The

Ontario Weekly Notes

VOL. XVIII. TORONTO, MARCH 26, 1920. No. 3

APPELLATE DIVISION.

FIRST DIVISIONAL COURT. MARCH 16TH, 1920.

RE DRISCOLL.

Infant—Custody—Neglected Child—Children's Aid Society—Foster-home Found by Society—Application by Parents for Custody of Child—Welfare of Child—Rights of Foster-parents.

Appeal by the parents of a child of five years from the order of LOGIE, J., in Chambers, 17 O.W.N. 144, dismissing the appellants' motion for an order awarding them the custody of the child.

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

D. W. Markham, for the appellants.

Daniel O'Connell, for the foster-parents, respondents.

K. W. Wright, for the Superintendent of Neglected Children and the Inspector of Children's Aid Societies.

THE COURT dismissed the appeal without costs.

FIRST DIVISIONAL COURT. MARCH 19TH, 1920.

*MORROW v. MORROW.

Lunatic—Contract—Necessaries—Board and Lodging—Claim of Brother against Estate of Deceased Sister—Corroboration—Ontario Evidence Act, sec. 12.

Appeal by the plaintiff from the judgment of LENNOX, J., at the trial, on the 19th November, 1919, dismissing an action by one

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

brother against another, the defendant being executor of the will of a deceased sister, to recover $2,967.25 for board, medical expenses, etc., of the sister while living with the plaintiff during the last three years of her life.

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

H. S. White, for the appellant.

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

MACLAREN, J.A., reading the judgment of the Court, said that at the trial the plaintiff sought to prove the insanity of the deceased at times, and also relied upon the promises made by her at the time she came to live with him and on subsequent occasions. There was some evidence of insanity.

The estate of a lunatic is liable for necessaries supplied to him: Manby v. Scott (1665), 1 Sid. 112; Wentworth v. Tubb (1842), 12 L.J.N.S. Ch. 61, 62; Howard v. Digby (1834), 2 Cl. & F. 634, 663; Williams v. Wentworth (1842), 5 Beav. 325, 329; In re Gibson (1871), L.R. 7 Ch. 52, 53.

If the question to be decided was, whether the deceased was insane at the time she went to live with the plaintiff, the learned Judge would have had difficulty in finding that question in the affirmative upon the evidence; but the plaintiff saw fit to bring witnesses to testify as to the deceased's insanity, not however as to her condition at the exact time of the contract upon which he based his claim.

The defendant's counsel sought to bring out from the plaintiff's witnesses testimony as to the deceased's insanity generally, and argued strongly that she was incompetent to enter into any contract at the time she went to live with the plaintiff or subsequently.

Assuming that it was not satisfactorily proved that the deceased was insane during the time that she lived with the plaintiff, there was, in the learned Judge's opinion, ample evidence to establish the fact that she was in the plaintiff's house in circumstances which would render her and her estate liable to the plaintiff for the fair value of her board and lodging during the 145 weeks she lived with him. The plaintiff testified that the deceased, when she first came to him, promised to pay her board, and this was amply corroborated by the plaintiff's wife and son—the testimony was more than sufficient to meet the requirements of sec. 12 of the Evidence Act, R.S.O. 1914 ch. 76.

The trial Judge made no specific findings, but it was clear from his observations that he credited the testimony of the plaintiff and his witnesses. He accepted the argument of the defend-

ant's counsel that the deceased was not competent to make a contract, and that without this the plaintiff could not recover. The law stated above as to the liability of a lunatic for necessaries was not presented to him.

The plaintiff was entitled to a reasonable allowance for the board and lodging of the deceased for the time she was at his house—$5 a week.

The counterclaim should be dismissed.

The plaintiff should have costs throughout on the Supreme Court scale.

Appeal allowed.

FIRST DIVISIONAL COURT. MARCH 19TH, 1920.

*MONTREUIL v. ONTARIO ASPHALT BLOCK CO. LIMITED.

Improvements—Mistake of Title—Option to Purchase Land Taken from Life-tenant—Mistake as to Nature of Estate of Vendor—No Mistake as to Ownership—Improvements Made before and after Discovery of Mistake—Conveyancing and Law of Property Act, R.S.O. 1914 ch. 109, sec. 37—Want of Application to Case Made—Improvements Made before Mistake Discovered—Enhancement of Value of Land—Action by Remaindermen for Recovery of Possession—Compensation for Improvements—Equitable Decree—Parties—Addition of Plaintiffs in Representative Capacity without their Consent—Reversal of Order Made at Trial.

Appeal by the plaintiffs from the judgment of FALCONBRIDGE, C.J.K.B., 17 O.W.N. 32, 46 O.L.R. 136.

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

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

J. H. Rodd, for the defendant company, respondent.

MEREDITH, C.J.O., read a judgment in which, after stating the facts, he said that the trial Judge founded his judgment on the case of Young v. Denike (1901), 2 O.L.R. 723, in which the decision was, as he thought, that a person having a contract of purchase was the owner of the land within the meaning of sec. 37 of the Conveyancing and Law of Property Act. But two conditions must exist to warrant the application of sec. 37: the person claiming the benefit of the section must have made lasting improve-

ments upon the land; and must have made them under the belief that the land was his own.

It was impossible to say that some at all events of the buildings and erections did not constitute lasting improvements; and an inquiry as to that aspect of the case should be directed if the respondent was entitled to be compensated for lasting improvements.

As to the expenditures made after it was discovered that Luc Montreuil was tenant for life only, it was clear that they were not made by the respondent under the belief that the land was its own. And the improvements made before the discovery were not made and could not have been made by the respondent under the belief that the land was its own. The respondent, until it exercised its option to purchase, had no estate in the land but that of a tenant for years. It had the right, if Luc Montreuil had been owner in fee simple, to become the owner if it should choose to exercise the option. The respondent was in no sense the owner of the land, and never supposed that it had any rights in it except those which the lease conferred.

Young v. Denike, supra, was not an authority for the application of sec. 37 in such circumstances as existed in the case at bar.

Although the respondent was not entitled to invoke the provisions of the statute, it was entitled, as a condition of the granting of the relief which the appellants claimed—recovery of possession of the land—to be compensated for the lasting improvements that were made on the land before it was discovered that Luc Montreuil was a tenant for life only, to the extent to which the value of the land had been enhanced by the improvements: Bright v. Boyd (1841-3), 1 Story R. 478, 2 Story R. 605; Gummerson v. Banting (1871), 18 Gr. 516.

Although both of these were cases of a purchaser in possession holding under a defective title, the principle of the decisions was of wider application and extended to such a case as the present. The respondent was in possession under an agreement which entitled it, if the lessor had the title which it was assumed he had, to become the owner of the land on the terms and subject to the conditions mentioned in the lease, and the improvements which were made before the discovery that the lessor was tenant for life only were undoubtedly made under the belief that he was owner in fee simple, and that, subject to those terms and conditions being complied with, the respondent would become the owner of the land.

It would be manifestly unjust that the remaindermen should be permitted to take possession of the improvements without making compensation to the extent to which they enhanced the

value of the land. If the improvements did not add to the value of the land, no compensation would be payable.

The judgment of the trial Judge should be set aside, and there should be substituted for it a judgment referring it to the Master at Windsor to ascertain and report as to the lasting improvements made by the respondent on the lands in question and as to the amount by which the value of the lands had been enhanced by such improvements, and reserving further directions and the question of costs of the action and appeal until after report.

