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APPELLATE DIVISION.

DECEMBER 15TH, 1913.

*WOOD v. GRAND VALLEY R.W. CO.

Contract—Subscription for Bonds of Railway Company—Undertaking to Construct Branch Line—Signature to Agreement—Liability of Company—Personal Liability of President—Money Paid on Faith of Undertaking—Non-performance—Damages—Difficulty of Assessment—Elements to be Considered—Reference—Costs.

Appeal by the defendant Pattison and cross-appeal by the plaintiffs from the order of a Divisional Court, 27 O.L.R. 556, 4 O.W.N. 556, affirming with a variation the judgment of MIDDLETON, J., 26 O.L.R. 441, 3 O.W.N. 1356.

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

C. J. Holman, K.C., for the appellant.

G. H. Watson, K.C., and Grayson Smith, for the defendants the Grand Valley Railway Company.

G. F. Shepley, K.C., and J. Harley, K.C., for the plaintiffs.

The judgment of the Court was delivered by MEREDITH, C.J.O.:—. . . We see no reason for differing from the conclusions of the trial Judge and the Divisional Court as to the liability of the railway company and of the appellant for such damages as the respondents have sustained by reason of the breach of the agreement entered into between the railway company and Pattison and the respondents. There was ample evidence to shew that the railway company acted upon and obtained

*To be reported in the Ontario Law Reports.

the benefit of the agreement, and to establish that the obligations of the agreement were to rest upon the appellant personally, as well as upon the railway company. It is not necessary to consider the question raised by Mr. Smith on behalf of the railway company as to the authority of the company to construct a line from Blue Lake to St. George; for, even if it had not that authority at the time when the agreement was made, the agreement which it entered into is wide enough to include an obligation to obtain it.

It was argued by Mr. Holman that the document which was drawn up when the agreement was concluded was not signed by the appellant except in his capacity as president of the railway company. I am not satisfied that this contention is well founded; but, even if it were, I agree with the view of the trial Judge and the Divisional Court that the appellant was bound by the parol agreement which he had entered into as to the extension of the railway to St. George and the other matters dealt with in the written document.

It was also contended by Mr. Holman that the provision of the document as to making through traffic arrangements with the Canadian Pacific Railway Company was qualified and controlled by the subsequent provision as to the appellant doing all things lawful to secure these arrangements, and that the latter was all that he bound himself to do. I am unable to agree with that contention; there is nothing in the later provision inconsistent with the obligation being, as the language used in the earlier provision imports, an absolute one.

There is more difficulty as to the damages. The contention of the respondents throughout has been that they are entitled to recover what they paid for the bonds of the railway company which were purchased on the faith of the agreement. The trial Judge decided, and rightly so we think, that the respondents were not entitled to that relief, because it could not be said that the consideration had failed; and he assessed the damages at $10,000, being of opinion that the loss of the benefits which might reasonably be expected to have flowed from the performance of the agreement was at least that sum.

The Divisional Court took a different view of the matter, and came to the conclusion that only the two respondent companies had sustained damages beyond nominal damages, and that the sums paid by them for the bonds they purchased ($1,940 each) afforded "some approximation of the amount of damage sustained, as representing the amount practically lost by relying

on the word of Pattison,'' and varied the judgment of the trial Judge by reducing the damages to $3,880 and ''giving to the other plaintiffs the $10 paid into Court as nominal damages.''

I am, with great respect, of opinion that the mode of assessing the damages adopted by the Divisional Court was erroneous. It is practically giving to the respondent companies judgment for the recovery of the price they paid for the bonds—relief they were entitled to only if the consideration had wholly failed, and I agree with the view of the trial Judge that they were not entitled to that relief, for the reasons which he gives for so holding.

The method of assessing the damages adopted by the Divisional Court was also, I think, open to the objection that it is substantially the same as that which this Court held in Village of Brighton v. Auston (1892), 19 A.R. 305, to be an improper one.

Nor am I able to agree with the contention of the counsel for the appellant that the respondents were not entitled to more than nominal damages.

That the motive which led the respondents to purchase the bonds was the desire to secure the extension of the railway to St. George and the traffic arrangements with the Canadian Pacific Railway Company for which the agreement provides, is not open to question; and that they anticipated that important benefits to them individually and apart from those which they would share with the inhabitants of the locality would follow if that should be accomplished, is also beyond question; and there was evidence upon which it was open to the trial Judge to find that there was a reasonable probability that these anticipations would have been realised, measurably at least, if the agreement had been performed.

There was, however, an entire absence of evidence to supply the data upon which the amount of the loss sustained by the breach of the agreement could be ascertained. There was nothing to shew the extent of the business carried on by the respondents at St. George or the amount of ''freight'' that was shipped to or from their manufactories, or the expense of teaming into or from the stations of the existing railways which served the district in which St. George is situate, nor was there any evidence as to the effect or probable effect in reducing freight rates and those expenses which would have resulted if the agreement had been implemented by the extension of the railway and the making of the traffic arrangements for which it provides.

In the absence of evidence of this character, any estimate of

the loss sustained by the breach of the agreement is, I think, practically guesswork: Williams v. Stephenson (1903), 33 S.C.R. 323.

There are, no doubt, cases in which it is impossible to say that there is any loss assessable as damages resulting from the breach of a contract; but the Courts have gone a long way in holding that difficulty in ascertaining the amount of the loss is no reason for not giving substantial damages, and perhaps the furthest they have gone in that direction is in Chaplin v. Hicks, [1911] 2 K.B. 766. . . .

Sapwell v. Bass, [1910] 2 K.B. 486, as explained by the same Lord Justice in Chaplin v. Hicks at p. 797, is not inconsistent with that case. . . .

It was said by Mr. Holman that the agreement makes no provision for the operation of the railway after it should be built; but, if that be the case, the only result is, that another difficulty will be added to those which exist in assessing the damages, as the tribunal which assesses them will have to take into consideration the probability that the railway would have been operated if it had been built.

Upon the whole, I am of opinion that the order of the Divisional Court should be discharged and the judgment of the trial Judge vacated, and that there should be substituted for them a judgment declaring that the respondents are entitled to recover from the appellant and the railway company the damages sustained by the respondents by reason of the breaches of the agreement in the pleadings mentioned, of which they complain, directing a reference to ascertain the amount of the damages, ordering the appellant and the railway company to pay to the respondents their costs up to and inclusive of the trial, and reserving further directions and the question of costs subsequent to the trial, except those of the appeals to the Divisional Court and to this Court, until after the report on the reference, and that there should be no other costs or any costs of any of the appeals to any of the parties; and that the cross-appeal of the respondents in the main appeal should be dismissed without costs.

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*ADDISON v. OTTAWA AUTO AND TAXI CO.

Fraud and Misrepresentation—Sale of Motor Car—"Perfectly New Car"—Repaired Car—Substitution of New Parts—Custom of Trade—Understanding of Purchaser—Representation Fraudulently Made—Right of Purchaser to Rescind—Action for Return of Purchase-money—Ability to Make Restitution—Compensation for Use of Car—Throwing off Interest on Purchase-money.

Appeal by the defendant company from the judgment of BOYD, C., at the trial at Ottawa, without a jury, in favour of the plaintiff, in an action to recover the purchase-price of a Russell motor car which the plaintiff bought from the defendant company for $2,400, and which, she alleged, was purchased by her relying upon representations made to her by the defendant company that the car was a "perfectly new one" and that it was a 1913 model, which, as she alleged, were untrue and were fraudulently made by the defendant company.

The Chancellor found that the representations were made as the plaintiff alleged, that they were untrue, and were fraudulently made by the managing director of the defendant company.

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

G. F. Henderson, K.C., for the defendant company.

E. J. Daly, for the plaintiff.

The judgment of the Court was delivered by MEREDITH, C.J.O.:—. . . We are of opinion that the findings of the Chancellor are supported by the evidence, and that the only one of them as to which there can be any question is as to the representations having been fraudulently made.

It may be that in a secondary sense, and according to the custom of the trade, the car might be properly described as a new car, although even that is doubtful upon the evidence, but it was not in the ordinary sense of the words a "new car" and certainly not a "perfectly new car;" it may be that, made to a person who was aware of such a custom, a representation that

*To be reported in the Ontario Law Reports.

the car was a new car would not have been untrue, but the question here is, was the car a "perfectly new car," in the sense in which these words were used by the respondent and understood by Ketchum, the managing director of the appellant company; and I think it is quite clear that it was not. The car had been previously sold to a man named Galarneau, who had had it in his possession for three months, and had driven it, as he says, about 250 to 300 miles, when it was badly damaged owing to its having been driven into a ditch. I say badly damaged because the expense which was incurred in bringing it into the condition in which it was when it was sold to the respondent was about $1,500. It is true that most of the damaged parts were replaced by new parts, but in some cases all that was done was to repair the damaged parts, as was done in the case of an axle which had been bent and was not replaced by a new one, but only straightened.

That Ketchum knew that the respondent was ignorant of any custom of the trade which would justify the car being called a new car, is beyond question; and the evidence satisfies me, as I have no doubt it satisfied the Chancellor, that Ketchum knew that, when she required him to assure her that it was a "perfectly" or an "absolutely" new car, she meant one that had not been previously sold and used; and that, when he answered her inquiry in the affirmative, he intended to mislead her, knowing or fearing that, if the history of the car had been told to her, she would not have bought it.

The respondent is, therefore, entitled to rescind—there being no question as to her having repudiated promptly after discovering the deception that had been practised upon her—unless, owing to the condition of the car due to its having been used from the time of its purchase in September until the 3rd of the following May, she is not in a position to make restitution.

The cases cited by Mr. Henderson on this branch of the case have, in my opinion, no application now that both law and equity are administered in the Court and the rules of equity prevail. The reasons for the decisions in the cases cited are pointed out by Lord Blackburn in Erlanger v. New Sombrero Phosphate Co. (1878), 3 App. Cas. 1218, 1278-9. . . .

[Reference also to Clarke v. Dickson (1858), E. B. & E. 148; Lagunas Nitrate Co. v. Lagunas Syndicate, [1899] 2 Ch. 392, 456, 457; Lindsay Petroleum Co. v. Hurd, L.R. 5 P.C. 221, 240; Earl Beauchamp v. Winn (1873), L.R. 6 H.L. 223, 232; Robertson v. Kennedy Motor Co. Limited, [1912] 2 Scots. L.T.R. 366.]

Acting in accordance with the practice stated by Lord Blackburn, the Chancellor allowed as compensation for any deterioration in the car and for the use of it by the respondent the amount of the interest on the purchase-money to which she would have been entitled; and we cannot see that, under all the circumstances, the allowance is not a reasonable one.

The appeal fails and should be dismissed with costs.

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CROFT v. MITCHELL.

Broker—Purchase of Shares for Customer on Margin—Failure to Deliver on Demand and Offer to Pay Balance Due—Liability of Broker—Employment of Agent—Purchase "for your Account" — Bought Notes — Interest — Commission—Value of Shares at Time of Demand.

Appeal by the defendants from the judgment of LENNOX, J., 4 O.W.N. 1086.

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

R. S. Cassels, K.C., for the defendants.

G. H. Watson, K.C., for the plaintiff.

The judgment of the Court was delivered by HODGINS, J.A.:—A perusal of the evidence satisfies me that the learned trial Judge is correct in his finding as to the effect of the agreement made between the appellants and respondent on the first occasion. It was argued, however, that, after the apparent execution of the order to purchase, the appellants had, by virtue of the conditions upon their bought note, in some way altered the relative positions and had become intermediate agents.

The measure of damage fixed by the learned trial Judge is correct, for there is nothing to indicate that actual delivery was not contemplated. The appellants' bought note begins with a statement to that effect, and the appellants' evidence at the trial establishes that as the legal result of their contract.

I do not read the bought note as indicating any change of position from that stated by Lamont: "Q. You got an order to purchase the shares? A. Yes, sir. Q. You accepted that? A. Yes."

From the bought note of Lyman & Co., put in at the trial, it would appear that they bought at one-quarter per cent. less than the amount represented to the respondent by the appellants in the bought notes of the latter.

I do not think it can be said that the bought notes are in themselves conclusive: Aston v. Kelsey, [1913] 3 K.B. 314. Yet they illustrate how the various parties treated the actual purchase, and from them it is clear that Lyman & Co. bought for and on account of the appellants, and that the appellants bought for and on account of the respondent. Mitchell says that Lyman charged them one-sixteenth per cent. on the purchase; so that the statement in the original bought note of 57¼, on a purchase by Lyman at 57, shews that the appellants included Lyman's commission as part of their own, and did not disclose it to the respondent, and included also one-eighth for prospective sale. This does not effect a change in relationship, as was the case in Johnson v. Kearley, [1908] 1 K.B. 514, because there was no concealed and arbitrary addition, but only the usual broker's commission, which in Aston v. Kelsey (ante) is treated as proper. But the non-disclosure, or rather the want of statement, that a commission charge was being made by Lyman & Co., is of importance as shewing that the latter were treated by the appellants as their agents, and not as the brokers of the respondent.

If this be correct, the importance of the notice said to be given by the printed matter on the bought note disappears. But there is really nothing on the bought note to indicate that Lyman & Co. were other than the agents of the appellants. Their case is based upon the fact that Lyman & Co. bought these shares; and a condition printed upon the note of that purchase after the order is executed, and not assented to by the principal, ought not to be binding unless it is beyond question clear, and couched in such terms as to cast upon the principal the duty of immediate dissent: Price v. Union Lighterage Co., [1903] 1 K.B. 750, 20 Times L.R. 177. There is not between a broker who knows all the facts and does not disclose them, and a customer, any duty similar to that stated in Ewing v. Dominion Bank (1904), 35 S.C.R. 133; nor, after a contract is made and executed or partly executed, can its effect be impaired by any such notice as is expressed on these bought notes.

The words "any kind of failure or default on the part of our correspondents" can hardly be said to include insolvency and its consequences; but rather point to neglect in executing the order.

I think the appeal should be dismissed with costs.

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*STEPHENSON v. SANITARIS LIMITED.

Warranty — Sale of "Non-intoxicating Hop Ale" — Purchaser Fined for Reselling in Local Option Town—Breach of Warranty—Damages—Right to Recover Amount of Fine and Costs—Fine and Costs Imposed upon Sub-purchaser—Remoteness—Postponement of Trial—Refusal by Trial Judge —New Trial—Costs.

Appeal by the plaintiff from the judgment of the County Court of the County of Simcoe dismissing an action for breach of warranty.

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

J. Birnie, K.C., for the appellant.

C. A. Moss, for the defendant company.

The judgment of the Court was delivered by MEREDITH, C.J.O.:—The appellant is a keeper of a restaurant in the town of Collingwood, in which, at the time of the transactions in question, a local option by-law was in force, and the respondent is a company carrying on the business of bottler of table water at Arnprior.

