact complied with the Dominion order in council at the time this action was commenced. Whether they have done so now, having regard to the later order in council, is still an open question. But they have

not supplied the lights nor the bell. The pier was, when the writ was issued, a common law nuisance and an obstruction to public navigation. The appellants had a right to sue, having regard to their special interest under their fishery license, which extends in front of lot 185 and others adjoining, without joining the Attorney-General of the Dominion. But the right they seek to enforce is, notwithstanding that fact, a public right—a right of navigation. Although they have to navigate these waters more often than others in order to fish, and to go and come for that purpose, the evidence establishes that, so far as fishing is concerned, its operations, both as to setting and hauling the nets, take place outside this obstruction, and that it is only in the going and coming that the pier, if lot 185 was in use, would be in any sense a nuisance.

The case of W. H. Chaplin & Co. Limited v. Westminster Corporation, [1901] 2 Ch. 329, which was cited and much discussed on the argument, does not lay down any new law nor treat it in any novel aspect. The particular interest of the appellants in the waters in question is founded on their fishing license. They frequent the waters in the exercise of their fishing rights, but in order to do so they must navigate them, and in navigating them they use them in no different way from the rest of the public. If the pier interfered with the setting out of the nets or the hauling in of them, or in fact with any other fishing operation, the license might supply the element which was lacking in the plaintiffs' position in the Chaplin case. But, unless that can be found as a fact—and there is no support for such a conclusion found in the evidence or in the judgment in appeal—the law of the highway must necessarily govern. The right of navigation is not a property right but a right of way, and the fishing license in the waters in question does not differ in its essentials from the property right of access to and from a particular lot or wharf, if regarded as the foundation of an action against interference.

There can be no doubt that the Navigable Waters' Protection Act was intended to give the Governor-General in Council statutory authority to permit the erection of what would otherwise be a common law nuisance in navigable waters: In re Provincial Fisheries (1896), 26 S.C.R. 444, 516; Regina v. Port Perry and Port Whitby R.W. Co. (1876), 38 U.C.R. 431, 443.

If, as I have indicated, neither the appellants' riparian privileges nor their fishing rights afford them at the present time a right to damages or an injunction by reason of the pier com-

plained of, their action must fail. But, as the respondents have not shewn compliance with the order in council, which alone would enable them to erect and maintain the pier, I think the dismissal of the appeal should be without costs. The respondents are unable to shew legal authority for what they have done, while the appellants have not shewn that the unlawful erection is a present cause of damage to them.

Appeal dismissed without costs.

APRIL 26TH, 1915.

RE COTTER.

Will—Construction—Incomplete Gift—Implication — Gift over in one Event—Trust—Death of Trustee in Lifetime of Testatrix—Residuary Gift—Death of Donee of Part—Intestacy —Validity of Gift of Remaining Part to Class—Costs.

Appeal by Robert Henry Johnston from the judgment of LENNOX, J., ante 46, declaring the construction of the will of Elizabeth Cotter, deceased.

The will was dated the 22nd April, 1901. The testatrix appointed her daughter Margaret Brimacombe sole executrix and trustee. By para. 2, she gave, devised, and bequeathed to her trustee a house and lot in Oshawa to be held by her in trust for the testatrix's grandson, the appellant, "until he arrives at the age of twenty-six years, but in case he should die before . . . that age . . . my said trustee shall dispose of said property as she is hereinafter directed to dispose of the residue of my estate." By para. 3, the testatrix bequeathed to her daughter Honora Ann Walsh all the moneys the testatrix should have at her death deposited with a savings company. By para. 4, the testatrix gave, devised, and bequeathed to her daughter Margaret "all the rest residue and remainder of" her estate, "in trust to pay firstly all my just debts funeral and testamentary expenses as soon as convenient and to divide the balance between herself and my grandchildren in such shares and in such manner as to her shall seem best."

Margaret died on the 13th February, 1906, and the testatrix on the 22nd March, 1907.

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

G. N. Shaver, for the appellant.

D. Urquhart, for Honora Ann Walsh.

E. C. Cattanach, for the Official Guardian.

G. D. Conant, for the Trusts and Guarantee Company, administrators (with the will annexed) of the estate of the testatrix.

The judgment of the Court was delivered by MEREDITH, C.J.O.:— . . . The first question is as to the effect of the devise of the Oshawa lot to the appellant. It is contended by the appellant that, as he attained the age of twenty-six years, he has become absolutely entitled to the lot; that he takes it by implication in the event that has happened of his not having died under that age. . . .

[Reference to Cropton v. Davies (1869), L.R. 4 C.P. 159.]

The principle of that decision is, I think, stated in the concluding words of the judgment, and is, that words such as those used by the testator in his devise in that case are sufficient to pass the whole interest, if, "looking to the language and to all the dispositions of the will, and the circumstances, there is an irresistible inference in favour of implying such a gift"—quoting from Fitzhenry v. Bonner (1853), 2 Drew. 36. . . .

[Reference to Wilks v. Williams (1861), 2 J. & H. 125.]

The leading text-writers, although they question the cases such as Newland v. Shephard (1723), 2 P. Wms. 194, in which it has been held that, even where there is no gift over, the devisee on attaining the stated age becomes entitled to the whole interest in the property, treat the law as being as stated by Page Wood, V.-C., in Wilks v. Williams, and as applied by the Court of Common Pleas in Cropton v. Davies, and we should, I think, decide this case in accordance with it.

It was suggested during the argument that there is in the will in question no devise over in the event of the appellant dying before attaining the age of twenty-one years, but there is no foundation for the suggestion. The provision that in case he should die before arriving at that age the trustee shall dispose of the lot "as she is hereinafter directed to dispose of the residue of my estate" is clearly a gift over of the beneficial interest in the lot to the persons who are to share in the distribution of the residuary estate.

I would, therefore, substitute for the declaration which has been made a declaration that, in the events that have happened, the appellant is entitled to the whole estate and interest of the testatrix in the house and lot mentioned in the second paragraph of the will.

The appellant also contends that, owing to the death of Margaret Brimacombe in the lifetime of the testatrix, the gift to her in trust contained in the last paragraph of the will has lapsed, and that there is an intestacy as to it; but that is clearly not so.

Where a devisor appoints a trustee who dies in the testator's lifetime, the trust is not thereby defeated, but fastens on the conscience of the person upon whom the legal estate has devolved, and in the case of an imperative power which partakes of the nature of a trust the Court protects a *cestui que trust* from the failue of the donee of the power, as it would do from the failure of any other trustee: Lewin on Trusts, 12th ed., pp. 1073-4; Brown v. Higgs (1803), 8 Ves. 561, 574; Attorney-General v. Lady Downing (1767), Wilmot 1, 23.

"When there appears a general intention in favour of a class, and a particular intention in favour of individuals of a class to be selected by another person, and the particular intention fails, from that selection not being made, the Court will carry into effect the general intention in favour of the class:" per Lord Cottenham in Burrough v. Philcox (1840), 5 Myl. & Cr. 72, 92.

Where, as in this case, it has become impossible, owing to the death of the trustee in the lifetime of the testatrix, to make the division of the residue as the testatrix by the fourth paragraph of the will directs, the Court divides the subject of the gift equally between the *cestuis que trust* or the objects of the power: Jarman on Wills, 6th ed., p. 613.

As Margaret Brimacombe died in the libetime of the testatrix, the gift to her of a share of the residue lapsed; she and the grandchildren of the testatrix did not form a class: Kingsbury v. Walter, [1901] A.C. 187; In re Venn, [1904] 2 Ch. 52. . . . In re Chaplin's Trusts (1863), 33 L.J.N.S. Ch. 183 . . .; In re Allen, Wilson v. Atter (1881), 29 W.R. 480, 44 L.T.R. 240; In re Featherstone's Trusts (1882), 22 Ch. D. 111, 120.

My conclusion on this branch of the case is, that the residue is divisible equally between the grandchildren of the testatrix who survived her and Margaret Brimacombe, and that there is an intestacy as to the latter's share.

The order appealed from provides that the costs of all parties "be paid out of the funds of the estate"—which means, I take it, that the burden of them is to fall on the residuary legatees.

As the main contention has been as to the effect of the devise to the appellant, the costs throughout should fall upon him and the property devised to him, and I would substitute for the order that has been made as to costs an order so providing. The appellant has failed in his contention that the residuary bequest has lapsed, although he has succeeded to the extent that it will be declared that the bequest of a share of it to Margaret Brimacombe has lapsed, and there is no injustice in leaving him and the property which he takes under the provisions of the second paragraph of the will to bear the costs of the litigation. The administrators and the Official Guardian will of course have their costs between solicitor and client.

Judgment below varied.

APRIL 26TH, 1915.

*MEAGHER v. MEAGHER.

Will—Construction—Trust—Beneficial Estate for Life Given to Trustees—Survivorship—General Power of Appointment over Corpus—Right of Trustees to Appoint to themselves.

Appeal by the defendant John Joseph Meagher from the judgment of LENNOX, J., 6 O.W.N. 361, in so far as it declared the true construction of clause 5 of the will of Thomas Meagher, deceased.

By clause 1 of the will, the testator, for the purpose of carrying out the trusts contained in the will, gave, devised, and bequeathed all his estate, real and personal, unto his daughters Mary Ann Meagher and Margaret Ellen Meagher upon trust: (2) to pay debts, etc.; (3) to pay $100 for masses; (4) to pay each of his grandchildren $100; (5) "to hold all my property in lots 8 and 9 . . . together with all stock crops . . . and personal property thereon for my said daughters Mary Ann Meagher and Margaret Ellen Meagher for themselves and to make such disposition thereof from time to time among my

children or otherwise as my said daughters decide to make they my said daughters in the meantime to have all the rents and profits therefrom."

By clause 6, the testator desired his trustees to sell a certain farm, giving his son Michael the first right of purchase, and to divide the proceeds of sale between his sons Michael and James equally.

By clause 7, he directed that no part of his real estate should be mortgaged.

By clause 8, he desired his trustees to sell and convert all the rest and residue of his estate and to divide the proceeds in equal shares among themselves and all his other children.

By clause 10, he appointed his trustees executrices of his will.

LENNOX, J., held that Mary Ann Meagher and Margaret Ellen Meagher took beneficially and absolutely the property mentioned in clause 5.

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

A. C. McMaster and J. H. Fraser, for the appellant and the respondents George Meagher and Thomas Meagher.

I. F. Hellmuth, K.C., and E. T. Coatsworth, for the respondents Mary Ann Meagher and Margaret Ellen Meagher.

E. C. Cattanach, for the Official Guardian.

The judgment of the Court was delivered by MEREDITH, C.J.O.:— . . . It is settled law that where property is devised or bequeathed, and the trustee is empowered or directed to dispose of it as he may deem best, without the object of the trust being further defined, the trust is void for uncertainty and the trustee does not take beneficially; and it is argued for the appellant that that is the case here, unless the word "otherwise" is used with reference to the time and not the objects of the disposition which is directed to be made; and that, if it is to be so read, the trust is for the benefit of all the children in equal shares. . . .

In my opinion, the appellant's contention is not entitled to prevail.

The whole of the testator's property is, no doubt, vested in the two daughters upon trust, but the purpose of the fifth clause

is to designate the persons who are to take beneficially the property mentioned in it. . . .

If the clause had ended with the names of the daughters, it would of course be clear that they took the whole beneficial interest in the property; and the words which follow may mean either that the two daughters individually and not as trustees are to make the disposition, or that the trustees are to make it in accordance with the directions of the two daughters as individuals and not as trustees.

The daughters are to have the property for themselves and to make such disposition of it from time to time among the children of the testator or otherwise as they may decide to make, and the former is, I think, the meaning of this provision, but it is immaterial which of these two views is the correct one, for in either case the disposition is to be made in accordance with the directions of the two daughters.

It is important to observe that there is a gift of the beneficial interest in the property to the two daughters. The trustees are "to hold" it "for my said daughters Mary Ann and Margaret Ellen Meagher," and the purpose for which the testator says they are to have it is "for themselves and to make such disposition . . ." and in this respect the case differs from Yeap Cheah Neo v. Ong Cheng Neo (1875), L.R. 6 P.C. 381, 390, 392. . . .