The order made at the trial adding three of the plaintiffs as plaintiffs in their capacity of executors of the will of Luc Montreuil could not stand, having been made without their consent. There was no need for making them parties.

Maclaren and Magee, JJ.A., agreed with Meredith, C.J.O.

Hodgins, J.A., was of opinion that the appeal should be allowed in toto.

Judgment as stated by the Chief Justice.

First Divisional Court. March 19th, 1920.

*CASTALDI v. DENISON.

Ice—Harvesting Ice Formed on Navigable Water—Protection of Public—Duty to Guard Opening in Ice—Negligence at Common Law—Breach of Statutory Duty—Criminal Code, sec. 287 (a)—Ice-field Fenced and Guarded—Duty to Guard Dangerous Place within Enclosure—Boys Entering Field in Spite of Warning and Falling through Thin Ice—Action against Person who Made Opening—Effective Cause of Accident—Failure to Shew.

Appeal by the defendant from the judgment of Clute, J., at the trial, in favour of the plaintiff, for the recovery of $500 damages, in an action under the Fatal Accidents Act, brought by the mother of two boys who, while skating upon the Napanee river, broke through thin ice formed over a hole said to have been cut by the defendant and left unguarded, and were drowned.

The appeal was heard by Meredith, C.J.O., Maclaren, Magee, and Ferguson, JJ.A.

D. L. McCarthy, K.C., and J. E. Madden, for the appellant.

W. S. Herrington, K.C., for the plaintiff, respondent.

MEREDITH, C.J.O., reading the judgment of the Court, said that the plaintiff alleged negligence at common law and breach of a statutory duty by the defendant, the duty imposed upon him by sec. 287 (*a*) of the Criminal Code.

The defendant for some time before the accident had been engaged in harvesting the ice, and had set off a part of the river, about 212 feet in width and 566 feet long, as the field for his operations. This he enclosed by a wire, strung from posts 75 to 80 feet apart, planted in the ice and resting upon the river-bottom. At the west end there were placed bushes at intervals, and there were bushes also on the north side. The wires had sagged in some places, and at some points had become partly embedded in the ice.

It was conceded that the two boys entered upon the ice-field at the west end; before entering it, they conversed with two boys, Irwin and Babcock. The conversation took place at the west end; and Irwin, seeing that they were on the ice-field, called to them, "I would not go in there"—that it was dangerous. But they went on, probably hearing though not heeding the warning. According to the testimony of Irwin, there was, in addition to the posts, wire, and bushes, a bank of snow, and the field could not be entered without ducking under the wire.

The accident occurred between 4 and 5 o'clock in the afternoon and in daylight. According to the testimony of some of the plaintiff's witnesses, it was quite apparent that ice-cutting was going on in the ice-field. The boys were 13 and 11 years old respectively—bright and intelligent lads.

The view of the trial Judge was, that the defendant had not complied with sec. 287 (*a*) of the Code—that it was not sufficient to have fenced the ice-field; the hole that had been made by removing the ice should have been fenced.

The section provides that every person who cuts or makes any hole, aperture, or place of sufficient size or area to endanger human life through the ice on any navigable or other water open to or frequented by the public, and leaves such hole unenclosed by bushes or trees or unguarded by a guard or fence, is guilty of an offence and liable to punishment.

At common law, the ice which forms upon a navigable body of water, the bed of which is in the Crown, belongs to the public, but becomes the property of him who has gathered it and reduced it into possession as an article of personal property: per King, J., in Lake Simcoe Ice and Cold Storage Co. v. McDonald (1901), 31 Can. S.C.R. 130, 133, 134.

The defendant discharged his common law duty by fencing the ice-field as it was fenced; and, even if he had failed to discharge it, the effective cause of the accident was not his breach of duty,

but the action of the boys in entering the ice-field, knowing what it was, and that it was dangerous to skate upon the ice within the enclosure, especially if they heard the warning.

Reference to Shilson v. Northern Ontario Light and Power Co. Limited (1919), 45 O.L.R. 449, 454.

Considering the case as affected by sec. 287 (*a*) of the Code, and assuming that a person who sustains injury because the duty imposed by the statute is not performed may recover, though at common law he could not, it is not open to question that the mere failure to perform the duty and the fact that an accident has happened is not enough; it must be shewn that the failure was the effective cause of the accident; and that was not proved in this case.

It was unnecessary to decide whether the view of the trial Judge was the correct view of the meaning of the section. As at present advised, the learned Chief Justice thought it was not, and, if necessary for the decision, would hold that where an ice-field is set apart and the field enclosed as the section requires, it is not necessary to enclose the openings that are made within the limits of the field. The purpose of the statute was not to safeguard one who, disregarding the warning that the fencing of the field would convey to him, takes upon himself the risk of entering the field.

The liability of a person engaged in harvesting ice to answer in damages to one who suffers injury by falling into an opening made in the ice or breaking through thin ice that has formed over an opening, where the fence is not of the character which the statute requires, necessarily depends upon the circumstances in which the accident happened. One seeing the fence and knowing that ice-cutting is going on inside must know that the fence is there to warn him that he ought not to enter; and, if he chooses to disregard the warning, his recklessness is the effective cause of any accident which befalls him.

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

eal allowed.

FIRST DIVISIONAL COURT. MARCH 19TH, 1920.

BANK OF OTTAWA v. CARSON.

Guaranty—Indebtedness of Company to Bank—Action against Guarantors—Defences—Innocent Misrepresentation by Bank-manager as to Security to be Transferred to Guarantors—Security not Actually Transferred—Election, after Discovery of Mistake as to Security, to Stand by Transaction—Further Evidence Adduced upon Appeal—Effect of—Election to Affirm Original Transaction—Costs.

An appeal by the defendants Carson, Lafrenière, and Garneau from the judgment of LENNOX, J., at the trial at Ottawa, in favour of the plaintiff bank for the recovery of $8,800 upon a guaranty.

The appeal was heard in 1918, and judgment (15 O.W.N. 375) was given on the 27th January, 1919, against the appellants (FERGUSON, J.A., dissenting), but subject to rehearing of the case upon further evidence.

Further evidence was adduced, and the case was reheard, on the 17th and 18th February, 1920, by MEREDITH, C.J.O., MACLAREN, MAGEE, and FERGUSON, JJ.A.

W. N. Tilley, K.C., for the appellants.

I. F. Hellmuth, K.C., and Wentworth Greene, for the plaintiff bank, respondent.

FERGUSON, J.A., in a written judgment, said that the re-argument of the appeal had not changed his opinion of the rights of the parties in so far as they were to be determined on the issues and evidence presented at the trial.

The new evidence was allowed for the purpose of establishing an affirmation of the contract of guaranty after the misstatement relied upon by the defendants had come to their knowledge.

The documents, i.e., the mortgage of the 4th January, 1916, the letter of the 13th January from the plaintiff bank to the defendant Carson, and the claims filed by the defendants against the insolvent estate of the principal debtor, all supported the plaintiff bank's contention—while the letter of the 13th January seemed to contradict the stories of Carson and Lewis and to support the story of the plaintiff bank's manager, Lough, as to the circumstances under which the mortgage was taken and the claims were filed.