Among other table waters bottled and sold by the respondent was one called "English Club non-intoxicating hop ale," which was manufactured in England by the British Non-Alcoholic Beverage Company of Liverpool. The ale was received in bulk from the English company, and was bottled by the respondent at Arnprior, and upon the bottles was placed a label which reads as follows:—

ENGLISH CLUB
E. C.
Non-Intoxicating
Hop Ale
Sanitaris Limited
Arnprior, Ont.
THE BRITISH NON-ALCOHOLIC BEVERAGE CO.
Liverpool, England.

The first transaction between the parties took place in July, 1911, when the appellant placed an order for the ale with a

*To be reported in the Ontario Law Reports.

traveller for the respondent, named Tearney. According to the testimony of the appellant, Tearney represented to him that the ale was non-intoxicating; but it does not appear that any bottle was then shewn to the appellant, or that he knew of the use of the label by the respondent.

There is no evidence that Tearney knew that there was a local option by-law in force in Collingwood, but it is a fair inference from his knowledge of what the appellant's business was, and the circumstances attending the transaction, that he knew that the appellant was not a person entitled to sell intoxicating liquor.

The ale that was ordered on this occasion was received by the appellant in due course, and the bottles had upon them the label. The appellant continued to deal with the respondent until the month of August, 1912, and the ale that was purchased during that period was ordered by letter, and described as "hop ale" simply, and came in bottles labelled with the label I have mentioned.

On the 27th September, 1912, a seizure was made of some of the ale which was still in the appellant's possession, and he was charged with an offence against the Liquor License Act—"unlawfully keeping liquor for the purpose of sale, barter and traffic therein, without the license therefor by law required," the liquor being the "hop ale." It was proved to the satisfaction of the Police Magistrate that the ale which had been seized contained more than $2\frac{1}{2}$ per cent. of proof spirits, which, by par. 1(*a*) of sec. 2 of the Liquor License Act, as enacted by sub-sec. 2 of sec. 1 of the amending Act of 1906, 6 Edw. VII. ch. 47, is conclusive evidence that liquor is intoxicating, and that it was, therefore, intoxicating liquor within the meaning of the Liquor License Act; and the appellant was convicted of the offence with which he was charged, and was fined $100 and costs $5.20, which he has paid.

The action is brought to recover damages for the breach of an alleged warranty by the respondent that the ale was non-intoxicating, and the appellant claims as damages the amount of the fine and costs, and a sum which he paid in satisfaction of the fine and costs which had been imposed upon a man named Muller, upon his conviction of a similar offence in respect of part of the ale purchased by the appellant, which he had resold to Muller.

At the trial, the appellant gave evidence of the facts I have mentioned, but failed to shew that the ale which he had purchased from the respondent was intoxicating liquor, within the meaning of the Liquor License Act, or that it was, in fact, intoxi-

cating. It appears from the statement of counsel for the appellant at the trial that he had expected that he would be able to prove by the Provincial Analyst, who was examined as a witness, that what he had analysed and found to contain more than 2½ per cent. of alcohol, was part of the ale that was seized; but he was unable to do this, owing to his inability to identify the bottle that had been sent to the analyst as one of those produced at the trial before the Police Magistrate. Upon discovering this, counsel applied for a postponement of the trial to enable him to supply the missing link in the evidence, but his application was refused, and the trial proceeded, with the result that, the appellant having failed to identify the liquor that had been analysed as part of that which had been seized, his action was dismissed.

The learned trial Judge should, we think, have granted the application to postpone, imposing such terms as he thought just as to the costs occasioned to the respondent by the postponement, or at least in dismissing the action should have provided that the dismissal should not be a bar to the bringing of another action.

It was, however, argued by counsel for the respondent that, even if the missing link in the evidence had been supplied, the appellant would not have been entitled to succeed; that no warranty in respect of the ale that was seized was proved; that, if any warranty was proved, it was a warranty that the ale was non-intoxicating, and that there was no evidence that it was not; that the fact that it contained more than 2½ per cent. of proof spirits, and was therefore intoxicating liquor within the meaning of the Liquor License Act, did not shew that it was intoxicating within the meaning of that term as used in the warranty; and that in any case the damages claimed were too remote, and were therefore not recoverable.

There was, I think, sufficient evidence of the warranty. It was not shewn from what shipment the seizure was made; but the proper inference is, that it was from one of the later shipments, and not from the ale for which the order to Tearney was given; and, although the subsequent orders were for "hop ale" simply, the parties must have contemplated that what was wanted was "hop ale" similar to that which had been previously sent—non-intoxicating hope ale, labelled as that which comprised the first and all the subsequent shipments.

It was also a proper inference from the fact that, as I have said, the nature of the appellant's business, and that he had not

a license to sell intoxicating liquor, was known to the respondent, and from the circumstances under which the first order was given, that the warranty was intended to be a warranty that the ale was such that it could be sold by the appellant in the course of his business without thereby contravening the provisions of the Liquor License Act; and, if it had been proved that it contained more than 2½ per cent. of proof spirits, a breach of the warranty would have been established.

The loss of the appellant occasioned by his prosecution for the infraction of the Liquor License Act of which he was convicted, was, in my opinion, a natural consequence of the breach of the warranty, and therefore recoverable.

In support of this view, I refer to Cointat v. Myham, [1913] 2 K.B. 220. . . . Crage v. Fry (1903), 67 J.P. 240. . . .

Different considerations apply to the fine imposed upon Muller and the costs he was ordered to pay. There was no evidence that, when the sale of the ale to the appellant was made, the respondent knew that it would be resold otherwise than in the ordinary course of the restaurant business of the appellant, and the sale to Muller was not of that character, but was a sale to him for the purpose of his reselling or using it in the course of his business as a boarding-house keeper; and the damages in respect of the fine imposed on Muller, and the costs he was ordered to pay are, therefore, too remote, and not recoverable.

The judgment should be reversed, and there should be a new trial, confined to the damages claimed in respect of the fine imposed on the appellant, and the costs and expenses incurred in and about his conviction; the evidence that has already been taken to be read upon the new trial, and each of the parties to be at liberty to supplement it by further evidence.

Under all the circumstances, there should be no costs of the appeal to either party. If the postponement applied for by the appellant's counsel had been granted, it would, no doubt, have been allowed only on the terms of the appellant paying all costs occasioned to the respondent by the postponement, and these would probably be at least equal to the appellant's costs of the appeal; and the one may fairly be set off against the other. . . .

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*WYNNE v. DALBY.

Motor Vehicles Act—Person Injured by Motor Car—Violation of Act, 2 *Geo. V. ch.* 48, *secs.* 6 (1), 15 — *Liability of "Owner" under sec.* 19—*Purchaser of Vehicle in Possession and Control—Unpaid Vendor Retaining Legal Title or Ownership.*

Appeal by the plaintiff from so much of the judgment of KELLY, J., after the trial, as dismissed the action as against the defendant the McLaughlin Carriage Company Limited.

The reasons for judgment of KELLY, J., in which the facts are stated, are reported in 29 O.L.R. 62. See also 4 O.W.N. 1330.

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

J. P. MacGregor, for the appellant.

L. F. Heyd, K.C., for the defendant the McLaughlin Carriage Company Limited.

The judgment of the Court was delivered by MEREDITH, C.J.O. (after setting out the facts) :—Upon the argument of the appeal it was contended on behalf of the appellant that the respondent was the owner of the car, within the meaning of sec. 19 of the Motor Vehicles Act (statutes of Ontario, 1912, ch. 48), which provides that "the owner of a motor vehicle shall be responsible for any violation of this Act or of any regulation prescribed by the Lieutenant-Governor in Council."

It is true, as pointed out by Mr. MacGregor, that by the terms of the order which Adams gave to the respondent for the car, it was "agreed that the right and title to the goods shipped under . . . order should remain in" the respondent "until the price thereof and any cheque, bill or note given thereof (sic) or any part thereof is paid in full;" but it is plain from the other terms of the order that the car was to be delivered to and to pass into the possession of Adams, for it was to be shipped on or about the 6th May, 1912, and it was to be delivered in "first-class running order," and the payments of the purchase-price ($1,400) were to be made, $500 on the 6th

*To be reported in the Ontario Law Reports.

May, 1912, and the remainder in monthly instalments of $90 on the 1st day of every month until it should be fully paid. . . .

According to the testimony of Oliver Hazlewood, the manager of the respondent's Toronto branch, the car was delivered to Adams, who gave his promissory notes for so much of the purchase-money as was not paid in cash, and, from the time of the delivery of the car to Adams until the accident happened, the respondent had nothing to do with it, and had no authority over it.

Up to and at the time of the accident and for some time afterwards the promissory notes were still current, and no default had been made in the payment of them; and it was not until the 21st October, 1912, that the respondent took possession of the car "to satisfy the lien-notes not paid."

Upon this state of facts I agree with the conclusion of the learned trial Judge that the respondent was not the owner of the car, within the meaning of sec. 19.

The word "owner" is an elastic term, and the meaning which must be given to it in a statutory enactment depends very much upon the object which the enactment is designed to serve. . . .

[Reference to Baumwoll v. Furness, [1893] A.C. 8, 17; Jackson v. Owners of S.S. Blanche, [1909] A.C. 126, 132-3; Lewis v. Arnold (1875), L.R. 10 Q.B. 245; Sale v. Phillips, [1894] 1 Q.B. 394; Hughes v. Sutherland (1881), 7 Q.B.D. 161; Meiklereid v. West (1876), 1 Q.B.D. 428.]

If in these cases the charterer of the ship, while he had the control of it and navigated it, was the owner of it, within the meaning of the Acts which were the subject of consideration, I see no reason why Adams, while he was in the exclusive possession of and had complete dominion over the car under his agreement of purchase, was not the owner of it, within the meaning of sec. 19; and no decided case that I am aware of is opposed to this view.

The purpose of sec. 19 was, I think, to avoid any question being raised as to whether a servant of the owner who was driving a motor vehicle when the violation of the Act or regulation took place was acting within the scope of his employment, and to render the person having the dominion over the vehicle, and in that sense the owner of it, answerable for any violation in the commission of which the vehicle was the instrument, by whomsover it might be driven; and I do not think that it can have been intended to fix the very serious responsibility which

the section imposes upon one who, like the respondent, at the time the accident happened had neither the possession nor the dominion over the vehicle, although he may have been technically the owner of it, in the sense in which the owner of the legal estate in land is the owner of the land.

For these reasons, as well as for those of my brother Kelly, I am of opinion that the appeal should be dismissed with costs.

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*TAYLOR v. GAGE.

Highway—Excavation in Unopened Road Allowance—Injury to Plaintiff's Land — Deprivation of Access—Finding of Fact—Appeal—Necessity for Municipal By-law to Authorise Work—Non-existence of Duty to Repair Road Allowance—Sale of Gravel to Defendant.

Appeal by the defendant from the judgment of FALCONBRIDGE, C.J.K.B., the reasons for which are noted in 4 O.W.N. 947.

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

G. Lynch-Staunton, K.C., and W. T. Evans, for the appellant.

J. Bicknell, K.C., and George C. Thomson, for the plaintiff, the respondent.

MEREDITH, C.J.O.:— . . . . The respondent is the owner of part of lot No. 32 in the 3rd concession of the township of Saltfleet, and the appellant is the owner of part of lot No. 33 in the same concession; and between these lots there is an original allowance for a road, which extends southerly from the macadamised road in front of these lands to and beyond the property of the Hamilton Grimsby and Beamsville Electric Railway Company; and the action is brought to recover damages for the making by the appellant of an excavation in the road allowance opposite to the appellant's property, which, as the respondent alleges, renders it impossible for him to use it

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as he had been accustomed to do; and for injury done to his land and the fruit trees growing on it, caused by the excavation having been made; and he also claims an injunction to restrain the appellant from further excavating and removing the earth from the road allowance in such a manner as to injure the respondent's property or his user of it.

The defence of the appellant is, that what is complained of was done under instructions from and by the authority of the Corporation of the Township of Saltfleet, and was a necessary work for the improvement of the property in the locality and the opening up of the highway; that the corporation, acting within its jurisdiction, by by-law ordered and directed that the highway west of the respondent's property should be opened up and made safe for pubilc travel and to be used as a highway: that the respondent will not be injured but will be benefited by the work being done; that the respondent never used the highway as an approach to his property; that the new road, when completed, will afford an additional means of access and will be a great benefit to it; and that the respondent "has wrongfully fenced in, and is in possession of, the easterly portion of the highway," varying in width from 23 to 25 feet, which affords him "ample means of access to his property from the King street road over the same grade as he originally enjoyed."

The learned Chief Justice found in favour of the respondent, and directed that judgment should be entered restraining the appellant from further excavating or removing earth from the highway, and for a reference as to damages; reserving further directions and all questions of costs until after the report.

The judgment is based upon the hypothesis that the appellant was a wrongdoer because no by-law was passed by the council authorising him to do the work; and the judgment of the Chief Justice was that the respondent had suffered, and would suffer, damage "by deprivation of access and injury to fruit trees by excessive drainage."

It was argued by counsel for the appellant that the work that was being done was one which the council had authority, without the passing of a by-law, to do; and that the finding that the respondent had been deprived of access to his land, and that injury had been done to his fruit trees, was not warranted by the evidence. . . .

The testimony of the respondent was corroborated by several witnesses, and there is, I think, no ground for disturbing the finding of the learned Chief Justice. . . .

It was contended by Mr. Lynch-Staunton that what was done by the appellant in removing the gravel from the highway was done under the authority and by the direction of the council; that, if the council had done it by its own officers, it would have been a lawful act done in the performance of its statutory duty as to the repair of highways; and that it was not the less lawful because it was done by the appellant, who was in the same position as if he had been employed by the council to do the work; that it was not necessary that a by-law should have been passed to authorise the doing of the work; and that, for these reasons, the action did not lie, and that the respondent's remedy was to obtain compensation under the provisions of the Municipal Act; and in support of that contention counsel cited and relied on Pratt v. City of Stratford (1887-8), 14 O.R. 260, 16 A.R. 5.

The decision of the Chancellor in that case was considered by Rose, J., in Ayers v. Town of Windsor (1887), 14 O.R. 682, and distinguished, upon the ground that in the Pratt case the work which was done was work which the defendants could have been compelled to perform, and he held that the work which had been done in the case before him—lowering the grade of the highway—was not such as the defendants could have been compelled to perform, and that there was no authority to do it without a by-law having been passed providing for its being done. . . . .

[Reference to Shawinigan Hydro-Electric Co. v. Shawinigan Water and Power Co. (1912), 45 S.C.R. 585, 603, and further references to Pratt v. City of Stratford, supra.]

I do not think that the decision in the Pratt case is binding on this Court to the extent of requiring that we should hold that in all cases, and under all circumstances, an alteration of the grade of the highway by a municipal corporation is a work of repair which may be done without a by-law; but that the decision must be taken to have depended on the particular circumstances of that case; and that the Court was mainly influenced, in coming to the conclusion which it reached, by the fact that the raising of the level of the highway, of which the plaintiff complained, had become necessary owing to the raising of the level of the bridge; and was, therefore, practically a part of or incidental to that work.