In my opinion, no trust as to the disposition of the beneficial interest in the corpus of the property is created. . . .

If it were not for the provision as to the two daughters being entitled to the rents and profits until the disposition should be made, I should have agreed with the learned trial Judge that the two daughters take beneficially and absolutely, but that provision is, I think, inconsistent with an intention that they should so take; and my opinion is, that the two daughters take beneficially for life, with a general power of appointment over the corpus. There is not much difference in the result between the two views, because, if my view is correct, the two daughters may make an appointment in their own favour, and so become entitled to the whole property. The power to appoint cannot be read as a power to appoint only among the children of the testator. The words "or otherwise," while they may refer to the time of making the disposition, also include the objects of the gift. . . .

[Reference to Yeap Cheah Neo v. Ong Cheng Neo, supra;

Gibbs v. Rumsey (1813), 2 V. & B. 294; Ellis v. Selby (1836), 1 Myl & Cr. 286; Buckle v. Bristow (1864), 10 Jur. N.S. 1095; Jarman on Wills, 6th ed., p. 902; Fenton v. Nevin (1893), 31 L.R. Ir. 381; Byne v. Blackburn (1858), 26 Beav. 41, 44.]

If, as I think, the two daughters are given a power to make such disposition among the testator's children or otherwise as they may think fit, the power is a general one, and may be exercised by appointing to themselves: Farwell on Powers, 2nd ed., p. 8.

For these reasons, I would vary the judgment of the learned trial Judge by substituting for the declaration which it contains as to the true construction of clause 5, a declaration that the respondents Mary Ann Meagher and Margaret Ellen Meagher are entitled beneficially to an estate for the lives of themselves and the survivor of them in the property mentioned in clause 5, with a general power of appointment over the corpus, giving them the right to appoint either to themselves or to any other person as they may think fit.

In other respects the judgment should be affirmed and the appeal dismissed, and the appellant should pay the costs of the appeal.

Judgment below varied.

APRIL 26TH, 1915.

RE FRANKER AND BARTLEMAN.

Mines and Minerals—Land Staked out and Recorded as Mining Claim—Right to Stake out and Record as Quarry Claim—Abandonment or Forfeiture—Discovery of Mineral in Place—Mining Act of Ontario, R.S.O. 1914 *ch.* 32, *secs.* 34, 118.

Appeal by Bartleman from a decision of the Mining Commissioner dated the 4th February, 1915.

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

H. E. Rose, K.C., for the appellant.

No one appeared for Franker, the respondent.

The judgment of the Court was delivered by MEREDITH, C.J.O.:—The question for decision is as to the right to stake out and record as a quarry claim land already staked out and recorded as a mining claim, and not lapsed, abandoned, cancelled, or forfeited.

The right to stake out and record a quarry claim is conferred by sec. 118 of the Mining Act of Ontario, R.S.O. 1914 ch. 32. The right is to stake out and record "as a mining claim, to be called a quarry claim, lands containing any natural bed, stratum, or deposit of limestone, marble, clay, marl, building stone, sand or gravel" (sub-sec. 1), and by sub-sec. 1 and sub-sec. 2 certain exceptions are made as to the lands which may be so staked. By sub-sec. 3 it is provided that a quarry claim shall not interfere with the right of a licensee to stake out a mining claim on the lands embraced in the quarry claim, and where a mining claim is so staked out the respective rights and duties of the licensee and of the holder of the quarry claim are defined; and by sub-sec. 4 it is provided that, except as provided in sub-sec. 3, the rights and duties of the holder of a quarry claim shall be the same as those of the holder of a mining claim, and that all the provisions of the Act as to mining claims shall, except where inappropriate, apply to quarry claims.

Having regard to these provisions, and especially to the fact that the quarry claim is to be staked out and recorded as a mining claim, and to the potential rights of the holder of a mining claim to obtain a patent of the land embraced in his claim, and the provisions of sec. 34 of the Mining Act, it is clear, I think, that where land is under staking or record as a mining claim there is no right to stake out or record a quarry claim upon any part of it, unless the mining claim has lapsed or been abandoned, cancelled, or forfeited; and, indeed, that section, as I read it, expressly so provides.

In addition to this, the fact that by sec. 118 it is provided that the staking out of a quarry claim is not to interfere with he right of a licensee to stake out a mining claim on the land embraced in the quarry, indicates clearly, I think, that the framer of the Act recognised that the effect of sec. 34 is what I take it to be; and, therefore, inserted the provision I have just mentioned, to do away with the operation of it to the extent of permitting a mining claim to be staked out on lands already embraced in a quarry claim, but made no provision for the converse case, and thus left it to the operation of sec. 34.

The appeal should be allowed and the decision of the Commissioner reversed, and there should be substituted for it an order dismissing the application of the respondent for the recording of the quarry claim, with costs, and the costs of the appeal should be paid by the respondent.

Since the foregoing was written, the respondent has applied to be heard and has put in a written argument, the main purpose of which is to shew that the appellant had not made a discovery of mineral in place, or valuable mineral in place, within the meaning of the Act, and was therefore not entitled to stake out or record the mining claim which he has been allowed to record.

It is a sufficient answer to this contention that there is no appeal by the respondent from the decision of the Commissioner in this regard; but, if there were, I see no reason for differing from the conclusion of the Commissioner, which was based not only upon the oral testimony but also upon a view taken by the Commissioner of the locus in quo.

APRIL 26TH, 1915.

*DOYLE v. FOLEY-O'BRIEN LIMITED.

Mines and Minerals—Injury to Miner—Explosion of Charge in Drilled Hole—Master and Servant—Negligence—Defective System—Evidence—Statutory Duty of Mine-owner—Mining Act of Ontario, R.S.O. 1914 *ch.* 32, *sec.* 164—*Trial of Action—Refusal of Adjournment — Discretion — Expert Testimony—Contributory Negligence—Damages.*

Appeal by the defendants from the judgment of CLUTE, J., 7 O.W.N. 780.

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

H. E. Rose, K.C., and G. H. Sedgewick, for the appellants.

F. J. Foley, for the plaintiff, respondent.

The judgment of the Court was delivered by GARROW, J.A.:—

. . . The learned Judge found that negligence on the part of

the defendants, in a failure to follow the provisions of the Mining Act and the rules therein contained for the safety of the miner, had been established; and with that conclusion I agree.

There were apparently two shifts of men employed, a day and a night; and in each shift there were four men in addition to the engineer. There was no foreman or overseer or other person in charge to whom the report called for by rule 14 of sec. 164 of the Mining Act, in the case of an unexploded hole, could be made. A blackboard to contain such a report had, however, been recently installed, but no chalk with which to write the report had been supplied, with the result that there was no notification of the unexploded hole by the shift going off work after the blast on Saturday night to the succeeding shift, as the statute clearly intends there shall be. The excuse offered is, that the staff of operatives was so small as not to require such officers as a mine captain and shift bosses, which is an excuse perhaps, but not, in my opinion, an answer. The Act does not prescribe a minimum of employees; the mine-owner may employ as many or as few as he pleases; but, whether he employs many or few, he must carry on his operations in conformity with the provisions of the Act designed for the safety of the miner, which are as applicable to the case of four employees as of four hundred. The essential thing to be accomplished is to give to the incoming shift due warning of the danger from unexploded holes, and the giving of such warning cannot be avoided by a failure to appoint the officers through whom, under the rules, such warning is intended to be given. If there are no such officers, then other provision for giving the necessary warning must be made in order that the provisions of the Act may, at least substantially, be complied with. Here, as the evidence shews, the warning would have been effectually given if placed upon the blackboard, which would have been done if the necessary chalk had been supplied, a trifling, but, as it turns out, an all-important, omission.

On the argument before us, counsel for the defendants, in addition to contesting the defendants' negligence in failing to give warning, also contended: (1) that the adjournment asked for at the trial should have been granted; (2) that the evidence discloses that the plaintiff's injury could not have been caused by striking an unexploded hole, but was caused by striking loose powder, for which the defendants were not responsible; (3) that the plaintiff was guilty of contributory negligence; and (4) that the damages are excessive.

The adjournment asked for was, as stated by counsel at the trial, for the purpose of obtaining the evidence of experts as to the action of dynamite; and the reason given for not having come to trial prepared with such evidence was because the defendants had not observed or become aware until the trial that the unexploded hole was found, after the explosion which injured the plaintiff, still to contain a quantity of unexploded powder—a circumstance which, it was argued, was entirely inconsistent with the plaintiff's contention. . . . Under the circumstances . . . stated by the learned Judge, it appears to me that he exercised a wise discretion in refusing the application, with which we ought not to interfere.

The expert evidence, to obtain which the adjournment was asked, was of course intended to bear upon the second objection; but, even without such evidence, the learned counsel for the defendants contended with great earnestness, upon the evidence which was given, that the accident could not have happened as described by the plaintiff. The point of his contention was apparently that the explosion would, in the ordinary course, have consumed the whole of the explosive. Such a contention, however, implies a constancy in the action of the explosive, dynamite, which was being used, which is not consistent with the evidence. There is not very much of it, it is true, and none of it what might be called strictly "expert," but it is the evidence of working men of actual experience in the work of mining, and none the less valuable because of that. . . . The inference is strong, satisfactorily strong, it seems to me, that it was with the unexploded hole, and not with loose powder in the muck, that the plaintiff came in contact on the occasion in question, and that the partial explosion which the witnesses describe was the result of such contact.

Not much need be said upon the third question. The only negligence on the plaintiff's part suggested by counsel really is that he did not see the hole and that it was unexploded. This takes little account of the surroundings, it seems to me. The explosion of Saturday night had left the floor covered deep with débris, or muck, as it is called. The only light in the drift was derived from three or four candles. Assuming that every one was doing as the plaintiff was—his duty—he had no reason to apprehend the danger which overtook him. He had looked at the blackboard before descending, and had found all clear there. He did not actually see the hole. It may have been, and indeed

probably was, covered over with the dust or small débris of the Saturday's explosion. Altogether the circumstances do not suggest to me any evidence of negligence on the plaintiff's part.

Nor does the question of the amount of damages call for lengthened remark. The plaintiff is a young man, 29 years of age. He was earning a good wage, and had his life practically all before him. As the result of this injury, caused by the defendants' negligence, he has been put to expense and made to suffer much pain, has lost one eye and had the sight of the other impaired. His career is thus practically ended, for there are not many satisfactory occupations open to one so handicapped. All things considered, I am not at all convinced that the amount awarded ($3,000), while liberal, perhaps, as verdicts go, is excessive.

Appeal dismissed with costs.

APRIL 26TH, 1915.

EVERTON v. KILGOUR.

Negligence—Injury to Road Engine—Defective Condition of Private Road—Findings of Jury—New Trial Directed because Negligence Found not Connected with Injury—Connection Found by Jury at New Trial—Question of Negligence Raised on Appeal—Res Adjudicata—Evidence.

Appeal by the defendant and cross-appeal by the plaintiff from the judgment of MIDDLETON, J., upon the findings of a jury, in favour of the plaintiff, in an action for damages for injury to the plaintiff's road engine, in the circumstances stated below.

The appeal and cross-appeal were heard by MEREDITH, C.J. O., MACLAREN and MAGEE, JJ.A., and RIDDELL, J.

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

T. N. Phelan, for the plaintiff

The judgment of the Court was delivered by RIDDELL, J.:—The plaintiff, on the invitation of the defendant's servant, took his road engine, with two following "tows," upon the private road of the defendant. The road was, as found by the jury, defective; and consequently the engine fell over a bank and was damaged.

The case was tried before Mr. Justice Sutherland and a jury on the 19th May, 1914, with the result that the plaintiff had a verdict for $500. An appeal was taken, and came on for hearing on the 29th October, 1914. The majority of the appellate Court were of opinion that, while the jury found negligence on the part of the defendant, that negligence was not found to have caused the accident; and they considered that the defect was not helped out by the charge to the jury. . . . All the members of the Court were of opinion that, if the negligence found had been found to have caused the accident, the plaintiff's verdict must stand. But, in the view taken by the majority of the Court, a new trial was ordered.

