THE

ONTARIO WEEKLY REPORTER

VOL. 24 TORONTO, JULY 24, 1913. No. 17

HON. MR. JUSTICE BRITTON. JUNE 30TH, 1913.

HAMILTON v. SMYTHE.

4 O. W. N. 1572.

Sale of Goods—Specific Performance—Mill and Machinery—Mutual Mistake as to Locus and Possession — Inequitable Conduct of Plaintiff—Costs.

BRITTON, J., refused specific performance of a contract for the sale of certain machinery, on the ground of mutual mistake, where both parties had acted in good faith and believed the machinery to be at a certain place, whereas, the fact was that it had been wrongfully seized by a third party and taken away, and plaintiff, although claiming that the title therein had passed to him, refused to take any steps to recover the same.

Action for specific performance of a contract to sell to plaintiff the mill and equipment of Taplin Timber Co., at Sassaginaga Lake, and damages for delay in carrying out the same or in the alternative for $6,000 damages.

Geo. Mitchell, for plaintiff.

Robt. McKay, K.C., for defendant.

HON. MR. JUSTICE BRITTON:—The defendant was the owner of a mill and machinery, belting and accessories, which he desired to sell.

He was in negotiation with one McClellan, who desired to purchase.

The plaintiff knew of this, and while these negotiations were on, the plaintiff wrote to the defendant, making an offer of $1,100 for the property.

This the defendant declined.

George Ross, of Cobalt, was acting for the defendant in endeavouring to effect a sale to McClellan.

Ross had no power to execute any bill of sale, or to receive any money. That was for the defendant, and Ross did not attempt to, nor did he in fact, exceed his power.

On the 31st December, 1912, the defendant, upon the advice of Mr. Mitchell, who was not then acting for the plaintiff, accepted plaintiff's offer of $1,100, the plaintiff paying $400 cash and giving two notes of $350 each for the balance.

Both plaintiff and defendant then supposed that the property was at Sassiganaga Lake, and in the undisputed constructive possession and control of the defendant.

The fact was, that unknown to the defendant and without his consent, McClellan had wrongfully taken possession of this property, and removed it from Sassiganaga Lake, and held it, afterwards refusing to give it up to the defendant, or to the plaintiff.

The plaintiff, upon the purchase by him, had the right to possession of said property, but he did not exercise that right, nor did he attempt to do so, and he refused to take legal proceedings to get possession, and he refused to assist the defendant to do so, but contended that he had a legal claim and right of action against the defendant.

The defendant, therefore, was obliged to stand upon his legal rights.

There was no warranty on the part of the defendant, that the property was at Sassiganaga Lake, and according to the plaintiff's own contention, the sale was completed and valid and he had the right to the property.

Had he taken the necessary steps to get it he could have obtained possession of it.

As soon as it came to the knowledge of defendant that the property had been taken possession of and removed he did all that he could without plaintiff's assistance; and, finding that plaintiff insisted upon attempting to hold defendant, and was not willing to take proceedings to get possession, the defendant tendered to plaintiff the money he had paid, and interest thereon, and a return of the notes, and cancelled the sale.

There was no express agreement on the part of the defendant to make delivery of the property.

There was simply the sale made in good faith.

I think the plaintiff must be held to have accepted the situation by his delay and his refusing to take any proceeding to recover possession.

It appears that McClellan took possession on the 18th December.

Plaintiff's agreement was 31st of December, and he did not inform defendant of his inability to get possession until March, 1913.

I think this is a case of mutual mistake, in each party thinking the property was at the lake, and in the immediate possession and control of the defendant, and the agreement, therefore, cannot be insisted upon.

As there was a tender, and as the money was by the parties treated as if paid into Court, the judgment will be for $400 and interest at 5 per cent., from 31st December, 1912, to date of tender, 31st March, 1913, and at 4 per cent. from date of tender to judgment.

Judgment will be for the return of the notes and for cancellation of the alleged agreement.

If case is carried by plaintiff no further, the judgment will be without costs, otherwise costs after tender to be paid by plaintiff to defendant. Thirty days' stay.

SUPREME COURT OF ONTARIO.

2ND APPELLATE DIVISION. JUNE 25TH, 1913.

EAGLE v. MEADE.

4 O. W. N. 1497.

Negligence—Evidence of—Hostler—Horse Stepping on—Negligence not Proven—Pure Accident—Action Dismissed.

BRITTON, J., 24 O. W. R. 259; 4 O. W. N. 948, dismissed an action for damages to plaintiff, an hostler in the employ of defendant, by reason of a horse belonging to defendant stepping upon him and breaking his leg, on the ground that plaintiff had failed to establish any negligence on the part of defendant, the occurrence being a pure accident.

SUP. CT. ONT. (2nd App. Div.) dismissed appeal without costs which were not demanded.

Appeal by plaintiff from judgment of HON. MR. JUSTICE BRITTON, 24 O. W. R. 259, dismissing his action for damages sustained while in defendant's employ as an hostler, caused by a horse stepping upon him.

The appeal to the Supreme Court of Ontario (Second Appellate Division) was heard by HON. MR. JUSTICE CLUTE, HON. MR. JUSTICE RIDDELL, HON. MR. JUSTICE SUTHERLAND, and HON MR. JUSTICE LEITCH.

J. M. Godfrey, for plaintiff, appellant.

G. C. Campbell, for defendant, respondent.

HON. MR. JUSTICE LEITCH:—Assuming that William Meade had the superintendence of the stable intrusted to him, the injury to the plaintiff was not caused by any negligence on his part whilst in the exercise of such superintendence.

The next question is, was the injury caused to the plaintiff by his conforming to any order or direction to which he was bound to conform and did conform. He was directed to put down the bedding for the horses. His injury was not due to this order or to any thing he did in carrying it out. It was urged on behalf of the plaintiff that William Meade caused the injury by untying the horse and backing him or permitting him to back out of the stall in order to water him. This was not negligence. It was also stated that there was evidence that he turned the horse loose in the stall to enable him to go to water. Even suppose that he did I do not think that that mode of managing a quiet horse or a number of quiet horses is negligence. It is a common every day practice of people having the care and management of horses. I do not see that there was any evidence of negligence to submit to the jury, and the appeal should be dismissed. The defendant did not ask for costs.

HON. MR. JUSTICE CLUTE and HON. MR. JUSTICE SUTHERLAND agreed, and HON. MR. JUSTICE RIDDELL agreed in the result.

HON. SIR G. FALCONBRIDGE, C.J.K.B. JUNE 21ST, 1913.

CLARY v. GOLDEN ROSE MINING CO.

4 O. W. N. 1491.

Company — Directors—Reduction in Number — Postponement of Annual Meeting—Validity of—Costs.

FALCONBRIDGE, C.J.K.B., dismissed with costs an action for a declaration that certain directors of a mining company were illegally elected.

Action by a shareholder for a declaration that the individual defendants were wrongfully holding certain offices in the defendant company, and for an injunction, mandamus, and an accounting.

R. R. McKessock, K.C., for plaintiff.

A. D. Meldrum, for defendants.

HON. SIR GLENHOLME FALCONBRIDGE, C.J.K.B.:—The case at the trial narrowed itself down to a question of the validity of the reduction of the number of directors from 5 to 3, and of the election of the 3 individual defendants as directors.

The president's reasons for causing the general meeting to be put off from July to November, viz., inability to get an auditor and lack of funds, seem to be good ones, and by-laws for these purposes were accordingly passed by the directors. All of these resigned, and it was necessary to appoint directors to carry on the company.

The action will be dismissed.

Plaintiff contended that in any event of the cause, he should have some special consideration as to costs, because he claimed that his action had the effect of compelling defendants to do their duty, as to some matters complained of in the statement of claim.

Townsend, the president, denied this under oath, and gave his own explanations.

Therefore, there is no reason why I should depart from the usual rule of giving the spoils of war to the victor.

Action dismissed with costs. Thirty days' stay.

HON. SIR G. FALCONBRIDGE, C.J.K.B. JUNE 24TH, 1913.

RE VINING ESTATE.

4 O. W. N. 1553.

Will—Construction — Postponed Gift—Vesting—Lapse—Member of Class Dying before Date of Will—No Gift to.

FALCONBRIDGE, C.J.K.B., *held*, that under a gift to all the testator's sons and daughters equally, the children of a daughter who had died prior to the date of the will did not take.
Christopherson v. *Naylor*, 1 Mer. 320, followed.

Motion for construction of the will of Alonzo Vining, who died on the 23rd May, 1895, leaving a will dated 21st September, 1894.

By paragraph three, testator devised the income of all his property both real and personal to his wife for life.

By paragraph four, he directed that after the decease of his wife all his property was to be converted, and out of the proceeds he bequeathed the following legacies amongst others:—

To his daughter, Amelia Brown, $400; to his daughter, Hannah Vining, $800.

By paragraph five, he directed "that all the rest and residue of my estate both real and personal that I shall own after the payment of the legacies" should be divided between all his sons and daughters equally, and should any of his sons and daughters be dead, he directed that the share of one so dying be divided equally between his or her children. The widow died 26th January, 1913.

Amelia Brown died intestate 21st January, 1913, leaving her surviving her husband and several children, who have assigned their interest to their father.

Hannah Vining died, unmarried, and intestate, 18th January, 1899.

Elizabeth Knapp died a widow and intestate, in 1892, leaving her surviving several children and children (infants) of a deceased child.

The questions for determination in the events which have happened are:—

(1) Is Lorenzo Brown, husband of the late Amelia Brown,entitled to the legacy of $400, and also to a share of the residue?

(2) Are the next of kin of Hannah Vining entitled to the legacy of $800, and also to a share of the residue?

(3) Are the next of kin of Elizabeth Knapp entitled to a share of the residue?

W. R. Meredith, for Official Guardian, and Mrs. Mallory.

C. G. Jarvis, for surviving children.

J. Vining, for executors.

HON. SIR GLENHOLME FALCONBRIDGE, C.J.K.B.:—With regard to the legacies, I think that each of the legatees had a vested interest on the death of the testator, and not an interest conditional on surviving the tenant for life.

With regard to the residue, the children of Amelia Brown are clearly entitled to the share which would have gone to their mother, had she survived the tenant for life, and it seems also clear that the share of Hannah Vining, who died unmarried, lapses and is divisible among the others entitled.

There is more difficulty in regard to Elizabeth Knapp, but I think the authorities compel me to hold that as she died before the date of the will, she could not be capable of taking under it, and although she left children living at the time of the death of the life tenant, these could not take in substitution for her.

Christopherson v. *Naylor* (1816), 1 Mer. 320; *Butter* v. *Ommamey*, 1827, 4 Russ. 73; *Re Websters Estate*, 1883, 23 Ch. D. 737; *Re Musther*, 1890, 43 Ch. D. 569.

I think the questions should be answered as follows:—

(1) Alonzo Brown, as husband and as assignee of his children's share, is entitled to the legacy of $400 and to the share of the residue to which Amelia Brown would have been entitled had she survived the tenant for life.

(2) Hannah Vining's estate is entitled to the legacy of $800, but not to any share in the residue.

(3) Elizabeth Knapp's estate has no interest under the will.

Costs to all parties out of the estate.

SUPREME COURT OF ONTARIO.

1ST APPELLATE DIVISION. JUNE 26TH, 1913.

SIMMERSON v. GRAND TRUNK RW. CO.

4 O. W. N. 1529.

Negligence—Injury to Brakeman—Shunting of Car—Negligence of Fellow-Servant in Charge of Operations—"Person in Charge or Control of Engine"—Findings of Jury.

MIDDLETON, J. (24 O. W. R. 403; 4 O. W. N. 1082) entered judgment for $1,500 damages for personal injuries to plaintiff, a brakeman, upon the findings of a jury who found that the plaintiff was injured through the negligence of a fellow-brakeman in charge of shunting operations in giving a signal before plaintiff was clear of danger.

Allen v. *Grand Trunk Rw. Co.*, 23 O. W. R. 453, referred to.

SUP. CT. ONT. (1st App. Div.) dismissed appeal with costs.

Appeal by the defendant from the judgment which MIDDLETON, J., on the 9th day of April, 1913, directed to be entered after the trial before him sitting without a jury at Hamilton on the 2nd day of that month.

The facts are fully stated in the reasons for judgment of HON. MR. JUSTICE MIDDLETON, reported 24 O. W. R. 403, and it is unnecessary to refer to them except as to one point.

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

D. L. McCarthy, K.C., for appellant.

W. S. McBrayne, for respondents.

HON SIR WM. MEREDITH, C.J.O.:—My learned brother, in stating the facts, appears to have thought that a witness had testified that Bryant had given the signal to the engine driver to reverse and go forward. In this he was in error. There was no direct evidence that it was Bryant who gave the signal. There was, however, ample evidence to justify the jury in drawing the inference that it was he who did so. It was Bryant's duty to give the signal, and without it the engine driver would have been guilty of a breach of his duty in reversing and going forward.

As that inference was drawn by the jury, they were warranted in finding that Bryant was guilty of negligence in

giving the signal without seeing that the respondent had reached the top of the car.

Upon that finding we agree that the respondent was entitled to recover, for the reasons stated by my learned brother.

The appeal is dismissed with costs.

HON. MR. JUSTICE MACLAREN, HON. MR. JUSTICE MAGEE, and HON. MR. JUSTICE HODGINS agreed.

SUPREME COURT OF ONTARIO.

1ST APPELLATE DIVISION. JUNE 26TH, 1913.

RE BRIGHT AND TOWNSHIP OF SARNIA

RE WILSON AND TOWNSHIP OF SARNIA

4 O. W. N. 1535.

Water and Watercourses—Ditches and Watercourses Act—Appeal from Drainage Referee—Report of Engineer—Alleged not Independent Opinion—Fees of Solicitors and Engineers—Charge on Work—Refusal to Interfere with.

SUP. CT. ONT. (1st App. Div.) dismissed appeal by plaintiffs from an order of the Drainage Referee dismissing plaintiff's application to set aside a report of an engineer upon a drainage scheme for Cow Creek drain in the respondent township.

Consolidated appeals by Robert Bright, James Bright, Thomas Wilson and Fred. Wilson, from an order of the Drainage Referee, dated 3rd March, 1913, dismissing application by the appellants to set aside the report, plans and specifications of A. S. Code, O.L.S., and C.E., and provisional by-law No. 10 D. of the corporation of the township of Sarnia, intituled "A by-law to provide for the improvement of the Cow Creek drain in the township of Sarnia."

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

R. I. Towers, for appellant.

T. G. Meredith, K.C., and A. I. McKinley, for respondent.

HON SIR WM. MEREDITH, C.J.O.:—All of the objections raised by the appellants were dealt with upon the argument except two, viz., (1) that the report, plans and specifications, and the assessment made by the engineer, were not the result of his independent judgment, and (2) that the engineer included as part of the cost of the work upwards of $1,000 for fees and expenses of solicitors and engineers, and that there was no authority under the Drainage Act to assess them against the drainage area.

There is nothing to warrant the conclusion that the report, plans, and specifications and assessments were not the result of the independent judgment of Mr. Code, the engineer. He testifies that they were. The fact that he heard and considered the objections of the engineer employed by the corporation of the township of Plympton to the scheme which he had originally recommended, but which was referred back to him by the council of the township of Sarnia, and that he modified the scheme after consideration of these objections, is of no consequence if, as he testified, and there is no reason to doubt, his judgment was convinced that they were right to the extent to which he yielded to their objections. It is not necessary to say more on this branch of the case than that I entirely agree with the reasoning upon which the learned Referee proceeded in refusing to give effect to the contention of the appellants.

The other question was also fully dealt with by the Referee, and I agree with his onclusion as to it and the reasoning on which it is based.

I would dismiss the appeal with costs.