In my opinion, the line of separation between acts which a municipal corporation may do in the discharge of its duty to keep in repair a highway under the jurisdiction of its council,

without passing a by-law authorising them to be done, and acts done for the improvement of a highway, for which a by-law is necessary, is nowhere better pointed out than by Macaulay, C.J., in Croft v. Town of Peterborough (1855-6), 5 C.P. 35, 45, 46, 141, 148, 149, 150; and I entirely agree with what is there said. See also Reid v. City of Hamilton (1856), 5 C.P. 269, 287.

In the case at bar, the two by-laws . . . seem to me plainly to indicate that what was proposed to be done was not to be done in the exercise of the corporation's powers or duties, as to the repair of highways, but was practically a sale to the appellant of the gravel under the surface of the road allowance, the consideration for which was to be the spreading of part of the gravel upon other roads under the jurisdiction of the council of the municipality. If what was done was, in effect, a sale of the gravel to the appellant, a by-law authorising the sale was clearly necessary (Consolidated Municipal Act, 1903, sec. 647).

It may be that, incidentally, what the appellant would do in removing the gravel would have had the effect of grading the highway, but that was not the primary purpose of what was proposed to be done; and the fact that the gravel was to be removed only up to the line of the respondent's fence, which encroached upon the highway to the extent of from 20 to 27 feet along the whole length of his lot, is an indication that the removal of the gravel was not for the purpose of improving the highway, but of benefiting the appellant.

The contention of the appellant, at the trial, was, that the road allowance had never been opened, and that it could not be used for vehicular traffic; and indeed that it could not be used even as a means of access to the respondent's land.

In Hislop v. Township of McGillivray (1900), 17 S.C.R. 479, it was decided that the duty of maintaining and keeping in repair roads under the jurisdiction of councils, imposed on corporations by the Municipal Act, only applies to roads which have been formally opened and used, and not to those which a township corporation, in its discretion, has considered it inadvisable to open; and it follows from that decision that the road allowance in question, never having been opened and used, no duty to keep it in repair rested upon the corporation, and on this ground this case is, in my opinion, distinguishable from Pratt v. City of Stratford.

Great inconvenience would result from holding that what it

is said the appellant was authorised by the council to do might be lawfully done without a by-law. There is no record of any such authority having been given, and the respondent might find great difficulty in establishing a claim for compensation against the corporation. Had the council determined to open the road allowance, and to improve it, property-owners who would, or might be, injuriously affected by what was proposed to be done, would have had an opportunity of knowing of the intention of the council, and, if they had desired to do so, of objecting to its being carried into effect.

I would affirm the judgment upon the ground that what was being done by the appellant was not a work of repair which had been undertaken by him under the authority or by the direction of the corporation, and that it was not such a work as might be lawfully done by the corporation itself, unless under the authority of a by-law of its council.

The appellant should pay the costs of the appeal.

MACLAREN and HODGINS, JJ.A., concurred.

MAGEE, J.A., dissented; reasons to be given later.

Appeal dismissed; MAGEE, J.A., *dissenting.*

DECEMBER 15TH, 1913.

*UNION BANK OF CANADA v. A. McKILLOP & SONS LIMITED.

Company—Trading Company—Powers Given by Charter—Declared and Incidental Purposes of Company—Statutory Powers—Companies Act, R.S.O. 1897 *ch.* 191, *secs.* 9, 10 (*b*), 15, 25, 46, 47, 49, 102—*Interpretation Act, R.S.O.* 1897 *ch.* 1, *sec.* 8 (25)—*Guaranty—Ultra Vires—Ratification—Estoppel.*

Appeal by the plaintiffs from the judgment of LENNOX, J., 4 O.W.N. 1253, dismissing an action brought upon a guaranty given by the defendant company.

*To be reported in the Ontario Law Reports.

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

H. Cassels, K.C., and D. C. Ross, for the appellants.

C. A. Moss and J. B. McKillop, for the defendant company, the respondent

The judgment of the Court was delivered by HODGINS, J.A.:—. . . The main defence was, that the giving of the guaranty was beyond the powers of the respondent company. As the latter is the sole defendant, no question arises as to the responsibility of the individual members of the company, who had, in order to relieve themselves from personal liability, induced the United Empire Bank to accept the respondent company's guaranty. The case must be decided upon the powers of the company in relation to the actual guaranty, and not upon any representation by those individuals as to its power to give it.

The respondent company was incorporated by letters patent, dated the 28th September, 1904, and the guaranty was given on the 13th March, 1907. The statute then applicable was the Companies Act, R.S.O. 1897 ch. 191. It is not, I think, possible to seek for any enlargement of the powers of the respondent by resort to the provisions of the Ontario Companies Act of 1907. It was not in force when the guaranty was given, and there is no evidence of any new agreement sufficient to bind the respondents. . . .

[Reference to R.S.O. 1897 ch. 191, secs. 9, 10(b), 14, 15, 25, 46, 47, 49, 102, and to the Interpretation Act, R.S.O. 1897 ch. 1, sec. 8 (25).]

From the above it would appear that, in addition to the powers expressly given in the letters patent, the company is vested with all the powers, privileges, and immunities which are extended to such a corporation, and which are enumerated in the letters patent, or in the Interpretation Act, and also those which are necessary to carry into effect the intention and objects of the letters patent and such of the provisions of the Ontario Companies Act as are applicable to the company. The company is also expressly given the incidental powers . . . to do all acts requisite or incidental to the due carrying on of its undertaking, and to carry on any branch of business incidental to the due carrying out of the objects for which the company was incorporated and subsidiary thereto, and necessary to enable the company profitably to carry on its undertaking.

There is also express power enabling the directors, if properly authorised, to borrow money upon the credit of the company and to issue bonds, debentures, or other securities of the company for the lawful purposes of the company.

Palmer, in the 10th ed. of his Company Law, says that a power to guarantee the performance of contracts by customers is one not easily implied (p. 65).

So far as the authorities in England and here are concerned, they bear out that statement. . . .

[Reference to Colman v. Eastern Counties R.W. Co. (1846), 10 Beav. 1; In re West of England Bank, Ex p. Booker (1880), 14 Ch.D. 317; Guiness v. Land Corporation of Ireland (1882), 22 Ch.D. 349; Small v. Smith (1884), 10 App. Cas. 119; Life Association of Scotland v. Caledonian Heritable Security Co. (1886), 13 Rettie 75; In re Queen Anne and Garden Mansions Co. (1884), 1 Manson Bkcy. Cas. 460; A. R. Williams Co. v. Crawford Tug Co. (1908), 16 O.L.R. 245; A. E. Thomas Limited v. Standard Bank of Canada (1910), 1 O.W.N. 379, 548; Real Estate Investment Co. v. Metropolitan Building Society (1883), 3 O.R. 476, 492; Humboldt Mining Co. v. American Manufacturing Co. (1894), 62 Fed. Repr. 356; Western Maryland Co. v. Blue Ridge Hotel Co. (1905), 102 Md. 307; Rogers v. Jewell Belting Co. (1900), 184 Ill. 574.]

Arguments based upon the receipt by the company of benefits by reason of the giving of the guaranty may be met with the question asked by Jervis, C.J., in East Anglian R.W. Co. v. Eastern Counties R.W. Co. (1851), 11 C.B. at p. 811: "What additional power do they acquire from the fact that the undertaking may in some way benefit their line?" And this question has been asked in much the same words in many succeeding cases. Nor does the fact that the predecessors of the appellants changed their position, and advanced money, help matters. There is no estoppel by an act which is beyond the corporate powers, and where recovery has been had of property or money received by a company upon a contract afterwards found to be ultra vires, the principle is based upon rescission and restoration of the parties to the status quo ante; and even that remedy is confined to cases where the consideration has been received from the other contracting party, and not from outside persons.

Unless, therefore, the powers given by the sections of the statute referred to aid the appellant, the established rule of law seems decisive against it.

It is not necessary upon the general law to go further back than the case of London County Council v. Attorney-General, [1902] A.C. 165, where Lord Halsbury, L.C., referring to Ashbury Railway Carriage Co. v. Riche (1875), L.R. 7 H.L. 653, and Attorney-General v. Great Eastern R.W. Co. (1880), 5 App. Cas. 473, remarks: "I think now it cannot be doubted that those two cases do constitute the law upon this subject. It is impossible to go behind those two cases. They are now part of the law of this country, and we must acquiesce in them, whether we like them or not."

From those two cases the general rule is deduced, that whatever may fairly be regarded as incidental or consequential upon the things which the legislature has authorised, ought not, unless expressly prohibited, to be held by judicial construction to be ultra vires.

The respondent company in this case has the "powers . . . which are incident to such corporation, or are expressed or included in the letters patent and the Interpretation Act and which are necessary to carry into effect the intention and objects of the letters patent, and such of the provisions of this Act as are applicable to this company (R.S.O. 1897 ch. 191, sec. 14). I read the word "incidental" as related to the word "necesary" and controlled by it. It also has power to do "all acts requisite or incidental to the due carrying out or of its undertaking," and further "to carry on any branch or branches of business incidental to the due carrying out of the objects for which the company was incorporated and subsidiary thereto and necessary to enable the company profitably to carry on its undertaking" (sec. 25). The latter part of this section, I think, refers to the company itself carrying on a branch of some business, which business is incidental to the due carrying out of its objects, and is a subsidiary one, and it cannot be said that the respondent company carried on the business of the West Lorne Waggon Company as a branch of its business, nor can the giving of a guaranty be described as carrying on of a business or even the financing of it, although upon the strength of it the other company may have been enabled to continue its business. Therefore, the question seems narrowed down to this: Was the giving of the guaranty authorised as incidental and necessary to enable the company to carry into effect the intention and objects of the letters patent under sec. 14, or as requisite or incidental to the due carrying on of its undertaking under sec. 25?

"Incidental" is explained by Lord Macnaghten in Amalgamated Society of Railway Servants v. Osborne, [1910] A.C. at p. 97, as equivalent to what might be derived by reasonable implication from the language of the Act to which the company owed its constitution. Even the words "incidental or conducive" have been given a restricted meaning and are treated as not including the taking of stock, although conducive to the interests of the company by increasing the company's connections: Joint Stock Discount Co. v. Brown (1866), L.R. 3 Eq. 139. And these incidental powers, if conferred by general words, are to be taken in connection with what are shewn by the context to be the dominant or main object, and are not to be read so as to enable the company to carry on any business or undertaking of any kind whatever. See Re Haven Gold Mining Co. Limited (1882), 20 Ch.D. 151; Re Coolgardie Consolidated Mines (1897), 76 L.T.R. 269; Re German Date Coffee Co. (1882), 20 Ch.D. 188; Stephens v. Mysore Reefs Limited, [1902] 1 Ch. 745; Pedlar v. Road Block Gold Mines of India, [1905] 2 Ch. 427; Butler v. Northern Territories Mines (1907), 96 L.T.R. 41; In re Kingsbury Collieries Limited and Moore's Contract, [1907] 2 Ch. 259; and Attorney-General v. Mersey R.W. Co., [1907] A.C. 415.

Reading the guaranty itself, it is obvious that the widest latitude was given to the bank, and that liability upon the guaranty was not limited to the result of direct dealings between the West Lorne Waggon Company and the bank, but extended to other dealings under which the bank might in any manner whatsoever become a creditor of that company, and remained in force notwithstanding any prejudice to the guarantors arising from the bank's dealings. This accentuates the necessity for the reluctance frequently expressed to imply a power to become surety because the result of a guaranty against the debts of another company is to put the assets of the guaranteeing company in peril for liabilities incurred in the carrying on of a business in which the guarantor is not directly interested, and whose engagements it has no means of controlling.

Upon the best consideration I can give, I cannot distinguish the issue here from that involved in those cases which deal particularly with the limitation imposed upon incorporated companies in regard to guaranties, and I see nothing in the other cases cited which enables me to say that the incidental powers of this company extend to guaranteeing the debts of another and different company whose sole connection with the respond-

ent company was that of a customer. The assent of all the shareholders cannot give validity to the guaranty if the company had no power to make it.

I am, therefore, obliged to come to the conclusion that the giving of the guaranty was ultra vires of the respondent company; and that the appeal must, on that ground, be dismissed with costs. It is, therefore, not necessary to discuss the other question argued, i.e., that there is no debt owing for which liability under the guaranty exists.

Appeal dismissed.

DECEMBER 16TH, 1913.

LLOYDS PLATE GLASS INSURANCE CO. v. EASTMURE.

Principal and Agent—Agency for Insurance Company—Substitution of Individual for Company—Liability of Individual to Account for Moneys Received since Substitution—Assumption of Liability for Preceding Period—Statute of Frauds—Finding of Fact of Trial Judge—Appeal.

Appeal by the defendant Eastmure from the judgment of LATCHFORD, J., in favour of the plaintiff company as against the appellant, after trial of the action without a jury at Toronto on the 30th September, 1913.

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

J. E. Jones, for the appellant.

R. McKay, K.C., for the plaintiff company, the respondent.

G. Larratt Smith, for the defendant Lightbourn.

Newman, for the defendant Eastmure & Lightbourn Limited.

The judgment of the Court was delivered by MEREDITH, C.J.O.:—The respondent is an insurance company, having its head office at New York, and the action is brought to recover money alleged to be due to it from its general agent for Canada, in respect of premiums collected and not accounted for and other money alleged to be owing by the agent.

The action was brought against the appellant and the defendant Lightbourn, trading under the firm name and style of Eastmure & Lightbourn, and in the statement of claim it was alleged that that firm was the general agent for Canada of the respondent and accountable for the money that the respondent claims. Eastmure & Lightbourn Limited was subsequently added as a defendant, and the statement of claim was amended by introducing an allegation that Eastmure & Lightbourn Limited is an incorporated company carrying on business at Toronto as an insurance agent, and an allegation that, in the event of its being held that the defendants Arthur L. Eastmure and Frank J. Lightbourn were not the agents of the respondent after the incorporation of the company or at any subsequent time, that company acted as agent of the respondent throughout Canada and is responsible for its claim. The appellant in his individual capacity was subsequently added as a defendant.

The finding of the trial Judge was, that after the 1st May, 1907, the appellant was the agent of the respondent and was liable for whatever balance may be found to be due to the respondent upon a proper taking of the account of moneys received for or on behalf or on account of the respondent, or which it was the duty of the appellant to collect and remit to the respondent, including any balance which may have been owing on that day by the defendant Eastmure & Lightbourn Limited, to the respondent, which has not been liquidated or paid off by payments made by the appellant, and that the defendant Eastmure & Lightbourn Limited was liable to the respondent for such balance, if any, as was due and owing by the defendant Eastmure & Lightbourn Limited to the respondent in respect of the agency business of the respondent conducted by that defendant down to the 1st May, 1907, which has not been paid or liquidated by payments made by the appellant subsequently, and the judgment was directed to be entered accordingly, with a reference to the Master in Ordinary to take the accounts, and dismissing the action as against Lightbourn and the firm of Eastmure & Lightbourn, with costs, and reserving further directions and costs as between the respondent and the appellant and the defendant Eastmure & Lightbourn Limited until after the report; and from that judgment this appeal is brought.