The new trial was had on the 27th January, 1915, before Mr. Justice Middleton and a jury, resulting in a verdict in favour of the plaintiff for $440. The learned trial Judge directed judgment to be entered "for $440 and costs on the County Court scale without set-off."

Both parties appeal: the defendant generally on law and fact; the plaintiff (1) to increase his damages, and (2) in any case for costs on the higher scale.

Upon the argument, we dismissed the cross-appeal; and it remains to dispose of the defendant's appeal.

The facts, the evidence, and the findings are substantially the same upon the present appeal as in the former. The defect in the findings on the former trial is healed on this. The Divisional Court which heard the former appeal was of opinion that the plaintiff would have been entitled to judgment had the connection between the condition of the road and the casualty been established, and sent the case back that that nexus might be found. If the Court then had thought that, even if that nexus had been found, the plaintiff could not recover, the Court must have dismissed the action; it never would have put the defendant to the cost and annoyance of trying out an immaterial question, but would have given him the judgment he was entitled to: Downs v. Fisher (1915), ante 257; Kettle v. Dempster (1913), 5 O.W.N. 149.

I think that the matter is res adjudicata, and the defendant cannot now succeed on any such ground.

If the merits are gone into, there is ample evidence to support the findings of the jury, and they are ample to support the judgment..

The defendant's appeal should also be dismissed.

Costs to follow the result.

APRIL 26TH, 1915.

*McCUNE v. GOOD.

Vendor and Purchaser—Agreement for Sale of Land—Absence of Title in Vendor—Knowledge of Purchaser — Nominal Damages—Costs.

Appeal by the plaintiff from the judgment of BRITTON, J., after trial of the action and counterclaim without a jury, dismissing the action with costs to the defendant Mary Good and without costs to the defendant James Good, and awarding the defendant Mary Good judgment for $500 on her counterclaim, with costs.

The action was for specific performance of an agreement for the sale of land in the city of Toronto to the plaintiff, or for damages; and the counterclaim was for occupation rent.

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

W. A. Henderson, for the appellant.

G. C. Campbell, for the defendant Mary Good, respondent.

G. W. Holmes, for the defendant James Good, respondent.

The judgment of the Court was delivered by HODGINS, J.A.:—The appellant could not succeed against the respondent Mary Good, and practically abandoned his appeal as to her on the hearing. It will, therefore, be dismissed with costs.

As regards the respondent James Good, the contention is, that he is liable for substantial damages owing to loss of a bargain, or at all events for some damages.

The appellant at the trial admitted, both personally and by his counsel, that before the lease was signed he knew that the respondent Mary Good owned the property. The evidence is not satisfactory as to how the option came to be in the lease, and it so struck the learned trial Judge. But enough appears to shew that the respondent James Good knew about it afterwards, and it was not repudiated by him. Indeed, his present attitude is, that he is quite willing that the option should be carried out by his wife. She, however, refuses, and has done so all along.

The respondent James Good has broken his contract, and the question is, what damages flow from that breach in favour of the appellant.

The general rule was considered by this Divisional Court in Ontario Asphalt Block Co. v. Montreuil (1913), 29 O.L.R. 534, and is . . . stated at pp. 545, 546. . . .

Both parties contracted with the knowledge that the respondent James Good lacked the ownership necessary to complete the transaction and that he had no right to get the title. In other words, both knew that the option was valueless when given, and that, if accepted before any change had occurred which would vest the property in James Good, it could not be carried out.

The acceptance, therefore, was the formal completion of a contract with the knowledge that it was completely nugatory so far as the property was concerned, giving at most a right only to those damages which would naturally flow from a breach of such an agreement in the contemplation of both of the parties to it.

Although in Robinson v. Harman (1848), 1 Ex. 850, evidence that the purchaser knew, when he entered into the bargain, that the vendor had no title, was rejected by Lord Denman, C.J., the defendant having in pleading admitted the contract, on the ground that the proposed evidence was inconsistent therewith, and the rejection was upheld by the Court of Exchequer, yet the decision in Bain v. Fothergill (1874), L.R. 7 H.L. 158, appears to protect vendors in all cases of want of title: Rowe v. School Board for London (1887), 36 Ch.D. 619, 625; Morgan v. Russell & Sons, [1909] 1 K.B. 357. The evidence, whether admissible or not (see In re Jackson and Haden's Contract, [1906] 1 Ch. 412, 425), would certainly be received in an action for deceit: Gray v. Fowler (1873), L.R. 8 Ex. 249, 282.

In an ordinary sale and purchase agreement, the damages would not include anything in respect of what had occurred after discovery of the defect or absence of title: Mayne on Damages, 8th ed., p. 240; Pounsett v. Fuller (1856), 17 C.B. 660.

Applying that rule, there would seem to be no right to recover even the ordinary damages, such as the expenses incurred by the purchaser in searching the title, etc.—much less damages for loss of profit on a resale. There is no definite evidence that the title was ever really searched, and the letter of the appellant's solicitor of the 4th February, 1914, shews that whatever was done in that direction took place in advance of the acceptance of the option on the 11th April, 1914.

In either view, therefore, those expenses are not recoverable. But nominal damages may, I think, be recovered, because the respondent James Good left the option standing after he knew it was in the lease, and neither repudiated its insertion nor attempted to withdraw it. The other party had the right to sue for breach of contract after acceptance. But I cannot think that those damages should carry the whole costs of an action for specific performance against this respondent, which the appellant must have known was bound to fail. It is perhaps reasonable to allow the appeal as against the respondent James Good to the extent of substituting for the judgment appealed against, one giving him $5 damages and $25 as costs of an action for nominal damages, which would probably not have been contested. The circumstances do not warrant imposing any further payment on this respondent for the costs of the appeal.

Judgment accordingly.

APRIL 26TH, 1915.

*RE OTTAWA AND NEW YORK R.W. CO. AND TOWNSHIP OF CORNWALL.

Assessment and Taxes—Railway Bridge Spanning Navigable River—Liability to Assessment—Assessment Act, R.S.O. 1914 ch. 195, sec. 4, sub-sec. 3—"Structure on Railway Lands."

Appeal by the Ottawa and New York Railway Company, the New York and Ottawa Railway Company, and the New York Central Lines, from an order of the Ontario Railway and Municipal Board, dated the 7th October, 1914, confirming the assessment of that part of the appellants' bridge over the river St. Lawrence which lies within the township of Cornwall.

The question for decision was as to the liability of the bridge to assessment under the Assessment Act, R.S.O. 1914 ch. 195. The bridge was built by the Ottawa and New York Railway Company, which was incorporated by an Act of the Parliament of Canada; the part of it lying within the State of New York was built by an American corporation, the Cornwall Bridge Company; and, in order that the two sections of it might be operated uniformly, the whole of the bridge was leased to a

holding company incorporated in the United States, the New York and Ottawa Bridge Company.

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

W. L. Scott, for the appellants.

G. I. Gogo and J. B. Smith, for the Corporation of the Township of Cornwall, respondent.

The judgment of the Court was delivered by MEREDITH, C.J.O. (after a short statement of the case as above and setting out sec. 47, sub-secs. 1, 2, 3, and 5, of the Assessment Act) :— The view of the Board was, that the river St. Lawrence is not a highway within the meaning of sec. 47; and that, as, by the interpretation section of the Assessment Act, "land" and "real property" include "buildings or any part of any building and all structures, machinery, and fixtures erected or placed upon, in, over, under, or affixed to land," the bridge is land and real property within the meaning of sec. 47, and does not fall within clauses (a), (b), or (c) of sub-sec. 2, but within clause (d), and is assessable as provided by that clause.

The Board was also of opinion that the bridge is not a structure on railway lands within the meaning of sub-sec. 3; and that, it is said, was admitted by counsel for the appellants.

Upon the argument before us, counsel for the appellants contend that the bridge is on railway lands within the meaning of sub-sec. 3, and that it is also a bridge over a highway merely crossed by the line of the railway, within the meaning of clause (c) of sub-sec. 2, and is therefore not liable to assessment.

As appears from the plan filed, the bridge on the Canadian side rests upon an abutment built on the railway company's land adjoining the Cornwall canal, which is crossed by a drawbridge. There is then a cantilever span crossing the north channel of the river St. Lawrence, and resting at the south end upon a pier built on Cornwall Island, which is or forms part of an Indian Reserve, and lies between the north and south channels of the river. There are three piers supporting the drawbridge, one at the north end of the canal, another about the centre of it, and the third at its south end. The cantilever span crossing the north channel is supported by two piers built into the bed of the channel, a pier at the southerly end of the channel and a pier at the south end of the canal. The railway is then carried across the island for about the northerly one-third of the distance in a cutting, for the next or middle one-third on practi-

cally level ground, and for the southerly one-third on a solid earthen embankment with one wooden trestle of about thirty feet in length across a cattle-pass, and at the southerly end of the island there is a pier, upon which rests the northerly end of a bridge which is built over the southerly channel of the river.

The erection of the bridge having been authorised by the Parliament of Canada, it must be assumed for the purposes of the case that it is a lawful structure, that the railway company is entitled to maintain it as it has been constructed, and that its occupation of the soil by the piers and by the superstructure, in so far as the latter occupies the land of the Crown, is a lawful occupation; and, that assumption being made, the bridge is, in my opinion, a structure on railway lands within the meaning of sub-sec. 3.

The Crown was the owner of the soil and freehold forming the bed of the river St. Lawrence and of the islands, and that it could grant the right to build the piers there is not open to question, nor is it open to question that, as the ownership of the soil extends upwards to an indefinite extent (cujus est solum, ejus est usque ad coelum), a grant of the right to construct and maintain the bridge is a grant of that part of the soil occupied by it; and, therefore, for the reasons already given, the railway company is the owner of so much of the soil as is occupied by the superstructure as well as by the piers, and it follows that the bridge is a structure on railway lands within the meaning of sub-sec. 3. . . .

[Reference to Co. Litt. 48; Sheppard's Touchstone, 8th ed., p. 206; 1 Preston on Estates, p. 8; Iredale v. Loudon (1908), 40 S.C.R. 313; Consumers Gas Co. v. City of Toronto (1897), 27 S.C.R. 453; City of Toronto v. Consumers Gas Co. (1914), 32 O.L.R. 21.]

It may be that this land, not including the bridge upon it, is assessable under clause (a) of sub-sec. 2 as part of the roadway or right of way, but that is not the way in which it has been assessed, and, if assessable, there are no data for determining at what sum it should be assessed.

The contest throughout has been confined to the single question whether or not the bridge itself is liable to assessment; and as, in my opinion, it is not, the appeal should be allowed and the assessment roll should be amended by striking out the assessment in respect of it.

Having come to this conclusion, it is unnecessary for us to determine the other question raised by the appellants.

Appeal allowed.

HIGH COURT DIVISION.

HODGINS, J.A., IN CHAMBERS. APRIL 26TH, 1915.

HUGHES v. CORDOVA MINES LIMITED.

Mortgage — Consent Judgment for Immediate Sale — Stay of Operation pending Outcome of Class Action to Determine Validity of Mortgage—Validity Upheld by Supreme Court of Canada—Pending Application for Leave to Appeal to Privy Council—No Appeal as of Right—Application for Further Stay Granted upon Onerous Terms—Security—Payment into Court—Rules 369, 370—*Privy Council Appeals Act, R.S.O.* 1914 *ch.* 54—*Mortgagors and Purchasers Relief Act,* 1915, *sec.* 4(3).

Application by the defendants, in this mortgage action, to stay the sale of their real estate and property, under a consent judgment for immediate sale, dated the 30th April, 1913, until after an application for leave to appeal from the judgment of the Supreme Court of Canada in Northern Electric and Manufacturing Co. Limited v. Cordova Mines Limited has been heard and disposed of by the Judicial Committee of the Privy Council.

J. M. Clark, K.C., and W. H. Price, for the applicants.
W. N. Tilley, for the plaintiffs.

HODGINS, J.A.:—It appears that the operation of the judgment in this action was in some way stayed by injunction pending the outcome of a class action between the Northern Electric and Manufacturing Company Limited, as plaintiffs, against the present plaintiffs and defendants, and also Peter Kirkegaard, as defendants, involving the validity of the mortgage in question. On appeal to the Supreme Court of Canada, a judgment has recently been pronounced holding the security good.