HON. MR. JUSTICE MACLAREN, HON. MR. JUSTICE MAGEE, and HON. MR. JUSTICE HODGINS agreed.

HON. MR. JUSTICE MIDDLETON. JUNE 19TH, 1913.

RE CORR.

4 O. W. N. 1487.

Executors and Administrators—Final Winding-up of Estate—Costs —Enquiry as to Next of Kin—Escheat to Crown.

MIDDLETON, J., made a final order disposing of the costs and balance of estate herein.

Motion by the administrators of Felix Corr, deceased, for an order or further directions, and as to costs. See 21 O. W. R. 798; 22 O. W. R. 537; 23 O. W. R. 732.

HON MR. JUSTICE MIDDLETON:—The Attorney General should have his costs of the commission out of the $400 paid into Court. The parties agree that the sums named, $200, and $40 for the costs of the appeal to Mr. Justice Kelly, are reasonable, and these sums may be paid out of this $400, and the balance may go to Mrs. Donnelly. The costs not already dealt with, of the applicants and the Attorney General, may come out of the fund; the balance will go to the Crown.

HON. MR. JUSTICE MIDDLETON. JUNE 19TH, 1913.

PHERILL v. HENDERSON.

4 O. W. N. 1487.

Judgment—Motion for—Default in Delivery of Statement of Defence—Default—Deliberate—Prejudice to Plaintiff—Judgment Granted.

MIDDLETON, J., gave judgment for the plaintiff upon his statement of claim as filed in an action to set aside a deed, where defendant's default was deliberate and he had not taken advantage of a reasonable offer to permit him to plead in consideration of a speedy trial.

Motion by plaintiff for judgment on the statement of claim as filed in default of defence in an action to set aside a deed.

A. J. R. Snow, K.C., for plaintiff.

O. H. King, for defendant.

HON. MR. JUSTICE MIDDLETON:—Any accidental default or slip should always be relieved against when a motion is made promptly, and fair terms can be imposed. Here there was no accidental slip in any way, but deliberate default, and when relief was offered upon most reasonable terms, the only condition sought being that the plaintiff should be in the same position as to trial as if the defence had been filed when due—nothing is done for more than two weeks. It is now impossible to have a trial till the fall, and the plaintiff will be prejudiced in many ways that cannot be compensated for by any terms I can impose. If the transaction is not now set aside at the instance of the plaintiff, her creditors will attack it.

There is nothing in the facts shewn calling for indulgence. The defendant may be ill, but her son is not, and he seems to have had the matter in charge for his mother.

There will be judgment as claimed, and the plaintiff is entitled to her costs unless she is ready to waive them.

HON MR. JUSTICE LENNOX. JUNE 20TH, 1913.

KREHM BROS. FUR CO. v. D. H. BASTEDO & CO.

4 O. W. N. 1488.

Sale of Goods—Action for Price — Payment — Promissory Notes Given for Price Discounted—Counterclaim—Costs.

LENNOX, J., dismissed plaintiff's action for the price of certain goods sold and delivered to defendants, finding that payment had been made therefor to plaintiff's satisfaction.

Action to recover $1,652, the price of certain furs alleged to have been sold and delivered to defendants, and counterclaim by defendants for alleged breach of contract.

A. J. Russell Snow, K.C., for plaintiffs.

Gideon Grant, for defendants.

HON MR. JUSTICE LENNOX:—This action involves questions rarely arising, but no difficulty in determining the conclusion to be reached. The defendants say that they settled the claim sued on by delivering to the plaintiffs negotiable instruments for the amount, and that these instruments having passed into the possession, and apparently into the ownership, of one Abraham Schacher, that they took them up before maturity and paid Schacher the amount less a discount allowed for the time they had to run, and that this was done with the knowledge and approval of the plaintiffs. I see no reason to doubt the truthfulness of Mr. Bastedo's evidence or the *bona fides* of the transaction he deposes to; and he is clearly corroborated by an independent witness. In addition to this, the documentary evidence, the way in which the plaintiffs launched their claim, their suit against Schacher, and their entirely unjustifiable charge of conspiracy, all go to confirm what the defendants allege.

It is quite true that the plaintiffs have been over-reached and are probably committed to a serious loss, but this all arises out of matters wholly unconnected with the defendants. There is a small item of from $15 to $30 for samples, not included in the vouchers given, and in connection with this the defendants allege a breach of contract, and claim damages. There was very little said about this part of the claim, or the counterclaim, at the trial, and I think it will be wise and fair to leave it out on both sides.

There will be judgment dismissing the action with costs and the counterclaim without costs.

HON. MR. JUSTICE KELLY. JUNE 28TH, 1913.

GIBSON v. CARTER.

4 O. W. N. 1565.

Judgment—Motion for, on Report of Referee—Appeal from Findings of Referee—Reduction in Amount Awarded—Dismissal of Appeal.

KELLY, J., varied a finding in favour of plaintiffs by J.A.C. Cameron Esq., Official Referee, by reducing the amount awarded them from $2,700 to $2,690, but otherwise dismissed defendants' appeal from such report.

Application by plaintiffs for judgment on further direction and costs, and by defendants by way of appeal against the report of J. A. C. Cameron, Esq., Official Referee, in so far as it finds in favour of plaintiffs.

On the reference made to J. A. C. Cameron, Esq., Official Referee, he on February 20th, 1913, found (1) that plaintiffs are entitled to recover from defendants $2,700 in respect of commission. (2) That plaintiffs are not entitled to any damages in respect of the matters alleged in their statement of claim. (3) That defendants are not entitled to damages against plaintiffs in respect of the matters set forth in their counterclaim.

R. S. Robertson, for the defendants.

Glyn Osler, for the plaintiffs.

HON. MR. JUSTICE KELLY:—The conclusions I have arrived at have been reached after a careful perusal and consideration of the voluminous evidence (some hundreds of papers) and the exhibits (almost two hundred in number) which were submitted to the Referee. I think it unnecessary to go into a detailed review of all this evidence, but weighing it all carefully, I cannot disagree with the opinion formed by the learned Referee, except in respect of the one claim of small amount.

The written reasons given by the Referee explain somewhat fully what occurred between the parties. The circumstances which influenced me are that, when plaintiffs entered into the agency agreement with defendants an important element was the enlarging by defendants of the capacity of their mill, a project which plaintiffs were given to understand would be carried through at an early date; the agency agreement confined plaintiffs' operations to selling for defendants except when by consent they were to be allowed

to sell for others; the president and general manager of defendants admitted in his evidence that their output was not sufficient to keep two persons employed, and there is no doubt that plaintiffs relied upon an early increase of the capacity of defendants' mill. Nothing having come of that within several months, defendants brought to plaintiffs' attention a scheme for merger with other milling businesses which would make it possible for plaintiffs to handle a larger output, and while this scheme was under consideration, an additional monthly allowance was made to plaintiffs, but the scheme not having matured, and defendants, practically from the beginning of the operations under the agreement with plaintiffs, having seriously delayed shipments on orders for sale procured by plaintiffs, threats were made by plaintiffs from time to time to discontinue the relationship and withdraw from the agreement.

The agreement provided for determination by either party on three months' notice; such notice was not given, and it becomes important to consider whether in the light of what happened there was an agreement or understanding between the parties that the relationship between them under the agreement should end on October 1st, 1911. I think the conclusion reached by the learned Referee, and for the reasons he assigned, is correct, viz., that there was a determination by mutual agreement on October 1st. Defendants themselves were dissatisfied with conditions as they existed; the ground of their dissatisfaction being shewn by their contention that plaintiffs took orders for sale of feed in excess of what the amount of their sales for flour warranted, claiming that there was an implied contract with plaintiffs that in making sales they were to maintain a certain proportionate relationship between the two classes sold. I do not find evidence of any such agreement, but I do think that defendants' dissatisfaction on that score rendered them willing to fall in with plaintiffs' proposals to cancel the agreement on October 1st. Not only did they not object to these proposals, but they made up statements of account between them and plaintiffs which were intended to be final; and had they not, after rendering their first account, receded from their position in respect of the $300 item specially allowed plaintiffs for covering some extra territory, and the extra monthly allowance of $100 which they had agreed to pay plaintiffs (and which I think they had no right to

repudiate), it is, I think, beyond doubt that had a settlement of the amount admitted by them to be due in their statement (exhibit 30) accompanying their letter of October 7th, 1911, been made, nothing further would have been heard of the additional claim put forward in the action.

In his reasons the learned Referee refers to the actions of defendants evidencing an acceptance on their part of plaintiffs' resignation without requiring the three months' notice. This view, with which I agree, is further supported by the correspondence between the parties in October, 1911, when plaintiffs on October 13th, wrote defendants with reference to a proposed sale and asked to be allowed a commission thereon, to which defendants replied on October 17th, agreeing to allow a commission if the sale went through, and saying, "we will be glad to fill any orders you send us on a commission basis," following which they stated the basis of commission they would allow on sales of flour, feed and grain respectively, and which differed materially from the terms agreed upon in their former agency agreement. If defendants had not agreed to a rescission of the original agreement, there would have been no object in making new terms of remuneration for orders sent by plaintiffs to defendants, and to my mind this correspondence of itself shews that the original agreement had been put an end to by consent.

The Referee, in arriving at the amount to which he found plaintiffs entitled, refused to allow defendants an item of $10 claimed by them for moneys advanced in September, 1910, to Robert Gibson, on the ground that it was a matter personal to him. Robert does not admit he received the $10, but his memory is not clear about it. On the other hand, defendants' book-keeper is quite positive he gave the $10 to Robert when he was at defendants' place of business in connection with business of plaintiffs, and that the amount has not been repaid. I think this should be allowed defendants and that the $2,700 found due by the report should be reduced by that sum.

My opinion, therefore, is, that defendants' appeal should be dismissed with costs, and the report, varied by the deduction of this $10 from the $2,700, should be confirmed, and that judgment should be entered in favour of plaintiffs for $2,690, dismissing plaintiffs' claim for damages, and dismissing defendants' counterclaim, and that defendants pay the costs of the action and of the reference.

HON. MR. JUSTICE LENNOX. JUNE 17TH, 1913.

RE HARRISON ESTATE.

4 O. W. N. 1455.

Will—Construction—Gift to Married Woman—Separate Estate—Restraint on Alienation—Validity during Coverture but not thereafter—Costs.

LENNOX, J., *held*, that a devise to three married women of certain lands free from the debts and control of their respective husbands and without power of alienation was valid so long and only so long as the coverture lasted.

Motion for construction of will of Louisa Ann Harrison, deceased.

W. B. Raymond, for all parties interested.

HON. MR. JUSTICE LENNOX:—The person who took the life estate is dead. Mrs. Kemp, Mrs. Verner, and Mrs. Stringer are now entitled to a fee simple in possession. The question to be determined is, can they sell the property? At the time of the making of the will in question they were married women and their husbands were alive. After the use of words sufficient to vest a fee in the lands in question in the three beneficiaries above named, the will provides:—With regard to the property and estate hereby and hereinbefore given and bequeathed . . . "I do hereby declare that the same is now hereby given and bequeathed to each of them for her aliment, maintenance and support and the same is to be held and possessed by each of them free from the interference or control or management of any husband they or any of them have or may have . . . nor shall the same or any part thereof be liable or be subject to be seized, attached or be otherwise taken from any of them either for her debts or the debts of any husband any of them may have nor shall the same be pledged, disposed of, mortgaged or alienated to any person or persons whomsoever on any condition or pretence whatsoever."

The intention of the donor is the thing which governs, provided it does not purport to go beyond the limits allowed as to perpetuities and the like; *In re Bown O'Holloran* v. *King*, 27 Ch. D. 411. The right to limit the estate during coverture in the way it is here attempted to be limited is recognised in *Tullott* v. *Armstrong*, 1 Beav. 21, and many

other cases. When the coverture ceases the widow can exercise the ordinary rights incident to separate estate and alienate the property. Two of these devisees are now widows. These two have the right and power to alienate their shares. The lady whose husband is still alive has not. As I intimated upon the argument this property being physically indivisible, the parties may find a way of carrying out what they desire by partition proceedings, and a sale as incidental to it. It is a case in which all parties would be benefited by disposing of the property and I would be glad if I had an act enabling me to remove the restraint as the Court has in England under the Conveyancing and Law of Property Act.

Costs as between solicitor and client out of the estate.

HON. SIR G. FALCONBRIDGE, C.J.K.B., JUNE 20TH, 1913.

WILSON v. SUBURBAN ESTATES CO. ET AL.

4 O. W. N. 1488.

Sale of Land—Fraud and Misrepresentation—No Clear Proof of—Damage—Not Established—Dismissal of Action—Costs.

FALCONBRIDGE, C.J.K.B., dismissed an action for damages for alleged fraud and misrepresentation in connection with the sale to plaintiffs of two lots in Port McNicoll, Ont., holding that neither the fraud nor the damage had been clearly proven.

Action for $590 damages for alleged fraud and misrepresentation, whereby plaintiffs were induced to purchase two lots in Port McNicoll, Ont.

J. P. MacGregor, for plaintiff.

Grayson Smith, for defendants.

HON. SIR GLENHOLME FALCONBRIDGE, C.J.K.B.:—In the consideration of this case I have entertained much doubt and hesitation. Perhaps the very fact that I doubt and hesitate furnishes a reason why plaintifls cannot have judgment. For he who alleges fraud and misrepresentat'on must clearly and distinctly prove the fraud which he alleges. The onus is on him to prove his case as it is alleged in the statement of claim.

Then, too, the plaintiffs do not ask for rescission, but only for damages, and there is no satisfactory or cogent evidence of the difference between the present value of the lots and the price paid for them. There was evidence both ways on this point—some of it of a bright and vivacious character.

I shall dismiss the action, but under all the circumstances, without costs. Thirty days' stay.

SUPREME COURT OF ONTARIO.

2ND APPELLATE DIVISION. JUNE 20TH, 1913.

LONG v. SMILEY.

4 O. W. N. 1452.

Broker—Conversion of Mining Shares—Two County Court Actions and one High Court Action—By Consent, Tried Together in High Court—Method of Dealing with Stock—No Evidence of Conversion.

Three actions for the return of moneys entrusted by plaintiff to defendants, brokers, for the purchase of mining stock, which plaintiff claimed had never been so employed. The actions were on similar facts for varying amounts, two being brought in the County Court and one in the High Court, and were tried together in the High Court, by consent. Plaintiff's instructions to the brokers were to purchase the stocks which were chiefly non-dividend paying, and to hold them in a form in which profits could be readily realised in case of enhancement in price. Defendants purchased the stocks in question, but did not allot them to their particular customers, keeping the stock of the one kind of all their customers in one envelope, to draw from when any customer sold:—

RIDDELL, J., *held*, 23 O. W. R. 229, 4 O. W. N. 229, that this method of dealing with the stock was the best calculated to carry out plaintiff's wishes, and that, on the facts, there had been no conversion.

LeCroy v. *Eastman*, 10 Mod. 499; Dos Passos, 2nd ed., pp. 255, seq., referred to.

Actions dismissed without costs.

SUP. CT. ONT. (2nd App. Div.) dismissed appeal without costs.

Appeal from the judgment of RIDDELL, J., 23 O. W. R. 229, in an action of damages for alleged conversion by brokers of certain stocks purchased for plaintiffs.

The appeal to the Supreme Court of Ontario (Second Appellate Division), was heard by HON. SIR WM. MULOCK, C.J.Ex., HON. MR. JUSTICE CLUTE, HON. MR. JUSTICE RIDDELL, HON. MR. JUSTICE SUTHERLAND and HON. MR. JUSTICE LEITCH.