In these circumstances, and in the absence of any expression of opinion by the trial Judge touching the credibility of the

witnesses, the learned Judge thought that the Court should give full effect to the documents, and hold that they evidenced an election by the defendants to affirm the original transaction, and to look to the estate of the debtor and the securities the defendants held for indemnity against their liability on the guaranty: Scarf v. Jardine (1882), 7 App. Cas. 345, 360; Bank of Toronto v. Harrell (1917), 55 Can. S.C.R. 512.

The learned Judge said that he would dismiss the appeal with costs; but the plaintiff bank should have no costs of the taking of the further evidence or of the rehearing, and the defendants should be paid their costs of these by the plaintiff bank.

MEREDITH, C.J.O., and MACLAREN and MAGEE, JJ.A., agreed with the conclusion of FERGUSON, J.A., as to the effect of the new evidence, but adhered to the views expressed in the opinion of the Chief Justice of the 27th January, 1919.

Appeal dismissed.

FIRST DIVISIONAL COURT. MARCH 19TH, 1920.

REX v. ERCOLINO.

Criminal Law—Arson—Setting Fire to Dwelling-house and Store of Prisoner—Contents Insured beyond Value—Circumstantial Evidence—Sufficiency of, to Support Conviction.

Case stated by the Junior Judge of the County Court of the County of Wentworth, upon the trial and conviction of the defendant for setting fire to his own dwelling-house and store in the city of Hamilton. The defendant was tried by the Judge without a jury.

The question stated was, whether there was any evidence to support the conviction. The evidence taken at the trial was made part of the case.

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

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

Edward Bayly, K.C., for the Crown.

MACLAREN, J.A., reading the judgment of the Court, went over the evidence with care. There was no direct evidence—no one saw the defendant set fire to the place—but the contents of the building were insured for $3,275, of which $1,275 was put on about

two months before the fire, and a great part of the goods which were upon the premises when that insurance was effected had been since removed, some of them only a few hours before the fire broke out. When the firemen broke the building open, after the fire had been discovered, they found the fire burning underneath a stove-pipe hole in the ceiling leading to a room above. On the floor and leading up to this hole were torn strips of clothing and other stuff on fire, with a strong smell of coal-oil; and a can of coal-oil was found upset on the floor. The prisoner gave evidence himself as to the keys of the premises, which was obviously untrue. His only defence at the trial was an alibi. He and the other occupants of his father-in-law's house, where he was sleeping at the time of the fire, swore that he and his wife came in a little before 10, and that they all went to bed shortly after that hour and did not wake up until the fire chief came about 2 o'clock and rang the bell. Even accepting their testimony, the defendant had ample time and opportunity, after they had gone to sleep, to slip out quietly and do all that was done at the store, say between 11 o'clock and 12.30, and return to his bed without waking any of the inmates.

The evidence at the trial was amply sufficient to justify the finding of "guilty," and the question submitted should be answered in the affirmative.

Conviction affirmed.

FIRST DIVISIONAL COURT. MARCH 19TH, 1920.

VAUGHAN v. TORONTO AND YORK RADIAL R.W. CO.

Negligence—Collision of Street Railway Cars—Brake Failing to Work—Lack of Inspection—Neglect of Motorman—Evidence—Findings of Jury—Injury to Passengers—Damages—Appeal.

Appeal by the defendant company from the judgment of MASTEN, J., upon the findings of a jury, in an action by Annie Vaughan and her daughter Dorice to recover damages for injuries received by them while passengers on the defendants' railway by a collision between two of the defendants' cars. The plaintiff Annie was awarded $7,085 damages and the plaintiff Dorice $175, with one set of costs to both plaintiffs.

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

I. F. Hellmuth, K.C., and W. Lawr, for the appellant company.

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

MEREDITH, C.J.O., read the judgment of the Court. He said that it was not disputed that the collision occurred in consequence of the failure of the brake upon the car in which the respondents were, to work, and that this was due to the brake-beam breaking completely through near to one of its ends and ceasing to perform its function. The negligence charged was, that there was no proper inspection of the brake-beam, and that the motorman of the car, when it had slid by the stopping place at St. Clair avenue, at a short distance from the car-barns, was negligent in not having an inspection made at the barns.

Questions were put to the jury and were answered as follows:—

1. Was the defendant company guilty of any negligence which occasioned the accident complained of? A. Yes.

2. If so, in what did such negligence consist? A. Improper inspection of brake-gear.

3. After the motorman became or should have become aware of the danger to his passengers, could he have done anything that he did not do to avoid the accident? A. Yes.

4. If so, state what he should have done? A. Motorman should have called for inspection at the car-barn.

The 3rd and 4th questions were doubtless intended by the trial Judge to apply to what is sometimes called ultimate negligence. The jury evidently did not so understand them; no doubt, they intended by their answers to add to the answer to the 1st question the additional negligent omission which they attributed to the motorman by their answer to question 4; and the answers should be so read.

Was there any evidence for the jury? If so, are the findings such that no 12 reasonable men could have made them on the evidence?

The first question should be answered in the affirmative, and the second in the negative.

It was open to the jury to reach the conclusion that, when the car slid, the brake-beam had become impaired, though it had not been broken completely through, and that an inspection at the car-barns would have resulted in the discovery of its condition, and so have prevented the collision.

The damages were not so large as to warrant the Court in interfering.

Appeal dismissed with costs.

FIRST DIVISIONAL COURT. MARCH 19TH, 1920.

PELL v. TORONTO AND YORK RADIAL R.W. CO.

Damages—Personal Injuries—Negligence of Street Railway Company—Collision—Quantum of Damages Assessed by Jury—Motion for New Assessment on Ground of Excess.

Appeal by the defendants from the judgment of SUTHERLAND, J., upon the findings of a jury, in an action for damages for injury sustained by the plaintiff, while a passenger in a car of the defendants, by reason of a collision of the car with a truck. The plaintiff lost part of one leg in consequence of the collision, and was awarded $10,000 damages and costs.

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

I. F. Hellmuth, K.C., and W. Lawr, for the appellants.

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

MEREDITH, C.J.O., reading the judgment of the Court, said that the only question was as to the damages. The respondent was injured in a railway accident with the result that his right leg had to be amputated about 4½ inches below the knee. Before the accident, his occupation was that of a lather, and his average earnings amounted to $6 for every working day; his age was 37; and, according to his testimony, he was unable to do any manual labour. He suffered pain from the time of the accident, the 19th July, 1919, down to the time of the trial, and suffers pain in damp weather.

The damages were large, but not so large as to warrant the Court in sending the case down for another assessment by a jury. It is a very serious thing for the respondent to have been deprived of part of his right leg and to be compelled to go through life in that condition. His actual loss up to the present time had been considerable. Then there was the pain and suffering and the permanent lessening of his earning power. While $10,000 was a large sum, its purchasing power was much less than it was under conditions that existed before the war. It was the function of the jury to estimate the damages, and it was impossible to say that the amount they had awarded was so large that no 12 reasonable men could have awarded it.

Appeal dismissed with costs.

FIRST DIVISIONAL COURT. MARCH 19TH, 1920.

OLIVER-SCRIM LUMBER CO. LIMITED v. GREAT LAKES DREDGING CO. LIMITED.

Sale of Goods—Action for Price—Dispute—Adjustment of Amount Due—Counterclaim or Set-off—Damages for Breach—Special Circumstances—Knowledge of Parties—Contract Made in Reference thereto—Evidence—Alteration in Contract—Time for Deliveries—Default.