The application for leave to appeal is to be made in this latter action, and this motion proceeds upon the assumption that, if leave is given, and the appeal results favourably to the present defendants, the consent judgment in this action will necessarily fall to the ground.

If the appeal was of right, there is sufficient reason to exercise a discretion in granting the stay. Naturally, a sale, while

an appeal is pending as to the validity of the mortgage, would be improper. And the fact that the appeal is in another action does not seem to affect the matter: Wilson v. Church (1879), 11 Ch. D. 576, 12 Ch. D. 454.

There is here, however, no appeal as of right such as is necessary to make it the duty of the Court to act in preserving the property in statu quo. In Wilson v. Church, 12 Ch. D. 454, Mr. Benjamin, Q.C., in opening the case, stated that "the appeal in this case is a matter of right, no leave being necessary." And the undoubted right of appeal is made the basis of the decision; and that was so in the case of Polini v. Gray (1879), 12 Ch. D. 438, as I understand it. Our Rules 369 and 370 are similar in character to the English Rule relied on in the latter case.

Here no appeal is sought in this case, and in the other action leave is necessary. The mortgage, according to the Supreme Court decision, is a good and valid security and is in arrear; and, even under the judgment of the Second Divisional Court, it stands for an unascertained amount equal to the debts paid off by it. There is also much doubt whether the mortgage and consent judgment can be impeached in the class action by the present applicants, who are only defendants therein.

Under these circumstances, can a stay be granted except on the terms usually imposed in mortgage actions and on appeals to the Privy Council?

The usual rule is to require payment into Court or security for the mortgage-money when a mortgagee is restrained from proceeding upon his mortgage. The present motion is for a stay until the defendants, either in their own right or through the class represented by the plaintiffs in the other action, who are not in fact joining in this motion, can secure leave to appeal. Under the circumstances, the plaintiffs ask that their proceedings should not be stayed except upon the usual terms in mortgage actions. Those terms would be that the applicants should give security against waste, for use and occupation, and, in appropriate cases, for the deficiency after a sale (Privy Council Appeals Act, R.S.O. 1914 ch. 54). There is in the consent judgment no order against the applicants to pay any deficiency. But this is an ordinary mortgage action; and, I think, our Rule 483 may properly be read with the judgment so as to put the applicants in the same position, on this application at all events, as if the judgment contained such a provision.

I may point out that under the Mortgagors and Purchasers Relief Act, 1915, if the interest, taxes, insurance, etc., are paid,

there will be an automatic stay (sec. 4, sub-sec. 3), subject to the right of the plaintiffs here to apply under that Act.

While I am anxious to help the applicants in view of the payments they have already made, and regret that no arrangement has been made between the parties, I do not think, where every one is insisting on his rights, that I can, after protracted litigation, do otherwise than accede to the plaintiffs' request, and that I have no discretion to abridge what I think is their right.

An order may go staying all proceedings under the judgment, on security being given against waste, for use and occupation, and for payment of the estimated deficiency, of $15,000, or, in the alternative, on payment into Court of the overdue interest and evidence to the satisfaction of the Clerk in Chambers that the taxes and insurance have been paid; this within one week.

The applicants must undertake to bring their motion for leave to appeal before the Judicial Committee in July.

The costs will be to the plaintiffs in any event of the appeal.

BOYD, C. APRIL 26TH, 1915.

*J. EDWARD OGDEN CO. LIMITED v. CANADIAN EXPANSION BOLT CO. LIMITED.

Trade Mark—Infringement—Invented Word—Initials of Company's Name—Use of Like Combinations by Others in same Business—Validity of Registration — Right to Impeach — Confusion from Similarity of Names — Passing-off — Evidence.

Action to restrain the defendant company from using the word "Cebcol" in connection with the sale of its goods, and for damages and an account of profits.

The two companies (plaintiff and defendant) dealt in expansion bolts, and the plaintiff company charged that the defendant company by the use of the word "Cebcol," as applied to its products, was infringing the plaintiff company's registered trade mark "Sebco," and was causing the confusion of the two companies' goods by intending purchasers—passing off its goods as the plaintiff company's.

Both words were made up of initials of names. The plaintiff company's predecessor was an American company called the

"Star Expansion Bolt Company," i.e., SEBCO, and the right to use the name in Canada was assigned to the plaintiff company. The defendant company adopted "Cebcol" from its own initials —C E B Co. L., or Canadian Expansion Bolt Company Limited. The plaintiff company registered its mark before action, and the defendant company not till after action.

The action was tried without a jury at Toronto.

J. F. Edgar, for the plaintiff company.

N. W. Rowell, K.C., for the defendant company.

BOYD, C.:—. . . Looking at the genesis of both trade words, and giving credence to the organiser of the defendant that he was not aware of the use in Canada of the word SEBCO when he put forth the initials of his company as a trade mark, I find myself unable to say that what was done was anything more than an honest and fair use of the initials of this company's own name to call the attention of the public interested in the output of this company's trade as being expansion bolts made or furnished by the defendant, and not the output or product of any other concern. . . .

Dealing with the question of the trade marks per se, and applying the test suggested by some Judges, when the two are not absolutely identical, but similar—that is, place the words side by side and test by inspection of the eye whether one is an obvious imitation of the other—so far as the view goes, I should not conclude, in the absence of evidence, that an ordinary dealer in these goods or an ordinary purchaser of them would be confused. . . . Tested phonetically, there is more likelihood of confusion, unless regard is had to the origin and the "C" is given the hard sound which is heard in "Canadian." . . .

I question whether the plaintiff company's trade mark would now be registered, as a valid and distinctive name, in view of the recent decisions in In re R. J. Lea Limited's Application, [1913] 1 Ch. 446, 452, and Registrar of Trade Marks v. W. & G. Du Cros Limited, [1913] A.C. 624, 632. . . . As pointed out by Farwell, L.J., in In re Applications of W. & G. Du Cros Limited, [1912] 1 Ch. 644, 661: "It is the common practice of tradesmen and manufacturers to put the initials of their firms on their goods, their invoices, and letter paper, and to use such initials in various modes." . . . See also Slazengers Limited's Application (1914), 31 R.P.C. 501, 507.

There were, when the plaintiff company's trade mark was

registered, dozens of companies using the descriptive words "expansion bolts" in their corporate names. . . . To all these companies the controlling initials E B C O were common property as indicative of the business they were engaged in. By the use of these public letters, with the "S" for "Star" prefixed, the plaintiff company claims to have secured a monopoly in its favour, as against other possible prefixes and initial letters of the various firms who were then making and dealing in or might hereafter deal in expansion bolts.

Assuming that the trade mark of the plaintiff company is to be treated as valid, then the trade mark registered by the defendant, pending action, of C E B C O L, should also be treated as valid, though I have my doubts as to the worth of either. Upon this part of the case and generally as to other issues, I would cite Coombe v. Mendit Limited (1913), 30 R.P.C. 709; Pope Electric Lamp Co. Limited's Application (1911), 28 R.P.C. 629; and In re Horsburgh (1878), 53 L.J.N.S. Ch. 237 (note), a decision of Jessel, M.R. . . .

As a matter of fact, the defendant company has not used the word attacked, apart from explanatory context. . . .

The public interested is an intelligent one—not likely to be deceived as to what is ordered or what is received—and it is of great significance that no single one of this constituency is called upon to give evidence or to prove actual mistake or misleading or confusion. In the case of honest traders accused of passing off their goods as the goods of the rival complainant, the rule of the Courts is, that it lies upon the plaintiff to make out beyond all question that the goods are so got up as to be calculated to deceive, and that is a matter of proof by witnesses: Payton & Co. v. Snelling Lampard & Co., [1901] A.C. 308, 310; Claudius Ash Sons & Co. Limited v. Invicta Manufacturing Co. Limited (1912), 29 R.P.C. 465 (H. of L.). . . . Johnson v. Parr (1873), Russell Eq. Dec. (Nova Scotia) 98, 100.

At the last moment, a piece of what is called "trap-evidence" was procured by the plaintiff; but that single exceptional example emphasises the lack of any of the usual evidence given to prove deception in passing-off cases. The existence of such a scrap of evidence does not prevent the Court from dismissing with costs an action not otherwise supported: Rutter & Co. v. Smith (1900), 18 R.P.C. 49. I have no doubt that the explanation of the sale is that it was a blunder. . . . : Turton v. Turton (1889), 42 Ch. D. 128, 135. . . .

The whole stress of the conflict centres around the sale of a

comparatively small part of the plaintiff company's business, i.e., the screw anchors; and I think that the attack made fails.

As to impeaching the plaintiff company's trade mark in this action by the defendant company, that is permissible. The law is settled, on the existing statutes as to trade marks, that it is open for the defendant to impeach directly by his defence the validity or inefficiency of the registered trade mark; and the whole situation was fully dealt with by Moss, J.A., in Provident Chemical Works v. Canada Chemical Manufacturing Co. (1902), 4 O.L.R. 545, 546. This decision was approved and followed by Burbidge, J., in the Exchequer Court of Canada, in Spilling v. O'Kelly (1904), 8 Ex. C.R. 426.

Upon the whole contention, my judgment is against the plaintiff company; and the action should be dismissed with costs.

SUTHERLAND, J., IN CHAMBERS. APRIL 27TH, 1915.

RE HOUGH LITHOGRAPHING CO. LIMITED.

Company—Winding-up —.Petition for Order under Dominion Winding-up Act after Liquidation Begun but not Completed under Ontario Companies Act — Interest of Unsecured Creditors—Investigation of Stock Subscriptions—Costs.

Petition by a creditor of the company for a winding-up order under the Dominion Winding-up Act and amending Acts.

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

K. F. Mackenzie, for the company and the present liquidator.

SUTHERLAND, J.:—The petitioner . . . is a creditor to the amount of $221.

An affidavit in opposition to the motion is filed by one Norman G. Chambers, a chartered accountant, by which it appears that he was appointed liquidator under the provisions of the Ontario Companies Act, on the 15th February, 1915, since that date has acted in that capacity, has disposed of the assets of the company, and proceeded generally with the liquidation under the provisions of that Act. . . .

Upon the argument it was suggested by counsel that an at-

tempt was being made to sacrifice the interests of the unsecured creditors, and it was also suggested that it was very desirable, and in their interest, that an investigation should be made into the stock subscriptions.

Under the provisions of the . . . Ontario Companies Act, R.S.O. 1914 ch. 178, sec. 187 et seq., application may be made to the Court from time to time during the course of the liquidation. There can be no doubt that this company is insolvent. That Act, however, is more a shareholders' Act than a creditors' Act.

Upon the authorities, it seems plain that the applicant is entitled to the order asked: In re Crigglestone Coal Co. Limited, [1906] 2 Ch. 327.

In the material filed there is nothing to indicate what the attitude of the unsecured creditors is. The applicant is a creditor for only a small amount, and it may well be that considerable costs will be incurred as a result of the granting of the order, without any substantial good accruing.

In these circumstances, I am almost disposed to put the applicant upon some terms as to the payment of these costs should the result of the proceedings taken thereunder prove of no utility to the creditors. That may, however, be a matter for future consideration under the Winding-up Act, R.S.C. 1906 ch. 144, sec. 19: Re Belding Lumber Co. Limited (1911), 23 O.L.R. 255.

In the meantime the order will go as asked, and I may be spoken to as to the question of the provisional liquidator.

FALCONBRIDGE, C.J.K.B. APRIL 27TH, 1915.

O'BRIEN v. MOORE.

Contract—Interest in Land—Undertaking to Convey—Written Memorandum—Proof of Signature—Handwriting Experts—Statute of Frauds—Trustee—Fraudulent Breach of Trust—Tax Sale.

Action for specific performance of an agreement to convey to the plaintiff the defendant's interest in certain land.

The action was tried without a jury at Guelph.

R. L. McKinnon, for the plaintiff.

N. Jeffrey, for the defendant.

FALCONBRIDGE, C.J.K.B.:—The plaintiff was the owner of lot 29 in the 1st concession of Proton; he sold it to Short and Boomer in 1907 for $650, getting $25 cash and taking back a mortgage for $625. These mortgagors never paid anything on the mortgage.