A. J. Russell Snow, K.C., for plaintiff (appellant).

T. N. Phelan, for defendant (respondent).

Hon. Mr. Justice Clute:—The defendants, as brokers, purchased for the plaintiff certain mining stocks, which were paid for in full at the time of purchase. A bought note was, in each case, sent to either the plaintiff, Georgina Long, or her sister, Kate, and the number of the scrip was entered opposite the plaintiffs' name in the defendants' stock-book.

Subsequently there appear entries in defendants' stock-book, shewing that this particular scrip was sold, at a profit, and passed out of the defendants' hands.

The plaintiff, Georgina Long, now seeks to recover the proceeds of what she claims to have been her shares or scrip. The defendants answer in effect that they did not sell her shares as they were not authorized so to do, but that they sold certain shares for other principals, and that the particular scrip representing her shares were handed out to such purchasers, the defendants always retaining sufficient scrip on hand, fully paid up and of the same issue, to meet the plaintiff's demand for the same when made.

My brother Riddell has found "that when any stock was ordered to be bought it was intended to be left in the hands of the brokers in a convenient form for immediate sale and that the plaintiff's quite understood and assented to it. Stocks which were paying dividends were, of course, to be transferred into the name of the purchasers, but not others. When dividend-paying stock was bought, it was so transferred." He further finds that sufficient of the scrip was held on hand to give every customer the amount held by him. He finds further that the plaintiff and her sister Kate Long quite understood that the stock had to be in such shape as that it could be delivered on a sale at a moment's notice. He expressly gives credit to the defendants' witnesses, and states that he cannot rely upon the accuracy of the plaintiffs' memory as to what took place between them and the defendants.

The evidence supports the findings of the trial Judge, as to the 500 shares of Otisse and 500 shares of Gifford, taken in the name of Kate Long, the defendant, McCausland, points out that they could not obtain it in lots of 250 shares at the market price, and it was, therefore, taken in the name of

the plaintiff's sister, Kate Long, instead of 250 shares in the name of each.

He further states that it was with the consent of the plaintiffs that the shares were left with the defendants, as a place of safe-keeping, that they never asked for delivery until 1911, when similar shares of the same issue were delivered to them. He further states that from the time the first purchases were made for the plaintiffs to the time the stock was finally delivered to them, there never was a "single moment" that they did not have on hand a sufficient amount of stock to meet their demands, and the demands of other customers who had a similar kind of stock; that they were never hypothecated or pledged or used in any way for the defendants' benefit; that these shares of their various principals were put in an envelope endorsed with so many shares for each principal, and that they were never short of any of the shares.

The plaintiff's case then is reduced to what the defendants admit, namely, that the defendants did not keep any particular certificate for the plaintiffs, but on making a sale delivered the scrip that first came to hand, and in this way handed out those certificates which had been designated by their numbers as having been bought for the plaintiff in the stock-book.

Did this, on the facts, as found by the learned trial Judge, amount to a conversion? I think not. The effect of what was done between the parties was to authorize the defendants to keep the scrip of those stocks which were not paying dividends in such form as could be readily transferred in case of sale. That, in fact, was done, and scrip of the like amount was always on hand and ready for delivery to the plaintiffs when demanded.

It is solely upon the findings of the trial Judge, in this particular case, and without giving effect to any alleged custom, that the plaintiffs, in my opinion, fail.

If, at any time, the defendants had parted with the scrip, without retaining sufficient of a like issue to satisfy not only the plaintiffs, but all other principals for whom they were acting, a different question would have arisen. A pledging or any dealing with the scrip for defendants' benefit and without plaintiffs' knowledge or consent, where as in this case, the stock had been fully paid for, would have amounted to a conversion, but nothing of that kind took place.

I also think, as held by the trial Judge, "that the dealings of the two sisters were of such a character that transferring stock certificates to one of them, Kate, under such a form as that they could be easily divided between the two sisters, was a sufficient compliance with the duty of the brokers." See *Sutherland* v. *Cox*, 6 O. R. (1885), 505; *Ames* v. *Comnee* (1905), 10 O. L. R. 159; *Ames* v. *Comnee*, 38 S. C. R. 601; *Langdon* v. *Waitte*, 6 L. R. Eq. 165; *Le Croy* v. *Eastman*, 10 Mod. R. 499; Dos Passos, 2nd ed., 250 to 255; *Scott & Horton* v. *Godfrey* (1901), 2 K. B. 726; *Wilson* v. *Finley*, 1913, 1 Ch. 247; *Clark* v. *Baillie*, 14 O. W. R. 848.

To what extent principals may be affected by the custom of brokers is fully discussed in *Robinson* v. *Mallett*, L. R. 7 E. & I. App. 802.

While I think, under the circumstances of this particular case, there has been no conversion, and the plaintiffs have not been damnified, yet the careless and irregular manner in which the business was conducted has led to this litigation, and ought not to be encouraged.

It is the duty of a broker to keep and be ready at all times to give a strict account of his dealings, so as to satisfy a reasonable principal. The manner in which the books were keep, and the fact that the numbers of the certificates were placed opposite the plaintiff's name, and sales were afterwards made of these numbered certificates, raised a natural, but erroneous suspicion on the part of the plaintiffs that the defendants had been selling the plaintiffs' stock and kept the proceeds and had bought in, the same number of shares, when the stock had fallen in the market to meet the plaintiffs' demand.

Under all the circumstances of the case, I think there should be no costs of this appeal. Appeal dismissed without costs.

HON. SIR WM. MULOCK, C.J.Ex. and HON. MR. JUSTICE LEITCH, agreed.

HON. MR. JUSTICE SUTHERLAND:—This is an appeal from the judgment of Riddell, J., reported in 23 O. W. R. 229.

Two actions in the County Court and one in the High Court were tried together. Two sisters, Georgina and Kate Long, alleged in their pleadings, that the defendants, a firm of brokers, received money from them for investment in min-

ing stocks and instead of so investing it appropriated it to their own use.

The trial Judge dismissed all the actions, and this is an appeal, by Georgina D. Long, from his judgment in the High Court action.

On her behalf it was said in argument on the appeal that the evidence disclosed that orders had been placed by her with the defendants to purchase certain shares of stocks in mining companies; and moneys advanced to pay for same; that the defendants had purchased the stocks, receiving specific certificates representing the shares in each case; and that in place of delivering such certificates to the plaintiff pursuant to her demands, the defendants had retained them in their possession, dealt with and sold the stock and handed over her certificates to purchasers, and in the end when she insisted on obtaining certificates procured other stock and certificates and tendered and delivered the same to her in lieu thereof.

The evidence on behalf of the plaintiff is not at all satisfactory. The trial Judge seems to attach little value to the testimony of either sister, not on account of wilful untruthfulness, but of confusion, discrepancy, and general unreliability. He credits the defendants' testimony.

It is apparent that the plaintiff knew one of the defendants, placed a great deal of confidence in him, and through him in the firm to which he belonged, and left the matter of her investments in the mining stocks very largely in his and their hands.

The trial Judge has found "that when any stock was ordered to be bought it was intended to be left in the hands of the brokers in a convenient form for immediate sale, and that both plaintiffs quite understood this and assented to it." The actions were brought with reference apparently to non-dividend paying or purely speculative stocks. He further finds that "When this kind of stock was bought for either plaintiff a sufficient amount of scrip was placed probably with other of the same mine in an envelope; sufficient of the scrip was always held on hand to give every customer the amount held by him."

The argument on behalf of the appellant to the effect that she was entitled to specific certificates of stock, representative of her purchases, was based largely on the fact that in the ledger of the defendant's, where purchases of stock

were made for her, the record thereof shewed not merely the number of shares, but the specific number of the certificate representing them. As to this the trial Judge finds: "This was mere book-keeping; the customer was not notified, and no attention was paid to keeping the particular certificate or certificates for the particular customer or any customer. When the time came, if it ever came, for the customer to get his stock, it would be by the merest chance that the particular certificate which had been entered near to his name in the books went out to him."

"It is admitted by the defendants that they did not keep any particular certificate for the plaintiffs, but sold these which had been first designated with their names in the books. The plaintiffs contend that this dealing was a conversion: but I do not think so. They quite understood that the stock had to be in such a shape as that it would be delivered on a sale at a moment's notice; they did not know that any particular certificate had been allotted to them; they made no request for any particular certificate, and until something more was done than was done, I do not think that any particular certificate was theirs even though they had paid out and out for some stock."

There is evidence which, if believed, warrants these findings. Under these circumstances, as the plaintiff acquiesced in the course of the dealings which went on, I am unable to see that she can recover in this section. The defendants alleged and attempted to prove at the trial that it was the custom among brokers to pay no regard to the numbers of the certificates of stock held by them for their respective clients, but only to see to it that they held sufficient shares, represented by certificates, for immediate delivery upon demand.

It is not necessary for us upon this appeal to determine whether such a custom was proved, or could be given effect to, apart from agreement between the broker and his client. As a matter of fact, it made no real difference to the plaintiff which certificate she would get so long as she received the specific number of shares in the particular company.

It is true that if the defendants had become insolvent, or made an assignment, awkward questions might arise between the plaintiff and the defendants' creditors, or the assignee. It is also true that if the defendants did not at all times keep sufficient stock on hand to represent the shares

which they held for the plaintiff, but left themselves in the position to try and secure stock by purchase for her when the certificate were demanded, it might in effect be substituting their personal security for the actual shares.

Here, these contingencies have not arisen, and upon the evidence, believed by the trial Judge, the defendants at all times were in a position to deliver to her the shares in the various companies which they had bought for her.

I am unable to see that the entries in the books of the defendants of specific numbers of shares, as associated with the plaintiff and her purchases of stock, can be said to so earmark the certificates as to necessarily compel the defendants on demand to deliver to the plaintiff those specific certificates.

In *Clarkson* v. *Snider*, 10 O. R. 561, Cameron, C.J., at 568 and 569, says: "It is quite true stock, so to speak, is not ear-marked, one share being as good as another; and it is not necessary that the identical shares bought for a client shall be kept separate from other shares, to be delivered when required by the client. To so hold would be holding against common sense, and imposing, for no good, trouble upon the broker. But while this is so, it does not interfere with the rule of law regulating the duty of an agent towards the principal, which requires him to have his principal's property so as to be ready for delivery to him when demanded, on payment of any lien he may have thereon against his principal."

Many of the cases as between broker and client are cases in which the broker is carrying stock on margin for the client, and deals with, or hypothecates, the shares for loans made to himself thereon.

In *Ames* v. *Conmee*, 4 O. W. R. 460, Boyd, C., at 462, says: "The law appears to be recognised in this country as it is in the United States, that so long as a broker retains and has in hand shares sufficient in number and kind to answer what have been bought for the principal, no sale of like shares bought for the principal ends the contract: *Horton* v. *Morgan*, 17 N. Y. 170; *Janisey* v. *Hart*, 58 N. Y. 475."

The plaintiff's contention on the appeal was that as the defendants admittedly did not retain the original certificates representing the shares bought by them for the plaintiff, but parted with them in connection with sales made by

the defendants of stock, the plaintiff is entitled to claim the benefit of any profit resulting, and that there should be a reference directed to ascertain it.

As it appears in this case, the plaintiff acquiesced with the defendants that the certificates be left with them, and in their dealings therewith; and as it it appears, also, I think that no loss accrued to the plaintiff by the substitution of other certificates for the original certificates, and as before action, certificates representing the full amount of her purchases were delivered by the defendants to her, I am unable to see that there is any good ground for allowing the appeal.

The system of dealing with the certificates may have been a loose one, but apparently was acquiesced in by the plaintiff. If what the defendants did in so far as the certificates were concerned, amounted to a technical conversion, I do not think the plaintiff was damaged thereby.

In *Clarke* v. *Baillie,* 14 O. W. R. 848 at 852, Mulock, C.J., Ex.D., says: "Applying that reasoning here, the plaintiff was not damaged by the hypothecation of the stocks, and there was, therefore, no misrepresentation which gave her a cause of action. The delivery of the stocks to her annulled the effect of their previous technical conversion and restored both parties to their former position, thus leaving the plaintiff in debt to the defendant for the unpaid purchase money which they would have been entitled to recover in an action of debt against her."

So, too, here the delivery to the plaintiff by the defendants, of the shares in the company of an equal amount annulled the effect of the previous technical conversion of the original shares, if it can be called a conversion, and the plaintiff suffered no damage.

I quote from Dos Passos on Stock Brokers and Stock Exchanges, 2nd edn. vol. 1, at 255: "Again, in 1859, the New York Court of Appeals in *Horton* v. *Morgan* (19 N. Y. 170), said, 'the plaintiff had no interest in having his shares kept separate from the mass of the defendant's stock. One share was precisely equal in value to every other share.' The same doctrine was laid down in England early in the reign of George 1st, 1722, by the Court of Chancery, in the case of *Le Croy* v. *Eastman,* 10 Mod. 499."

In the present case there was either an absence of agreement to keep on hand the identical stock or there was an ac-

quiescence on the part of the plaintiff to the dealing with the identical certificates, as to which the plaintiff complains. Reference to 19 Cyc. 210.

I think the appeal must be dismissed with costs.

HON. SIR JOHN BOYD, C. JUNE 20TH, 1913.

MATTHEWSON v. BURNS.

4 O. W. N. 1477.

Vendor and Purchaser — Specific Performance—Option in Lease—Consideration for—Right to Revoke—Acceptance of New Lease —Not Waiver of Option—Alleged Inadequacy of Consideration —Power of Attorney—Authority of Agent.

BOYD, C., *held*, that where an option to purchase is contained in a lease of certain property, that there is consideration for the giving of the option and the same is valid and irrevocable during the stated term without seal.

Davis v. *Shaw*, 21 O. L. R. 481, and *Pyke* v. *Northwood*, 1 Beav. 152, referred to.

That the mere taking of a new lease of the demised premises during the term to commence at its expiry is not a waiver of the lessee's rights to purchase under the option and it can be exercised thereafter.

Action for specific performance of an agreement to sell certain lands contained in a lease of the premises to plaintiff, with option of purchase.

J. I. MacCraken, K.C., for the plaintiff.

N. Champagne, for the defendant.

HON SIR JOHN BOYD, C.:—I think credit must be given to the evidence of W. G. Burland, who acted as agent for the owner of the land in question, Thos. Burns, under power of attorney, dated 4th September, 1909. Burns, the owner, unmarried and invalid, was living in a hospital at the time he arranged through the intervention of his agent Burland to lease his house and land to the plaintiff. The terms arranged were in writing, and signed by both parties. The term was to begin on 1st June, 1910, and to extend to the last day of April, 1913, and the plaintiff was to have the option of purchasing at any time, on or before the expiration of the lease, for the sum of $2,800. This paper is dated 30th April, 1910, and was signed by Burland, as attorney for the owner, on that day, and this was communicated by telephone

to the plaintiff, who was at Montreal. Burns agreed that it would be enough if she signed on her return, and this she did the first week in June. Possession was taken by her on 11th and 12th June, and rent was duly paid.

Burns, forgetful, apparently, of the dealing between the plaintiff and his agent, signed a lease of the same house on 6th May, 1910, to Mrs. Constantineau for six months at the same rent, $25, and with option to purchase (no price being named, however). A letter dated 7th May, 1910, written by Burns to Burland, was received by the latter, in these words:

"The other day I gave you a power of attorney to act for me in connection with my property, on the understanding that you would not sell or dispose of any of it unless first approved of by me. I hereby revoke any power of attorney given by me to you, and you are hereby notified accordingly. Since seeing you, I have rented the place till fall with option of purchase. Thanking you for your kindness."