An appeal by the plaintiffs from the judgment of FALCONBRIDGE, C.J. K.B., 17 O.W.N. 48, whereby he dismissed the action with costs, on the ground that the defendants had established a set-off or counterclaim equal to or greater than the plaintiffs' claim.

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

J. H. Rodd, for the appellants.

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

FERGUSON, J.A., reading the judgment of the Court, said that on the 11th October, 1917, the plaintiff company and the defendants entered into a contract by which the plaintiff company agreed to deliver to the defendants 2,000 piles 80 feet in length at the rate of 40 cents per lineal foot. The plaintiff company failed to make shipments at the times and in the quantities agreed upon. On the 28th October, 1917, the defendants wired the plaintiff company: "Upon learning that you failed to begin shipment according to contract we began negotiations with Day. Not yet closed. However we must get piles as early as possible. Prompt shipment determines who supplies them." Having on the 3rd and 4th November entered into contracts with two other firms for their other 80-foot piles, the defendants, on the 2nd December, informed the plaintiff company that their contract was altered, and ordered them to deliver, instead of the piles contracted for, 1,000 piles 80 feet in length and 1,000 in shorter lengths. The plaintiff company continued to ship 80-foot piles and shorter lengths until the 28th May, 1918, at which time they had shipped 1,615 pieces, being 1,192 pieces of 80 feet and 423 in other lengths. A dispute arose as to the number of pieces rejected by the defendants as not being according to contract. This dispute was adjusted by an agreement made on the 10th October, 1918. The plaintiffs' claim was based on the adjustment. The defendants' answer was a set-off or counterclaim based on two allegations: (1) that the plaintiffs were liable for the difference

between the contract-price and the market-price of 385 shorter piles not delivered under the amended or substituted orders; (2) that, owing to the plaintiffs' default in making delivery of pieces of 80 at the times specified in the original contract and in accordance with its requirements, the defendants were, when they commenced work on the 6th January, 1918, and down to the end of April, unable to work their 3-pile driving wheel to capacity, and that in consequence they were engaged a longer time in driving 2,000 80-foot piles than would otherwise have been necessary, and that they thereby suffered a loss of $93.20 per day.

The learned Judge said that the contract of the 11th October took the form of a contract for the sale and delivery of goods. In ordinary circumstances, the damages resulting from a breach of such a contract would be limited to the difference between the contract-price and the market-price at the time and place of delivery. If, however, the defendants had alleged and shewn such special circumstances, known to the plaintiff company at the time of the contract, as would give them notice that a breach of the contract would result in otherwise unexpected loss, it might be found that the plaintiff company in entering into the contract did so with such knowledge and in such circumstances that they must be held to have known of the special damage that would accrue on default, and that the defendants believed that the plaintiffs in contracting contemplated a liability for such damage. See Mayne on Damages, 8th ed., pp. 13, 14, 38; Sedgwick on Damages, p. 265; Dominion Textile Co. v. Diamond Whiteware Co. (1915), 25 D.L.R. 241, and cases there cited. There was no allegation in the pleadings of knowledge of special circumstances or of a contract made in reference thereto; and the evidence did not support any such claim.

The learned Judge was of opinion:—

(1) That the defendants had failed to establish a case entitling them to any special damage on a failure to deliver at the times mentioned in the contract of the 11th October.

(2) That there was no general damage, in that the contract-price was not lower than the market-price at the date and place named for delivery or when the defendants purported to cancel the order for 1,000 pieces of 80.

(3) That, on the default of the plaintiffs, the defendants, instead of claiming general damages, elected to allow the plaintiffs to supply such piles as they could supply up to 2,000 at the same price as stipulated in the contract of the 11th October—1,000 to be pieces of 80 and the other 1,000 of shorter lengths.

(4) That, at the time of the proposed change, it was known to both parties that the piles were to be used in the work of a certain steel company, and that that work would commence

shortly, but it was also known to the defendants that the car situation was such that deliveries would be governed by the supply of cars, and, though not expressly so stipulated, it was understood by both parties that the deliveries were to be made in a reasonable time, having in view all the circumstances.

(5) That the plaintiffs did not expressly accept the defendants' offer. They made a counter-proposition, and under that counter-proposition they shipped and the defendants took delivery—the parties not being agreed as to the terms of the shipment and acceptance, except that both parties were of the opinion that the deliveries were made in a reasonable time.

(6) That the whole 2,000 piles were not delivered because the defendants refused to accept 80-foot piles, rather than because the plaintiffs were unable to deliver them.

(7) That the plaintiffs did not bind themselves to deliver the 1,000 pieces of shorter lengths, and consequently did not make default in reference to the 385 pieces by which the total deliveries fell short of 2,000 pieces.

The appeal should be allowed with costs, and judgment should be entered for the plaintiffs for $3,335.41 with interest from the 4th October, 1918, and costs.

Appeal allowed.

HIGH COURT DIVISION.

SUTHERLAND, J. MARCH 16TH, 1920.

GALLINGER v. GALLINGER.

Contract—Parent and Child—Oral Bargain between Father and Son—Son Put in Possession of Land—Evidence to Establish Contract—Statute of Frauds—Acts of Part Performance—Improvements Made by Son—Death of Father Intestate—Action by Admisistratrix for Possession—Parties—Addition of Heirs at Law—Counterclaim.

Action by Clarey Gallinger, the widow and administratrix of the estate of James Alexander Gallinger, deceased, to recover possession of the south-east quarter of lot 24 in the 8th concession of the township of East Nissouri.

The deceased was the registered owner of the land, but his son Zenas Gallinger, the original defendant, was in possession thereof at the time of his father's death.

The original defendant, in his statement of defence, objected that the proper parties were not before the Court, and at the trial the adult heirs at law of the deceased (other than Zenas), were added (by their written consent) as plaintiffs, and the only infant heir at law was added as a defendant, the Official Guardian representing him and delivering a defence.

The defendant counterclaimed for a declaration of his right to possession, or for compensation for his improvements, alleging an agreement with his father.

The action and counterclaim were tried without a jury at London.

J. M. McEvoy, for the plaintiffs.

Edmund Meredith, K.C., for the defendant Zenas Gallinger.

F. P. Betts, K.C., for the Official Guardian.

SUTHERLAND, J., in a written judgment, said that the intestate had, at the time of his death, in addition to the 50 acres in question, a farm of 100 acres, on which he had been living with his wife and some of his children; and the defendant Zenas Gallinger, while claiming the 50 acres, also claimed a share in the 100 acres. He had been living at home with his father and mother on the 100 acres up to the time of his marriage on the 9th April, 1913. At the trial he stated that, about a month before this, his father made a bargain (not in writing) with him, by which he gave him the 50 acres, telling him "to go on and do with it as he pleased, as it was his." Upon his marriage he went into possession. He also said that part of the bargain was that he should pay the interest on an existing mortgage on the 50 acres and the principal when due. He further stated that, in compliance with and reliance upon the agreement, he had ever since remained in possession of the 50 acres, had had entire control thereof, and had paid the taxes thereon and the interest on the mortgage from year to year; also that, with the knowledge of his father, he made extensive improvements of the value of about $2,000 on the 50 acres. His father, he said, had intended to convey the land to him, and on one occasion had gone to a solicitor's office for the purpose of having a conveyance drawn.