In August, 1913, the plaintiff was advised by the treasurer of the County of Grey that the land had been sold for taxes on the 15th November, 1912, to the defendant, for $20. The plaintiff had been for many years on very friendly terms with the defendant, and on the 11th August, 1913, the plaintiff called on the defendant and shewed him the treasurer's letter. The plaintiff had the idea of taking an assignment of the defendant's certificate of sale from the treasurer and taking a tax-deed to himself, with a view of getting rid of the mortgagors (the aforesaid Short and Boomer), and thus saving the expense of a foreclosure. The defendant expressed himself to be satisfied, and the plaintiff said he would give him $10 over the $20. The plaintiff did pay the defendant $10 on account; and then, the plaintiff alleges, a certain memorandum (exhibit 6), endorsed on an envelope, was signed by the defendant. The defendant, asserting that the balance ($21, he says) was not paid in time, procured a tax-deed to be made to himself, dated the 17th April, 1914.

One of the crucial points of the evidence is whether the defendant did in truth sign this memorandum. The experts who were called—the manager of a bank, the deputy-treasurer of a county, and a deputy-postmaster, all of whom have in their various occupations to pass on signatures—were of opinion that the signature on exhibit 6 was that of the defendant. There was an admitted standard of comparison, and the plaintiff and defendant afforded specimens of their respective handwritings by using pen or pencil in Court. I have been trying cases of disputed handwriting for nearly 28 years, and I have no hesitation in finding that the signature on exhibit 6 is that of Charles Moore (the defendant), both on the sworn testimony and the testimony of my own eyes.

The defendant was a bad witness; . . . his brother John was a little, but very little, better. I disbelieve them both as

against the evidence of the plaintiff and the writing, wherever they are in conflict, and I would do so even without the writing. Their story about the plaintiff bringing out of his pocket an old soiled envelope, and a memorandum (not the one produced by the plaintiff) being written on . . . the side with the flap on it, is an absolute fiction. It is a very short story and easily learned by heart, so as to be absolutely cross-examination-proof.

Finding, as I do, all the facts in dispute in favour of the plaintiff, the only remaining consideration is as to the Statute of Frauds, which is pleaded by the defendant and strongly urged in argument as a defence, inasmuch as all the terms of the agreement did not appear in the memorandum. . . .

The Statute of Frauds was not made to cover fraud: Lewin on Trusts, 12th ed., p. 56; Snell's Equity, 16th ed., p. 481; Godefroi on Trusts and Trustees, 3rd ed., p. 210 et seq. The defendant is in the position of a trustee, and he is endeavouring to perpetrate a fraud upon the plaintiff. The balance of the money which the plaintiff was to remit did arrive later than the thirty days which, the defendant says, was the time within which it should be paid; but, on the defendant's own story, he got the $20, although I believe that he got it earlier than he said he did. But he neither sent it back nor intimated that he would not keep it.

When the plaintiff called on him on the 11th August, the defendant knew well that the plaintiff, failing to make terms with him, would go on to Owen Sound and redeem the lot; so he lulled his friend into security, with the intention, then formed, I believe, to steal his land. The statement of the Moores that the defendant was to keep for the plaintiff any money which the plaintiff might send to the defendant, instead of to Mr. Lucas, is a silly afterthought to try and account for the defendant not having returned the money. The receipt and retention by the defendant of the $20, without apparent objection, naturally had the effect of keeping the plaintiff from being alert to redeem within the year, or at least within the further period of 30 days allowed to an incumbrancer under the Assessment Act, R.S.O. 1914 ch. 195, sec. 171, or the corresponding section of 4 Edw. VII. ch. 23.

I find for the plaintiff, and order the defendant to convey to him all interest in the said land derived under the tax-deed or otherwise, with costs on the Supreme Court scale.

HODGINS, J.A. APRIL 28TH, 1915.

PARSONS v. TOWNSHIP OF EASTNOR.

Arbitration and Award — Motion to Set aside Award — Claim under Municipal Drainage Act, R.S.O. 1914 *ch.* 198*—Damages—Alleged Mistakes of Arbitrator in Fact and Law—Written Reasons of Arbitrator not Forming Part of Award —Mistake not Appearing on Face of Award—Jurisdiction to Set aside Award.*

Motion by the plaintiff to set aside the award of BARRETT, Co. C.J. (since deceased), who was appointed sole arbitrator by agreement of reference dated the 30th September, 1913; and, if necessary, to extend the time for moving.

The motion was heard in the Weekly Court at Toronto.

G. H. Kilmer, K.C., and D. Robertson, K.C., for the plaintiff.

W. H. Wright, for the defendants.

HODGINS, J.A.:—The plaintiff began proceedings under the Municipal Drainage Act, and served notice of his claim. He thereafter agreed with the defendants that further proceedings before the Drainage Referee thereon should be stayed, and that the plaintiff's claim and all matters of dispute between the parties should be referred to the determination and award of Judge Barrett. Accordingly an agreement of reference was signed, giving the usual powers to the arbitrator, and authorising him to direct the defendants to do the work as he might deem proper, and to order the issue of a mandamus or injunction, if necessary.

There is no provision for appeal in the agreement of reference. Pursuant thereto, Judge Barrett made an award on the 6th January, 1915, which contained this paragraph: "The said Parsons is entitled to such damages only as he sustained after having served the said notice on or about the 28th day of June, 1913, and after that date he sustained no damage whatever."

In the argument before me counsel for the plaintiff rested his case upon two points: (1) that there was a mistake in law on the face of the award; and (2) that there was a plain mistake of fact.

The mistake of fact alleged is, that the learned arbitrator held that whatever damages had accrued were caused by non-

repair, whereas they were, it was contended, caused by improper construction, and the maintenance in that condition of the drains.

The matter of law in which he is said to have gone wrong is his holding that under sub-sec. 2 of sec. 80 of the Municipal Drainage Act, R.S.O. 1914 ch. 198, the damages were limited to those sustained after the service of the notice on the 28th June, 1913.

In support of these objections reference was made to the reasons given by the learned arbitrator, which, it was said, must be taken to form part of his award.

The cases referred to on the argument by the plaintiff in support of that contention are all based upon the fact that the arbitrator's reasons were to be found in a paper delivered with the award, and both, in the opinion of the Court, to be taken as one instrument. This is expressly stated in Kent v. Elstob (1802), 3 East 18, and Leggo v. Young (1855), 16 C.B. 626; and, in explaining these cases, in Holgate v. Killick (1861), 7 H. & N. 418. These cases are consistent with and founded upon decisions which are collected in the later cases of Dinn v. Blake (1875), L.R. 10 C.P. 388; In re Keighley Maxsted & Co. and Durant & Co., [1893] 1 Q.B. 405; McRae v. Lemay (1890), 18 S.C.R. 280; Re Laidlaw and Campbellford Lake Ontario and Western R.W. Co. (1914), 31 O.L.R 209.

Under these later cases, it is quite impossible, I think, to contend that reasons which may be written out by an arbitrator become part of the award or are incorporated with it to such an extent as to permit the Court to treat error appearing therein, of fact or of law, as entitling the Court to set aside the award. The modern practice of arbitrators giving reasons is useful so far as it permits the parties to ascertain the grounds for the decision, and in satisfying the parties that points have not been overlooked. But they form no part of the award, and cannot be acted upon in a motion to set it aside. The reasons are looked at because, in cases in which the Court is entitled, as under the Municipal and Railway Acts, to go into the merits and to alter or vary the award, or remit the matter to the arbitrator, it is valuable to see upon what principle the arbitrator has proceeded.

But, in any case, the mistake of fact alleged by the plaintiff to have been made is one which cannot be ascertained without going into the merits—a course which is not open to me on this motion: Lancaster v. Hemington (1835), 4 A. & E. 345; Phillips v. Evans (1843), 12 M. & W. 309.

The so-called mistake in law is in applying the provisions of sec. 80 of the Municipal Drainage Act to the claim of the plaintiff. If the learned arbitrator was right upon his facts, then there was no error in law, so far as I am able to judge; but my present decision proceeds wholly upon the ground that I am without jurisdiction to set aside the award in this case, as I can find nothing on the face of the award shewing mistake in fact or in law; and, if I did, there is nothing before me to indicate that the learned arbitrator was aware of the mistake and desired to have it corrected. The importance of this is pointed out in the Laidlaw case, supra.

I think the case falls within the rule that the parties, having chosen their own tribunal, are bound, for better or for worse, by its decision both on the facts and the law.

Motion dismissed with costs.

MIDDLETON, J. APRIL 30TH, 1915.

*HETHERINGTON v. SINCLAIR.

Trust—Conveyance of Land Absolute in Form Admitted to be Security for Debt—Mortgage—Sale of Land by Trustee without Consent of Mortgagor—Right of Purchasers—Unregistered Agreement—Executory Contract not Completed by Conveyance—Superior Equity of Mortgagor—Right to Redeem—Payment of Debt—Account — Costs — Claim of Purchasers against Mortgagee—Damages—Loss of Profits.

Action for an account and redemption and to set aside an agreement made by the defendant Sinclair for the sale of land to the defendants Perkins and Toll; and third party claim by the defendants Perkins and Toll against the defendant Sinclair.

The action was tried without a jury at Chatham.

J. G. Kerr, for the plaintiff.

O. L. Lewis, K.C., for the defendant Sinclair.

R. L. Brackin, for the defendants Perkins and Toll.

MIDDLETON, J.:—By deed bearing date the 3rd January, 1894, Mary Jane Craford and Philander Craford (her husband) conveyed certain lands to the defendant Sinclair, by a deed

which, though absolute in form, was intended, it is admitted, to be in truth a mortgage or security for debt.

Part of the land covered by this deed was sold, and some controversy arose between the Crafords and Sinclair. This was submitted to arbitration. . . . An award was made on the 15th October, 1901, by which it was found that this conveyance was in reality a trust deed held as security for payment of money due by the grantors. An account is then taken between the parties, in which a balance is found due to Sinclair, and the lands then remaining unsold, as well as certain other securities, are directed "to be held by the said Sinclair as security for repayment to him of the said amount due him, with interest thereon at 6 per cent., and that all sums received by him . . . on sales of the said lands or any part thereof shall be applied by him upon the amount found due to him as aforesaid."

After . . . this award, sales were made, in each case with the authority and approval of the Crafords. Where their interest in the property was known, they joined in the conveyance. Where the purchaser knew only of Sinclair's apparently absolute title, Sinclair alone conveyed.

In all these transactions the husband was the active party, although the wife was really the owner of the land. Both husband and wife are now dead, and the wife, by her will, left everything to the plaintiff, her daughter. . . .

Upon the death of Craford and his wife, Sinclair assumed to deal with the property without in any way consulting the plaintiff.

A drainage scheme of a most extensive character was suggested, by which the lands in question and . . . other lands . . . were to be reclaimed. . . . The defendants Perkins and Toll . . . asked Sinclair his price for the lands, and he told them $10 per acre. They agreed to buy at that price, paying $100 down and agreeing to pay $100 a year, with interest at 7 per cent., until the land should be paid for. The total acreage, according to the plan prepared in connection with the drainage scheme, is 62 acres, so that the price, assuming the measurement to be accurate, would be $620. The lands were really worth much more than this—probably $50 per acre—with the possibility of being worth several times that figure if the drainage scheme is a success(this price being given upon the assumption that the purchaser assumes the whole drainage tax). The purchase by these defendants was bona fide, although at a great un-

dervalue. The agreement for purchase was not registered, so that the defendants cannot claim the protection of the Registry Act.

The plaintiff contends that Sinclair had no right to make this sale without her concurrence; and in this, I think, she is right.

It is laid down in Fisher on Mortgages, 6th ed., p. 193, that where a deed absolute in form is taken as security for a debt, the grantee has no power of sale, unless indeed a statutory power of sale can be imported into the deed; nor can the mortgagee foreclose; he holds the land as trustee, and his only remedy, in the absence of the concurrence of the mortgagor, is to have a sale through the Court.

The decision in Pearson v. Benson (1860), 28 Beav. 598, is cited in support of this proposition. . . . This decision has never since been questioned. Oland v. McNeil (1902), 32 S.C.R. 23, is not in conflict with it.