Burland forthwith repaired to the hospital and saw Burns, and shewed the letter. Burns spoke about some crooked work going on, and Burland had typewritten at the bottom of the letter these words: "I hereby cancel the above letter," which Burns signed on the evening of the day that the letter reached Burland. A letter dated 11th May was sent, signed by Thos. R. Burns, to Mrs. Constantineau, in these words: "I regret in inform you that my agent had rented my house, 134 Stewart St., previous to your renting from me, and to inform you that you cannot have it. Enclosed you will find my cheque for $25, being the amount you paid in advance." Mr. Burns was aware of the lease to the plaintiff, and its terms, and there is found in a book kept in his own writing, a page headed "Mrs. M. Matthewson: Rent 134 Stewart St., from 1st June, at $25 per month." It contains entries of payments of rent down to November 30th, 1910, after which it is transferred to a pass book (not in evidence).

Mr. Burns died on 28th January, 1911, leaving a will by which he devised this house and land to his brother, the defendant. The plaintiff took a lease of the house from the defendant dated 10th March, 1913, to commence on 1st May, for 12 months, at the rate of $25 a month rent, i.e., the day after the first lease, with the option expired (viz.,

30th April, 1913). It is disputed whether she spoke of the exercise of the option at the time when this last lease was made; but she signed without advice as to her rights and with no intention of waiving the privilege of purchasing. The defendant and his solicitor were under the impression that the option to purchase was revocable and claiming that it had not been accepted by the plaintiff they served notice of withdrawal by letter, without date, but in an envelope post-marked May 1st. The defendant, in his defence, admits that on 29th April, the plaintiff tendered a conveyance of the land for signature, and the balance of the price $2,800, after deducting the amount due on a mortgage. Even if there had been no prior statement of intention to act on the option, and even if it were revocable, this act would be sufficient to shew that the plaintiff claimed to exercise the right within the allotted time.

The defence is based on a denial of the authority of the agent to execute the lease, with the option at $2,800.

That the option was not under seal and revocable, and was also withdrawn before acceptance.

That specific performance should not be granted because the price is inadequate, and the agreement made improvidently.

That if the plaintiff had an option she waived it (presumably by executing the lease of 10th March, 1913).

This action was begun on 1st May, 1913. Upon the defence raised in the pleadings, the plaintiff should succeed. Both parties agreed that the deceased was well able to transact business, though physically disabled from attending to details in person.

No case is made as to inadequacy or improvidence. The evidence given as to the present values does not count, because the prices of land began to go up in the fall of 1910. In 1909 one witness was ready to offer $3,500 for it, but it was then valued at $4,000. The testator told the witness Burland, his agent, that the best he had been offered for it was $2,700. The fall before he had told the plaintiff that he was willing to take $2,800 for the place; and she, when the lease was made, was willing to pay that at the end of the term, and would not have taken the lease unless on that condition. The price, as things were in 1910, was not so low as to give rise to any suspicion of unfair dealing.

This option being obtained, as I have said, it follows that the option was not given without consideration, and that it is not a revocable concession terminable at the will of landlord. I base this conclusion on the view taken in American authorities discussed by Falconbridge, C.J., in *Davis* v. *Shaw*, 21 O. L. R. at p. 481. The agreement to pay rent, and the payment of rent under the lease (though not under seal) is applicable to the whole agreement. The lease for the term would not have been taken by the plaintiff unless it was accompanied by the option, and the whole contract stands or falls together; one part cannot be separated and eliminated at the will of the landlord; the right to buy exists exercisable at any time during the period specified. *Pike* v. *Northwood*, 1 Beav. 152.

There is no evidence of any waiver by the plaintiff of the option to purchase. The taking of a new lease to begin at the termination of the other was merely a provident act in case she did not think fit to purchase. Had she elected to purchase during the former lease, that would *ipso facto* have determined the relation of landlord and tenant, and a new relation of vendor and purchaser would have arisen. None other follows in regard to the second lease; it did not become operative on the plaintiff electing to purchase at the end of the first term.

Next and last, as to the power of the agent to enter into a contract giving the option to purchase. He acted under a power of attorney most comprehensive in its terms; power was given to let, set, manage, and improve the lands; to sell and absolutely dispose of the land "as and when he shall think fit"; "he shall execute and do all such things as he shall see fit for any of the said purposes, and generally to act in relation to the estate, real and personal, as fully and effectually in all respects as the principal could do personally.

These ample powers *per se* would cover selling by way of option during the term at a fixed price. The option is a possible prospective sale, and is a manner of dealing which was not foreign to the way in which Burns himself managed the property. Besides, Burns was told of this very arrangement with plaintiff, and, in fact, ratified it by his letter of 11th May, 1910.

It was further urged that there had been a revocation of the power of attorney. That, however, was an act which

was itself revoked and cancelled by Burns on the same day that the agent was informed of the revocation. There was no withdrawal of the signed and sealed power of attorney which remained always with the agent. And Burns recognised the tenancy created under that power on till his death by the receipt of rent. Another answer to this contention is that the first lease had been made and signed by the agent before this attempted revocation took place.

On all grounds, therefore, I think that the plaintiff is entitled to specific performance with costs. The usual reference, if desired, as to amount if parties cannot agree.

HON. MR. JUSTICE LENNOX. JUNE 19TH, 1913.

ONTARIO ASPHALT BLOCK CO., LTD. v. MANTREUIL.

4 O. W. N. 1474.

Vendor and Purchaser — Specific Performance—Option in Lease—Exercise of Same—Tender—When to be Made—"End of Demised Term"—Dies Non—Defect in Title—Life Interest only—Specific Performance with Compensation — Damages—Acquiescence in Permanent Improvements by Lessees — Reference—Costs.

LENNOX, J., *held*, that where an option was given in a lease to purchase certain property at the "end of the demised term" upon notice which was properly given, and the lease expired on a Saturday, the lessees could legally tender the purchase-money and a deed upon the following Monday.

That where as to a portion of the lands agreed to be sold the lessor only had a life interest, the lessees were entitled to a conveyance of the same with a corresponding abatement in purchase-price.

That where the lessor had at the time of giving the option been honestly in error as to the extent of his title but where later he discovered the error and allowed the lessees to proceed and make permanent improvements upon the demised premises without notifying them of the same, damages should be substantial and not confined to mere conveyancing charges.

Action for specific performance of defendant's contract to convey to plaintiffs certain land and land covered by water described in the pleadings; and damages.

The contract arose out of an option contained in a lease of the lands in question from the defendant to the plaintiffs for ten years, from the 2nd February, 1903.

D. L. McCarthy, K.C., and J. H. Rodd, for plaintiff.

M. K. Cowan, K.C., for defendant.

HON. MR. JUSTICE LENNOX:—The option is in the words following, that is to say: "It is agreed between the parties hereto that the lessee, its successors and assigns, shall have the right to purchase the demised premises at the end of the demised term of ten years for the cash sum of $22,000, provided it shall have given six months previous notice in writing of its intention so to do."

In strict compliance with the terms of this option the plaintiffs on the 5th of January, 1912, gave notice to the defendant of their intention to exercise the option, and to purchase the demised lands; and the right of the plaintiffs to exercise this option and to have these lands conveyed to them, was never disputed until or after the expiration of the term.

On Saturday, the first of February, 1913, and again on the following Monday, the third of February, the plaintiffs tendered to the defendant the $22,000, and a deed of the lands in question for execution. On both occasions the defendant refused to accept the money or to convey. The form of the conveyance has not been objected to.

The defendant sets up in his statement of defence that the lease was obtained by fraudulent representations as to the nature of the business to be carried on. There was no attempt made to prove this. The defendant also set up that the lease provided against the carrying on of any business that might be deemed a nuisance.

The defendant collected his rent for the whole term of ten years without complaint, and there is no evidence to show or suggest that the plaintiffs ever carried on any business other than that for which the premises were expressly demised.

It is also set up by the defendant that the lease became forfeited by non-payment of taxes for a year, and non-payment of rent for three months. There was no evidence in proof of this plea. In fact, the statement of defence contains many idle and irrelevant statements.

The answers set up at the trial were:

(a) That the tender on Saturday, the first of February, was ineffective, because there was a quarter's rent then in arrear, and, this rent having been paid later on in the same day, that the tender made on Monday the third of February was too late.

(b) That the defendant thought he had the fee but finds that he has only a life estate in the portion in the lands in question which belonged to his father, that is, in the high land, and that as to the land covered by water, although he holds this by patent from the Crown in fee, that the Crown should only have granted to him a life estate therein; and, lastly,

(c) That the plaintiffs, if they are entitled to anything, are entitled to damages only; and, the breach of contract arising through a *bona fide* mistake of title, these damages are confined to solicitor's charges and the like.

I am of opinion that the tender made on Monday was clearly in sufficient time. The right to purchase is to arise "at the end of the demised term of ten years"; that is, at the end of Saturday, the first of February. On the strictest interpretation, the plaintiffs would have the whole of the following day within which to act, and, this being a *dies non*, they would have Monday, the day on which the second tender was made.

But in my view they were not confined to Monday. The one thing that they had to be careful about was to give the full six months' notice. Without this, no contract to purchase or sell would arise. This notice being given, and there being no condition making time of the essence of the contract, a contract of sale binding upon both parties, and to be completed within a reasonable time, arose.

If the matter then ended here, the plaintiffs would be entitled to judgment for specific performance.

If a plaintiff has contracted for the purchase of more land than the defendant is able to make a good title to, the purchaser is entitled to that which the vendor has, with an abatement of the price in respect of that which cannot be conveyed; and with the addition of nominal or substantial actual damages, dependent upon the particular circumstances of the case.

I cannot entertain the defendant's objection to his own title to the water lot.

The plaintiffs in this case are entitled to a conveyance from the defendant in fee simple of such part of the land in question in this action as was granted by the Crown to the defendant by patent thereof, dated the seventh day of October, 1874, and, as regards the residue of the lands agreed to be conveyed, to a conveyance of the defend-

ant's life interest therein, with an abatement of the purchase money in the proportion in which a fee simple exceeded this life interest in value, at the end of the 10 years term.

There will be the ordinary judgment for specific performance to this extent; with a reference to the Master at Sandwich to take an account upon that basis, to enquire as to damages as hereinafter provided for, and to settle the conveyances in case the parties cannot agree.

It is my duty to determine the character of the damages which the plaintiffs should recover. When the lease was executed, the plaintiffs' obligation to pay rent and taxes, and to build a wharf, purchased not only the right of occupation for ten years, but the option and its incident as well, namely, the right to the land in fee upon notice and payment of an additional consideration of $22,000. The defendant did not know of the limitations of his title when he made the lease; and there are decisions limiting the damages to about actual outlay in favour of a vendor acting *bona fide* and without negligence in such a case.

But the defendant did know of the defect in his title in 1908. For ten years the plaintiffs have been *bona fide* expending money in improving this property, and in establishing and extending their business there, to the knowledge of the defendant. The defendant, with full knowledge of his position, and as well after as before the receipt of the plaintiffs' letters of the 2nd of October and 24th December, 1908, and the notice of exercising the option served on the 5th of January, 1912, by his deliberate and continued silence invited and encouraged the plaintiffs to continue their improvements and expenditures, and to believe, and they evidently did believe, that the defendant would be able to, and would, in fact, carry out his contract.

This does not seem to me to be the case of a *bona fide* excusable mistake, in which all the loss is to be thrown upon the purchaser by an award of nominal damages or of solicitor's expenses only. But I am inclined to believe—although I have no actual evidence of it—that by a little exertion the defendant can obtain the title and carry out his bargain. This is what he should do, if possible; and this, I believe, he can do with less expense to himself, if my judgment as

to his ability is correct, than will be involved in a protracted reference and assessment of damages.

I direct that all proceedings be stayed for one month to enable the defendant to get in the title and convey the property to the plaintiffs, if the defendant determines to do so, and gives notice of his intention within fifteen days from the 19th June inst.; and in this event there will be judgment against the defendant for specific performance of the contract according to its terms; the plaintiff paying interest on the $22,000 as being about equal to the rental, with costs, and a reference to the Master to compute and settle the conveyance.

If this suggestion is not, or cannot be, acted upon by the defendant, then in the reference hereinbefore directed to ascertain and fix the abatement in price, will be included a direction to the Master to ascertain and report what amount the plaintiffs are entitled to as damages in addition to abatement in price, for breach of contract, calculated on the basis of the plaintiffs' loss.

The plaintiffs are entitled to costs down to and including the trial. Costs of the reference and further direction reserved.

MASTER-IN-CHAMBERS. JUNE 16TH, 1913.

JORDAN v. JORDAN.

4 O. W. N. 1484.

Discovery—Place of Examination — Convenience—Alimony Action.

MASTER-IN-CHAMBERS, ordered defendant, a resident of Parry Sound, to attend before a special examiner in Toronto to be examined for discovery in an alimony action.

Marcus v. *Macdonald*, 3 O. W. R. 411, followed.

Motion by plaintiff for an order for examination of defendant, the Local Registrar at Parry Sound, for discovery as may be directed or can be conveniently arranged for.

Plaintiff in person.

H. W. A. Foster, for defendant.

CARTWRIGHT, K.C., MASTER:—The parties not being able to agree it devolves on me to dispose of the matter.

Following *Marcus* v. *Macdonald* (1904), 3 O. W. R. 411, and cases cited, it seems proper to direct that defendant attend for examination before a special examiner at Toronto at such time, and place as he may appoint. This will be far less expensive to the parties and more likely to prove satisfactory than if a special examiner was appointed to go to Parry Sound; or if the defendant was ordered to attend at some other county town as Bracebridge or Barrie or North Bay.

Conduct money from Parry Sound to Toronto is $7.50, which with allowance for two days or even three would not exceed $10 or $11.25.

Costs of this application will be in the cause.

HON. MR. JUSTICE KELLY. JUNE 16TH, 1913.

NORTH AMERICAN EXPLORATION & DEVELOPMENT CO. v. GREEN.

4 O. W. N. 1485.

Trust—Director and Secretary of Company—Option Taken in own Name—Option by Company Allowed to Lapse — Reference—Costs.

KELLY, J., *held*, that where defendant, a director and secretary of plaintiff company entrusted with its negotiations in respect of a certain property, allowed the company's option upon such property to lapse and took another in his own name and for his own benefit, he was a trustee in respect thereof for the plaintiff company.

Action for a declaration that defendant was trustee for plaintiffs of certain lands conveyed to him and for a reference and damages.

H. J. Macdonald, for the plaintiff company.

J. T. Mulcahy, for the defendant.

HON. MR. JUSTICE KELLY:—At the close of the argument I intimated my belief that plaintiffs were entitled to succeed. But as a very considerable amount of documentary evidence was put in I mentioned that I wished to read it before finally expressing my judgment. I have now gone over all this carefully, and it has only tended to strengthen my view in favour of the plaintiffs.

The defendant was a director of the plaintiff company and its secretary. On January 5th, 1912, Graham, with whom an agreement had been made respecting the land in question wrote Ivens, the president of the company asking what was he going to do about the place (referring to the property). The reply thereto written by defendant on Iven's instructions stated that "we are endeavouring to get things in shape," and "we will write you again in a few days," and then he informed Graham of the acceptance of McDowell's resignation as secretary of plaintiff company, and of his (defendant's) appointment to that position. Then followed on February 2nd a letter to Graham from plaintiffs signed by Ivens as president, and defendant as secretary, arranging for his (Graham's) coming to Toronto to continue negotiations about the property. Graham came to Toronto within a few days and met defendant and Ivens and Sutherland (another director of the company.) McDonald, also a director, was present about the same time. As a result of these meetings a new option was given by Graham in defendant's name and as I find at his suggestion.