It was argued on behalf of the appellant that the finding of the trial Judge that the appellant became the sole agent of the respondent on the 1st May, 1907, was not supported by the

evidence, and that the action as against the appellant should have been dismissed.

We are of opinion that there was evidence which supports the finding that is attacked by the appellant.

The firm of Eastmure & Lightbourn was appointed general agent for the respondent for Canada in 1898. In 1904 or 1905, a company was incorporated bearing the name of Eastmure & Lightbourn Limited, which took over the business of the firm, and subsequently acted as general agent for Canada of the respondent. The only shareholders in the company were the appellant and Lightbourn and three other persons each holding five shares. These three persons were nominees of the appellant and Lightbourn, and the shares were allotted to them in order to comply with the requirement of the Ontario Companies Act that there shall be five applicants for letters patent of incorporation.

Owing to difficulties between the appellant and Lightbourn, and losses which the company met with, owing, as was alleged, to the actions of Lightbourn, he withdrew from the company in the year 1907, and after that time the appellant was practically the company, though it was of course a separate entity.

Owing to these difficulties and losses having occurred, and probably fearing that, if knowledge of them came to the respondent, the general agency which the company had would be put an end to, the appellant went to New York and had there an interview with Mr. Woods, the president of the respondent; and it is upon what took place at this interview that the determination of the matter in issue mainly depends. The account of what took place given by Mr. Woods differs from the account given by the appellant. The testimony of Mr. Woods was corroborated by that of Mr. Chambers, the secretary of the respondent, and the trial Judge gave credit to them, preferring their testimony to that of the appellant, and found that the arrangement then made was that thereafter the appellant should be the sole general agent for Canada of the respondent; and with that finding we agree. It is reasonably clear, we think, that, although it may not have been expressed in so many words, the intention of the parties was that this change should take place. There was no reason why the appellant should have been unwilling that it should be made, but every reason in the circumstances why he should have been willing, and all the probabilities of the case are in favour of the view that it was agreed that the change should be made.

While I agree with the conclusions of the learned trial Judge as to the matters with which I have dealt, I am unable to understand upon what ground the appellant is made personally liable for anything that may have been owing by Eastmure & Lightbourn Limited in respect of the transactions of the agency prior to the 1st May, 1907. No case is made on the pleadings for such relief, and there is no evidence to support a finding that it was part of the arrangement made in New York that the appellant should assume any such liability; and, even if it was so agreed, the agreement could not be enforced, as it would have been an undertaking to answer for the debt of another, and not enforceable because not evidenced as required by the Statute of Frauds.

The judgment should, therefore, be varied by striking out so much of it as declares that the appellant is liable to the respondent for what, if anything, is owing by Eastmure & Lightbourn Limited; and, with that variation, the judgment should be affirmed.

This variation of the judgment is of no importance practically, because, as Mr. McKay stated upon the argument, the respondent does not claim anything in respect of the transactions of the agency prior to 1910.

There should, I think, be no costs of the appeal to either party.

DECEMBER 17TH, 1913.

RE SMITH.

Will—Construction—Codicil—Substituted Legacy to Daughter —Annuity—Income—Corpus—Division of Estate—Decease of Daughter—Right of Daughter's Representative to Share of Corpus.

Appeal by Dale M. King, executor of Bertha Hope King, the deceased daughter of Emma Josephine King, deceased, from the order of MIDDLETON, J., 4 O.W.N. 1115, declaring the construction of the will and codicil of Emma Josephine Smith.

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

I. F. Hellmuth, K.C., and C. A. Moss, for the appellant.

E. D. Armour, K.C., and D. C. Ross, for Elias Smith, Carl Smith, and Vernon Smith.

R. J. McLaughlin, K.C., for the executors of Emma Josephine Smith.

MACLAREN, J.A.:— . . . The facts are stated, and a very complete summary of the will given, in the judgment appealed from. In the paragraph sumarising the ninth clause of the will it is stated that the division of the estate is to be made when the youngest child attains the age of "twenty-five." The will says "twenty-one," and "twenty-five" is first mentioned in the codicil; but in the result nothing appears to turn upon this. In the same sentence the word "realise" is used. This is not the word used in the will; the exact language there being the expression "sell and convert into money." This may be material when we come to consider the meaning of the same word in the codicil.

I think the codicil can be best construed by taking it as a whole and reading it with the will—endeavouring to ascertain from the language used what was in the mind of the testatrix, rather than by construing the different clauses or sentences separately without regard to the context.

The following is a verbatim copy of the codicil, with the punctuations in the copy certified by the Surrogate Registrar:—

"Not feeling satisfied with the provision made in my will for Bertha Hope Smith my only daughter, I hereby add this codicil.

"I desire that the sum of six hundred dollars a year be paid her out of my estate by my executor or executors for her maintenance and education until she attain the age of twenty-five years, if at that time she should be married then for the remainder of her lifetime I desire my executor or executors to allow her for her own use and benefit the sum of four hundred dollars a year unless the income realised through or by my property on division should yield more to each surviving child or children should such be the case then I authorise such division to be made, Bertha having atained the age of twenty-five years as aforesaid. Should Bertha remain unmarried then she is to be paid the sum of six hundred dollars a year in quarterly instalments by my executor or executors for the remainder of her life—Whatever my estate realises over and above the payment of this bequest to Bertha and a provision made for my

husband and executor J——— D——— Smith in my will is to be equally divided between my surviving sons or their surviving child or children as provided in my will.

"This bequest to Bertha is to supersede all others made in my will, with the one exception of the provision made for J——— D——— Smith my husband.

"Following the bequest to Bertha I solemnly charge my executor or executors with a provision for Vernon's education or profession until he attain the age of twenty-five years."

(Signed and witnessed and dated the 16th July, 1894.)

It was agreed by the counsel on both sides that the real question to be decided was, whether this codicil dealt only with the income of the estate of the testatrix, or whether it also disposed of the corpus. It was argued on behalf of the appellant that it had reference solely to the income, while it was contended by counsel for the respondents that it practically revoked the whole will. The learned Judge has adopted the latter view, and held that "the whole will is abandoned excepting so far as it provides for the husband."

In the first paragraph of the codicil the testatrix states clearly what was her reason and motive for making it: "Not feeling satisfied with the provision made in my will for Bertha Hope Smith my only daughter, I hereby add this codicil." She says she adds a codicil to the will; no suggestion that she is practically revoking it except in so far as it provides for her husband. It is quite clear what she intended to accomplish by it; it remains to be seen whether there is anything in the language she used to prevent effect being given to her intention.

In the will she had given no preference to Bertha over her sons, either as to income or corpus. By the second paragraph of the codicil she proceeded to carry out her expressed intention by giving to Bertha $600 a year until she was twenty-five; and by the third paragraph of the codicil she gives Bertha priority for this sum next after the provision made for her husband, and it would be payable out of corpus if the net income was not sufficient to give the husband his $750 a year and Bertha her $600.

If Bertha was married when she attained twenty-five years of age, her preferred income was to be reduced to $400, unless the income of her estate realised on a division more than $400 for each child, in which case a division was to be made; each of her four children in that event receiving an equal sum of

over $400 a year. If Bertha remained unmarried, then she was to be paid $600 a year for life.

I quite agree with my brother Middleton that down to this point the codicil deals exclusively with income, save that Bertha would be entitled to receive her $600 out of the corpus if the income were insufficient; but I fail to find anything in the concluding sentence of the second paragraph or in the third paragraph of the codicil to justify his conclusion that they refer to corpus and not to income.

There is nothing in the instrument itself to suggest that the testatrix was proceeding, in the last sentence of the second paragraph, to take up a new subject, or that she was about in a few words to write something that was entirely out of harmony with what she had previously written or with her expressed desire at the beginning of the codicil, or that she was about practically to revoke the whole will, except in so far as it provided for her husband, as the learned Judge puts it. I am not surprised that he had hesitation in coming to such a conclusion or that he could not surmise why the testatrix should have so determined.

He seems to have been influenced almost entirely, if not wholly, by the meaning which he attached to two words used by the testatrix, namely, "realises" in the last sentence of the second paragraph and "supersede" in the third.

He assumes that the testatrix used the word "realises" in the sense in which he has used it in his judgment in his summary of the will—the conversion of real and personal property into cash. In my opinion, the testatrix used it in the same sense as she had done in an earlier part of the second paragraph, where she speaks of the "income realised through or by my property," and that she was simply providing for an equal division among her three sons or their children of the surplus income of the estate after payment of the annuities to her husband and to Bertha. Another difficulty is created by his conclusion that this division referred to the corpus. If so, when was it to take place? No time is mentioned; but the language points to an immediate division after the death of the testatrix, which is quite inconsistent with the scheme of both will and codicil.

It would appear to have been her use of the word "supersede" which chiefly led the learned Judge to the conclusion that the whole will was abandoned except in so far as it provided for the husband. I think a reading of the sentence with what precedes and follows makes it abundantly clear that the testa-

trix used the word in its original and etymological meaning of "to sit above, be superior to, precede, or have priority over"—a meaning which, according to standard dictionaries, it still retains. She merely meant that the three preferred bequests were to rank as follows: first, her husband; second, Bertha; and third, her son Vernon for his education or profession.

Another objection to the interpretation put upon the codicil by the judgment appealed from is, that it would indirectly revoke all the special bequests of heirlooms, jewellery, silver, and furniture made by the testatrix to each of her children, and would wholly deprive Bertha of any share in them, although her mother gave her an equal share of the furniture with her brothers and as much of the other articles as her three brothers together. These bequests are made in the will with great particularity and detail, giving special articles to each of her children, and occupy no less than five clauses of the will, and nearly as much space as does all the rest of her real and personal property. It is little wonder that counsel for the sons shrank from the necessary application of their theory of construction to these portions of the will.

To my mind this theory of interpretation is wholly at variance with the entire scope of the codicil. It is quite apparent that the testatrix had one leading object and purpose, namely, that of assuring to Bertha a more generous income, and there is no language in the codicil to lead to the conclusion that she proposed practically to revoke the will in so far as it conferred benefits upon Bertha, but the contrary; that she meant simply, as she says, to add a codicil in the express interest of Bertha; and, in my opinion, the language used by her in the codicil carries out this intention, and effect should be given to it.

Furthermore, there is nothing in the codicil to suggest that there was any intention to revoke the will. If such had been intended, it should have been expressed in clear and unambiguous terms. This canon of construction has been laid down many times by the highest authorities, and was well expressed by Chief Justice Tindal in Hearle v. Hicks (1831), 1 Cl. & F. 20, at p. 24. . . .

I would, therefore, reverse the judgment appealed from, and make a declaration in harmony with the foregoing, that the executor of Bertha is entitled to share in the corpus of the estate equally with the sons of the testatrix. Costs of all parties out of the estate; those of the executor of the testatrix as between solicitor and client.

MEREDITH, C.J.O., and HODGINS, J.A., agreed with the judgment of MACLAREN, J.A.

MAGEE, J.A., was of opinion, for reasons stated in writing, that the appeal should be allowed and the order appealed from varied by declaring that, in the events which had happened, the deceased Bertha King was entitled to an income of $600 a year until at least her marriage, and thereafter to either that sum or the income of her share.

Appeal allowed.

DECEMBER 19TH, 1913.

*BANCROFT v. MILLIGAN.

Fraudulent Conveyance—Action to Set aside—Priority of Mortgage — Will — Election — Counterclaim —Subrogation — Surety.

Appeal by the defendants John C. Milligan and Maude Milligan from the judgment of FALCONBRIDGE, C.J.K.B., 4 O.W.N. 1605, in favour of the plaintiff.

The prayer of the statement of claim was: (1) that a deed from the defendant John C. Milligan to his wife, the defendant Maude Milligan, should be declared void; (2) for a declaration that a mortgage from John C. Milligan to his father, William Milligan, was entitled to priority over the deed first-mentioned; (3) and for a further declaration that the said mortgage was given for the express purpose of exonerating the farm of the father from and against two mortgages placed on it by him for the benefit of John C. Milligan, and an order for sale of the lands comprised in the mortgage, and the application of the proceeds to pay off the two farm mortgages, or for the assignment of the mortgage to the mortgagees of the farm "to carry out the agreement between the said John C. Milligan and William Milligan, deceased."

The learned trial Judge found that the plaintiff had proved all the material allegations in the statement of claim.

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

*To be reported in the Ontario Law Reports.

J. A. Macintosh, for the appellants.

G. A. Stiles, for the plaintiff, respondent.

No one appeared for the respondents James A. Milligan, William A. Milligan, and Nancy Milligan.

MEREDITH, C.J.O.:— . . . The appeal should be allowed and the action dismissed, upon the short ground that the evidence does not warrant the conclusion that the mortgage from the son John to his father was anything but what it purports to be, a mortgage to secure the indebtedness of the mortgagor to the mortgagee in the amount secured by the mortgage. The transactions which resulted in the giving of the mortgage by the father of his own farm, and his taking the mortgage from the son, were in substance, as well as in form, a borrowing by the father from his mortgagees of the $3,500, repayable on the terms mentioned in the mortgages, and a lending to the son of the amount so borrowed, which was to be repaid according to the terms of the mortgage from the son, which . . . are different from those applicable to the mortgages which the father had given.

The fact that the son paid the interest on the mortgages of the father is not inconsistent with this view, as the proper inference in the circumstances is, that these payments were to be treated as payments pro tanto on the son's mortgage, as well as payments in discharge of the liability of the father on the mortgages he had given.

If this is the proper conclusion, it follows that no question as to subrogation can arise, as the mortgage from the son to the father was not a mortgage to indemnify the father, nor was the father a surety for the debt of the son, but his creditor for the amount of the son's mortgage.

MACLAREN and MAGEE, JJ.A., agreed with the opinion of MEREDITH, C.J.O.

HODGINS, J.A., agreed in the result, for reasons stated at length in a written opinion, in which he referred to Cooper v. Jenkins, 32 Beav. 337; the Wills Act, R.S.O. 1897 ch. 128, secs. 37, 38; 10 Edw. VII. ch. 57, sec. 38, sub-secs. 1 and 2; Lewis v. Lewis, L.R. 13 Eq. 227; In re Newmarch, 9 Ch.D. 12; Elliott v. Dearsley, 16 Ch.D. 322; Gael v. Fenwick, 43 Ch.D. 178, 22 W.R. 211; Dungay v. Dungay, 24 Gr. 455; Mason v. Mason, 13 O.R. 725; In re Hawkes, [1912] 1 Ch. 251; In re Rispin,

[1898] 1 Ch. 667, [1899] 1 Ch. 128; and concluded that the appeal should be allowed and the action dismissed, with costs to the appellants against the plaintiff; and that there should be judgment on the counterclaim without costs, declaring that the west half of the farm was charged, under William Milligan's will, with $400, without interest, in favour of the estate of Nancy Milligan.

Appeal allowed.

HIGH COURT DIVISION.