The question then remains, whether the defendants Perkins and Toll are bona fide purchasers for value from Sinclair so as to preclude the plaintiff from asserting her right. I have come to the conclusion that they are not. The contract with them is executory. The land has never been conveyed. Upon payment of the balance of the purchase-money, they will have an equity to compel a conveyance of the property to them, but this equity is subject to the plaintiff's prior equity. Her equity to have the land reconveyed to her, upon payment to Sinclair of the balance due to him, cannot be thus defeated. Lord St. Leonards, in Molony v. Kernan (1842), 2 Dr. & War. 31, has laid it down clearly that actual payment of the price is necessary to establish a purchase for value.

The plaintiff, coming to Court seeking to be paid, must be prepared to do equity. She must—and her counsel said she was ready—pay off the balance due to Sinclair. The purchasers are entitled to be refunded the money paid to Sinclair. In this action an accounting is sought, and it was agreed that I should refer the action to the Master to take the account of the amount remaining due to Sinclair. . . .

In the reference, in the absence of misconduct, Sinclair as mortgagee would be entitled to be allowed the costs of accounting; but the litigation has been occasioned by Sinclair and his co-defendants setting up absolute title to the lands and the right to convey. I think a fair disposition would be to direct

Sinclair on the one hand, and Perkins and Toll on the other, each to bear one half of the plaintiff's costs of the action down to and including the trial; the costs payable by Perkins and Toll to be set off pro tanto against the $100 which they have paid under the contract. In the accounting between the plaintiff and Sinclair, Sinclair must then give credit for this $100 and for the half of the costs for which he is liable. In default of payment of the amount found due to Sinclair within a time to be fixed by the Master, the lands must be resold by the ordinary procedure of the Master's office. The costs of the reference will be reserved to the Master, but they will be given to Sinclair as mortgagee unless he is found by the Master to have been guilty of improper conduct.

Perkins and Toll . . . claim as against Sinclair to recover the loss of profit which they would have made by reason of the increase in value of the lands since the purchase, and upon the ground that he had covenanted to convey.

For the reasons given in the recent decision of McNiven v. Pigott (1914), 7 O.W.N. 593, 33 O.L.R. 78, and in appeal (1915), 8 O.W.N. 107, I do not think that these damages can be recovered. No evidence has been given shewing that any other damage has been sustained. The proper disposition of the third party proceedings is, I think, to make no order, and to leave each party to bear his own costs.

HODGINS, J.A. APRIL 30TH, 1915.

*RE SHARP AND VILLAGE OF HOLLAND LANDING.

Municipal Corporation—Local Option By-law—Motion to Quash—Discretion—Power of Court—Curative Clause of Municipal Act, R.S.O. 1914 *ch.* 192, *sec.* 150—*Shifting of Onus of Proof as to Affecting Result—Voters' List—Municipal Act, sec.* 266—*Liquor License Act, R.S.O.* 1914 *ch.* 215, *sec.* 137 (2)—*Voters' Lists Act, R.S.O.* 1914 *ch.* 6, *sec.* 24—"*Matter Preliminary to the Poll*"—*Voters on List Disqualified in Point of Residence—Result of Determining that Votes Bad—Voter's Description not Given—Date of Third Reading of By-law—Illegal Council Meeting.*

Motion by Sharp to quash a local option by-law.

The motion was heard in the Weekly Court at Toronto.

J. B. Mackenzie, for the applicant.

W. E. Raney, K.C., for the village corporation.

HODGINS, J.A.:—The discretion exercised by the Courts as to quashing by-laws is now, so far as local option by-laws are concerned, practically vested in the Executive of the Province. This change was introduced in 1908 (8 Edw. VII. ch. 54, sec. 11); and, while the Court is still bound to decide according to law, and may yet quash a by-law, the effect of its decision is dependent on the assent of the Minister. This was a pretty plain intimation of the legislative will. But an amendment to the Municipal Act by 3 & 4 Geo. V. ch. 43, sec. 150 (now R.S.O. 1914 ch. 192, sec. 150), has, to my mind, made a radical change with regard to the effect of objections to these by-laws. . . .

[The learned Judge then set out the former "curative section," sec. 204 of 3 Edw. VII. ch. 19, and the present one, sec. 150 of R.S.O. 1914 ch. 192.]

The practical difference in the two enactments is seen in three directions. The former statutory provisions applied to the taking of the poll; the present one also includes "anything preliminary thereto." Then, the words "by reason of any irregularity" are replaced by the expression "by reason of any mistake or irregularity in the proceedings at or in relation to" the vote.

The important change, however, is this. Under the previous clause, the validity of the by-law was saved if it appeared to the tribunal having cognizance of the question that "such non-compliance, mistake, or irregularity did not affect the result." This meant affirmative proof, or conviction from the proved circumstances, that the result was not affected. . . .

[Reference to Re Hickey and Town of Orillia (1908), 17 O.L.R. 317.]

Under the present section, it is sufficient to uphold the by-law that there is no proof that the result was affected by the non-compliance, mistake, or irregularity. If the applicant does not prove it, and it does not otherwise appear, then, provided the principles of the Act governed the conduct of the vote, the by-law stands. In other words, the onus upon those supporting the by-law is confined to shewing compliance with the principles laid down in the Act, while upon the applicant is laid the bur-

den of shewing that the result was affected by the proved irregularities. . . .

From this new standpoint the objections raised in the present application must be considered. . . .

Several votes were challenged, but I shall first deal with the objection that the voters' list used was not that required by sec. 266 of the Municipal Act, R.S.O. 1914 ch. 192. . . .

The Liquor License Act, R.S.O. 1914 ch. 215, sec. 137, subsec. 2, provides that "no person shall vote . . . who is not, at the date of taking the vote, and has not been for three months before that date, a bona fide resident of the municipality . . . and as to such persons the certified list mentioned in section 24 of the Ontario Voters' Lists Act shall not be final and conclusive."

The Voters' Lists Act there referred to is R.S.O. 1914 ch. 6, sec. 24, formerly 2 Geo. V. ch. 4, sec. 3. A list prepared in accordance with that Act was signed by the Judge and used in this election.

As the Liquor License Act allows all the electors of the municipality to vote, I should have doubted whether sec 266 applied, but for its concluding paragraph. But, as neither the voters' list nor the special list is final on the point raised with regard to these votes, I think the use of this list, in the circumstances, comes well within sec. 150, as a matter preliminary to the poll. The intention of the Municipal Act is to provide, for use, a voters' list, founded upon the certified voters' list; and the Liquor License Act also deals with the latter as binding, except as to those who cannot shew the necessary length of residence before the vote.

The objection seems well covered in principle by Re Ryan and Town of Alliston (1910), 21 O.L.R. 582, 22 O.L.R. 200, and must be disallowed. Reference may also be made on this point to Re Sinclair and Town of Owen Sound (1906), 13 O.L.R. 447.

Nothing appears to indicate the effect that this will have upon the result of the vote, and the objection fails as well upon that point.

There are 6 electors in all whose right to vote is questioned as being disqualified in point of residence or length of residence, and one (William McClure) because his description does not appear in the voters' list. . . . The vote stood 63 for and 39 against, so that 5 votes have to be struck off those in favour of the by-law to destroy the majority. But, if I come to the con-

clusion that these 6 votes are bad, where does that leave the matter? I am unable to inquire how these men voted; and the reason underlying the rule of subtraction hitherto followed has, in consequence of the amendment I have mentioned, disappeared. That rule was to deduct them from the votes in favour of the by-law; and the reason was, that it could not be made to appear to the Court that the result would not be affected: Re Leahy and Village of Lakefield (1906), 8 O.W.R. 743; Re Gerow and Township of Pickering (1906), 12 O.L.R. 545; Re Sinclair and Town of Owen Sound (1906), 12 O.L.R. 488; Re Cleary and Township of Nepean (1907), 14 O.L.R. 392; Re Ellis and Township of Renfrew (1910), 21 O.L.R. 74.

Now it must clearly appear that the result was in fact affected; and, if the contentions now made by the applicant are resolved in his favour, there still remains the question, Why should the votes be deducted from those in favour of the by-law?

While the statute remained as it was, a reason existed, namely, the possibility of the majority in favour being made up of illegal votes. Now, while that possibility still exists, it remains a possibility only, and it cannot be made to appear that the result was really affected. I do not say that if a class of voters is disfranchised, or wrongfully enfranchised, the vote could be said to be conducted according to the principles laid down in the Act: In re Pounder and Village of Winchester (1892), 19 A.R. 684. But if only isolated votes here or there, of a class of voters properly entitled to vote, are tendered by persons on the voters' list, and they are received as prescribed by the Act, then, although the voters are in fact unqualified, and their votes are subject therefore, to scrutiny and rejection, I cannot think that the whole vote must be set aside as for a departure from the scheme laid down in the Act.

For this reason, I propose to examine, following the precedent set by Mr. Justice Riddell in Re Ellis and Township of Renfrew, 21 O.L.R. 74, only three votes, leaving the others to depend on the view I have expressed—that, if held to be invalid, they cannot be said affirmatively to have affected the result of the vote, and that the attacked votes, in number and circumstances, are not sufficient to satisfy me that the principles laid down in the Act have been departed from.

Isaac Walters' vote is admittedly bad.

William McClure is on the voters' list but his description is not given. He is named therein, and his vote cannot be dis-

allowed: Re Schumacher and Town of Chesley (1910), 21 O.L.R. 522; Re Ellis and Town of Renfrew, 21 O.L.R. 74; S.C. in appeal (1911), 23 O.L.R. 427.

John Butterfield's residence is in Holland Landing, where his house is. Part of it is rented, and part of it contains his furniture. Under these circumstances, it must be held that he is resident.

Objection was made that the by-law was improperly given a third reading on a date less than two weeks from the declaration of the result by the clerk; that the council's power was exhausted by such improper third reading; that the meeting on the 6th February, 1915, was illegal by reason of not being summoned by the clerk; and that the council was not bound to pass the by-law, there being no properly signed petition.

The first point is, I think, covered by authority which is against the objection. The second and third I do not give effect to. They seem to carry their own answer. The last objection I do not consider, as, whether the petition was sufficiently signed or not, the council did pass the by-law. To determine whether it was its duty or not so to do, is not important. . . .

Application dismissed with costs.

SUTHERLAND, J., IN CHAMBERS. APRIL 30TH, 1915.

RE HEYES BROTHERS LIMITED.

Company—Winding-up—Petition for by Creditor—Winding-up Act, R.S.C. 1906 *ch.* 144—*No Opposition by other Creditors —Refusal of Company's Request for Delay—Discretion.*

Application by Daniel Jacobs, a creditor of the company, for a winding-up order under the Dominion Winding-up Act, R.S.C. 1906 ch. 144.

W. D. Gwynne, for the applicant.
J. M. Forgie, for the company.

SUTHERLAND, J.:—The material filed in support of the application appears to be sufficient. The applicant, on the 6th Janu-

ary, 1915, recovered judgment against the company for $2,163.20 and costs taxed at $129.90.

In opposition to the motion an affidavit of . . . the secretary-treasurer of the company is filed, in which he says that the president of the company is in England endeavouring to reorganise its affairs; that there is a fair prospect of his doing so; that the goodwill of the company is valuable, and if it is wound up will largely disappear; that, if given an opportunity, the company will be in a position, he anticipates, when the war ends, to make a fair offer of settlement with the creditors which would be more advantageous to them than if the company were wound up.

On behalf of the company it is urged that in these circumstances no order should be made. . . .

[Reference to In re Brighton Hotel Co. (1868), L.R. 6 Eq. 339; In re Western of Canada Oil Lands and Works Co. (1873), L.R. 17 Eq. 1; In re St. Thomas' Dock Co. (1876), 2 Ch. D. 116; In re Great Western (Forest of Dean) Coal Consumers' Co. (1882), 21 Ch. D. 769; In re Crigglestone Coal Co. Limited, [1906] 2 Ch. 327.]

The judgment debt of the applicant represents a claim for a very substantial amount. No creditor is objecting before me; and the affidavit of the secretary-treasurer deals with expectations and probabilities in a vague and general way only.

An order will go as asked for the winding-up of the company, appointing G. T. Clarkson provisional liquidator, and for the usual reference to the Master in Ordinary.