The learned Judge, after a careful examination of the evidence, said that he was unable to find, upon the evidence as a whole, that the defendant Zenas Gallinger had shewn that the agreement put forward by him in his statement of defence had been proved. The Statute of Frauds was a bar to the claim. The alleged acts of part performance were in part equivocal and might be attributable to an expectation on the son's part that the father would leave the property to him by will. It was clear that the

most substantial part of the improvements was made after the son realised that he had no agreement binding on his father, and had learned and come to the conclusion that his father would not make a deed to him, and the only way he could acquire ownership was through possession for a sufficient length of time: Orr v. Orr (1874), 21 Gr. 397; Smith v. Smith (1898), 29 O.R. 309.

There should be judgment for the plaintiffs and the infant defendant against the defendant Zenas Gallinger for possession of the 50 acres and for costs of the action, and dismissing his counterclaim with costs, including in each case the costs of the Official Guardian.

ORDE, J. MARCH 16TH, 1920.

*WHITTEN v. BURTWELL.

Negligence—Highway Accident—Child Injured by Motor-car—Excessive Speed—Want of Care—Motor Vehicles Act, sec. 23—Onus—Disproof of Negligence—Failure to Satisfy—Conditions of Traffic—Duty of Driver—Responsibility of Owner of Vehicle—Finding of Trial Judge—Damages—Permanent Injury—Expenses Incurred by Parent.

Action by Louise Whitten, a child of 6 years, by her mother and next friend, and by the mother, to recover damages for injury sustained by the child and expense occasioned to the mother by the running down of the child by the motor-car of the defendant.

The action was tried without a jury at St. Catharines.

T. M. McCarron, for the plaintiffs.

E. A. Lancaster, for the defendant.

ORDE, J., in a written judgment, said that the accident occurred on the 31st May, 1919, which was a Saturday and a public school holiday. The infant plaintiff went into the street in front of her mother's house to play, and was in the roadway when she was struck by the defendant's car, which was being driven by his son Harry, a boy of 16, who had a driver's license, and was in the habit of driving the car; the child was seriously, probably permanently, injured.

The statements of the different witnesses of the accident varied, as might be expected. [The learned Judge reviewed the evidence.]

It was admitted that Harry Burtwell was driving the car as the defendant's servant or agent.

Under sec. 23 of the Motor Vehicles Act, the learned Judge said, he had to determine whether or not the defendant had succeeded in proving that the driver of the car was not negligent. Section 23 means that the burden of disproving his negligence now falls as heavily upon the defendant as that of proving negligence would fall upon the plaintiff but for the section. The section is not to be confined to a mere alteration of the method of procedure at the trial; but, so soon as it is proved that the damage was sustained by reason of the motor-vehicle upon the highway, the section renders the owner liable unless he can prove that he was not negligent. In doing so, every defence which he might otherwise raise is still open to him: Bradshaw v. Conlin (1917), 40 O.L.R. 494; but he is, nevertheless, at that stage, prima facie liable.

It was not necessary to determine whether or not Harry Burtwell was complying with all the traffic laws and regulations as to speed, signals, etc. There was ample evidence, though contradicted, that he was going along the street at a high rate of speed. He was approaching a standing vehicle, and, according to his own story, tried to pass another vehicle going in the same direction as he was going. Near the standing vehicle, on both sides of the highway, there were children standing and running about; the day was a school holiday, as Harry Burtwell must have known; and children, in such circumstances and in such a neighbourhood, were likely to cross the street or to play in it. Under such conditions, it was incumbent upon drivers of motor-vehicles to exercise more than ordinary care. Mere compliance with statutory and municipal regulations was not sufficient. The defendant had failed to shew that absence of negligence which he must establish in order to escape the consequences of the accident. To the contrary, there was evidence to shew that Harry Burtwell was driving at a high rate of speed, and from his own admissions it was clear that he did not have his car sufficiently under control to avoid striking the child. He admitted that the car might have been going 10 miles an hour when it struck the child; and it can be inferred from what he said that he might have avoided the child by running into the standing vehicle.

The learned Judge, therefore, found the defendant guilty of negligence and liable in damages to the plaintiffs.

The plaintiff Eliza May Whitten, the mother, should have judgment for the amount expended by her in consequence of the injury to the child, $236.90.

The child was seriously injured for life, and should have judgment for $2,000, although a lower figure was named by the plaintiffs' counsel at the trial. The $2,000 should be paid into Court to the credit of the plaintiff Louise Whitten, to abide further order.

The plaintiffs' costs should be paid by the defendant.

ORDE, J., IN CHAMBERS. MARCH 17TH, 1920.

*PARRY v. PARRY.

Costs—Scale of Costs—Action Brought in the Supreme Court of Ontario—Trespass to Land—Declaration as to User of Right of Way—Judgment for Plaintiff with Nominal Damages and Costs—Adjudication of Taxing Officer as to Scale of Costs under Rule 649—Appeal—Pleading—Issue Raised as to Title—Proof of Value of Land Involved—Onus—Jurisdiction of County Court—County Courts Act, sec. 22 (1) (c).

Appeal by the defendants from the ruling of the Local Taxing Officer at Belleville that the plaintiff was entitled to costs of this action on the Supreme Court scale.

J. M. Forgie, for the defendants.
C. A. Payne, for the plaintiff.

ORDE, J., in a written judgment, said that the plaintiff was the owner of land in the township of Sidney, over which the defendant Parry, as the owner, and the defendant Jeffrey, as tenant, of adjoining land, were entitled to a right of way. The plaintiff, as well as his predecessor in title, had maintained certain bars across the way to prevent his cattle from straying from his barn-yard and his neighbours' cattle from straying upon his land. When using the way, the defendants had to remove these bars and replace them. Shortly before the commencement of this action, the plaintiff, for his own purposes, substituted for the old bars certain new ones, which, the defendants asserted, were larger and more cumbersome than the old ones; and the defendants, for that reason, objected to being obliged to remove and replace them, considering that the new bars interfered with their enjoyment of the right of way as theretofore exercised. After removing the bars, the defendants refused to replace them, thereby leaving the roadway open.

The plaintiff brought this action in the Supreme Court of Ontario for a declaration that he was entitled to maintain and keep the bars on the right of way of the defendants and that it was the duty of the defendants to replace the bars after using the right of way; the plaintiff also claimed $50 damages, incidental relief, and costs.

The trial Judge pronounced the declaratory judgment asked for, and awarded the plaintiff $5 damages and costs.

The trial judgment being silent as to the scale of costs, it fell to the officer to determine the scale: Rule 649.

The sole question—apart from the quantum of damages—before the trial Judge was whether or not, in casting upon the defendants the burden of removing and replacing heavier bars than theretofore, the plaintiff was interfering with the free exercise by the defendants of their right of way over his land.

The statement of claim set up the facts and the defendants' conduct, and alleged that "the defendants defy the plaintiff to prevent them from so conducting themselves." The defendants in pleading did not avoid the issue so raised. They alleged that the new bars were heavier and more cumbersome than the old; that they had given notice to the plaintiff of their refusal to permit the use of the new bars; that the plaintiff refused to maintain the bars as they had been used; and that the defendants, in order to enjoy their right of user of the land, and owing to the difficulty of restoring the new bars, threw them down and refused to permit the plaintiff to maintain the right of way in a manner different from the way in which it had always been used by their predecessor in title and themselves.