MEREDITH, C.J.C.P. DECEMBER 12TH, 1913.

*MUNRO v. STANDARD BANK OF CANADA.

Assignments and Preferences—Chattel Mortgage Made by Insolvent Debtor to Bank—Unjust Preference—Assignments Act, 10 Edw. VII. ch. 64, sec. 5—Security for Existing Debt not yet Payable—Intent to Prefer—Dominant Purpose—Pressure — Threat of Criminal Proceedings — Proceeds of Sales of Mortgaged Goods—Recovery of—Sec. 13 of Act—Action by Assignee for Creditors and Individual Creditor—Costs—Preservation and Realisation of Property by Bank—Compensation.

Action by the assignee for the benefit of creditors of the defendant Ross and by a creditor, as plaintiffs, to declare void and set aside a chattel mortgage made by the defendant Ross to the defendants the Standard Bank of Canada.

The action was tried without a jury at London on the 11th November, 1913.

T. G. Meredith, K.C., and D. C. Ross, for the plaintiff.

E. Meredith, K.C., and W. R. Meredith, for the defendants the Standard Bank of Canada.

P. H. Bartlett, for the defendant Ross.

MEREDITH, C.J.C.P.:—The parties . . . present these three questions for the consideration of the Court:—

(1) Is the chattel mortgage in question invalid, as to the plaintiffs, because of any failure to comply with any of the requirements of the Bills of Sale and Chattel Mortgage Act?

*To be reported in the Ontario Law Reports.

(2) Is such mortgage invalid, as against the plaintiffs, under any of the provisions of the Assignments and Preferences Act?

(3) Are the payments made upon the chattel mortgage good?

If the plaintiffs are entitled to succeed upon either the first or the second point, the other of the two need not be considered; and, therefore, it may be more convenient to deal with the second first.

The second point depends upon the question whether the mortgage in question was made by the defendant Ross to his co-defendants, the Standard Bank of Canada, at a time when he was in insolvent circumstances, and with intent to give the bank an unjust preference over his other creditors: 10 Edw. VII. ch. 64 (the Assignments and Preferences Act), sec. 5.

Admittedly no new consideration was given for the security the mortgage afforded; if it could be contended that any new consideration were given, it would be one which in itself would vitiate the transaction—the stifling of a criminal prosecution; but there was in fact none such. The mortgage was given to secure payment of a then existing debt, but which was not then, nor for more than four months afterwards, payable. It purports to have been made to secure also further advances, but none such were intended; the debtor had not only come to, but had gone a good deal beyond, that which should have been his "line of credit" tether; causing much anxiety respecting the chances of payment of the indebtedness, not only in the local agency, but also in the head office of the bank—as the correspondence between the local agent and the general manager makes very plain. . . .

The question whether, upon estimated values and supposed liabilities, on one side and the other, the balance would be for or against the debtor, has been much discussed; but, however that may be, the taking by the bank of the land and chattel mortgages, covering substantially all that Ross owned, put him unquestionably in embarrassed circumstances, and would have been an act of bankruptcy if the usual bankrupt laws had been in force here.

Upon the whole evidence, I can come to no other conclusion than that, when that chattel mortgage was given, the debtor was unable to pay his debts in full and was in insolvent circumstances: the fact that the failure is not as hopeless an one as failures sometimes are, that his justly secured creditors—not counting the bank in that category—will be paid in full, and that the others may be paid fifty cents on the dollar, and that their claims

do not in all amount to many thousands of dollars, does not make it the less so; it is but part of the evidence bearing upon the question: see In re Jukes, [1902] 2 K.B. 58.

That the intention of both mortgagor and mortgagees was to give the bank a preference over all other unsecured creditors is self-evident; it was obviously and necessarily a part of the transaction; and, under the circumstances of such a case as this, it was an unjust preference, within the meaning of that term as used in the Assignments and Preferences Act, which is aimed at equally between creditors; unless indeed there was some other dominating intention in giving the security. That the preference was especially unfair to the plaintiff Munro is unquestionable. Before the mortgage in question was made, a question had arisen whether he was liable as surety for the defendant Ross upon promissory notes bearing his signature, amounting to about $2,200; he affirmed that Ross had never asked him to sign, and that he never knew he had signed, for any greater amount than about $300. When payment of the larger amount was demanded by the holder of the notes, in his difficulty he applied for advice to the local agent of the bank, and was advised by him to give a new note for the larger amount; and that, upon such advice, he did; afterwards, when sued on that note, he defended the action, but then it was too late to rely upon his earlier contentions as to the earlier notes; and it is on the payment of the greater sum, as surety for Ross, that his claim against Ross, in this action, is based. It was urged that the bank's local agent deliberately advised Munro to accept liability for the larger amount, so that the bank might thereby benefit in their claims against Ross, as they undoubtedly did; but I am quite unable to find in accordance with that contention; I cannot find that there was any conscious intention to bring about such a result, or that the agent consciously intended to do any wrong in that matter; though his loyalty to his employers, and his keen desire to save them from loss, may, and probably did, have some effect upon his judgment. I am sure that he now sees that, in the circumstances, he should have declined to be Munro's adviser. To advise Munro to accept a liability that it is possible he might have successfully resisted, and then to take security for the bank's debt upon all the property out of which Munro could expect to be recouped, is assuredly a hardship upon Munro at the hand of his trusted adviser; but in itself is not an injustice such as makes the preference which the bank obtained over Munro an unjust one within the meaning of the Assignments and Preferences Act.

And so really the one substantial question for consideration is, whether there was any dominant purpose, other than to give the bank an advantage over other creditors, in the giving of the impeached mortgage.

For the defendants it is said that there was "pressure;" and that that pressure was the dominant factor in the transaction. And, if that be so, I am bound by the law, as enunciated in many cases in our own Courts, to uphold the transaction. But "pressure" is not a certain, definite, well-understood thing which can be recognised and given effect to as soon as mentioned. It has been said to mean much and little; indeed, from the words of some of the Judges, it would seem as if whether there was pressure or not might depend on who spoke first; that if the debtor first offered the preference it would be bad; if the creditor first asked for it, good; a state of affairs that might well seem ludicrous to practical business men. But we have got far beyond such a notion: the question now is: what was the dominant purpose? If to give a preference to one creditor over another, the transaction cannot stand against him.

As I have said, the debt was not payable for several months; pressure by way of enforcing it was out of the question. All that has been urged is that the pressure was in the nature of threats of criminal proceedings, a somewhat dangerous position to take, for, as I have said, if the result were an agreement to stifle criminal proceedings, the security so obtained would be invalid on that ground; and one who is threatened with criminal proceedings is not likely to pay the price unless he gets exemption, or some kind of shielding, from them.

But it is quite impossible for me to find that any such threats were the cause in any sense. The debtor needed no such pressure, nor any other than such as a demand from his bankers. The bank desired the security, and their agent was anxious to get it, in the fear of a loss on this customer's dealings with the bank; and so the bank asked for the security and got it; and, if that is sufficient pressure to support the transaction, it ought to stand; but I cannot think it anything like enough. The dominant purpose was to give the bank an advantage which other unsecured creditors had not; and which, being accomplished, left the debtor without any means of giving like security to them; as well as without the means to pay his debts in full in case of an assignment for the benefit of creditors, or of litigation to enforce their claims, or, even in ordinary course, if no steps were taken by those who were thus prejudiced to enforce their claims. . . .

Neither fear nor threats of criminal responsibility or prosecution had, as I find, any real part in the chattel mortgage transaction; not to speak of either being in any sense the dominant cause of it.

As against the defendants, that mortgage, therefore, falls, upon this ground; and it becomes unnecessary to answer the first of the questions raised in this action. . . .

Upon the third point, it is admitted by the defendants that the moneys in question are the proceeds of sales of the mortgaged goods by the mortgagees, though through the debtor in some instances; and so they are the proceeds of the sale, by the mortgagees, of goods of which they acquired title from, and as against, the mortgagor, under the impeached mortgage only; such money can be recovered in this action; that is expressly provided for in sec. 13 of the Assignments and Preferences Act. For the reasons before given, it is not necessary to consider the very different question, what would have been the effect of these payments if this case had to be determined on questions arising under the Bills of Sale and Chattel Mortgage Act only?

All the goods comprised in the mortgage have been sold by the mortgagees, under the mortgage; and the proceeds of the sales have been paid into Court in this action. To such moneys, subject to the payment, out of them, of all proper charges and costs, the assignee plaintiff is entitled for the benefit of creditors generally, according to their rights to be worked out under the provisions of the Act. . . .

As to the costs, I do not think the case is one in which any of the parties individually should be ordered to pay any costs. The action of the bank in taking and in acting under their mortgage, in the result has been as beneficial to creditors generally—apart from this litigation of course—as if they had taken the mortgage expressly as trustees for all creditors. The goods have doubtless been saved for the creditors to a greater extent than they would have been if they had been left at the free disposition of the debtor. . . . It would be reasonable and proper that the bank should have some compensation for their loss and labour in preserving the property and converting it into money. A reasonable way of compensating them would be to allow them their costs, between party and party, of this litigation, out of the estate: the plaintiffs should have their costs of the action, as between solicitor and client, also out of the estate: the result being that all the costs will eventually fall upon the debtor, if he is ever able to pay them; and I am inclined to think

that, under all the circumstances involved in this case, he ought to bear them.

Judgment may go accordingly, with the usual stay of proceedings, if desired by either party, for thirty days.

LATCHFORD, J. DECEMBER 15TH, 1913.

RE CLOONEY.

Will—Construction—Specific Legacy — Infant Legatee — Postponement of Time for Payment of Principal Sum—Direction to Trustees to Invest—Application of Income for Maintenance and Education—Time for Making Investment—Income Payable to Legatee after Majority—Vested Legacy Subject to Divestment—Gift over.

Application by the executors for the opinion and advice of the Court upon certain questions arising, or said to arise, under the will of Kate Clooney, late of the city of Toronto, married woman, deceased.

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

N. B. Gash, K.C., for the children of Michael Ryan.

A. E. Knox, for the children of Mary Ann and Josephine Flanagan, and for Daniel Flanagan.

H. Arrell, for a claimant.

J. R. Meredith, for the Official Guardian, representing the infant John Clooney Flanagan.

LATCHFORD, J.:—The paragraph of the will now in question directs the trustees and executors to pay "to John Clooney Flanagan $5,000 when he shall attain the age of twenty-three years." The legatee is not yet twenty-one years of age. The testatrix directed that the "vested or expectant share of any infant" under her will shall be invested by her trustees "during the minority of any child who, if of the age of twenty-three years," would be entitled to a share under the will, and empowers the trustees "to apply the whole or any part of the income of the expectant share of such minor for or towards his or her support, maintenance and education, with liberty to pay the same at their discretion to the guardian or guardians of such minor . . . and shall accumulate the residue (if any) of the said income by

investing the same and the resulting income thereof, to the intent that such accumulation shall be added to the principal share . . . and follow the destination thereof."

The trustees are also given power to resort to the accumulations of any preceding year or years, and to apply the same towards the support, education, or maintenance of any person for the time being presumptively entitled thereto, and may further, at their discretion, raise the whole or any part of the expectant share of any minor, and apply the same for his advancement or benefit as the trustees shall think fit.

In case of a deficiency of assets, there is to be a proportionate abatement of the pecuniary legacies other than that to John Clooney Flanagan. Should this legatee die without leaving issue, there is a gift over of the bequest made to him by the will.

It is quite clear that John Clooney Flanagan, if he attains the age of twenty-three, will be entitled to the $5,000. The trustees have, in the meantime, the duty cast upon them of investing the $5,000, and the discretion of applying for his maintenance and education the whole or any part of the income of his expectant share. There is nothing in the will fixing the time within which the conversion of the estate of the deceased is to be made. The trustees accordingly have the usual term of one year from the death of the testatrix. Not later than one year after her death it is their duty to set aside and invest the sum of $5,000 to provide for the legacy to John Clooney Flanagan. They may pay the income, or any part of it, for his benefit until he attains twenty-one, and to him from that time until he attains the age of twenty-three, when he will be entitled to the $5,000, and any part of the income not expended as directed. Payment of the principal sum should not be made to him when he attains twenty-one. His interest in all but the income becomes divested if he should die without leaving issue before he is twenty-three, and passes to others by express terms in the will.

There will be judgment accordingly. In matters so plain as this, the advice of the Court should not, in my opinion, be sought. I cannot, however, say that the application is improperly made. But the costs should not come out of the legacy to John Clooney Flanagan; they should be paid out of the general estate of the testatrix.

LENNOX, J. DECEMBER 15TH, 1913.

WASHBURN v. WRIGHT.

Master and Servant—Profit-sharing Enterprise—Statement of Master as to Servant's Share of Profits—Right to Impeach for Fraud—Master and Servant Act, 10 *Edw. VII. ch.* 73, *sec.* 3, *sub-sec.* 2*—Finding of Fraud—Account—Reference.*

Action by the widow and administratrix of the estate of Benjamin Washburn, deceased, to establish a partnership between the deceased and the defendant and for an account.

R. R. McKessock, K.C., and G. M. Miller, for the plaintiff.
R. McKay, K.C., and Joseph Fowler, for the defendant.

LENNOX, J.:—The action is founded upon an agreement dated the 2nd July, 1911, for the carrying on of a semi-ready tailoring business in Sudbury, in which the defendant is described as the employer and Washburn as employee and manager; and the plaintiff alleges a partnership and claims an account. The defendant sets up that the relation created by the agreement was that of master and servant only; that he has duly accounted for the share of profits to which the deceased was entitled; that the account rendered to the administratrix, shewing a balance of $585.41 coming to the defendant, is correct; and that, at all events, the plaintiff is bound by sub-sec. 2 of sec. 3 of the Master and Servant Act, 1910, and must be content to accept the share of profits appropriated to the estate by the statement or return made by the defendant of the net profit of the business. This is a drastic provision and should be construed strictly. It is a provision for the benefit of the employer, and the employer must bring himself clearly within its provisions. The agreement was prepared by the defendant's solicitors, and it speaks in the language of the defendant.

Under the present statute the statement is impeachable for fraud. A similar provision in R.S.O. 1897 ch. 157 did not contain this qualification, in words; but Mr. Justice Anglin held in Cutten v. Mitchell (1905), 10 O.L.R. 734, that this was to be inferred as the intent of the Legislature. The learned Judge said: "Notwithstanding the sweeping terms in which the statute declares the finality of statements furnished by the employer, I cannot conceive that it was thereby intended to render

fraudulent statements conclusive and unimpeachable;" and, when the case subsequently came on before him for trial, he found actual fraud in that the defendant, contrary to the agreement, had withdrawn $5,000 from the sum appropriated as profits.

A similar condition of things is presented in this case. This is not an ordinary case of master and servant. The business carried on in the name of "Washburn & Co.," after the execution of the agreement, was the continuation, though on a more extensive scale, of a business carried on in the same premises for many years before the making of the contract by Benjamin Washburn alone. The statute declares that an arrangement of the kind here made shall not constitute a partnership, "unless the agreement otherwise provides or a contrary intention may be reasonably inferred therefrom." I have come to the conclusion that a "relation in the nature of a partnership" was not created.