KELLY, J., IN CHAMBERS. APRIL 30TH, 1915.

*RE HAMILTON IDEAL MANUFACTURING CO. LIMITED.

Company — Winding-up — Petition by Shareholders for Order under Dominion Winding-up Act, R.S.C. 1906 *ch.* 144— *Report of Inspector Appointed under Ontario Companies Act, R.S.O.* 1914 *ch.* 178, *sec.* 126—*Meeting of Shareholders —Sec.* 11(*d*), (*e*), *of Dominion Act—Impairment of Capital "Just and Equitable"—Evidence—Discretion.*

Petition by shareholders of the company for a winding-up order under the Dominion Winding-up Act, R.S.C. 1906 ch. 144, and also for an order, under the Ontario Companies Act, R.S.O.

1914 ch. 178, sec. 126, appointing an inspector to investigate the company's affairs and management.

C. V. Langs, for the petitioners.
G. Lynch-Staunton, K.C., for the company.

KELLY, J.:—The total number of shares of capital stock of this company issued and outstanding is 400, of which, at the time of the filing of the petition, 169 were held by the petitioners and 127 by D. H. Fletcher, the president and manager of the company, the remaining shares being held by others, principally in small lots. Of the three directors, two are petitioners. . . .

When the application first came before me, I directed that Mr. C. S. Scott, of Hamilton, should act under the provisions of sec. 126 of the Ontario Companies Act; and on the 25th October, 1914, to which time the motion had been enlarged, he appeared before me and gave evidence, submitting his report. I then directed (see 7 O.W.N. 254) that the information which he supplied should be submitted to a meeting of the shareholders . . and the meeting was held on the 29th December, 1914. The motion was renewed before me on the 1st February, 1915.

The company was incorporated in December, 1904, by letters patent under the Ontario Companies Act, and carried on business until 1913. In the latter part of that year, it sold its lands and premises on which it carried on business, and its factory buildings, machinery, factory equipment, material on hand, its patents, and some other chattels, to the Nagrella Manufacturing Company. The latter company has since gone into liquidation, and is indebted to this company.

Apart from the record of what took place at the meeting of the 29th December, the only evidence submitted in opposition to the petition are affidavits of Fletcher, who resists the winding-up, on the ground that no sufficient reason is shewn for such a course. He contends that the company is solvent and capable of continuing in its business, and that any want of harmony in reference to its operations pertains to the internal management, with which the Court will not interfere.

The Winding-up Act, R.S.C. 1906 ch. 144, sec. 11, states several grounds on which the Court may make a winding-up order, amongst them being, (*d*) when the capital stock is impaired to the extent of 25 per cent. thereof, and when it is shewn to the satisfaction of the Court that the lost capital will probably not be restored within one year, and (*e*) when the Court is of opinion that it is just and equitable that the company should

be wound up. In either of these cases the application for winding-up may be made by a shareholder holding shares to the extent of at least $500. Each of the ten petitioners, at the time the petition was presented, was a holder of stock to at least that amount.

The Companies Act, R.S.O. 1914 ch. 178, sec. 187, provides that a corporation may be wound up, by an order of the Supreme Court, where (c), in the opinion of the Court, it is just and equitable, for some reason other than the bankruptcy or insolvency of the corporation, that it should be wound up.

There is a distinction between cases in which the real contention is on a question of internal management or mismanagement and cases where what may be termed the foundation upon which the company's business is based is shewn to have disappeared or to have become so weakened as to justify the Court's intervention, and in which a very strong case must be made out to induce the Court to interfere. But, where it is satisfied that the subject-matter of the business for which the company was formed has substantially ceased to exist, the Court will order a winding-up, although a large majority of the shareholders desire to continue to carry on the company: In re Haven Gold Mining Co. (1881), 20 Ch. D. 151. In order to ascertain whether it is just and equitable that a company should be wound up, on the ground that its substratum is gone, the Court, generally speaking, must look only at the objects of the company as defined by the memorandum of association; but, if it is once established that a part of the substratum is gone, the Court is then bound to consider all the other circumstances in order to ascertain whether it is just and equitable that the company should be wound up: In re Thomas Edward Brinsmead & Sons, [1897] 1 Ch. 45, 61. . . .

The company now being dealt with was incorporated to buy, sell and otherwise acquire and dispose of farm implements and household appliances of all kinds . . . and to buy, sell and otherwise dispose of raw material used in manufacture.

Almost a year prior to the commencement of these proceedings it made the sale of its assets above mentioned; and, outside of moneys due to it, its assets are comparatively of small value. There is no active business being carried on, and no apparent prospect of a resuscitation of the business. Fletcher's allegations, that the business is being and can be successfully carried on as an agency or brokerage business, have not been shewn to have foundation, and I have the gravest doubts that such a business can be carried on, under the conditions shewn here, with profit to any one but Fletcher himself, or that the lost capital can thereby be restored. The operations of the business for one

month about the time the petition was presented resulted in total sales (not profits on sales) amounting to $50, at an expense to the company of $125, practically all in wages, of which Fletcher, the president, received $50. . . .

The meeting of shareholders on the 29th December was called by direction of the Court with the object of eliciting the candid opinion of the shareholders in the light of the inspector's report. The sworn statement of what occurred at the meeting—and there is no evidence in contradiction of it—shews that Fletcher's conduct was so arbitrary and high-handed as, in my opinion, to make it quite impossible to get from the shareholders the candid uninfluenced views which it was sought to obtain. . . . The certificate of the result of the voting, signed by him as president and by the secretary of the meeting, shews that a majority in value of the shareholders voting were opposed to the winding-up, but the uncontradicted evidence as to the method by which this result was obtained deprives it of the value it was intended by the Court that it should have. There is the added fact that between the filing of the petition and the holding of the meeting 38 shares were transferred to persons who were not at the commencement of the proceedings shareholders, and these shares so transferred were represented at the meeting, and the weight of the votes in respect of them was thrown in opposition to the winding-up. Can it be said that these new shareholders were in a position knowingly to express a candid view?

From the inspector's evidence it appears (and some of this is borne out by other evidence) that the company is without plant, machinery, manufacturing appliances, or patents; that it has an office, but the inspector does not know if it is doing any business, and he says that it is practically not carrying on business; and that the capital of the company has been impaired to the extent of nearly one-half. . . .

The only conclusion I can come to is, that there is little, if any, prospect of the company doing the business it was brought into existence to do; that the inevitable result of its continuing under the conditions to which it has been brought is to entail loss to every one financially interested in it, except perhaps to Fletcher, who, being in receipt of a salary payable out of its assets, is opposed to a course which will deprive him of that easily earned money. To my mind, the case is brought within the authorities which make it the duty of the Court, in a proper exercise of its discretion, to make the order for the winding-up. Mr. C. S. Scott is appointed interim liquidator; and there will be a reference to the Local Master at Hamilton to appoint a permanent liquidator, fix the security, and for the other usual purposes.

MIDDLETON, J. MAY 1ST, 1915.

*THAMES CANNING CO. v. ECKARDT.

Sale of Goods—Contract—Statute of Frauds—Receipt and Acceptance—Defect in Goods—Implied Condition as to Fitness—Right to Inspect and Reject—Place of Inspection—Adequate Cause for Rejection.

Action to recover the price of 700 cases of beans alleged to have been sold and delivered by the plaintiffs to the defendants.

The action was tried without a jury at Chatham.

J. M. Pike, K.C., for the plaintiffs.

O. L. Lewis, K.C., for the defendant.

MIDDLETON, J.:— . . . The beans in question were sold by a broker, Mr. Somerville, who says that the transaction was evidenced by bought and sold notes. On the question of fact I think I must find that there were not any sale notes. . . . The only document which existed was the memorandum of shipping instructions sent by the broker to the canning factory. This memorandum, I think, so far as it goes, correctly sets forth the transaction. The 700 cases of golden wax beans were sold at $1.30 per case, less an allowance for labels which were to be placed upon the tins by the purchasers, making the net price f.o.b. at the factory $899.84. The goods were shipped as contemplated by the contract, and delivered to the carrier and received from the carrier and taken into the defendant's warehouse, where they were examined; so that there was an actual receipt and acceptance sufficient to take the case out of the Statute of Frauds; for, to constitute an acceptance within the statute, all that is necessary is that there should be such a dealing with the goods as to recognise the existence of the contract. A receiving into the warehouse and an examination to ascertain if the goods are in accordance with the contract, is enough, even though the goods are immediately rejected as not being in accordance with its terms: Page v. Morgan (1885), 15 Q.B.D. 228; Taylor v. Smith, [1893] 2 Q.B. 65.

Although nothing appears on the face of the shipping instructions, the goods were in fact sold as first-class goods of the highest grade, and it was known that it was the intention of

the defendant to sell these goods to retail merchants, under his own labels, as goods of the highest quality.

Concerning the beans themselves there is no complaint; but first-class canned goods should be packed in clean, bright, new tins. The packing of these goods was defective. I was unable to learn whether the tins had been originally defective or had become defective while in the plaintiffs' possession. From the way in which they were said to have been handled, I rather suspect the latter. . . .

The careless treatment of the tins in which the goods were contained undoubtedly degraded the goods and seriously impaired the merchantability of the packages, rendering them quite unfit for the purpose for which they were bought, namely, the labelling with the defendant's "Monarch brand" and the placing of them on the market as goods of the highest grade.

The goods were not inspected at the time of shipment. No notice was shewn to have been given of the time when the goods would in fact be shipped. As soon as they arrived at the defendant's warehouse, the defective condition was revealed, complaint made, and the goods rejected. Mr. Thomas, who succeeded Mr. Somerville in his agency, quite agreed that the complaint was justified, and from the evidence of the practical men called before me I am of the same view.

Then it is said that the place of inspection was the point of delivery, and that, no inspection having taken place there, the purchaser cannot now object, and that he must keep the goods, relying upon a cross-action or counterclaim for damages by reason of the defective quality.

In considering this question it must be kept in mind that this is not a mere warranty but a condition. . . .

[Reference to Smith's Leading Cases, 11th ed., vol, 2, p. 28.]

In this way the case resolves itself into the old and familiar situation. The Court cannot make for the parties a contract they have not themselves made. The defendant, who contracted to purchase beans in bright, clean, new tins, cannot be compelled to accept any beans not so packed, unless from his conduct there can be implied a new contract so to do.

Now, the rule as to what is to be implied from a failure to inspect at the place of delivery is by no means as drastic as the plaintiff contends. It is thus stated in Benjamin on Sale, 5th ed., p. 753: "The buyer's opportunity of inspection prima facie

arises at the place of delivery, but it need not necessarily be the place of delivery, for the contract may expressly or by implication provide that the time for inspection shall be subsequent to delivery, and the place of inspection shall be different from the place of delivery.''

It is to be noticed that this does not speak of an obligation of the purchaser alone; it is ''the opportunity of inspection;'' and this implies as great an obligation on the part of the vendor to afford an adequate opportunity of inspection as it imposes a duty on the purchaser to avail himself of the opportunity and then and there inspect.

The judgments of Brett, J., in Heilbutt v. Hickson (1872), L.R. 7 C.P. 438, and Grimoldby v. Wells (1875), L.R. 10 C.P. 391, justify not only the text but this comment.

[Reference to Pierson v. Crooks (1889), 115 N.Y. 539; Fogel v. Brubaker (1888), 122 Penn. St. 7; Molling and Co. v. Dean and Son Limited (1901), 18 Times L.R. 217.]

Dyment v. Thompson (1885-6), 9 O.R. 566, 12 A.R. 658, S.C., sub nom. Thomson v. Dyment (1886), 13 S.C.R. 303, is naturally much relied upon by the plaintiff, and is undoubtedly binding upon me; but on carefully considering this case it will be found that the decision is in accordance with the principle as indicated. . . .

[Reference to Lewis v. Barré (1901), 14 Man. R. 32.]

For these reasons, I determine that the goods were not of the stipulated quality or in accordance with the contract; that they were not merchantable as first-class goods nor fit for the purpose for which they were sold; that the right of inspection existed at the time the goods were inspected in the warehouse; and that upon inspection they were at once rejected for adequate cause.

The action, therefore, fails. If I should be in error in this, I would assess at $250 the difference in value between goods contracted for and goods supplied.