This defence was a distinct assertion by the defendants that the nature of the right of way which they were entitled to enjoy over the plaintiff's land was different from that asserted by the plaintiff. That issue involved a question of title—namely, what is the nature and extent of the defendants' easement, or the extent to which the plaintiff's title to the servient tenement is affected by that easement?

The action should be regarded as one for trespass or injury to land in which the question of title to land is involved, and in which is sought a declaration binding upon the parties, not only as to the immediate cause of action for damages, but also as to their future rights.

The case, therefore, if within the jurisdiction of a County Court, must fall within the class of cases over which, by sec. 22 (1) (c) of the County Courts Act, a County Court has jurisdiction if the value of the land does not exceed $500, and the sum claimed does not exceed that amount.

The sum claimed was only $50; but there was no evidence that the interest in or right over his own land enjoyed by the plaintiff and sought to be curtailed by the defendants was worth less than a sum exceeding $500. Unless that was clearly shewn (and the burden was on the defendants), a County Court would have no jurisdiction. In fact the value in such a case as this might well be that of the whole of the plaintiff's land and not merely that strip of land over which the actual roadway runs: see Moffatt v. Carmichael (1907), 14 O.L.R. 595.

The plaintiff's costs were, therefore, taxable on the Supreme Court scale, and the appeal should be dismissed with costs.

RIDDELL, J. MARCH 17TH, 1920.

RE STOREY.

Will—Construction—Apparently Inconsistent Clauses—Reconciliation—Later Clause Explanatory of Earlier.

Motion by the executors of the will of James A. Storey, deceased, for an order determining a question as to the meaning and effect of the will.

The motion was heard in the Weekly Court, Toronto.
J. A. Macintosh, for the executors.
J. F. Strickland, for the adult beneficiaries.
E. C. Cattanach, for the Official Guardian.

RIDDELL, J., in a written judgment, said that the testator and his son Merton were tenants in common of certain lots in Peterborough known as Nos. 132, 134, 136, 140, and 140½, Park street. By his will the testator made the following disposition of his real estate: (1) He gave to his son Merton "all my interest" in the two houses Nos. 132 and 134, together with lots 139 and 140, plan 34, in Portage la Prairie, "and all tools and autor-car." (2) He gave to his daughter Margaret his dwelling in Aylmer street, Peterborough, No. 564, and all his household furniture, including his watch, and four houses in Park street, Peterborough, Nos. 140½, 140, 138, 136, and all notes and money if any. (3) He gave and devised to his executors his dwelling in Aylmer street, No. 564, and the four houses in Park street, Nos. 140½, 140, 138, and 136, to sell or to rent as they think best, and the interest or rent to be paid over to Margaret for her support, and the principal received for the property aforesaid to be paid to Margaret at the age of 23 years, and if the property is not sold before Margaret reaches the age of 23, she is to become the owner.

The son and another were appointed executors, and had been granted letters probate of the will. They found difficulty in reconciling clauses 2 and 3.

The learned Judge said that (in general) when two clauses in a will are irreconcilable, the later one is to be preferred. But, before rejecting either, the Court must see that they are really irreconcilable in substance and not in mere form; and, if possible, the Court will reconcile two dispositions apparently inconsistent: Kerr v. Clinton (1869), L.R. 8 Eq. 462, 464; In re Bywater (1881), 18 Ch. D. 17.

There was no real inconsistency between the clauses. Clause 3 was merely explanatory and not a revocation of clause 2. In

clause 3 the testator was simply expressing clearly how he desired his daughter to have the advantage of his gifts in clause 2. Consequently clause 3 prevailed—and the result was the same as if the more stingent rule were to be applied.

Costs as usual.

MASTEN, J., IN CHAMBERS. MARCH 19TH, 1920.

*REX v. HOGAN.

Ontario Temperance Act—Magistrates' Conviction for Offence against sec. 40—Keeping Intoxicating Liquor for Sale—Taking Liquor from Express Office—Fictitious Name—Application of sec. 70—Possession of Liquor—Presumption under sec. 88—Failure to Rebut—Trial of Accused—Criminal Code, sec. 715—Accused not "Admitted to Make his Full Answer and Defence"—Consultation of Magistrates with Crown Attorney before Decision Given—Argument Addressed to Magistrates and Crown Attorney by Counsel for Prosecutor in Absence of Defendant and his Counsel—Crown Attorneys Act, R.S.O. 1914 ch. 91, sec. 8 (g)—Unfair Trial—Conviction Quashed with Costs to be Paid by Magistrates—Protection of Magistrates.

Motion to quash a conviction of Samuel Hogan by two Justices of the Peace, at the City of Kingston, on the 29th January, 1920, for that he did unlawfully keep intoxicating liquor for sale, barter, or traffic, contrary to the Ontario Temperance Act.

A. B. Cunningham, for the defendant.
Edward Bayly, K.C., for the magistrates.

MASTEN, J., in a written judgment, said that it was admitted by counsel for the magistrates that the decisions under sec. 70 of the Ontario Temperance Act made it plain that that section does not apply to this case, and that the taking of the liquor by Hogan from the express office, where it was lying, addressed to "S. Holding," did not afford ground for a conviction.

It was, however, contended that sec. 40 of the Act applied. It was not disputed that Hogan had the liquor in his house; and it was contended that, under sec. 88 (as to burden of proof) and under the decision in Rex v. Le Clair (1917), 39 O.L.R. 436, the possession of the liquor concerning which Hogan was being prosecuted constituted prima facie evidence that he was guilty of the offence with which he was charged; and that, as he failed to rebut this

implication to the satisfaction of the magistrates, the conviction must stand.

The learned Judge agreed with this view, and the motion failed on the first and second grounds stated in the notice of motion.

The third ground was, that the magistrates had acted improperly, because, after the hearing of the case, and before giving their decision, they, in company with the counsel for the prosecutor, and without notice to the defendant, and in his absence and in the absence of counsel representing him, discussed the case with the County Crown Attorney, and after such discussion found the defendant "guilty."

By sec. 72 of the Ontario Temperance Act, the provisions of the Ontario Summary Convictions Act, R.S.O. 1914 ch. 90, apply to every prosecution under the Temperance Act; and sec. 4 of the Summary Convictions Act makes Part XV. of the Criminal Code applicable to every case of an offence against a provincial statute.

Section 715 of the Code, which is found in Part XV., provides: "The person against whom the complaint is made or information laid shall be admitted to make his full answer and defence thereto, and to have the witnesses examined and cross-examined by counsel, solicitor, or agent on his behalf."

Reference to Rex v. Farrell (1907), 15 O.L.R. 100, 12 Can. Crim. Cas. 524; In re Rex v. McDougall (1904), 8 O.L.R. 30; Regina v. Justices of Suffolk (1852), 18 Q.B. 416; Regina v. Justices of Yarmouth (1882), 8 Q.B.D. 525; Regina v. Sproule (1887), 14 O.R. 375, 387; and other cases.

The Crown Attorneys Act, R.S.O. 1914 ch. 91, sec. 8 (*g*), makes it the duty of the Crown Attorney to "advise a Justice of the Peace in respect to criminal offences brought before him for preliminary investigation or for adjudication if he requests him to do so by writing containing a statement of the particular case."

That procedure did not appear to have been followed in this case, and the statute could not be invoked in support of what was done.