Without reviewing all the details of what took place leading up to and at the time of the making of the option of February 7th, there is not a shadow of doubt in my mind that the transaction was entered into on behalf of and for the benefit of the plaintiffs. I am equally clear when the three months term was expiring, the defendant who had been entrusted with the duty of carrying on the dealings with Graham under the option of February 7th, allowed the option to expire, and, without keeping the directors informed of what was taking place, and without their knowledge, entered into a new agreement with Graham for his own benefit, using no money of his own but with and on the strength of the $400 paid over on behalf of plaintiffs in February, and with other money obtained from the sale of timber on the property, which he entered into practically concurrently with this new arrangement. He made use of his position as an officer of the company to obtain a personal benefit and advantage which belonged to the company. I accept the statements made by Ivens and Sutherland that the understanding was that the agreement of February 7th with Graham was on behalf of and for the benefit of the company. If anything further were needed to bear me out in this view it is found in the evidence of Mr. Fasken, who

drew the agreement of February 7th and who met the parties at that time. In addition to this the whole setting of the transaction from beginning to end shews conclusively that the agreement or option of February 7th was intended not for defendant but for plaintiffs. Defendant's excuse that plaintiffs or the directors, would not put more money into the transaction in or about May is without substance, for the new arrangement made about that time between him and Graham required no present advance by him, and as I have said before, he made no advance or payment out of his own moneys. There is significance too in the fact of his requiring secrecy on Graham's part in respect of the dealings between them, and which is shewn by two letters of his written in May.

There is no doubt in my mind that there was a deliberate design on defendant's part of depriving plaintiffs of the benefits belonging to them and of obtaining these benefits for himself.

In fairness to Graham it should be said that I don't think he knowingly aided defendant in carrying out his design.

I think it proper to mention that MacDonald, a witness called for the defence, was unwilling—for what reason I cannot say—to answer important questions on his cross-examination. On an intimation from me that he would either have to submit to the penalty due to his refusal, or that he should be withdrawn, counsel withdrew him from the witness box. His evidence, however, so far as it went, and without further cross-examination, was not such as to affect my view of the rights of the parties.

The position of defendant now is that of trustee for the plaintiffs of the property conveyed to him by Graham, and he must convey the same to the plaintiffs and account to them for his dealings with the property and the moneys derived therefrom, and to pay to them whatever amount shall be found to be due on a reference—which I now make to the Local Master at Lindsay—for that purpose. He must also pay the costs of the action.

HON. SIR JOHN BOYD, C. JUNE 18TH, 1913.

ELLIS v. ELLIS.

4 O. W. N. 1461.

Alimony—Action to Recover Wife's Separate Estate—Presumption as to Corpus—Different Presumption as to Income—Evidence—Alleged Gift—Mental Condition of Wife—Prior Consent—Judgment as to Quantum of Alimony—Refusal to Re-open—Chattels—Judgment for Delivery of—Costs.

BOYD, C., *held*, that as to the corpus of the wife's separate estate received by the husband during coverture the presumption is against a gift to him as to the income, that the presumption is that it was expended for their joint purposes and that the husband is not accountable for the same.

Rice v. *Rice*, 31 O. R. 59; 27 A. R. 121.

Action for alimony, for certain sums of money belonging to plaintiff received by defendant, and for the possession of certain chattels.

J. Rowe, for plaintiff.

S. G. McKay, K.C., for defendants.

HON. SIR JOHN BOYD, C.:—In the conflict of evidence which arises in the case between the parties themselves, I feel constrained to accept the recollection of the wife as more accurate than that of the husband. On various points of disagreement, she is so far corroborated by independent testimony, that my best conclusion is to hold in the main that her version of affairs is correct.

Besides, as to the chief claim, the documentary evidence shewing the ownership of the money is in her favour. That she received considerable sums from her father's estate in Scotland, after her marriage, is not disputed; the contention is, how much? In the absence of other evidence to countervail, it must be taken that the face of the bank receipts shewing sums payable to her, expresses the fact that she was the depositor and owner of the moneys. I find on the facts that the husband handled these moneys on her endorsement of the receipts as her agent and could not against her will apply any portion to his own use. She gave no consent to any such user as to the corpus or capital, but signed in order that the money might be more profitably invested.

From the marriage in 1888, till 13th October, 1910, the parties lived together as man and wife and had children. On 2nd November, 1910, a writ for alimony was issued, and by its endorsement also claimed "an account and payment of moneys received by the defendant on the sale of the plaintiff's lands and interest thereon." On 8th December, 1910, a consent judgment was obtained by which an allowance of $400 a year was to be paid by the defendant to plaintiff on account of alimony. In addition to this an agreement of separation was entered into between the parties on 21st November, 1910, reciting the consent to allow alimony (afterwards put into the form of judgment), and agreeing that when the land of the husband (being part of lot 15 on a lot in the village of Norwich) was sold he would pay the wife one-third of the proceeds and upon such payment she was to release her dower.

The account asked by the endorsement of the writ was in respect of house and land standing in the wife's name which had been sold by the husband and the proceeds of sale paid to the wife, except about $500, which he retained for repairs and improvements made out of his money on the property and house. The husband says it was agreed that this should be deducted. The daughter says the mother was apparently persuaded by the husband to let him keep this $500, when the house was sold in 1910.

I judge that this claim should not be entertained as things stand. The alimony suit, with its special claim for an account as to the sale of this house of the wife was settled by the concession of alimony at the rate of $400 a year and a further concession of one-third out and out of the proceeds to be derived from the sale of the husband's house, when it was sold (which stands good for all the future) and that house is said to be worth at least $4,000. This term of the agreement was beyond her legal claim for dower; and while technically it may be said the matter is not *res judicata,* yet it must be considered that the claims and rights of both parties in respect to both houses were present in their minds when the quantum of alimony was settled. To put it strictly it does not seem to be equitable now to disturb that settlement of 1910, unless the judgment for alimony is set aside, and the question of how much is to be paid is left open for enquiry and settlement having regard to the altered condition of the defendant's estate.

I do not propose to have the amount of alimony reconsidered, and for this reason, do not interfere in regard to this claim for $500.

But on the other part of the case as to the separate moneys of the wife, I think no obstacle arises based on the former action and the additional deed of separation.

That outstanding right of the wife to these moneys of her own taken by the husband, was not alluded to or considered; though it must have been known to both parties. The delay of the wife is not explained, but such a delay does does not bar her right, if a trust existed in regard to this money. Such a trust I hold did exist as to all the moneys received from Scotland, which appear in the deposit receipts—but not necessarily so as to the income or interest derivable from the principal sums. On the 15th May, 1896, the wife consented to $650 being drawn out of the capital for investment by the husband.

And again 6th October, 1896, a further sum of $500 for a like purpose. Finally on 12th January, 1897, she endorsed to her husband the whole of the two amounts then on deposit in her name; on receipt for $1,721, and one for $589. The husband claims these two sums as a gift out and out from the wife. I cannot, having regard to all the surroundings, accept this conclusion. The parties were not on equal terms; she had already discovered his unfaithfulness to her, and was greatly disturbed and nervously unstrung. The matter was kept quiet, but her condition was such that the physician advised a rest and a journey to the old country; but to that, her husband would assent only on condition that she turned over all this money to him, as he said he might have occasion to use it or some of it during her absence. In her weak and disordered condition, on the eve of her departure, it needed much less than coercion to induce her to endorse the receipts and give them to her husband. He cannot be allowed to take advantage of such a surrender. His position as husband was to protect her even from herself, and taking the receipts as he did and as she gave them, he did not cease to be her trustee for those sums, i.e., $1,721 and $589. He is also to be charged with the two other principal sums withdrawn for a special purpose, which he does not seem to have fulfilled, but rather to have pocketed or otherwise expended the money (*i.e.*, $650 and $500).

The interest or income from the capital sums stands on a different footing which should exempt him from liability as a matter of fairness between man and wife living together in family and household relations. The presumption is in such cases that the income of the wife's separate property is expended for the joint benefit of husband and wife and their household. That is supported by many circumstances which need not be detailed; except to say that she returned to her home from the journey in December, 1897, and though he claimed the money as his own they lived together supported by the husband till she left the house in 1910; even in the absence of these details I would not (having regard to the whole course of litigation and the manner of life of the now disputants), charge the husband with interest and rests as claimed. Did I feel obliged to do so I should certainly vacate the alimony judgment and let an amount be fixed afresh in view of the changed financial condition of the defendant. But in charging only the amounts actually received by him as indicated, I do not feel pressed to disturb the consent judgment.

This distinction as between the receipt of the corpus and the interest or income by the husband of the wife's separate estate, when they were living together for many years, is well defined. If the husband claims there has been a gift of the corpus that must be made out clearly and conclusively or he will be held to be a trustee for her. As to the income, however, the burden of proof is the other way. She must establish with like clearness and conclusiveness that this yearly increment expended for their joint purposes and advantages was dealt with by her husband by way of loan and for which he was to be held to account. *Rice* v. *Rice,* 31 O. R. 59, affirmed 27 A. R. 121. The counsel for the wife stated in open Court that he only desired to charge against the husband that which was fair and just, and I think that my present ruling should satisfy him in this respect.

I find that the money of the wife was expended in the purchase of the piano in pleadings mentioned—and that the sum paid was $325. This is to be allowed to the husband as a proper payment, and the piano is declared to be the property of the plaintiff, and to be forthwith delivered to her.

The other chattels claimed were to be ascertained and their identity determined by the intervention of the daughter, who was accepted by both sides as a suitable referee to adjust the adverse claims, and her decision I do not propose to dis-

turb. The articles should be handed over to the plaintiff according to the determination of the daughter, and they need not be mentioned in the judgment.

I would fix the amount of liability thus:—

Deposit receipts endorsed over to defendant at the time the plaintiff left for England	$1,721
He had also drawn out before	587
On 15th May, 1896	650
And on October 6th, 1896	500
	$3,458
Less paid to her at sale of house	1,170
	$2,288

As to the piano, it cost and he paid $325; he got $225 of this from the wife when in England, and also drew out on 12th January, 1897, $100 from her money, which will square this account and leave the piano as paid for out of her money, and to be handed over to her.

Judgment should be for delivery of piano and the other chattels as designated by the daughter, and the payment of $2,288 with interest, to run from the date of separation in October, 1910.

The defendant should pay the costs.

———

HON. MR. JUSTICE KELLY. JUNE 30TH, 1913.

ALLEN v. GRAND VALLEY RW. CO.

4 O. W. N. 1578.

Contract — Guarantee—Goods Supplied Railway Company—Guarantee of Two Directors of Company — Alleged Variation in Amount of Contract—Knowledge of Defendants—Variation Contemplated by Contract.

KELLY, J., gave judgment for plaintiffs against defendant company for the price of certain material supplied for railway construction, and against the two individual defendants, directors of defendant company, upon a guarantee executed by them, holding that the fact that the later figures of the plaintiffs for a complete job exceeded their earlier figures when the data upon which they were estimating was admittedly incomplete and subject to revision, did not release the guarantors.

Action for recovery of moneys claimed as a balance due for goods supplied by the plaintiffs to the defendant company for use in the construction of their railroad, and payments of

which plaintiffs claim defendants Verner and Dinnick guaranteed.

H. E. Rose, K.C., and G. H. Sedgewick, for plaintiffs.

F. Smoke, K.C., for defendants.

HON. MR. JUSTICE KELLY:—At the time the guarantee was given on July 23rd, 1909, Verner was president and Dinnick vice-president of the defendant company. The inception of the dealings between the parties in respect of which the claim is now made, so far as the evidence shews, was on July 14th, 1908, when plaintiffs, whose business operations are carried on at Sheffield, in England, wrote to the defendant company referring to a letter of June 21st from their representative Smith and submitting prices "for points 12 feet 6 inches long and crossings in Allen's (Imperial) manganese steel, all in accordance with the drawings sent by him." Accompanying the letter was a schedule of estimated prices for special track work and which referred to the various items of works as "jobs," each job bearing a number.

The present action is in respect of jobs 34 and 43 referred to in that schedule.

Following the letter of July 14th, 1908, nothing appears to have passed between the parties until July 13th, 1909, when defendant company wrote plaintiffs accepting their tender of July 14th, 1908, "in general accordance with tracings and sketches there submitted, but to be amended as necessary to accord with the requirements of our engineer and that of the city engineer of Brantford." This acceptance also contained the following modifications: "As explained to your Mr. Ward and Mr. Hampton, there will be certain alterations, and, probably additional work, in various job numbers, but the details of these alterations and additions can only be arrived at when your engineer comes here to prepare the working drawings . . ." "A formal written acceptance of this contract is to be given us immediately you receive a satisfactory undertaking from Mr. Murray A. Verner, president of the Grand Valley Rly. Co., in regard to the due fulfilment of payments. . . ." "Jobs Nos. 33, 34, and 35 are to be complete layouts, including manganese steel rails curved to the required radius. Prices of these three layouts to be arranged as soon as detailed drawings have been prepared."

Between that time and July 23rd, some communication seems to have taken place between the parties in relation to

the guarantee, for on that date Dinnick, as vice-president, wrote to Ward, plaintiffs' representative (who appears also to have been a director of plaintiffs and their attorney), referring to a statement of Ward's that if he (Dinnick) would join Verner in the guarantee, Ward would be perfectly satisfied to recommend plaintiffs to proceed with the wrok. This was accompanied by the written guarantee now sued upon and Dinnick requested Ward to wire that it was satisfactory and that he had cabled to proceed with the work.

The guarantee is as follows:—

"Toronto, July 23rd, 1909.

"J. C. Ward, Esq., Director Edgar-Allen Co.,
c|o Auditorium Annex,
"Chicago, Ill.

"Dear Sir,—In regard to the order which the Grand Valley Railway Company have placed with your firm for the special work for the Brantford Street Railway Company amounting to some sixty thousand dollars, the first work to be delivered in two months or sooner if possible, and the terms on each consignment to be fifty per cent. on delivery and the balance sixty days after delivery, we wish to state that in connection with the said contract and these terms of payment, we hereby personally undertake to make these payments if the company fails to do so.

"Signed this Twenty-third day of July, 1909, at Toronto, Canada.

"M. A. Verner, President.
[Seal.]
"W. S. Dinnick, Vice-President.
[Seal.]

"Witness: A. J. Williams."

This was followed by a letter of July 28th, 1909, from plaintiffs to Dinnick as vice-president of defendant company, in which, after referring to the telegram which had passed between them relating to the cabling for plaintiffs' expert engineer to come on, the writer continues:—"Upon the strength of yourself and Mr. Verner's personal guarantee, we accept the contract of the Grand Valley Railway Company, Brantford, dated July 13, and we will do everything in our power to effect the earliest possible deliveries." On the same date plaintiffs wrote the defendant company that in view of the personal undertaking of Verner and Dinnick, they were proceeding under the acceptance of July 13th, 1909, and

they asked that the letter be considered a formal written acceptance of the order.

Evidently the parties had proceeded to arrange for the layout of job 34, for on August 27th, 1909, plaintiffs wrote defendant company submitting a revised estimate for points and crossings in this layout, for which they quote a price of £1,609.5, and this was accepted by the chief engineer of the defendant company. But on September 24th, plaintiffs submitted to defendant company a further revised estimate for this job "as per drawings submitted to you," and therein it was stated that "this estimate now includes the whole of the manganese steel points and crossings to form a complete layout, and will cancel our former tender of August 22nd, which was approved by you August 13th, 1909." The price of this complete layout was therein stated to be £2,411.8.4, the amount now sued for in respect of this job.

One of the grounds of defence relied upon by Verner and Dinnick is that there was such variation in the terms of the contract in relation to job 34 as discharged them from liability, or in effect, that, so far as that job is concerned they did not guarantee it as it was finally agreed upon.

It should have been stated that the schedule of prices submitted on July 14th, 1908, quoted £633.12.6 for points and crossings for job 34, but defendant company's letter of July 13th, 1909, clearly did not intend that job to be accepted in the form and at the price quoted in July, 1908, but contemplated a contract for a complete layout, the details and particulars of which and the amount of the price therefor it was not possible then to determine or arrive at, and they were not to be determined or ascertained until detailed drawings were prepared covering the whole job, which were to be drawn after plaintiffs' expert engineer had arrived from England.