The statutory provision upon which the defendant relies is as follows: "(2) Any statement or return by the employer of the net profits of the trade, calling, business or employment on which he declares and appropriates the share of profits payable under such agreement shall be final and conclusive between the parties and all persons claiming under them, and shall not be impeachable upon any ground whatever, except fraud." The agreement provides that the net profits actually realised from month to month shall be divided monthly. To carry out this provision and comply with the statute, the defendant would have to make a full statement or return of the net profits of the business down to the end of the first month, and so from month to month, and appropriate to Washburn his share of the profits upon that basis. This was never done. It may be that, not having been done in the lifetime of Washburn in the way contemplated by the agreement, the defendant could yet invoke this statutory immunity from full disclosure by furnishing a statement of the kind prescribed by the statute before the matter comes to be dealt with by the Court; but, if he has failed to do this, I think it is my duty, even aside from the question of fraud, to direct that the true state of accounts between the parties according to the actual facts shall now be ascertained.

First, then, I find that the defendant never has furnished a statement of the net profits of the business carried on in the name of "Washburn & Co." The net profit of this business is whatever it was worth at the time of Washburn's death, over and above all sums of money properly paid out and all liabilities incurred on

account of it; and this sum, less any stock added after the death of Washburn, is the sum for which the business was sold. There has been no pretence of furnishing a statement of profits or appropriating one-half thereof to the Washburn estate upon this basis; but, on the contrary, while the defendant charges up the total freight and express charges and all improvements, alterations, and repairs, and all expenses for fixtures, to the business, and although the goodwill of the business, which was brought in by Washburn as late as July, 1911, produced a net profit upon the entire stock of 20 per cent., all this is eliminated from what purports to be a statutory statement "of the net profits of the trade, calling, business, or employment," and his appropriation of the estate's share thereof. The test of the profit to the defendant, if it was his business alone, is, how much he was better off by going into it—and this is what Washburn was to get one-half of for turning over the goodwill of his business, his name and his services, to the new concern. He would be a loser if the stock depreciated in value or if the custom drifted away and the business became worthless as a going concern, and he must share in the profits, too, on the final winding-up if there is an appreciation in values.

Then what is meant by fraud in the statute? I have referred already to the judgment of Mr. Justice Anglin. What could it mean except a wilful withholding or misrepresentation of the profits or the basis of profits? The defendant appeared to be a fairly respectable man, though keenly alive to his own interests; and there are many who fail to be judicially impartial when it comes to separating their moneys from the moneys of some one else. The statement was not a fair one, and the defendant knew it; it was not an honest one, and he knew it; and, exercising this statutory judicial function of finally deciding between himself and his associate, and much more deciding between himself and the widow of his associate, necessarily ignorant of the facts, I cannot come to any other conclusion than that this statement, in which the defendant charged up everything as if it had been a permanent business, whether the deceased got the benefit of it or not, omitted all the profits on sale, and omitted even the money received on the sale of fixtures and all the outstanding book-debts—I say that I cannot come to any other conclusion than that the statement was intentionally misleading, and was fraudulent within the meaning of the statute.

There will be a reference to the Local Master at Sudbury to take an account upon the lines above indicated.

Further directions and costs reserved.

LENNOX, J., IN CHAMBERS. DECEMBER 16TH, 1913.

GILPIN v. HAZEL JULES COBALT SILVER MINING CO.

Writ of Summons—Order Permitting Issue of Concurrent Writ for Service Abroad—Irregularities—Correction—Rule 521—Service of Notice of Writ on Officers of Defendant Company Resident Abroad and not British Subjects—Company Incorporated in Ontario—Rule 29—Leave to File Affidavit nunc pro tunc—Rule 26—Amendment of Order—Costs.

Motion by the defendant company to set aside an order made by one of the Registrars, in Chambers, allowing the issue of a concurrent writ of summons for service out of the jurisdiction, and to set aside the writ and the service of notice thereof upon officers of the defendant company, not British subjects, residing in the State of New York.

A. C. Craig, for the defendant company.
C. W. Plaxton, for the plaintiff.

LENNOX, J.:—There is no outstanding merit in this application. The Registrar's book shews that the affidavit upon which he made the order was produced and read over before the order was made. That the order did not recite the material is a mere clerical error or slip, of the class directed to be corrected under Rule 521. The same may be said of the direction as to costs; and the proof of the claim was made in the affidavit filed on obtaining the order.

There is a good deal more room for argument, but no more merit, upon the objection taken that the writ itself, and not notice of the writ, should have been served. Upon the merits it must be said that whatever purpose it might serve in a case where the defendant had by some means failed to take measures to defend until after judgment entered, it has no merit here, for the notice gives the company, if anything, more information and warning than a writ, and the defendant company might quite as well have entered its defence, if any it has, as come into Court and wrangle about it. The defendant, however, has a right to have this question judicially dealt with. The plaintiff has shewn that the company's office is in Buffalo, and that the persons representing the company for service, namely, the president and secretary, are resident there, and are not British

subjects. The defendant contends that, by analogy, the company, being incorporated in Ontario, is to be read "a British subject." I do not think that I should seek out analogies except in the last resort. A company chartered in Ontario, although subject to Ontario laws, is not, in my opinion, a British subject; and, if not, the question raised is distinctly dealt with by Rule 29, which provides that, where the defendant is to be served out of Ontario, as here, and is neither a British subject nor resident in British dominions, as here, notice of the writ, and not the writ itself, is to be served.

A point not taken is, that Rule 26 was not fully complied with. The plaintiff will be at liberty to do so now by filing an affidavit, nunc pro tunc, stating that, in his opinion, he has a right to the relief claimed, and that the case is a proper one for service out of Ontario under these Rules, and how this is—as, for instance, that the money was lent and repayable in Ontario. Notice of the filing of this affidavit will be served upon the defendant's solicitors, and the defendant will have ten days after such service to enter an appearance—of course in conformity with the present Rules.

The order appealed from will be treated as amended by striking out the provision as to costs and referring to the affidavit filed; and I now order that, in case the defendant does not appear, the plaintiff, before entering judgment, shall file an affidavit verifying the cause of action, that the money to be recovered is payable in Ontario, and that the defendant company is justly and truly indebted to him in the amount he claims.

I also order that the costs of the order moved against and the costs of this application shall be costs in the cause to the successful party .

LENNOX, J., IN CHAMBERS. DECEMBER 16TH, 1913.

RE BELLEVILE DRIVING AND ATHLETIC ASSOCIATION LIMITED.

Company—Transfer of Paid-up Share—Refusal of Directors to Allow—Ontario Companies Act, sec. 54 (2)*—Resolution of Directors—Ultra Vires—Regulation—Prohibition— Mandamus.*

Motion by Hartford Ashley for a mandatory order upon the association to transfer to the applicant, upon the books of the association, one share of the capital stock standing in the name of James A. Wheeler.

A. H. F. Lefroy, K.C., for the applicant.
M. L. Gordon, for the association.

LENNOX, J.:—Although it would be decidely undesirable as a law applicable to companies generally, it is very much to be regretted, I think, that steps were not taken, before or immediately upon the incorporation of this association, to enable the directors effectively to exercise the right of control now set up. That a share should not be assignable at the mere will of the shareholder was, I am convinced, the view and intention of a large majority of those who embarked in the scheme, even before the charter was obtained. There was a discussion about it again shortly after the incorporation, I believe, but nothing definite was done until the 3rd January, 1908, when a resolution was passed declaring "that no stock held in the association shall be validly transferred or assigned or binding upon the association until the same has been approved by the directors and duly entered upon the minutes of the association." I am compelled to hold that this resolution was not and is not binding upon James A. Wheeler, a non-assenting shareholder, and is not valid against his assignee, Hartford Ashley, the applicant for registration: Re Good and Jacob Y. Shantz Son & Co. Limited, 23 O.L.R. 544. This is not even a by-law, and is not as effective as a general by-law duly passed after proper notice would be; but I do not rest my judgment at all on this ground. The very farthest the association can go is to pass a by-law "regulating" the transfer of shares, and "regulation" only means how, in what manner, and with what formalities the transfer is to be made: In re Imperial Starch Co., 10 O.L.R. 22.

The power to regulate does not include the power to prohibit: City of Toronto v. Virgo, [1896] A.C. 88. The statute expressly provides that the shares are personal estate, and, subject to any restrictions clearly authorised by the statute, possess all the essential qualities of such property, including alienability. There is no power that gives any majority of shareholders or the directors the right to prevent a sale of paid-up shares or refuse to enter the transfer upon the books of the company. On the contrary, sub-sec. 2 of sec. 54 of the Ontario Companies Act provides that, "subject to sec. 56" (a share not paid for) "no by-law shall be passed which in any way restricts the right of the holder of paid-up shares to transfer the same, but nothing in this section shall prevent the regulation of the mode of transfer thereof." I have nothing to consider as to mere regulation upon this motion; the right set up against Wheeler and Ashley is prohibition. I regret that the conclusion is forced upon me that the interests and purposes of the majority cannot be safeguarded in the way the association desires.

As a matter of expediency, I am entirely in sympathy with the proposal that the majority should say who is to be in a company of this character. The law, however, as I understand it, is distinctly the other way.

There will be a mandatory order issued directing, ordering, and compelling the Belleville Driving and Athletic Association Limited forthwith to cause to be transferred, on the books of the association, one share of the capital stock of the asociation at present standing upon the books of the association in the name of James A. Wheeler, to the applicant herein, Hartford Ashley, and to duly register the transfer of the said share from the said James A. Wheeler to the said Hartford Ashley; and the association will pay the costs of this application.

BOYD, C. DECEMBER 16TH, 1913

RE BLAND AND MOHUN.

Mortgage—Assignment of, as Collateral Security for Promissory Note of Lesser Amount—Right of Assignor to Redeem—Discharge of Mortgage by Assignee—Validity—Registry Act, 10 *Edw. VII. ch.* 60, *secs.* 62, 66*a, and Form* 10—*Judicature Act—Title to Land—Vendor and Purchaser.*

Motion by the vendor, under the Vendors and Purchasers Act, for an order declaring that the vendor was able to make a good title as against objections of the purchaser upon a contract for the sale and purchase of land.

A. C. McMaster, for the vendor.
H. H. Shaver, for the purchaser.

BOYD, C.:—The assignment of the 17th August, 1904, by Vandervoort to Ibbotson, purports to be an asignment of a mortgage for $1,150, made by Amy Lee to Vandervoort, dated the 15th August, 1904. It recites that the assignee, Ibbotson, has lent to the assignor, Vandervoort, $1,000 for one year, on the promissory note of the assignor, and that the assignor has agreed to execute the assignment as collateral security for the said note. Then the witnessing part declares that the assignor doth assign and set over to the assignee all that the recited mortgage and also the sum of $1,150 and the full benefit of all powers, covenants, and provisions contained therein and full power and authority to use the name of the assignor for enforcing the performance of the covenants, etc.

There is a special covenant written in, that the assignee binds himself that, upon payment of the $1,000, he will re-assign and set over the said mortgage and will convey the lands to the said assignor.

Under the provisions of the Judicature Act as to assignments of choses in action, the question arises whether the assignment of the debt is absolute, i.e., does it purport to pass the entire interest of the assignor to the assignee, or is it an assignment purporting to be by way of charge only? If, on the construction of the document, it appears to be an absolute assignment, though subject to an equity of redemption, express or implied, it is not material to consider what was the consideration for the assignment: see Hughes v. Pump House Hotel Co., [1902] 2 K.B. 190, 197.

The cases point to this, I think, under the Judicature Act that an absolute assignment of a mortgage, even if it appears on the face of the assignment that it was only for the purpose of securing a debt lesser in amount, would be sufficient to come under the Act, so long as it did not purport to be by way of charge only: Mercantile Bank of London v. Evans, [1899] 2 Q.B. 613, 617.

On this assignment I think that, as between the mortgagor and the assignee, there was the right to receive the whole amount of the mortgage, and that such payment would be a good discharge—leaving it still to be discussed between the assignor and assignee how that sum total should be applied and distributed. As I read the assignment, it is sufficient under the Registry Act, 10 Edw. VII. ch. 60, sec. 62, to put the assignee, Ibbotson, in the position of an assignee to whom the mortgage has been assigned, and also a person entitled by law to receive the money and to discharge the mortgage. The whole mortgage and the whole of the debt is in fact assigned, and not merely a part of the debt and the instrument. See form 10 in the schedule to the statute 10 Edw. VII. ch. 60, p. 539 of the statute-book of 1910; and the effect of registration as declared by sec. 66*a*, added to the Registry Act by 1 Geo. V. ch. 17, sec. 31 (1911).

Had default been made by the mortgagor in paying, the action for recovery of the whole must have been by the assignee, in whose hands was the security, and who had the express right to use the name of the mortgagee to enforce performance of the covenant to pay. Suing in the name of the mortgagee, payment to the assignee would be a good discharge for the whole, and he would hold the surplus over the $1,000 for the use of his assignor. But under the Judicature Act he could also sue in his own name, though as to part of the money he would hold it in trust for the mortgagee, his assignor: Comfort v. Betts, [1891] 1 Q.B. 737.

The title is good as against this objection. I suppose the parties have aranged as to costs.

MIDDLETON, J. DECEMBER 16TH, 1913.

RE BUCHANAN AND BARNES.

Will—Devise in Fee Simple—Restraint on Alienation—Invalidity—"Condition"—Time Limitation—Absence of Gift over—Vendor and Purchaser.

Motion by the vendor, under the Vendors and Purchasers Act, for an order declaring that the vendor was able to make a good title as against an objection taken by the purchaser, upon a contract for the sale and purchase of land.

The motion was heard by MIDDLETON, J., in the Weekly Court at London, on the 13th December, 1913.

J. D. Shaw, for the vendor.

C. St. Clair Leitch, for the purchaser.

MIDDLETON, J.:—The sole question is, whether the condition attached to the devise to Isaac Buchanan is repugnant and void. The will reads: "To my son Isaac Buchanan I give devise and bequeath the east half . . . for his own absolute use and benefit forever, but subject to this further condition that he the said Isaac Buchanan shall not have the power to sell or cause to be sold or mortgaged or incumbered the said east half . . . for a period of twenty years from my decease." There is no gift over.

Blackburn v. McCallum, 33 S.C.R. 65, is a repudiation of the doctrine of Earls v. McAlpine, 6 A.R. 145, and accepts In re Rosher, 21 Ch.D. 838, as the governing authority, and must be taken to determine that a general restraint on alienation is not given validity by a time limitation.

When there is a gift over, it may amount to an executory devise and terminate the estate given; but a mere prohibition of alienation, though called a "condition," does not constitute a good common law condition so as to work a forfeiture.

Here the fee is given, and there is nothing to take it away.

The parties have, no doubt, some arrangement as to costs. If not, I may be notified.