The conviction could not stand—the defendant had not been "admitted to make his full answer and defence."

That conclusion, however, was not founded on the consultation with the Crown Attorney, but rather on the argument made by counsel for the prosecutor before the magistrates and the Crown Attorney, which resulted apparently in the conviction. Had counsel for the accused been permitted to be present, he might have been able to refer to the case where it was held that sec. 70 of the Ontario Temperance Act could not be invoked in the circumstances of this case.

The conviction should be quashed; and, having regard to the unfairness of the whole proceeding, the costs of the motion should be paid by the magistrates. The learned Judge inclined, however, to the view that what the magistrates did was not done maliciously or with the intention of being unfair, but thoughtlessly and carelessly and without an appreciation of the wrong which they were doing to the accused; and so there should be the usual order protecting the magistrates.

MIDDLETON, J. MARCH 19TH, 1920.

*LAW v. CITY OF TORONTO.

Contract—Agreement with Municipality to Do Concrete Work upon Bridge—Interference by Municipality—Breach of Implied Obligation—Damages—Asphalt Work Shewn on Plans—Clause Incorporating Plans in Specifications—Effect of—Determination by Engineer of Municipality that Asphalt Work Included in Contract—Misconstruction of Contract—Powers Given to Engineer by Contract — Jurisdiction — Disqualification of Engineer as Arbitrator—Interest.

Action for the value of extra work done by the plaintiff in connection with the erection of a bridge upon St. Clair avenue, Toronto. The plaintiff had a contract with the defendants for the doing of the concrete work. He also claimed payment of part of the contract-price withheld by the defendants.

The action was tried without a jury at a Toronto sittings.
G. H. Kilmer, K.C., for the plaintiff.
Irving S. Fairty, for the defendants.

MIDDLETON, J., in a written judgment, said that, after the making of the contract, the defendants built a temporary bridge on the site of the work and operated street-cars upon it. This caused the contractors inconvenience, delay, and extra expense. It is an implied obligation upon the part of any contracting party that he will not do anything to interfere with the other party in the discharge of his contractual obligation. The erection of the bridge caused the plaintiff substantial damage. The sum of $1,500 would be a fair amount to allow.

The contract was for the concrete substructure and floor of the bridge. Certain asphalt work was shewn on the plans, but not mentioned in the specifications or contract. The contractor for the concrete work rightly considered that he was not obliged to

do the asphalt work any more than the steel or carpenter work, merely because the work was shewn upon the plan. The defendants' engineer, under the power given him by the contract, assumed to determine that the plaintiff's contract called for this work, though not mentioned, by reason of a clause making the drawings part of the specifications and providing that work shewn by the drawings shall be done even if not called for by the specifications. That is not the effect of the clause. If the contract were to do all the work so that the contractor was bound to deliver a structure in accordance with the plans he would be bound to do all shewn by them. But, where the contract is to do only part of the work shewn by the plans, this clause does not compel the contractor to do more than the concrete work.

The defendants, acting on the engineer's view, had this asphalt work done by the Canada Floors Company, at a cost of $2,450, and deducted this from the price payable.

The contract provided for the determination by the engineer of all questions as to the matters covered by the contract; but he could not, by an erroneous construction of the contract, give himself jurisdiction over matters not covered by it. He could not go beyond the matters as to which the parties agreed to give him jurisdiction, nor could he deprive the Court of the right and duty of determining the limits of his jurisdiction: Faviell v. Eastern Counties R.W. Co. (1848), 2 Ex. 344, 350.

Produce Brokers Co. v. Olympia Oil and Cake Co., [1916] 1 A.C. 314, distinguished.

It was not alleged that there was fraud upon the part of the engineer; but it was obvious that in truth he was called upon to perform a delicate task. The specifications, for which he was responsible, were misleading if the intention was that the plaintiff should do the asphalt work. If there was no separate contract for it, the defendants might well complain, for a serious item of cost had been overlooked. In either case an element was introduced which should disqualify the engineer from making a determination: Eckersley v. Mersey Docks and Harbour Board, [1894] 2 Q.B. 667, 671; Bright v. River Plate Construction Co., [1900] 2 Ch. 835.

Even if the conclusion were reached that the engineer, under the guise of interpreting the contract, had the power to compel the contractor to do something outside the contract, the plaintiff would not be bound by the engineer's decision, for the reason that he was disqualified.

There should be judgment for the plaintiff for $1,500 and $2,450, with interest on the latter sum from the 31st August, 1914, and costs of the action.

RIDDELL, J. MARCH 20TH, 1920.

*NOBLE v. TOWNSHIP OF ESQUESING.

Assessment and Taxes—Lands Acquired by Upper Canada College—Exemption from Taxation—Upper Canada College Act, R.S.O. 1914 ch. 280, sec. 10—Assessment of College notwithstanding Exemption—Appeal to Court of Revision—Allowance of Appeal—Substitution of Tenant of Land as Person Assessed—Assessment Act, sec. 69 (16)—Change Made without Notice to Tenant—Invalid Assessment—Declaration of Court—Curative Provisions of sec. 70 not Applicable—Lease to Tenant for 10 years Made in 1916—Amendment to Upper Canada College Act in 1919, by 9 Geo. V. ch. 80—Land Made Assessable in Hands of Tenant—Interpretation of Statute—Non-retroactivity—Existing Tenancy not Affected—Land not Assessable under Existing Lease.

Motion by the defendants to dissolve an interim injunction, turned by consent into a motion for judgment.

The motion was heard in the Weekly Court, Toronto.

A. C. McMaster, for the plaintiff.

G. L. Smith, for the defendants.

RIDDELL, J., in a written judgment, said that Upper Canada College, having bought and become the owner of certain land in the township of Esquesing, and not desiring to use it for a time to build upon, on the 11th May, 1916, rented it to the plaintiff for a sheep farm for ten years from the 17th November, 1916, at a rental of $600 per annum.

At the time of the lease the lands were exempt from taxation under the provisions of the Upper Canada College Act, R.S.O. 1914 ch. 280, sec. 10; and the tenant made his contract with that fact in view. In or before April, 1919, the land was assessed under the name "Upper Canada College," and notice was given to the College on the 21st April, 1919: Assessment Act, R.S.O. 1914 ch. 195, sec. 49. The College appealed, and the appeal was allowed by the Court of Revision on the 9th June. The Court, purporting to act under sec. 69 (16) of the Assessment Act, changed the assessment into the name of the plaintiff; and at once adjourned, not to meet again. No notice was given to the plaintiff, as required by sec. 69 (16), and he never had an opportunity of laying his case before the Court of Revision or the County Court Judge.

The township corporation, the defendants, were said to be proceeding to collect the amount of taxes from the plaintiff, when he brought this action and obtained an interim injunction.

The express wording of sec. 69 (16) made the validity of the change of assessment conditional upon the giving of the notice mentioned, and the omission to give the notice made the change ineffective. Section 70 was not applicable—there was no defect or error committed in or with regard to the roll or the notice required by sec. 49; the notice required by sec. 69 (16) is not mentioned at all.

The assessment should be declared invalid; and the plaintiff should have his costs, including the costs of the injunction.

When the assessment was made in the first place, the Act of 1919, 9 Geo. V. ch. 80, amending the Upper Canada College Act by adding sec. 10*a*., had not been passed, and the land was non-assessable in any hands. That Act was assented to on the 24th April, 1919.