Down to the submission of the estimate of August 27th, 1909, and its acceptance by defendant company's engineer, there is no doubt that nothing had happened which would operate as a discharge of the sureties.

At first I entertained doubts as to the effect of the submission of the revised estimates of job 34 in September, 1909 and their acceptance, that is, whether there was on August 27th a complete layout such as was contemplated by the proposition of July, 1909, or whether what was contemplated by that proposition was not fully and finally determined until September 24th. I was inclined to the view that the esti-

mates of August 27th contained all that was in mind (so far as job 34 was concerned) when the proposition of July 13th was made, but on more mature deliberation and a further careful review of the evidence and consideration of the documents, I have to conclude that what was proposed by the estimates of August 27th was not a fulfilment of the proposal of July 13th, 1909, and that it was not until the estimates of September 24th were agreed upon that the specifications of the complete layout intended by that proposition and the price of that job were finally arrived at.

In that view of the matter, my opinion is that the sureties were not discharged from liability.

The estimate made in August was aimed at determining what was the complete layout of job 34 contemplated in the proposition of July 13th, but that estimate turned out not to be complete, and it therefore became necessary to make further alterations or additions such as were referred to in the original proposition, before that layout was finally completed; that result was arrived at by the estimate of September 24th, which was finally agreed upon as complete. I can find nothing in the evidence to shew that the latter estimate exceeded what was reasonably within the meaning of the proposition of July 13th, or that what took place up to that time was anything more than a working out or development of what was contracted for. The sureties must be taken to have intended to include in their guaranty the price of a complete layout of job 34. Dinnick's evidence is, that when he entered into the guaranty he knew the contract had been made, but that he did not look at the terms and the prices.

The sureties were chief officers of the defendant company and had knowledge of its operations.

Then again the guaranty fixed the limit of the sureties' liability at "some sixty thousand dollars;" the total of the contract including the £2,411.8.4 as finally agreed upon for job 34, falls very considerably within that sum.

Defendant company set up that at the date of commencement of action, plaintiffs had no cause of action; that the goods sued for were not delivered on or before June 9th, 1911, and in effect that the sixty days term of credit had not expired. This defence is not borne out by the evidence. I find that the period of credit dating from the delivery of the goods had expired at the time the action was begun, and that therefore these proceedings were not premature.

Defendant company counterclaimed for damages for failure to deliver within the time contracted for, and for loss owing to alleged imperfect and incomplete and defective material and work supplied and done by plaintiffs. No evidence was submitted to substantiate these claims.

There will be judgment in favour of plaintiffs for the amount sued for, including interest, and costs, and dismissing defendant company's counterclaim with costs.

SUPREME COURT OF ONTARIO.

1st Appellate Division. June 26th, 1913.

MALCOLMSON v. WIGGIN.

4 O. W. N. 1538.

Vendor and Purchaser—Action for Balance Due—Alleged Satisfaction—Evidence—Appeal—Allowance of.

Sup. Ct. Ont. (1st App. Div.) in an action to recover the balance of unpaid purchase money upon the sale of certain premises in Hamilton *held* that plaintiff was entitled to recover, not having accepted the liability of another upon a mortgage upon other lands as part payment, as alleged by defendant.

Judgment of Wentworth, Co. Ct., reversed with costs.

Appeal by the plaintiff from the judgment of the County Court of the county of Wentworth, dated 11th February, 1913, pronounced by the Senior Judge after the trial before him sitting without a jury on the 3rd December, 1912, dismissing the action.

The appeal to the Supreme Court of Ontario (First Appellate Division) was heard by Hon. Sir Wm. Meredith, C.J.O., Hon. Mr. Justice Maclaren, Hon. Mr. Justice Magee and Hon. Mr. Justice Hodgins.

J. G. O'Donoghue, and M. Malone, for appellant.

S. F. Washington, K.C., for respondent.

Hon. Sir Wm. Meredith, C.J.O.:—On the 1st April, 1912, the appellant sold to the respondent a house and lot in Hamilton for $4,450. In order to complete his purchase, it was necessary for the respondent to borrow on mortgage of the property $4,000, and arrangements were made to pro-

cure the loan from James E. Stedman, a client of Mr. Gauld, who also acted for the respondent in completing the purchase.

Stedman held a mortgage made to him by Francis S. Depew on property which the mortgagor had subsequently sold to a Miss Law. Upon this mortgage there was assumed to be owing $1,133, and this sum Stedman required to make up with other money he had in hand the $4,000 he was to lend to the respondent. A solicitor named Ogilvie acted for the appellant and as the learned Judge found acting for Miss Law received from her the $1,133 to pay to Stedman in discharge of the Depew mortgage.

The appellant and the respondent met at the office of Mr. Gauld to close the transaction. Ogilvie being also present representing the appellant. Stedman had in the meantime signed and left with Mr. Gauld, a statutory discharge of the Depew mortgage, with instructions when the money was paid to him to apply it to make up the amount to be lent to the respondent.

Mr. Gauld informed the appellant that until the Depew mortgage money was received by Stedman there would not be money enough to enable Stedman to advance the $4,000 he had agreed to lend to the respondent, and the transaction could not be closed.

Ogilvie, without the knowledge of the appellant, had received from Miss Law the whole of the mortgage money and appropriated it to his own use, $300 of the principal having been paid to him on the 28th July, 1910, $350 on the 27th January, 1911, and the balance of the principal on the 9th February, 1912; the interest had also been paid to Ogilvie.

All the parties who took part in closing the purchase, except Ogilvie, were ignorant of the fact that these payments had been made, and believed that the $1,133 was still owing on the Depew mortgage, and that it would be paid by Miss Law on presentation to her of the certificate of discharge.

Ogilvie subsequently paid to the appellant part of the money he had received from Miss Law, but a balance is still unpaid, and the action is brought to recover that balance.

The learned Judge dismissed the action; his view was that when the transaction was closed all parties knew that the $1,133 had been received by Ogilvie from Miss Law, and that it was agreed that Ogilvie should become his debtor for that sum, and that the respondent should be discharged from the payment of a like amount of the purchase-money.

I am unable to agree with that view, which could only be supported, if at all, upon the hypothesis that the appellant knew that Ogilvie had received the $1,133; but there is no evidence of this and on the contrary Mr. Gauld testified that when the transaction was closed at his office and Ogilvie said, "We will take that," i.e., the certificate of discharge, Ogilvie said to the appellant, "I will have the money in a few days," referring to the certificate.

It is impossible upon the evidence to hold that the appellant accepted the certificate of discharge in satisfaction of $1,133 of the purchase-money payable by the respondent. Putting the case for the respondent at the highest it was no more than if Stedman had signed a norder directing Miss Law to pay the money to the appellant, and what the parties contemplated was that on presenting the certificate to Miss Law the money would be paid, not that the appellant should become the assignee of the Depew mortgage or have to proceed against Miss Law for the recovery of the money payable on the mortgage.

The judgment of the Court below should, in my opinion, be reversed, and judgment should be entered for the unpaid balance of the purchase money. On the 10th May, 1912, the balance was fixed at $755.75, and Ogilvie gave to the appellant a cheque for that sum, which was dishonoured. Subsequently two sums of $550 and $80 respectively were paid by Ogilvie on account, leaving an unpaid balance of $125.75, and for that sum with costs the appellant should have judgment.

The respondent must pay the costs of the appeal.

Upon payment of the judgment debt and costs, the certificate of discharge of the Depew mortgage is to be handed out to the respondent, and the appellant, if required, is to execute to him an assignment of any interest the latter may have in the mortgage.

HON. MR. JUSTICE MACLAREN, HON. MR. JUSTICE MAGEE, and HON. MR. JUSTICE HODGINS agreed.

SUPREME COURT OF ONTARIO.

1ST APPELLATE DIVISION. JANUARY 27TH, 1913.

RE CANADIAN BUILDING & LOAN ASSOCIATION AND CITY OF HAMILTON.

4 O. W. N. 1185.

Municipal Corporations — Plans and Surveys—City and Suburbs Plans Act—2 Geo. V. c. 43—No Objections Filed by City Corporation within 21 Days—Right of O. R. & M. Board to Give Effect to Later Objections—Necessity for Evidence—Remission to Board—Costs.

SUP. CT. ONT. (1st App. Div.) *held*, that the Ont. Rw. & Mun. Bd. were not bound to approve of a plan of subdivision under the City and Suburbs Plans Act, 2 Geo V. c. 43 even though the city corporation had not filed its objections thereto within 21 days, as provided by s. 7 of the Act.

An appeal by the association from an order of the Ontario Railway and Municipal Board refusing to certify its approval of the appellants' plan for the laying out of a tract of land into streets and building lots. Section 6 of the City and Suburbs Plans Act, 2 Geo. V. ch. 43, provides: (1) That notice of an application to the Board for its approval of a plan shall be given to the corporation of the municipality in which the land is situate and to the corporation of the city, and all parties interested shall be entitled to be heard, and may be represented by counsel at the hearing of the application; (2) that a copy of the plan shall accompany such notice.

Section 7 provides: (1) That objections to the plan shall be stated in writing and be filed with the secretary of the Board within 21 days after delivery of the notice and plan; (2) that, if no objection is made within that period, the applicant shall be entitled to have the plan certified as approved, unless the Board of its own motion shall have otherwise directed.

The city corporation did not file objections to the plan within 21 days; and the association thereupon applied to the Board for a certificate as of right. Before the application was heard, the solicitor for the city corporation notified the Board that the city corporation objected to the plan. The Board decided to hear the objection; and, upon hearing, gave effect to it, and dismissed the association's application..

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

J. P. MacGregor, for the appellants, relied on the language of sub-sec. 2 of sec. 7, "unless the Board of its own motion shall have otherwise directed."

H. E. Rose, K.C., for the city corporation.

Their Lordships' judgment was delivered by

HON. SIR WM. MEREDITH, C.J.O.:—We think that the objection of Mr. MacGregor that the Board, unless, within the 21 days after service of the notice, it had considered the application and determined not to approve of it, had no power to refuse the certificate if no objections had been filed within the 21 days, is not well taken.

The scheme of the Act would be entirely defeated if any such interpretation were given to the section. There is cast upon the Board not merely the duty that would be imposed upon it by the general terms in which the powers are conferred, but there is an express requirement that, in determining as to the suitability of the proposed plan, or as to the desirability of any change in it, the Board, where the land lies within the city, shall have regard to making the subdivision and roads and streets and their location and width, and the direction in which they are to run, conform, as far as practicable, with any general plan which has been adopted or approved by the council of the city and suburbs shall be laid out or the rearrangement of the streets and thoroughfares shall be effected, and where the land is situated without the limits of the city, the Board is to have regard to certain other matters which are mentioned in the section (sec. 4).

Now it would be absurd, unless it was absolutely necessary, to give to the statute a construction that would require the Board, within the 21 days—and before, indeed, as far as the requirements of the statute are concerned, the plan was before them at all—to exercise that judgment and act upon the direction of the statute, which would be the effect of Mr. MacGregor's argument.

As to the other point, whether there was proper evidence before the Board upon which it could act, different considerations apply.

Upon a question of fact there is no appeal from the Board; but upon a question of law there is an appeal, if leave is given to appeal.

It is a question of law is the Board acted without any evidence at all, where evidence is required; and I suppose there is no doubt that evidence was required in this case.

We think, therefore, that the proper order to make is, that the case should be remitted to the Board in order that it may deal with it under the powers conferred by the Act; and, in doing that, it is to be understood that the Board is to have the right to take such testimony as it pleases—relevant testimony, of course—with regard to the matter, and to exercise its judgment on the whole case as to whether the plan ought or ought not to be certified.

I do not suppose that the question can arise again. If it goes back to the Board, only questions of fact can arise. There can be no question of law.

J. P. MacGregor: There are a number of questions of law which I have not gone into; one is, that the proposed plan takes about 20 per cent. more of our land.

HON. SIR WM. MEREDITH, C.J.O.:—That is a question as to whether they should exercise their discretion upon such a state of facts.

The order will be that the case be remitted to the Board to deal with, and there will be no costs to either party.

HON. MR. JUSTICE LENNOX. JUNE 30TH, 1913.

BALDWIN v. CHAPLIN.

4 O. W. N. 1574.

Injunction—Interim Order—Principles on which Granted—Power of Local Judge of High Court—Bona Fide Dispute as to Rights—Balance of Convenience — No Irreparable Loss — Injunction Dissolved.

LENNOX, J., dissolved an interim injunction granted by a local Judge of the High Court where there was serious doubt as to the respective rights of the parties and where the plaintiff's damage in case the defendant were to proceed with the works complained of was not irreparable.

Motion to continue an interlocutory injunction order granted *ex parte* by the local Judge at Chatham, restraining defendants from erecting certain structures which would interfere with plaintiff's rights as a riparian owner.

W. M. Douglas, K.C., and J. G. Kerr, for plaintiff.

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

HON. MR. JUSTICE LENNOX:—The plaintiff's application to amend is granted upon the condition agreed to in Court, namely, that the added plaintiffs will be in the same posi-

tion as to liability for costs and damages as if they had been originally made parties.

Consolidated Rule 357 applies to all Judges, and *ex parte* orders are only to be granted when the Judge is satisfied that the delay caused by notice of motion might entail serious mischief. In *Thomas* v. *Storey,* 11 P. R. 417, it was said that no order of any moment should be made *ex parte* except in a case of emergency. In a recent case Mr. Justice Middleton reports Lindley, J. as saying: "*Prima facie* an injunction ought not to be granted *ex parte.* In cases of emergency it will be granted, but an injunction is rarely granted without hearing both sides." See also Kerr on Injunctions, 4th ed. p. 555. This as I say applies to all Judges, but there is more than this to be considered when the application is to a local Judge of the High Court under Rule 46. The local Judge has no jurisdiction unless the extra time required to apply in the regular way "is likely to involve a failure of justice." With very great respect, I am of opinion that this is a case in which the learned County Court Judge should not have acted.

This does not, however, necessarily determine the question of whether or not the injunction should be continued until the trial. This is a case involving the determination of important and conflicting questions of fact and numerous, unusual, and exceptionally difficult questions of law. It is not a case of apparently unquestionable rights on the one side and apparently flagrant and impudent disregard of these rights by the other; it is rather a case of two parties *bona fide* asserting opposing rights of a character so exceptional and intricate that even after a trial it may be difficult enough for the Court to determine them. The plaintiff is a land owner adjoining the lake and claims that the defendants' works obstruct him and will obstruct him in the exercise or enjoyment of his riparian rights—that the works of the defendants not only interfere with the general right of the public in navigable waters but that he suffers or will suffer special and peculiar damages and that he is the owner of the land upon which the works are being built. These are all disputed questions of fact to be determined at the trial. *Bell.* v. *Quebec,* 5 A. C. 84. And on the other hand it is not the case of a palpable trespasser coming in to rob and run, for the defendants claim as licensees for value under a lease from the Ontario Government expressly providing for the erection

and operation of these works. Whether right or wrong in their claim of title they are giving earnest of good faith by the expenditure of large sums of money, and their readiness to conform to the navigation laws and regulations of the Dominion Parliament. The question then for me to decide is not the many and involved questions which will arise at the trial—of fact and of law—but the balance of convenience, the avoidance of loss to either party as far as may be, would damages compensate the plaintiff, can the *status quo* be restored after the trial if the plaintiff succeeds? I think so. Mr. Kerr says, at p. 14: "A man who seeks the aid of the Court by way of interlocutory injunction, must as a rule be able to satisfy the Court that its interference is necessary to protect him from that species of injury which the Court calls irreparable, before the legal right can be established upon trial." It is not right that I should discuss the remedy in case it is found at the trial that the defendants are in the wrong—it is enough for me to say that the rights of the parties are by no means clear—that there are *bona fide* questions to be tried—that so far as appears both parties are honestly asserting what they think are legal rights—that complete justice can be done at or after the trial and the best interests of all parties will be conserved not by a quasi adjudication of the rights of the parties now, but by leaving them in abeyance until the case is heard.