MIDDLETON, J. DECEMBER 16TH, 1913.

RUDDY v. TOWN OF MILTON.

Municipal Corporations—Drainage—Natural Watercourse—Obstruction by Inadequate Culvert—Injury to Private Property — Negligence — Placing of Proper Culvert — Mandatory Order—Damages—Costs.

Action for damages for flooding of lands, tried without a jury at Milton on the 5th November, 1913.

George Bell, K.C., for the plaintiffs.
W. I. Dick, for the defendants.

MIDDLETON, J.:—The premises in question are situate at the corner of King and Bowes streets, in the town of Milton. Lots 8 and 9, upon which the plaintiffs' house is erected, were conveyed to the plaintiff Fanny Ruddy on the 17th November, 1908. The rear lot, number 10, was conveyed to the plaintiff Anna C. Ruddy on the 29th December, 1911. This property was bought many years ago, but the conveyances were only recently obtained.

The whole land is flat and low-lying. Originally a watercourse, having its origin in the block bounded by King, Bronte, Mary, and Bowes streets, north-west of the block in question, crossed King street, flowed across the block in question, crossed Robert street, and thence, flowing in a south-easterly direction, joined a much larger stream, which receives most of the town drainage. King street has a slight grade from both directions toward the place where this watercourse crosses it. The road has been turnpiked, and a ditch has been constructed on each side. Where the watercourse crosses the road, a twelve-inch wooden box has been placed; and, to facilitate the continued flow of water in the old channel, a twelve-inch tile has been placed between the southern ditch and the boundary of the road. This brought the water on the land on the corner of lot 7, owned by Mr. Core; and a few lengths of ten-inch tile were placed on his land, facilitating the discharge of the water still in the old watercourse, where it entered the western boundary of lot 8.

Where the watercourse crosses Robert street, the municipality placed tiles, at the north end six inches in diameter, and at the south end eight inches in diameter, for the purpose of

conveying the water across the street, so that it could continue in its old course. The municipality constructed a ditch on the south side of Robert street, running from the old watercourse to the large creek. This would have taken care of all the water that this little watercourse would have discharged, but, objection being taken by the owners of property on Robert street, to water which originally flowed in some other direction being brought down that street, the municipality filled up the new course at the foot of Bowes street, so that the water of this creek could not flow through this newly constructed drain. South of Robert street the old watercourse flowed through the lands of a man named White; and he ploughed up the land and filled in the channel. The result is, that there is now no free outlet for such water as would flow down the channel in question.

The municipality was no party to the action of White; instructions have been given to the town solicitor to take any proceedings necessary to secure the opening up of the old channel through his property.

The watercourse drains only a small area; the only water that reached it before passing the plaintiffs' house is that gathered from the Mary street block and King street. Bronte street is well drained, and takes care of its own water and of all water to the west of it; also north of Mary street, save in so far as that territory is drained by the main stream, Bowes street and the land east of it drain into this main drain. The only time there is any appreciable water in the ditch in question is during the spring thaw and occasionally after an exceptionally heavy rain. In the spring, a good deal of water collects, and slowly makes its may off the land in question through this watercourse.

In the spring of 1913, the plaintiffs' cellar was flooded and some injury was done to the hot air furnace. This flooding was not occasioned by the filling in by White of his land, as that did not take place till afterwards. Robert street had been raised, and the small tiles placed across it were insufficient, and they afforded some obstruction to the flow of water there. Further obstruction was caused from the fact that the old watercourse across White's land had become obstructed by the growth of grass and weeds and otherwise.

I think that the municipality was guilty of negligence in providing an inadequate culvert where the stream crossed Robert street, and that this inadequate culvert was the cause of the plaintiffs' cellar being flooded.

According to the plan put in by the defendants, the elevation at the entrance to the culvert is 89.36, and its discharge point 89.46. The elevation of the cellar floor is 90.43. From this it is argued that the inadequacy of the outlet at Robert street could not occasion flooding upon the floor of the cellar.

I do not think that this follows; because the crown of Robert street is considerably higher than the culvert entrance; and, when the water came down the watercourse and found an inadequate outlet at Robert street, it would rise above the crown of the road. This would, I think, be sufficient to cause a flooding of the cellar.

It is inconceivable that a competent engineer would place a six-inch tile at a culvert lower down the stream, when he had placed a twelve-inch culvert much higher up, and the six-inch tile is quite inadequate to take care of the water. The area of the six-inch tile was further diminished by the fact that it was laid at the down-stream end at a higher elevation than at the up-stream end. At the present time this tile is found to be partly filled with earth, and it is impossible to say what its condition was when the flood was on.

The plaintiffs have brought their action upon the theory that they are now entitled to recover a comparatively large sum by reason of the depreciation of the house owing to its liability to be flooded at any time. I think that this is a mistaken theory, and that all that they are entitled to is judgment for the damage already sustained and an order directing the placing of a proper culvert across Robert street, the present culvert being an unauthorised obstruction of the watercourse.

In view of the partial success, and of the possibility of the plaintiffs being able to obtain this relief in the County Court, in which case a set-off would follow, I think justice would best be done by assessing the damages already sustained at $100, and by making the mandatory order indicated, and fixing the plaintiffs' costs at the lump sum of $100.

It is to be hoped that some arrangement may be made by which the water may be taken care of before next spring, or that Mr. White may see the wisdom of re-opening the watercourse over his property where he has obstructed it.

BOYD, C., IN CHAMBERS. DECEMBER 17TH, 1913.

*SNIDER v. SNIDER.

Pleading—Statement of Claim—Addition to Claim Made by Special Endorsement on Writ of Summons — Rules of Court, 1913*—Anticipating Defence—Irrelevant Statements —Promissory Notes—Action on, against Executors of Deceased Maker — Legacy — Set-off — Foreign Executors— Forum of Litigation.*

Appeal by the defendants the foreign executors of Thomas Albert Snider, deceased, from the order of HOLMESTED, Senior Registrar, in Chambers, refusing to set aside the statement of claim: ante 325.

W. J. Elliott, for the appellants.

H. E. Irwin, K.C., for the plaintiff.

BOYD, C., referred to Rules 32, 33, 56, 57, 109, 111, 127, 141, 143, and 151 (Rules of 1913), and continued:—

The power of amendment ex parte, once, by the plaintiff, under Rule 127, is more limited than the power to alter, modify, or extend his claim as endorsed on the writ, under Rule 32. As at present advised, I should say that he had no power to introduce a new cause of action, although he may amend in such particulars as will not depart from the original cause of action as specially endorsed. But, assuming a larger power such as is given under Rule 109, I do not think that the pleadings now complained of can stand. There is one cause of action and one statement of claim, as endorsed upon the specially endorsed writ, claiming to recover against the defendants, as executors, on two promissory notes made by T. A. Snider in favour of J. E. Snider for $5,000 each, $10,000, with interest at 5 per cent. from the 1st February, 1909, $2,000. The plaintiff has now undertaken to file a second statement of claim in remarkable contrast to the first: containing 14 paragraphs and 4 prayers for relief, in addition to the inevitable prayer for costs. . . .

[The Chancellor then stated the substance of the pleading.]

The whole pleading appears to be open to many objections, and offends against many of the rules for the regulation of pleadings, and in particular in its anticipation of the answer

*To be reported in the Ontario Law Reports.

of the defendants, and so, according to the homely phrase of Hale, C.J., the plaintiff "is like one leaping before coming to the stile." See Odgers on Pleading, 6th ed., p. 93.

The 1st, 2nd, and 3rd paragraphs are superfluous in the case of a specially endorsed writ. The 4th and 9th, as to the amicable relations between the brothers, has no relevance to the cause of action. In the 7th and 8th paragraphs, a few lines as to the provision in the will were enough; and all the rest of the references to it diffuse and superfluous. The 11th paragraph is specially objectionable in setting forth the language of conversations and generally the evidence proposed to be offered to the Court, instead of a concise statement of the material facts. The last three paragraphs might have been condensed into three lines.

But, as some of these observations apply only to the pruning of the luxuriance, the more serious point is, that the claim as framed is misconceived. It is an elaborate attempt to set forth that the notes sued on were given for legal or good consideration—a matter that is presumed in the case of negotiable instruments. The proper course of pleading is to wait until the defendants make their defence and then let the plaintiff meet it by appropriate pleading. If the defendants make no defence, the plaintiff gets judgment at once on proof of the notes—so let him wait till there is something that interferes with his recovery. It appears to me manifest that the proper forum of litigation is in this Court as to the validity of the notes sued on; if that is established, all difficulty as to the payment of the legacy will be overcome. In the American forum the testator has left the matter so that the legacy will be equipoised by the notes of the plaintiff held by him. It does not appear to me proper to remove this part of the controversy and make it part of the action on the specially endorsed writ; for, if the plaintiff makes out his contention on the notes sued on, one cannot assume that further litigation in the United States will be needed to enforce that judgment. If the questions raised by the second statement of claim, which I now set aside, are to come up by reason of the defence made, well and good, so long as they are properly pleaded; but at present they are an excrescence on the record and should be removed.

There was good reason for the intervention of the American executors; for, in the first place, the Canadian executor is the son of the plaintiff, and from the objectionable pleading I should judge his chief witness; and, in the second place, the

American executors are interested in actively recovering, as they are entitled to, all the assets of the testator not needed for the satisfaction of his debts; and, if his assets fall short in this country of meeting all claims, resort for the balance of claim will be had to the American assets in the hands of these defendants.

The Registrar, in allowing the pleading to stand, was probably influenced by the fact that the motion made was too large in seeking to have the action dismissed. The action should be prosecuted on the specially endorsed writ, and the defendant is to have sufficient time to plead thereto.

The costs of the application below and of the appeal will be both in the cause.

BOYD, C. DECEMBER 17TH, 1913.

RE TRACY.

Will—Devise of Life Estate to Husband—Direction to Executors to Sell after Death of Husband and Divide Proceeds among Named Persons—Husband Predeceasing Testatrix—Sale of Devised Land by Testatrix after Husband's Death—Conversion into Cash and Mortgage—Ademption—Cash and Mortgage Falling into Residue—Predecease of Residuary Legatee—Intestacy.

Motion by the executors of Rachel Tracy for an order, under Con. Rule 600, determining a question arising in regard to the estate of the testatrix.

D. Inglis Grant, for the executors.
H. Cassels, K.C., for certain legatees.
J. J. Maclennan, for the next of kin.

BOYD, C.:—The testatrix made her will in 1904, and she died in December, 1912. By the will she left the land in question to her husband for life, and after his death it was to be sold by her executors and the proceeds paid to various persons and objects named. The residue of her estate was given to her husband. He died before the testatrix, in April, 1912. She sold the land in June, 1912, and received part of the price in

two payments of $500 each; and the balance is on mortgage for $2,000. After the death of the husband, she had the power and elected to sell the land in question and convert it into money and mortgage. The property devised to the executors she thus by her own act destroyed, and to that extent revoked the devise; technically there was an ademption according to the definition given in all modern authorities.

I am bound by Re Dods, 1 O.L.R. 7, which has been followed, to hold that the devise of the land and proceeds to the executors is inoperative. The cases cited to the contrary are cases where the manifest intention of the testator was to give the subject of the gift, whatever was its condition, so long as it could be identified; and usually this obtains where the will deals with property coming to the testator from another estate than his own. The distinction is marked in Lee v. Lee, 27 L.J.Ch. 824, and Toole v. Hamilton, [1901] 1 I.R. 383, cited by Mr. Cassels.

Ademption means simply the taking away of the benefit by the act of the testator. The matter is neatly put in a note to the last edition of Jarman—6th ed., vol. 2, p. 1157: "A specific devise of land may be adeemed by the property being sold or conveyed after the date of the will. Mr. Jarman treats this as an instance of 'revocation by alteration of estate.'" This discussion will be found in vol. 1, pp. 161, 162; and In re Clowes, [1893] 1 Ch. 214, is cited, shewing that, even if the testator, on sale of the devised land, takes back a mortgage to secure the purchase-money, the benefit of the mortgage does not pass to the devisee.

Here the testator gave the property specifically to her executors so that her husband might have it for life, and at his death the executors were to sell and divide the proceeds as directed. But, on the death of her husband, the widow proceeded to sell the property and to turn part of it into personal estate outstanding at her death. This the executors would take as part of the residue; but, the residuary legatee being the husband, it follows that there is an intestacy as to this. I see nothing in the will to indicate that the persons named, who are relatives of the husband, were intended to take under the will—all that was ended when the land was sold by the widow.

There is intestacy as to the moneys and mortgage in question; costs out of the estate.

RIDDELL, J. DECEMBER 17TH, 1913.

SARNIA GAS AND ELECTRIC LIGHT CO. v. TOWN OF SARNIA.

Municipal Corporations—Powers of Expropriation—Works and Property of Gas and Electric Light Company—Municipal Act, 1903, *sec.* 566, *sub-sec.* 4—*Street Lighting—Stated Case —Inferences of Fact.*

A special case stated for the opinion of the Court.

I. F. Hellmuth, K.C., W. J. Hanna, K.C., and R. V. LeSueur, for the plaintiffs.

E. F. B. Johnston, K.C., and J. Cowan, K.C., for the defendants.

RIDDELL, J.:—This is a stated case, argued in part before me on the 19th June, 1912; judgment was given on the 20th June, 1912 (3 O.W.N. 1455), in which most of the facts are set out. The point decided there, it was said, would be sufficient, and the decision render unnecessary the consideration of other matter submitted and argued. The parties are now, however, desirous of a decision upon the other points as well.

The questions for the opinion of the Court are as follows:—

1. Are the provisions of the Consolidated Municipal Act, 3 Edw. VII. ch. 19, sec. 566, sub-sec. 4(a), applicable to the plaintiff company, either as to its electric plant or its gas plant or to both?

2. If so, do the provisions contained in sec. 566, sub-secs. 4(b) and 4(g), make the provisions of sec. 566, sub-sec. 4(a), under the circumstances, inapplicable, inoperative, and non-effective in respect to the plaintiff company?

3. If the provisions of the said section of the said Act, namely, 3 Edw. VII. ch. 19, sec. 566, sub-sec. 4(a), are applicable to the plaintiff company, and the proceedings had and taken by the defendants, purporting to be under and by virtue of said section, are regular, was the appointment of the third arbitrator in such proceedings intra vires?

4. If the proceedings had and taken by way of arbitration are, under the circumstances, intra vires, can the plaintiff company refuse to proceed or to be bound by the same?

5. If an award is made in such proceedings, is there any

provision for enforcing the same or of compulsory expropriation based on such award; and, if not, then, in the event of the company refusing to accept the sum fixed by the award to be paid to the company, and to transfer its property to the defendants, can the defendants then construct and operate similar works to those being carried on by the company without the leave of the company?

6. If the defendants have a right to proceed under sub-sec. 4(a) of sec. 566, then must they take over and pay for the company's works and property situate in the village of Point Edward and Sarnia township, as well as for those in the town of Sarnia?''