Action dismissed with costs.

SUTHERLAND, J. MAY 1ST, 1915.

*DANGLER v. HOLLINGER GOLD MINES LIMITED.

Alien Enemy—Action by Administrator for Benefit of Alien Enemies—Fatal Accidents Act—Summary Dismissal of Action Begun during War.

Application by the defendants for an order dismissing the action, upon the ground that the persons for whose benefit it was brought were alien enemies of the King.

The action was brought (4th February, 1915) under the Fatal Accidents Act, R.S.O. 1914 ch. 151, by the administrator of the estate of Steve Samurski, who was crushed in a shaft of the defendant company and so injured that he died, to recover damages for his death.

The action was brought for the benefit of John Samurski and Agnes Samurski, the father and mother of the deceased; and it was admitted that at the time the action was brought and now they were subjects of the German Emperor and resident in Germany.

The motion was heard in the Weekly Court at Toronto.

G. H. Sedgewick, for the defendants.

H. S. White, for the plaintiff.

SUTHERLAND, J., set out the facts and referred to secs. 4(1), 6, and 8 of the Fatal Accidents Act; 4 & 5 Geo. V. ch. 87 (Imp.), respecting penalties for trading with the enemy, sec. 1(2); Dumenko v. Swift Canadian Co. Limited (1914), 7 O.W.N. 155, 32 O.L.R. 87; Porter v. Freundenberg, Kreglinger v. Samuel and Rosenfeld, In re Merten's Patent (1915), 31 Times L.R. 162; Maxwell v. Grunhut (1914), 31 Times L.R. 79, 80; Continental Tyre and Rubber Co. (Great Britain) Limited v. Daimler Co. Limited, [1915] 1 K.B. 893.

The learned Judge proceeded:—

It is contended on behalf of the plaintiff that the right of action is clearly given under the Fatal Accidents Act to an executor or administrator, and that it is an administrator duly appointed by a competent Surrogate Court of the Province who brings the action . . . and such an administrator . . . is legally entitled to bring an action for a claim such as is involved in this action, even though the benefit accrue to alien enemies. . .

[Reference to Blake v. Midland R.W. Co. (1852), 18 Q.B. 93; Pym v. Great Northern R.W. Co. (1863), 4 B. & S. 396, 407; Leward v. The "Vera Cruz" (1884), 10 App. Cas. 59, 67; Town of Walkerton v. Erdman (1894), 23 S.C.R. 352, 366.]

The administrator can, I think, have no higher right than those for whom he has brought the action. If he had failed for six months to do so, the parents of the deceased man would themselves have had the right to institute the action; but, if they had done so, they would have been met with what would be a fatal defence—the plea that they were alien enemies. This would have disentitled them to succeed.

If I could see my way to do so, I would prefer to make an order staying the action, for the reason that, if it is dismissed, the statutory period may possibly run and so put an end to the action.

I think, however, I must hold that the action must be dismissed with costs.

LINKE v. CANADIAN ORDER OF FORESTERS—MIDDLETON, J.—APRIL 26.

Life Insurance—Presumption of Death of Insured—Absence of Seven Years — Evidence of Circumstances — Costs.]—This action was brought by the wife of Carl Linke to recover the amount of a policy upon his life, the plaintiff alleging that the insured had not been heard of for upwards of seven years, and that the circumstances were such that his death ought to be presumed. The action was first tried by BRITTON, J., who gave judgment for the plaintiff: 7 O.W.N. 516, 33 O.L.R. 159. A new trial was directed by a Divisional Court of the Appellate Division: 7 O.W.N. 795, 33 O.L.R. 159. The second trial was before MIDDLETON, J., without a jury, at Berlin, on the 13th April, 1915. From evidence given at this trial, it appeared that Carl Linke was seeking employment in New York a year or more after the date at which he disappeared, without in any way communicating directly with his former associates; and, in the opinion of the learned Judge, that prevented any presumption of death arising from his continued silence. The learned Judge also said that the plaintiff's case was entirely unsatisfactory in that there was absolutely no evidence that Linke was not now in Germany. The plaintiff said that her husband's heart was in Germany; and, beyond the replies to the letters written shortly after his dis-

appearance, and probably while he was still in New York, there was nothing at all from Germany. The plaintiff continued paying premiums on the policy until the seven years from July, 1907, when he disappeared, had elapsed. The learned Judge suggested to the defendants the fairness of entering into some arrangement by which she should now be allowed to pay up arrears, if she desired, or by which the future premiums should form a charge upon the proceeds of the policy. This was refused by the defendants. The result was, that not only did the action fail, but the plaintiff must lose the money paid, without any hope of being able to better her position by further lapse of time and by further inquiries in Germany. In these circumstances, while the action should be dismissed, there should be no costs of the action, the former trial, or the appeal. E. P. Clement, K.C., for the plaintiff. G. H. Watson, K.C., for the defendants.

LIBOIROU v. MCCORMACK—LENNOX, J.—APRIL 26.

Costs—Action in Supreme Court against Several Defendants —Verdict of Jury — Damages within Competence of County Court—Title to Land Disputed by two Defendants—Scale of Costs—Set-off—Discretion—Rule 649—*Judicature Act, sec.* 74.] —The action was brought against four defendants, McCormack, Rochford, Park, and Porthenais, to recover damages for injury to land and destruction of chattels by fires set out by the defendants. The defendant McCormack died, and the action was carried on against the other three defendants only. The land before the fire was worth about $2,700; and the plaintiff's title to it was disputed by the defendants Rochford and Park. At the trial, the plaintiff obtained leave to amend by adding as a co-plaintiff the person to whom he was under contract to convey at the time of the fire. The action was tried by LENNOX, J., and a jury. The jury assessed the entire damages at $100, to be paid by the three defendants in equal shares, and judgment was given accordingly, the question of costs being reserved. The learned Judge now disposed of that question, in a written memorandum, in which he said that, apart from the question of title, it was a case in which it would be proper simply to direct judgment with costs and allow Rule 649 to govern, without modification of any kind. With title disputed, the action was not of the proper competence of a County Court; but, on the other hand, the plaintiff practically failed as to this issue, in

his own view at all events, as he applied for and obtained leave to amend; and the amendment, as against him, must be taken to have been necessary to his success. It would not be fair to allow him Supreme Court costs as against any of the defendants. He should have County Court costs against all the defendants, with a direction under sec. 74 of the Judicature Act, R.S.O. 1914 ch. 56, that they be borne by the defendants in equal shares. The defendants Rochford and Park, who disputed the title, should not be allowed to set off; but the defendant Porthenais, who did not dispute the title, should be entitled to set off costs according to the provisions of Rule 649, and should have a lien for the excess not otherwise recoverable against the damages and costs payable by his co-defendants. W. B. Lawson, for the plaintiffs. George McLaurin, for the defendant Park. C. H. Cline, for the defendant Rochford. I. Hilliard, K.C., for the defendant Porthenais.

McMURTRY v. BULLEN—SUTHERLAND, J., IN CHAMBERS—APRIL 27.

Execution—Judgement for Recovery of Purchase-money of Land—Proceeding under Execution after Coming into Force of Mortgagors and Purchasers Relief Act, 1915—*Necessity for Leave of Judge under sec. 2—Stay of Execution for Limited Period—Terms.*]—Motion by the defendant to set aside the plaintiff's judgment or to stay execution thereon. The judgment was recovered on the 29th January, 1915, for the amount of money due under an agreement for the purchase and sale of land and for costs. Execution was issued and placed in the hands of the Sheriff on the 11th February, 1915. On the 8th April, 1915, the Mortgagors and Purchasers Relief Act, 1915, came into effect. Held, that, in attempting to proceed under his execution to realise the amount of his judgment debt, the plaintiff was continuing proceedings for the recovery of part of the principal money payable for the purchase of his land; and, under sec. 2 of the Act, he could not do this except by leave of a Judge granted upon application for that purpose.—In the circumstances of the case, as shewn by affidavits filed, an order was made staying proceedings under the writ of execution until the 15th October, 1915, upon the defendant within ten days paying the interest down to the 10th April, 1915, and the costs of this motion. A. R. Clute, for the defendant. W. J. McLarty, for the plaintiff.

GALVIN v. IMPERIAL GUARANTEE AND ACCIDENT INSURANCE CO. OF CANADA—SUTHERLAND, J., IN CHAMBERS—APRIL 27.

Jury Notice—Motion to Strike out—Issues of Fact—Application to Judge in Chambers—Adjournment to be Heard by Trial Judge.]—Motion by the defendants to strike out a jury notice. The action was to recover the sum of $3,000 upon a policy of accident insurance issued by the defendants in favour of the plaintiff, insuring her husband, who died from injuries received in an accident. SUTHERLAND, J., said that he was inclined to think that the case upon the pleadings was one which he would be disposed to try without a jury; but he was not sure that there were not, upon the pleadings, issues of fact which a trial Judge might think should be disposed of by a jury before the determination of any questions of law under the contract. Motion adjourned to be heard by the trial Judge, who shall dispose of the costs thereof. J. S. Beatty, for the defendants. J. M. Forgie, for the plaintiff.

BANK OF MONTREAL v. MCALPINE—SUTHERLAND, J., IN CHAMBERS—APRIL 27.

Attachment of Debts—Garnishee Disputing Liability—Order Directing Trial of Issue—Appeal.]—Appeal by the plaintiffs, judgment creditors, from an order of the Master in Chambers refusing to make an attaching order absolute and directing an issue to determine the question whether the garnishee Carrique is liable to the judgment debtor. SUTHERLAND, J., was of opinion that the case was not so plain a one that it could be satisfactorily disposed of in Chambers, without the trial of an issue. Appeal dismissed, with costs to be paid by the appellants unless the trial Judge shall otherwise determine. W. D. Gwynne, for the appellants. J. S. Beatty, for the judgment debtor. W. Proudfoot, K.C., for the garnishee Carrique.

HOMEWOOD SANITARIUM v. PARKER AND TORONTO GENERAL TRUSTS CORPORATION—FALCONBRIDGE, C.J.K.B.—APRIL 28.

Contract—Liability for Hospital Expenses—Wife of Patient—Estate of Patient—Charge on Estate.]—Action to recover money due for board, lodging, nursing, attendance, etc., on a patient. The action was tried without a jury at Guelph and

Toronto. The learned Chief Justice said that, in the circumstances of the case, he must hold both defendants liable to the plaintiff. Judgment accordingly for the plaintiff for $1,803.57, with interest from the date of the issue of the writ of summons and costs, against both defendants. No internecine relief or costs as between the defendants. For whatever money the defendant Mary Parker pays or is obliged to pay under this judgment she is to have a first charge on the estate of her husband in the hands of the defendant the Toronto General Trusts Corporation. C. L. Dunbar, for the plaintiff. R. McKay, K.C., for the defendant Mary Parker. A. Ogden, for the defendant corporation.

RE THOMAS AND MORRIS—SUTHERLAND, J., IN CHAMBERS—APRIL 28.

Mortgage—Proceedings to Enforce—Application for Leave under Mortgagors and Purchasers Relief Act, 1915—*Arrangement between Mortgagor and Mortgagee for Receipt and Application of Rents of Mortgaged Properties.*]—Application by Herbert E. Thomas, mortgagee, under the Mortgagors and Purchasers Relief Act, 1915, for an order permitting the institution of proceedings for foreclosure or sale in respect of two mortgages made to the applicant by Thomas R. Morris and his wife. It appeared by affidavit that there was owing on each of the two mortgages the instalment of principal payable on the 31st January, 1915, and that the mortgagor, in respect thereof, sought the protection of the Act. After hearing argument, the learned Judge suggested that some arrangement might be made looking to the mortgagee receiving the surplus of the rents of the mortgaged properties after payment of the interest on the mortgages and taxes. Acting upon this suggestion, the parties arranged that the solicitors for the mortgagor shall receive the rents of the properties as they become due, and, after payment thereout of the interest and taxes, hand over to the mortgagee, without expense to him, the balance thereof, to be applied in payment of the past due and future accruing principal. In view of this arrangement, the motion was dismissed without costs. G. M. Willoughby, for the applicant. W. C. Davidson, for the respondents.