The trial Judge can best deal with the question of costs and they will be reserved for him.

Except as to the amendment above provided for the motion will be dismissed and the injunction dissolved.

HON. MR. JUSTICE LENNOX. JULY 2ND, 1913.

EMPIRE LIMESTONE CO. v. McCARROLL.

4 O. W. N. 1579.

Local Master—Report of—Appeal from—Improper Admission and Rejection of Evidence—Effect on Findings—Costs.

LENNOX, J., dismissed an appeal from the report of the Local Master at Welland, holding that though the said Local Master throughout the hearing had on occasions improperly admitted and rejected evidence, the same had not affected the conclusions reached by him which were not shewn to be erroneous.

Motion by way of appeal from report of Local Master at Welland upon a reference herein.

H. D. Gamble, K.C., for appellants.

Wm. M. German, K.C., for respondents.

HON. MR. JUSTICE LENNOX:—When judgment was entered in this action determining certain issues and referring the question of boundaries to the determination of the Local Master of this Court at Welland further directions and subsequent costs were reserved.

By the motion before me I am asked to set aside or vary the report of the learned Local Master upon the ground that his findings were contrary to the evidence, that evidence was improperly admitted and refused, that the defendants' counsel was treated unfairly, and that the defendants had no notice of the setting of the report.

I think the learned Master erred in his rulings as to both the admission and rejection of evidence on several occasions and that counsel for the defendants has some ground for complaint as to interruptions and statements by the Local Master during the hearing, but I am not able to come to the conclusion that anything was done or omitted which prevented the fair trial of the matters referred or that the conclusions reached and reported by the Local Master are erroneous.

The motion must be dismissed, but, as I have said, there is ground for complaint and it will therefore be without costs.

HON. SIR G. FALCONBRIDGE, C.J.K.B. JULY 2ND, 1913.

RE PIGGOTT & KERN.

4 O. W. N. 1580.

Vendor and Purchaser—Application under Vendor and Purchasers Act—Prospective Litigation—Not to be Forced on Purchaser.

FALCONBRIDGE, C.J.K.B., *held*, that as long as acceptance of a title involved a "reasonably decent probability of litigation" he would not force it upon an unwilling purchaser.

Reid v. *Bickerstaff*, [1909] 2 Ch. 319 and *Re Nichols & Van Joel*, [1910] 1 Ch. 43, followed.

Application by one Piggott, the vendor, under the Vendors and Purchasers Act, for an order declaring that the purchasers' objection to the vendor's title had been satisfactorily answered, and that a certain registered agreement did not form a cloud upon the title.

C. A. Moss, and F. Morison, for vendor.

W. S. MacBrayne, for purchasers.

HON. SIR GLENHOLME FALCONBRIDGE, C.J.K.B.:—Mr. Moss put the case ingeniously and ably as to the agreement of 9th January, 1909, being spent or *effete* so as to preclude the possibility of trouble arising to purchasers therefrom. But in view of the declared attitude of Mrs. Bell and the *vis inertiae* of the Bank of Hamilton and the possible assertion of right of purchasers from the Cumberland Land Co., I am obliged to hold that there is "a reasonable decent probability of litigation" to which the purchasers may be exposed and that this title must for this reason only be classed as doubtful.

Armour on Titles, 3rd ed. 200-1; *Reid.* v. *Bickerstaff* [1909] 2 Ch. at 319; *Re Nichols and Van Joel*, [1910] 1 Ch. 43.

No costs.

HON. SIR G. FALCONBRIDGE, C.J.K.B. JULY 3RD, 1913.

BREED v. ROGERS.

4 O. W. N. 1576.

Injunction—Interim Order—Alleged Nuisance—Coal Sheds—Balance of Convenience—Damage not Irreparable—Order Refused.

FALCONBRIDGE, C.J.K.B., refused to grant an interim injunction restraining the erection of certain coal sheds alleged to be a nuisance, upon the ground that the balance of convenience had been shewn to be in defendant's favour and the damage in any costs was measureable in money terms.

Application by plaintiff for an interim injunction, restraining defendants from erecting certain coal sheds at the head of Lawton avenue, Toronto, which were alleged to constitute a nuisance.

S. H. Bradford, K.C., and T. A. Silverthorne, for plaintiff.

G. F. Shepley, K.C., and G. W. Mason, for defendants.

HON. SIR GLENHOLME FALCONBRIDGE, C.J.K.B.:—It does not appear to me that the plaintiff has made out a sufficiently strong case to justify the Court in interfering by way of interlocutory injunction.

While there is no great dispute about the actual facts, plaintiff asks me to draw one inference and the defendants another, and in my opinion the proper inference can be drawn only by the eliminative process of a trial.

The damage, if any, cannot be irreparable—it can be easily estimated in dollars by a Judge or Master.

The affidavit of Alfred Rogers shews that the preponderance of convenience—public as well as private—is wholly against the propriety of granting an interlocutory injunction.

The injunction will not now be granted, but the motion will stand over until the trial. The parties may deliver pleadings in vacation, and defendants are to speed the trial. Costs of motion to be costs in the cause until the Judge at the trial shall otherwise order.

The authorities on which I base this judgment are as follows:—

Halsbury's Laws of England, XVII., pp. 217-8, and XXI., pp. 531, 534; Kerr, 3rd ed., 174; *Lord Cowley* v. *Byers,* 1877, 5 C. D. 944; *Earl of Ripon* v. *Hobart,* 1834, 3 M. & K. 169; *Magee* v. *London,* 1857, 6 Gr. 170; *Pope* v. *Peate,* 1904, 7 O. L. R. 207, and see *Rushmer* v. *Polsue,* 1906, 1 Chy. 234, as to increase of noise in an already noisy neighbourhood.

MASTER-IN-CHAMBERS. JUNE 27TH, 1913.

GASCOYNE v. DINNICK.

4 O. W. N. 1563.

Discovery—Motion for Further Examination—Refusal to Answer—Issues not Properly Defined in Pleadings—Amendment of.

MASTER-IN-CHAMBERS refused to grant further examination for discovery where the issues as disclosed upon the pleadings as filed did not warrant it but gave leave to plaintiffs to renew the motion after amendment of pleadings.

Motion by plaintiffs for an order for further examination, the defendants on examination for discovery having refused to answer certain questions deemed relevant by plaintiffs.

B. N. Davis, for motion.

J. Grayson Smith, contra.

CARTWRIGHT, K.C., MASTER:—This action is brought to recover $10,000 as due under an agreement for sale of lands by plaintiffs to defendants under an agreement dated 1st November, 1912, and which is produced.

The statement of defence alleges that plaintiffs have not a good title and counterclaim for return of deposit of $500.

The reply says that defendants accepted plaintiffs' title to said lands and raised no objection within the time limited by the agreement for so doing.

It appears that the offer of 30th October, 1912, to purchase contained terms as to payment more favourable to purchasers than the agreement of 1st November, 1912, which supplemented or superseded it. A letter from defendants' solicitors of 30th December, 1912, to plaintiffs' solicitor says this agreement was afterwards changed "by the parties." Ward who was the nominal purchaser on his examination for discovery says he had nothing to do with this last change, but says Mr. Somers Cocks was acting for the purchasers. The Dinnicks have since been made defendants instead of Ward, and plaintiffs fear they cannot now use Ward's depositions as evidence. They desire to know who "the parties" were, as they think this will assist them in proving acceptance of title so as to bind the real parties in the transaction—as alleged in the reply—That allegation is most probably too indefinite. It is in fact a conclusion of law from facts of which presumably plaintiffs have knowledge, in which case they should be charged in the pleadings. See *Carter* v. *Foley O'Brien*, 3 O. W. N. at p. 889. However, no objection was taken to the reply; and the defendants have since obtained leave to amend their defence, and plaintiffs are to be allowed to amend as they may be advised. It, therefore, is unnecessary to make any order at present. When the pleadings are again closed the examinations will be resumed and it may well be that what is not relevant now will become so on a different record.

In the meantime this motion will be dismissed with costs in the cause.

SUPREME COURT OF ONTARIO.

1ST APPELLATE DIVISION. JULY 2ND, 1913.

BLAISDELL v. RAYCROFT.
RAYCROFT v. COOK.

4 O. W. N. 1568.

Executors and Administrators—Action to Set Aside Sale—Purchase by Executrix—Plaintiffs Joining in Conveyance — Good Price Obtained—Laches — Shifting of Onus—Action Dismissed—Appeal—Costs.

Actions by residuary beneficiaries to set aside a sale made by executrices of certain lands belonging to the estate. The evidence shewed that at the time of the sale, some four years ago, a good price was obtained for the lands, but since then, owing to unforeseen circumstances, the lands had more than doubled in value.

Plaintiffs had joined in the deed to the purchaser and obtained certain specific legacies out of the purchase-moneys, but claimed the lands had been in reality secretly purchased by one of the executrices and that there had been a consequent breach of trust. The property had in fact been purchased to the knowledge of all by a daughter of the executrix, and shortly after conveyed to the executrix.

BOYD, C., *held* (23 O. W. R. 259; 4 O. W. N. 297) that the facts shewed that the sale was at a good price and that there had been the utmost good faith on the part of the executrix, both at that time and subsequently.

That the onus was on the plaintiffs to get rid of the deed they signed, and no sufficient grounds had been shewn.

Re Postlethwaite, 59 L. T. N. S. 59; 60 L. T. N. S. 517, and *Williams* v. *Scott*, 1900, A. C. 499, referred to.

Actions dismissed with costs.

SUP. CT. ONT. (1st App. Div.) dismissed appeal from above judgment with costs.

Appeal in the first case is by the plaintiffs and in the second case by the defendant from the judgments which the Chancellor, on the 7th November, 1912, directed to be entered after the trials before him sitting without a jury, at Brockville, on the 29th and 30th of the previous month of October.

The facts are fully stated in the reasons for judgment of the learned Chancellor which are reported (1912) 23 O. W. R. 259, and less fully in (1912), 4 O. W. N. 297, and it is unnecessary to repeat them.

G. F. Shepley, K.C., for appellants in first case.

F. J. French, K.C., for appellant in second case.

J. A. Hutchinson, K.C., and P. K. Holpin, for the respondent, Raycroft.

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

HON. SIR WM. MEREDITH, C.J.O.:—Although the finding of the Chancellor in favour of the reality of the sale to Mrs. Farlinger of the testator's farm was vigorously attacked by counsel for the appellants, we see no reason for doubting the correctness of the finding which is amply supported by the evidence.

It is beyond doubt that the purchase price ($4,800), was the full value of the farm, and that but for the decision of the Grand Trunk Railway Company of Canada to remove its terminals from Brockville to Prescott it would not be saleable for more at the present time.

The appellants joined in the conveyance to Mrs. Farlinger, and each of them testified that she understood that the purchaser was the executrix, Jane Raycroft, and was willing that she should become the purchaser.

If a finding upon the point were necessary to the determination of the case, I think that the proper conclusion upon the evidence is that each of them knew that the conveyance was being made to Mrs. Farlinger, but it may be that they understood that she was buying for her mother, Jane Raycroft.

In truth though the real purchaser was Mrs. Farlinger, she bought upon the understanding that $4,000 of the purchase money was to be provided by her mother, and in consideration of this the mother was to be maintained on the farm during her lifetime by Mrs. Farlinger, who it was intended should remove with her husband from the United States, where they resided, to the farm, and that they and Mrs. Raycroft should live together upon it.

This feature of the transaction was not explained to the appellants, and it was urged that the sale could not therefore stand.

But the appellants in the first case who are the only persons interested in having the transaction set aside, admitted on cross-examination, that they were quite willing that Mrs. Raycroft should buy the farm for $4,800, and it is clear that, accepting their statements, that when they ex-

ecuted the conveyance they thought it was she who was buying, assented to the sale being made to her.

If they were willing that she should become the purchaser, I am unable to see how it can be open to them because Mrs. Raycroft was willing to give $4,800 of her own money to Mrs. Farlinger, to enable her to buy, stipulating that in return for it she should be maintained on the farm during her lifetime, to attack the transaction as a breach of trust.

For the reasons given at length by the Chancellor, and for the reasons I have mentioned, and especially having regard to the long delay in attacking the transaction, and the considerable expenditure that has been made by Mrs. Raycroft in improving the property on the faith of her being the owner of it, I am of opinion that the appellants' case failed, and that their action was rightly dismissed.

In the second case, I am of opinion that judgment should be affirmed, and can usefully add nothing to the reasons given by the Chancellor for the conclusion to which he came.

HON. MR. JUSTICE MACLAREN, HON. MR. JUSTICE MAGEE, and HON. MR. JUSTICE HODGINS agreed.

SUPREME COURT OF ONTARIO.

1ST APPELLATE DIVISION. JUNE 26TH, 1913.

MARTIN v. MIDDLESEX.

4 O. W. N. 1540.

Water and Watercourses — Improvement of Highway—Closing of Cove—Injury to Plaintiff's Land by Flooding—Defective Work —Action—Arbitration—Amount of Damages—Appeal.

SUTHERLAND, J. (23 O. W. R. 974; 4 O. W. N. 682) gave judgment for plaintiff for $700 and costs in an action against a municipal corporation for damages to plaintiffs' lands, by reason of the closing up of a natural watercourse and the neglect to provide sufficient other means for the escape of the water in the spring freshets, whereby plaintiffs' lands were overflowed and seriously injured.

SUP. CT. ONT. (1st App. Div.) dismissed appeal with costs. *Williams* v. *Raleigh*, [1893] A. C. 540, distinguished.

Appeal by the defendant corporation from the judgment directed to be entered by HON. MR. JUSTICE SUTHERLAND, on 24th January, 1913, after the trial before him sitting

without a jury at London on the 8th and 9th October, 1912, in favour of plaintiff for $700 damages and costs.

The reasons for judgment are fully reported in (1913), 23 O. W. R. 974.

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

J. C. Elliott, for appellant.

P. H. Bartlett (Scandrett), for respondents.

HON. SIR WM. MEREDITH, C.J.O.:—The learned trial Judge found that the work which was done by the appellant corporation and which, according to the contention of the respondent, caused damage to his land was defective in that the road was not carried to a sufficient height east of the cover, and that the ditch on the north side of the road, which the corporation constructed, led the water to the east and caused the two breaks in the road between the cove and the hill through which the water came which caused the damage to the respondent.

There was evidence to support these findings, and therefore to fix the appellant corporation with liability for the damage caused to the respondent's land.

There was evidence also, we think, to warrant a finding that the appellant corporation stopped up a water course which crossed the highway through which the waters at flood time passed, and that the result of this was to cause an accumulation of the waters to be penned back and ultimately to break through the embankment and cause damage to the respondent's land, and that was an actionable wrong.

The appellant's counsel argued that as a competent engineer was employed to design the works which it constructed, and they acted on his advice, no action lay, but that the respondent's remedy was to seek compensation under the municipal Act, and in support of his contention counsel cited and relied on *Williams* v. *Raleigh*, 1893, A. C. 540.

That case is clearly distinguishable. The work in question was a drainage work, and was constructed under the authority of a by-law of the council. It was a preliminary requisite to the passing of the by-law that a report of an

engineer should be procured recommending a plan to be adopted for carrying out the drainage scheme, which the council had been petitioned to undertake: and the decision proceeded upon the ground that as the council acting in good faith had accepted the engineer's plan and carried it out, persons whose property was injuriously affected by the construction of the drainage work must seek their remedy in the manner prescribed by the statute.