The important point was, whether this land, leased for a term of years before the Act of 1919, the term extending after the Act, could be assessed at all under the Act. In the interpretation of a statute, vested rights will not be interfered with if any other interpretation is reasonably possible—a statute will not be considered retroactive unless plainly intended to be so.

A tenant leasing property non-assessable at the time of the lease cannot be supposed to fix the amount of rent which he can pay by a consideration of some possibility that at some future time the land may by legislative action be rendered assessable. If the land is made assessable in his hands, he is seriously damnified—what he must pay per annum for the land is increased. Such an interpretation of the statute would be unreasonable unless the wording made it imperative.

The wording, however, pointed in the other direction. The Legislature, when past dealings with the property were in contemplation, used the perfect tense—"land which has been sold or otherwise disposed of;" but, when speaking of land under lease, used the words "land leased by the College." The same difference in language appears in the latter part of the statute, "the person to whom such land has been sold or disposed of or agreed to be sold"—"such lessee." The Legislature, when speaking of past transactions, used the language apt for such transactions, and it meant something different when it used different language—namely, future leases.

Both reason and the wording of the statute combined in the same interpretation.

There should be a declaration that the land is not assessable in the hands of the plaintiff under the lease in question.

MIDDLETON, J., IN CHAMBERS. MARCH 20TH, 1920.

CLARKSON v. DAVIES.

Appeal—Leave to Appeal from Order of Judge in Chambers Consolidating Actions—Importance of Question Raised—Doubt as to Correctness of Order—Consolidation of Actions—Indirect Substitution of New Plaintiff for one Disqualified.

Motion by the defendants for an order staying all proceedings by the plaintiffs in respect of the action begun by G. T. Clarkson, liquidator of the Dominion Permanent Loan Company, and John R. Young, representing a class, against E. C. Davies and others, on the 15th March, 1920, and for leave to appeal from an order made by LENNOX, J., on the 19th March, 1920, consolidating that action with an action begun by Clarkson, as liquidator, and Kathleen A. Hancock, representing a class, against Davies and others, on the 15th August, 1919.

A. C. McMaster, for the defendants.
J. W. Bain, K.C., for the plaintiffs.

MIDDLETON, J., in a written judgment, said that the question raised seemed to be of sufficient importance and the solution effected by Lennox, J., sufficiently doubtful to justify the granting of leave to appeal. When it is found that a plaintiff, representing a class, is personally disqualified, it has been held that an amendment should not be made by adding or substituting a new plaintiff. If this can be accomplished by adjourning the trial and issuing a new writ and then proceeding with the trial of both actions together in this indirect way, an end is attained by circumvention which cannot be attained directly. The new plaintiff is in this way relieved from assuming the burden of costs that would have to be taken if he were added or substituted.

It is most dangerous to do indirectly that which cannot be done directly.

Leave to appeal granted—the appeal to be set down at once.

CORP V. SCHLEMMER—LENNOX, J.—MARCH 16.

Fraud and Misrepresentation—Procuring Execution of Agreements and Payment of Money—Failure of Consideration—Recovery of Money Paid—Joinder of Parties—Two Plaintiffs Claiming Moneys Paid by each Separately.]—Action for a declaration that certain agreements entered into by the plaintiffs at the instance of the defendants were fraudulent and void and for repayment of moneys paid by the plaintiffs. The action was tried without a jury at Woodstock. LENNOX, J., in a written judgment, said that the plaintiffs had each paid $638.80; and, in addition to this, each alleged that he had paid $231.45. The execution of the agreements by the plaintiffs was obtained in pursuance of a dishonest scheme and by misrepresentation of their meaning and effect. In any case, the consideration had wholly failed. The defendants were not in a position to perform their part of the agreements, and had not suggested doing so. They denied and repudiated their agreements. The plaintiffs were entitled to recover the amounts actually paid to the defendants, with interest at 7 per cent. The form of the action had not been objected to, and the joinder of the two claims in one action had lessened the expense. The evidence of the plaintiffs as to the payment by each of an additional sum of $231.45 was not satisfactory—it was not certain that it related to the agreements in question. There should be judgment for the plaintiffs for $1,277.60, with interest, as stated, and with costs of the action. R. N. Ball, for the plaintiffs. R. S. Robertson, for the defendants.

STEINHOFF V. WILSON—SUTHERLAND, J.—MARCH 18.

Trusts and Trustees—Agreement to Hold Company-shares as Security for Payment of Annuity—Breach of Trust—Delivery up of Shares to Another—Accounting—Payment of Value of Shares—Findings of Trial Judge.]—Action for a declaration that the defendant had become a trustee for the plaintiff of 112 shares of fully paid common and 50 shares of fully paid preferred stock of the Dominion Glass Company, and for an accounting, delivery of the stock, or payment of its value, etc. The action was tried without a jury at Chatham. SUTHERLAND, J., in a written judgment, set out the facts at length, and found that the sale by the plaintiff to the defendant of 10 shares of the stock of the Sydenham Glass Company, when the Dominion Glass Company was buying up the stock of the Sydenham Glass Company, was subject to the term, condition, and guarantee, on the part of the defendant, that the plaintiff was to receive an annuity of $2,000 per annum

whether he continued president of the company or not, and that, to secure the payment thereof, the defendant would procure shares in the stock of the purchasing company and hold the same as trustee for the plaintiff; and that the defendant did subsequently procure for the plaintiff 112 shares of fully paid common and 50 shares of fully paid preferred stock in the Dominion Glass Company. The defendant pleaded that the refusal of the plaintiff to pay the defendant's bill of $25 for alleged services in procuring security, which the defendant had undertaken as part of the bargain to obtain, amounted to a repudiation by the plaintiff of the security thus obtained, and warranted the defendant in subsequently handing over the stock to W. A. Gordon, the manager of the company, who had made a previous bargain with the plaintiff to pay him $2,000 a year. That plea was altogether untenable—the defendant himself did not act upon that view of the matter. After the plaintiff had refused to pay the $25, the defendant took the stock from Gordon, and it must be assumed that the taking of it was pursuant to the contract between the plaintiff and defendant. The defendant held it for years for the like purpose. Notwithstanding that he was a trustee for the plaintiff of the stock, he, in breach of the trust, delivered it to Gordon without notice to the defendant or authority from him. There should be judgment for the plaintiff, declaring that the defendant became the trustee of the stock for the plaintiff to secure the payment to the plaintiff of the annuity of $2,000 a year for his life; directing that the defendant as trustee account to the plaintiff for the stock; that, as he had parted with the stock, he should be allowed 30 days to replace it; that, in default of his so doing, a reference be directed to the Master at Chatham to ascertain the value of the shares on the 23rd July, 1917, when they were delivered by the defendant to Gordon, unless the parties could otherwise agree upon the value; for recovery by the plaintiff against the defendant of the amount so found or agreed upon; and for the appointment by the Master of a new trustee to receive the shares or the amount found as their value, upon the terms of the agreement signed by Gordon, dated the 31st May, 1913, and the letter of the defendant to the plaintiff of the 2nd June, 1913. The plaintiff should also have judgment for his costs of the action, including the costs of the order for his examination de bene esse and of that examination and of the reference. O. L. Lewis, K.C., for the plaintiff. J. M. Pike, K.C., for the defendant.