In the case at bar the work was not done under a by-law and the appellant corporation was not required as a preliminary to doing the work to have a plan prepared by an engineer. The engineer employed was but the agent of the corporation and for his acts it is as responsible as if the work had been done without the intervention of an engineer.

The appeal must be dismissed with costs.

HON. MR. JUSTICE MACLAREN, HON. MR. JUSTICE MAGEE and HON. MR. JUSTICE HODGINS agreed.

HON. MR. JUSTICE MIDDLETON. JUNE 27TH, 1913.

McPHERSON v. FERGUSON.

4 O. W. N. 1564.

Land Titles—Action for Possession — Purchase from Sheriff—Defendant Mentally Incompetent—Judgment Reserved—Appointment of Guardian to be Made—1 Geo. V. c. 20.

MIDDLETON, J., refused to give judgment in an action for possession of certain lands until a guardian or committee should be appointed for defendant who appeared in person and who was plainly mentally incompetent.

Action to recover possession of certain lands.

M. J. O'Reilly, K.C., for the plaintiff.

The defendant in person.

HON. MR. JUSTICE MIDDLETON:—This action came on before me at the sittings in Hamilton. I heard the evidence at length, and it is quite clear that no defence was disclosed.

The land in question was sold by the sheriff under a *fi. fa.*, and the plaintiff became the purchaser on the 16th of May, 1903. The defence upon the record is that prior to

the sale the defendant (the execution debtor) paid or offered to pay to the sheriff the money due upon the *fi. fa.*

This is not made out. A witness called for the defendant stated that she was a witness to the tender and that this was before the sale; but she fixed the date by the fact that her child, which will be ten years old next August, was then six months old and suffering from illness. This will shew that she is mistaken in the date and that the tender was not made until the year following the sale. The defendant's son was called by her, and he stated that the tender was in the year after the sale.

The mortgages upon the land were upheld as valid in the former action of *Ferguson* v. *McPherson*. At my suggestion, the plaintiff in this action—a daughter of the defendant—agreed to accept less than the amount due to her upon the mortgages and in respect of the purchase money, and to allow the land to be redeemed. The plaintiff stated her readiness to accept $2,000, although the amount due is some $300 more than this. The land has so increased in value recently that it is now worth more than $5,000.

The defendant refused to listen to this suggestion; seeking to go back of the former judgment.

From what took place at the trial, I am satisfied that the defendant, by reason of brooding over her troubles and from other causes, is not in a position to properly protect her own interests; and I think that before judgment can be given in this action she must be represented by a guardian or committee. I accordingly direct that the matter stand over until the necessary application is made. The case seems to be one in which the statute 1 Geo. V. ch. 20, may well be resorted to.

If upon a guardian being appointed he thinks that the plaintiff's offer should be accepted, then application may be made for judgment upon that basis; or he should have liberty to tender further evidence if he desires.

Inasmuch as I was given to understand that the action was only brought for the purpose of preventing the Statute of Limitations running and so barring the plaintiff's title, I would suggest that a settlement might be worked out by which the defendant would be allowed to remain in possession of the land during her life, and upon her death some benefit might be secured to the younger daughter, who is now living with her mother.

SUPREME COURT OF ONTARIO.

1ST APPELLATE DIVISION. JUNE 26TH, 1913.

NEY v. NEY.

4 O. W. N. 1536.

Alimony—Desertion of Husband by Wife—Offer to Return—Refusal to Receive—Accusation of Infidelity by Husband—No Evidence Tendered in Support — Custody of Children—Welfare—Prior Conviction of Defendant—Paternal Right—Access by Mother—Terms.

BRITTON, J., *held* (24 O. W. R. 193; 4 O. W. N. 935) that a wife was entitled to alimony even where she had deliberately deserted her husband and children, where she had been guilty of no other misconduct and offered to return but defendant refused to receive her.

Ferris v. *Ferris*, 7 O. R. 496, followed.

That defendant was entitled to the custody of the two children of the marriage, as he had not disentitled himself in any way and the welfare of the children would be better served thereby.

Order for access by plaintiff to children at reasonable intervals.

SUP. CT. ONT. (1st App. Div.) dismissed an appeal by plaintiff from above judgment.

Appeal by plaintiff from judgment of HON. MR. JUSTICE BRITTON (24 O. W. R. 193; 4 O. W. N. 935), in an action for alimony.

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

L. F. Heyd, K.C., for plaintiff (appellant.)

J. M. Godfrey, for defendant (respondent.)

HON. MR. JUSTICE HODGINS:—The motion on which the order was made had been referred to the trial Judge, and although the writ of *habeas corpus* only affected the child Marshall Ney, the order covers the case of both children, Marshall Ney and Dorothy Ney; the former now six years of age, and the latter now four and a half years.

The effect of the order is that the father is given the custody of the children. The mother is to have access to them at reasonable intervals, and the children are to be maintained by their father in a home, where together they

and their father will reside. The order is, therefore, one made after the learned trial Judge had seen and observed both the father and the mother.

In cases affecting the custody and welfare of children nothing is more important than the character and disposition of the parents, and I think the utmost importance should be attached to the view of an experienced Judge, who has had the advantage of seeing the parents; hearing them detail their complaints, and listened to their explanations. The evidence discloses a case of continual quarreling, resulting in personal violence on both sides from time to time.

The position in which the children now are is the direct result of the desertion by the wife of the husband, which produced a situation, the consequence of which is that the husband now declines absolutely to take the wife back.

In the evidence reference was made to an offence committed by the husband after the separation in 1909, and to an event in the life of the mother, both of which were passed over lightly by counsel at the trial, yet they occupied the attention of the trial Judge, and I have no doubt influenced his decision.

In view of the evidence given, I should be disposed to think that this is peculiarly a case in which the welfare of the children should outweigh every other consideration affecting the parents, and that the order in appeal is the only order which could be made at this stage of the case.

In *Re Hutchinson*, 26 O. L. R. 601, 4 O. W. N. 777, the Divisional Court thought it necessary to stipulate that the father should at least undertake to procure a suitable house, with his sister in charge of it, before he obtained the custody of his child. In this case the order of the learned Judge has made a similar provision, and I think the order is right, and should be affirmed.

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

HON. SIR G. FALCONBRIDGE, C.J.K.B. JUNE 28TH, 1913.

GELLER v. BENNER.

4 O. W. N. 1565.

Costs—Mortgage Redemption Action—Further Directions—Payment into Court.

FALCONBRIDGE, C.J.K.B., on a motion for further directions and costs fixed the costs of the mortgagees in a mortgage redemption action at $75.

Motion by plaintiff for judgment on further directions and costs in an action for redemption of a mortgage.

E. V. O'Sullivan, for plaintiff.

G. Grant, for defendant.

HON. SIR GLENHOLME FALCONBRIDGE, C.J.K.B.:—The order under which the sum of $750 was paid into Court does not provide, and it was not the intention of the learned Judge, that that sum should furnish any criterion or standard by which the question of costs should be adjudged.

Defendants were rightly in possession, the mortgagors being in default, and they are entitled to their costs of action and reference, which under all the circumstances I fix at the sum of $75.

MASTER-IN-CHAMBERS. JUNE 23RD, 1913.

KENNEDY v. KENNEDY.

4 O. W. N. 1560.

Discovery—Further Affidavit on Production—Variation of Statutory Form—Con. Rules 469, 1224—Information Obtainable on Examination for Discovery.

MASTER-IN-CHAMBERS *held*, that slight variations from the statutory form were permissible in the case of an affidavit on production, and that a further affidavit should not be ordered where the information sought would probably be obtained on the examination for discovery.

McMahon v. *Railway Passengers*, 26 O. L. R. 430, referred to.

Motion by plaintiff for better affidavits on production by defendants, the two former affidavits having been held insufficient.

E. D. Armour, K.C., for motion.

O. H. King, for defendant Janette Kennedy.

J. C. M. MacBeth, for defendant R. Kennedy.

CARTWRIGHT, K.C., MASTER:—The action is brought to set aside conveyances of lands from R. Kennedy to his wife the co-defendant as fraudulent. All the transfers will therefore appear recorded in the proper office.

The affidavit of R. Kennedy, as might be expected, states that he has now no documents relating to these transfers as they were all handed to his co-defendant when the conveyances were made to her. If her affidavit is sufficient his will not be objectionable.

But Mrs. Kennedy's affidavit is objected to as not being sufficiently definite because paragraph 4 reads:—

"I have had, to the best of my recollection, but have not now," etc., and paragraph 5 reads: "The last-mentioned documents or as many of them as were in my possession were last in my possession," etc.

It is also objected to this paragraph that the statement "Instrument No. 6 (a mortgage from Purity Spring's Water Co. to deponent) was turned over to the Bank of Toronto some months ago" should have been amplified. Also that paragraph 6 which states that this mortgage is held by the Bank of Toronto as collateral to a loan is not full enough and that it should have been said to whom the loan was made and when and whether or not the mortgage has been assigned to it as it might be necessary to make the bank a party defendant if the transaction was subsequent to the issue of the writ herein.

It was argued in answer to the motion that the affidavits were sufficient on their face and that there was no unwarrantable departure from the form as given under Con. Rule 469 which does not use the word "shall" but says such affidavit "may be according to Form No. 19."

The variations in the present case do not seem to affect the sufficiency of the affidavits considering the nature of the action. See Con. Rule 1224. Any further and more precise information as to the mortgage and the lost deed can be obtained when the defendants are examined for discovery. See as to this *McMahon* v. *Railway Passengers*, 26 O. L. R. 430.

At present the plaintiff does seem to have all information that is really necessary at this stage at least. The motion is therefore dismissed without prejudice to its being renewed for good cause. Costs will be in the cause.

HON. MR. JUSTICE MIDDLETON. JUNE 23RD, 1913.

CORNISH v. BOLES.

4 O. W. N. 1551.

Jury Notice—Appeal from Order Striking Out—Con. Rule 1322—Effect of — Exercise of Discretion by Judge in Chambers—No Appeal from.

MIDDLETON, J., *held*, that the exercise of the discretion of a Judge in Chambers under Con. Rule 1322, as to striking out a jury notice, was not properly reviewable by an Appellate Court.

Motion for leave to appeal from order of HON. SIR GLENHOLME FALCONBRIDGE, C.J.K.B., striking out jury notice.

M. L. Gordon, for defendant.

R. R. Waddell, for plaintiff.

HON. MR. JUSTICE MIDDLETON:—Mr. Gordon is no doubt right when he says that this action is one which could well be tried by a jury; but this is not the question. The action can equally well be tried by a Judge; and under the Judicature Act the trial Judge or a Judge in Chambers may in his discretion direct the action to be tried without the intervention of a jury.

The Rule recently passed (Con. Rule 1322), requires the Judge in Chambers, upon an application being made to him, to exercise the same discretion as he would if presiding at the hearing. *Brown* v. *Wood*, 12 P. R. 198, determines that at the trial the Judge has absolute control over the mode in which the case shall be tried, and that his discretion will not be interfered with upon an appeal to the Divisional Court. The same principle is applicable to the exercise of discretion by the Judge in Chambers, and I do not consider that the matter is one which is properly the subject of appeal.

Clearly, the case is not brought within the provisions of the Rules regulating appeals from Chamber orders. The application is therefore dismissed, with costs to the plaintiff in any event.

HON. SIR G. FALCONBRIDGE, C.J.K.B. JUNE 24TH, 1913.

RE IRWIN, HAWKEN AND RAMSAY.

4 O. W. N. 1562.

Arbitration and Award—Appeal—Award or Valuation—No Appeal—Construction of Lease.

FALCONBRIDGE, C.J.K.B., *held*, that the decision of three valuators under a clause in a lease was a valuation not an award, and no appeal lay therefrom.

Re Carus, Wilson & Greene, 18 Q. B. D. 7, followed.

Motion by Hawken by way of appeal from an alleged award of a board of three arbitrators or valuators. In answer it was contended that no appeal lay, the decision being a valuation and not an award.

L. F. Heyd, K.C., for Hawken.

C. A. Moss, for Ramsay.

J. T. White, for Irwin estate.

HON. SIR GLENHOLME FALCONBRIDGE, C.J.K.B.:—I am clearly of opinion that what the documents contemplated and what the valuers did, was a valuation and not in the nature of an award or an arbitration.

Therefore this application cannot be entertained. *Re Carus, Wilson and Greene*, 18 Q. B. D. 7.

No costs except that as the Irwin estate seems to have been unnecessarily brought before me, Hawken must pay their costs which I fix at $5.

SUPREME COURT OF ONTARIO.

1ST APPELLATE DIVISION. JUNE 26TH, 1913.

GOLDFIELDS v. MASON.

4 O. W. N. 1530.

Company—Action for Breach of Agreement—Plaintiff Company not in Existence at Date of Agreement, nor Assignee of—Right to Maintain Action.

SUP. CT. ONT. (1st App. Div.) *held* that a company were not entitled to sue upon an agreement who were not parties thereto or assignees thereof.

Judgment of CLUTE, J., affirmed.

Appeal by the plaintiff company from judgment of HON. MR. JUSTICE CLUTE, of November 14th, 1912, dismissing an action, for a declaration that defendant was not and never

had been a shareholder in plaintiff company in respect of 41,000 shares of the stock of the Harris-Maxwell Company which were transferred to the plaintiff company for an equal number of shares in the plaintiff company, and for delivery up by the defendant of his certificate for the plaintiff company's shares or for damages for breach of contract.

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

G. H. Kilmer, K.C., for plaintiff company.

W. A. McMaster, for defendant.

HON. MR. JUSTICE MACLAREN:—I think this appeal must be dismissed. The appellant did not give us any precedent for such an action as the present, and I have not been able to find any. The action is based upon the alleged violation by defendant of a contract or agreement between the defendant and the other holders of a majority of the shares of two mining companies whereby they agreed to form a third company to which they promised to assign the shares which they held in the two amalgamating companies in exchange for an equal number of shares in the new company. This agreement bears date the 18th of January, 1910. The charter was not granted to the new company (Goldsmiths Limited, the plaintiff), until the 14th of March, 1910.

The action was begun by one Mackay, who was a shareholder in one of the amalgamating companies and a party to the agreement of January 18th, 1910, and Goldsmiths Limited as co-plaintiffs; but during the trial the name of Mackay was dropped and the action continued by the company alone.

It is an elementary principle of law that no one can sue on a contract unless he be either an original party to it or the lawful assignee of an original party.

The plaintiff company was not a party to the agreement of the 18th of January, 1910, the breach of which forms the basis of its present action, as it was not even in existence until nearly two months after that agreement was made. It does not claim to have any assignment from any of the original parties to the agreement in question of their claims against the defendant if indeed such claims as it seeks to have en-

forced in the present action are susceptible of being legally assigned.

But even if this objection were not a fatal one, the plaintiff, as pointed out by the trial Judge, with full knowledge of all the circumstances sought to enforce the registration of the shares in the Harris-Maxwell Co. transferred to it by the defendant and which it now seeks to compel him to take back, and to return the equal number of shares in the plaintiff company which he received in exchange. I agree with the learned trial Judge that it is now too late for the plaintiff to take this position.

As an alternative, plaintiff made a claim for damages; but no evidence was given on which such a claim could be based. It may be noted that the plaintiff did not claim before us that there had been an implied agreement when the defendant received the shares of the plaintiff company that he should do nothing to prevent the registration of the Harris-Maxwell shares which he gave in exchange and that he was liable in damages for preventing such registration and compelling the plaintiff to purchase other shares to give it control of the Harris-Maxwell Co. Nor was there any evidence produced that the plaintiff was obliged to pay more for such shares than they were really worth.

There being no evidence of damage this branch of the plaintiff's case fails also.

The appeal should be dismissed with costs.

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