In the case it is agreed that the plaintiff company supplies "gas for heating purposes and electricity for lighting to the municipal corporations of the town of Sarnia and the village of Point Edward, but is not now supplying and never has supplied either the town of Sarnia or the village of Point Edward with both gas and electricity for street lighting purposes.''

Nowhere does it appear whether the plaintiff company supplies or has supplied "gas or electric light for street lighting in the municipality.'' For all that appears, the electricity supplied may be to light the municipal buildings, and not to light the streets.

While I have the power to draw inference of fact as at a trial (former Con. Rule 372(3)), I decline to do so when the inference would not be far removed from a mere guess, and the real fact might have been clearly stated. Section 566, sub-sec. 4(a), is expressly only to apply "to a gas or electric light company that has supplied or shall supply gas or electric light for street lighting in the municipality''—but the fact is not stated. The Court will not make an order "when the facts . . . stated on a special case were such as did not enable the Court to determine the rights of the parties'' and "it is not a proper use of the Act of Parliament to come to the Court for its opinion on a partial . . . statement of facts:'' Bulkeley v. Hope (1856), 8 D. M. & G. 36. I shall follow the Lords Justices and make no order upon this case, without prejudice to any question, and without prejudice to another special case being stated containing all the material facts.

No costs.

BOYD, C. DECEMBER 18TH, 1913.

RE LAIDLAW AND CAMPBELLFORD LAKE ONTARIO AND WESTERN R.W. CO.

Railway—Expropriation of Land—Compensation and Damages—Ascertainment by "Valuers"—Agreement between Land-owner and Company—Motion to Set aside "Award" of Valuers—Valuation, not Arbitration—Jurisdiction of Court—Misconduct of Valuers—Interview with Owner in Absence of Representative of Company—Validity of Decision not Affected—Evidence not before Valuers—Failure of Company to Adduce—Examination of Valuer—Discretion.

Motion by the railway company to set aside an award or decision of valuers appointed under an agreement between Laidlaw and the railway company to ascertain the amount to be paid by the company for compensation to Laidlaw for land taken and damages for injury to land not taken for the railway.

Angus MacMurchy, K.C., for the railway company.
M. K. Cowan, K.C., and E. G. Long, for Laidlaw.

BOYD, C.:—Laidlaw's land having been intersected by the Campbellford Lake Ontario and Western Railway, and certain portions being required, notice of expropriation was given and $1,200 offered by the railway company as for compensation and damages. This was not accepted, and the parties agreed on the 12th July, 1913, that these questions be referred to the determination of Joseph Hickson, as valuer appointed by the company, Nicholas Garland, appointed on behalf of the owner, with His Honour Judge Morgan as third valuer. The decision of any two valuers was to be conclusive and binding without appeal and without costs. Each party was to pay the fees of his own valuer and half the fees of the third. The parties covenant that the decision of the valuers shall be kept and observed and shall be binding and conclusive upon both and shall not be subject to appeal. Then follows this clause: "Either party shall have the right to have one representative present, if desired, at any meeting of the valuers; but failure of such representative to attend, whether through lack of notice or otherwise, shall not affect the validity of the decision."

The award of two of the valuers, dated the 22nd August, 1913, sets forth: "Having called the parties before us, at all

times sitting together, and having, at the request of the parties, viewed the land and premises, and having heard the arguments of counsel for both parties"—and then proceeds to declare that $6,800 is fixed as compensation for both items.

On the 9th October, a motion is made in a summary way to "set aside the award," on the ground, first, that it was not made on the basis of evidence and statements presented and facts disclosed upon the view and inspection made. That ground was not argued, nor was it arguable, for no evidence was taken, and the parties were content and intended that the valuers should act on their own knowledge and experience and have the most ample discretionary powers—as no restrictions were placed upon their actions.

The second ground was, that the amount was unreasonable and exorbitant. That ground is equally untenable, and was not discussed.

The third ground is, that the arbitrators did not act judicially, but conferred with one of the parties in the absence of the other, and in that and other respects were guilty of misconduct sufficient to invalidate the award.

The sole ground of alleged misconduct is, that the view was taken on the premises and in the presence of Mr. Laidlaw, the owner.

The point was not specifically taken that the Court had no jurisdiction to deal summarily with the motion to set aside. But it seems to be a formidable objection, as the parties were free to make their own agreement as to how the amount of compensation was to be attained, and had the right to agree that there should be no appeal. This motion is in substance an appeal; and at present it would seem to me that there are excluding words which oust the jurisdiction of the Court. See per Hannen, J., in Jones v. St. John's College (1870), L.R. 6 Q.B. 115, at p. 126.

But, dealing with the last ground, it may be that in ordinary arbitrations where evidence is to be taken under oath in the usual way, and the matters of fact in dispute are to be dealt with judicially, this action of viewing the premises with only one of the parties present might amount to misconduct so that the award would have to be remitted to the same arbitrators for further consideration. That would be the utmost relief, for actual misconduct there is none in the present case—nothing more than mere inadvertence.

The notice of motion assumes that this is an arbitration and calls the referees arbitrators; but, I think, the better view is,

that there were no judicial proceedings properly speaking contemplated; the matter was left to the sound judgment and good sense and well-known experience of the three who are called "valuers" by the parties themselves in the document, which is drawn by a legal hand.

As briefly put by Lindley, J., in In re Carus-Wilson and Greene (1886), 18 Q.B.D. 7, "It is a mere matter of fixing the price, not of settling a dispute."

Having regard to the decisions in Eads v. Williams (1855), 24 L.J. Ch. 531, 533, Bottomley v. Ambler (1877), 38 L.T.N.S. 545, Re Hammond and Waterton Arbitration (1890), 62 L.T. N.S. 808, and Re Langman and Martin (1882), 46 U.C.R. 569, I prefer to treat the agreement as one for valuation rather than as one for arbitration.

There is greater latitude contemplated on the part of valuers than in the case of arbitrators. In this very case there appears to be a provision made against such an objection as the one in hand. The three valuers went, "on the request of the parties," in the most natural way, to the place of inspection, and there met and had intercourse with Mr. Laidlaw. In truth, the railway company were there represented by the valuer Mr. Hickson, who was to be paid by them, and it was not thought needful to have their interests better protected. If another representative did not attend or was not notified, that, as the last clause quoted of the agreement provides, was not to "affect the validity of the decision."

Another matter was urged, which is not in the notice of motion, but it ought not to prevail. It is said that the valuation might have been different had the valuers been aware of the fact that an interlocking switch had been ordered by the Railway Board to be established by the railway company at this point. That, if material, was a matter known to the railway company, and should have been by them brought before the valuers. Failing to do so, they merely failed to adduce a piece of evidence which might or might not have affected the final result: Lemay v. McRae (1888-9), 16 O.R. 307, affirmed 16 A.R. 348. The only foundation for urging this ground is obtained by the examination of one of the valuers, and his evidence fails to shew any such mistake or miscarriage as would be a violation of general principles. See per Lord Eldon in Walker v. Frobisher (1801), 6 Ves. 70, 71, 72. The line of examination pursued seems to offend against the rule laid down in Duke of Buccleuch v. Metropolitan Board of Works (1872), L.R. 5 H.L. 418, that

questions are not to be put as to what passed in the referee's mind when exercising his discretionary powers on the matters committed to him.

The motion is dismissed with costs.

MIDDLETON, J. DECEMBER 18TH, 1913.

EDWARDS v. PUBLIC SCHOOL BOARD OF SECTION THREE OF THE TOWNSHIP OF EAST OXFORD.

Building Contract—Erection of School Building—Claim for Extras—Change in Size of Doors—Fault of Contractor—Delay in Completion of Work—Initial Delay on Part of School Trustees and Architect — Acquiescence by both Parties — Damages — Architect's Certificate — Interest — Costs.

Action to recover $1,089.80, the balance alleged to be due upon a contract for the erection of a school building.

The action was tried before MIDDLETON, J., without a jury, at Woodstock, on the 16th December, 1913.

S. G. McKay, K.C., for the plaintiff.

R. N. Ball, K.C., for the defendants.

MIDDLETON, J.:—Originally the defence set up was a denial of liability with respect to $28.50 claimed with respect to a change in the size of the doors in the building, and a claim for $560 penalty for seventy days' delay in completing, at $8 per day, the rate stipulated in the contract. At the hearing an amendment was asked to permit the setting up of failure to complete the building in accordance with the contract. Leave was granted. No particulars had been furnished before the trial, and a good deal of difficulty in satisfactorily dealing with this branch of the case became apparent, from the plaintiff's inability to deal satisfactorily with matters of detail as to which he had no adequate notice. Finally it was agreed between the parties that an abatement should be allowed of $130 to compensate for all matters where there had been a departure from the strict terms of the contract. This sensible arrangement relieved me from considering the difficult question which would have arisen owing to the peculiar form of the architect's certificate, and the consideration of the difficulties which arise with relation to an entire contract.

Upon the evidence, I do not think that the plaintiff has established his claim to the $28.50. It may be that, in truth, it was the fault of the architect; but the trouble giving rise to the supply of doors of an improper size ought to have been guarded against by the plaintiff, or he should have seen that he had very definite orders from the architect for his protection.

The remaining question relates to the penalty. Under the contract the trustees were bound to make the excavation and to supply bricks, sand, and gravel. The architect was bound to supply necessary plans and details. The trustees were also bound to do the roofing.

I think that there was such default on the part of the trustees in the performance of their part of the undertaking as to make it impossible for the contract to be complied with and for the building to be completed by the 1st August, the day stipulated. It may be that this delay was unavoidable; nevertheless it was substantial, and left the matter at large. In the same way, the architect was dilatory. For example, he did not supply the details for the interior work until the 18th July. He frankly says, what is quite obvious, that it was then entirely impossible for the building to be completed by the 1st August. The fact was, as is usual in cases of this kind, that both parties acquiesced in a good deal of dilatoriness; and it was practically conceded by counsel upon the argument that it is impossible to enforce a penalty under these circumstances.

In the alternative, the trustees ask for damages for the delay. I do not think that they are entitled, in the circumstances; nor do I think the damages which they claim, namely, the teacher's salary, can be recovered. See Brown v. Bannatyne, 5 D.L.R. 624.

The school was completed, so far as the plaintiff was concerned, on the 11th October. The delay from that time to the 11th November, when the school was opened, was occasioned by the failure of the trusteees to have made any proper provision for the installation of heating apparatus; and, as Mr. Towns explains, the seats could not be placed in the building until after the heating apparatus was installed.

The result is that the plaintiff is entitled to recover the amount sued for, $1,089.80, less $28.50 and $130, being $931.30, and interest from the 30th April, 1913, the date of the architect's certificate. The money paid into Court, $513.30, and any accrued interest, to be paid out to him on account thereof. The plaintiff is also entitled to the costs of suit.

MIDDLETON, J. DECEMBER 18TH, 1913.

RICHARDSON v. GEORGIAN BAY MILLING AND POWER CO.

Sale of Goods—Wheat in Elevator—Purchase-price not Paid—Destruction by Fire in Elevator—Property not Passing—Insurance—Vendor's Loss.

Action for the price of wheat sold; tried at Toronto on the 12th and 17th December, 1913.

J. J. Maclennan, for the plaintiffs.
G. W. Mason and F. C. Carter, for the defendants.

MIDDLETON, J.:—It is common ground that, as the result of the correspondence filed, the plaintiffs bargained and sold to the defendants ten thousand bushels number two northern wheat, at the price of 94½ cents per bushel. The defendants were to give instructions for the shipping of the wheat, and it was contemplated that delivery should be at the option of the purchaser, but within a reasonable time. The plaintiffs drew upon the defendants for the price, but the draft was allowed to stand unaccepted and unpaid, for the convenience of the purchaser; it being understood between the parties that the purchaser should pay the carrying charges upon the wheat in question, these charges consisting of the elevator charge, interest, and insurance.

The wheat at this time was in an elevator at Meaford. It had in no way been separated from a larger quantity, owned by the plaintiffs, which was stored there. The order for delivery was attached to the draft, and the defendants could not obtain delivery without first paying the draft. While matters were in this situation a fire occurred, and the wheat was destroyed. The question is, which party is called upon to bear the loss?

The case in some respects is very like Inglis v. James Richardson & Sons Limited, 29 O.L.R. 229, 4 O.W.N. 655, 1519; but I think that it is clearly distinguishable. Here the wheat was not paid for, the order upon the elevator had not been handed over, and nothing whatever had been done from which it could be inferred that the property had actually passed. The intention of the parties, to be inferred from all the circumstances, was, that the property in the grain should remain in the vendor until the draft was paid.

Both parties carried insurance on grain which they held in the warehouse, so that little light is thrown on the situation by this. If it be important, I think that the vendor continued specific insurance for the purpose of covering the grain in question.

There is nothing here to take the case out of the general rule laid down in Graham v. Laird Co., 20 O.L.R. 11. See also Benjamin on Sale, 5th ed., p. 417.

The action therefore fails, and must be dismissed.

MIDDLETON, J. DECEMBER 18TH, 1913.

CITY OF WOODSTOCK v. WOODSTOCK AUTOMOBILE MANUFACTURING CO.

Mortgage—Security for Loan by City Corporation to Manufacturing Company—Agreement—By-law—Credit on Loan for Men Employed in Manufactory—Construction of Mortgage-deed—Enforcement—Assignment by Company for Benefit of Creditors—Proviso for Reverter to Mortgagee—Conveyance of Property by Assignee to Another Company—Employment of Men in Manufactory by that Company—Effect of, as Compliance with Mortgage — Bonus—Contract—Assignment—Redemption—Damages—Implied Obligation to Repay Loan—Account—Costs.

Action by the Corporation of the City of Woodstock to enforce a mortgage security.

The action was tried, without a jury, at Woodstock, on the 16th December, 1913.

S. G. McKay, K.C., for the plaintiffs.

W. T. McMullen, K.C., for the defendants.

MIDDLETON, J.:—By by-law 583, the plaintiffs agreed to lend to the defendant the Woodstock Automobile Manufacturing Company Limited—a company incorporated under the Ontario Companies Act—the sum of $3,500, upon the terms set forth in an agreement dated the 24th February, 1912, to be secured by a mortgage calling for compliance with the terms and conditions upon which the aid was given. The agreement set forth that the company was to employ during the seven succeeding

years, upon an average, twenty men for a period of eleven months (of ten-hour days) in each year, and that on the 1st April in each year credit should be given upon the mortgage for the amount that should have been earned during the preceding year. If more men than stipulated for had been employed, the credit was to be proportionately greater; if fewer, the credit would be less.

In the event of the company going into liquidation or assigning for the benefit of its creditors, or discontinuing business before becoming entitled to a discharge of the mortgage, the property was to revert to the plaintiffs. Upon the earning of any credit, the mortgage should, nevertheless, remain as security for the full amount until the total credits should entitle the mortgagor to a complete discharge.

A mortgage was drawn and executed, bearing date the 6th May, 1912, reciting the by-law and the agreement, containing a proviso that it is to be void "if the said the mortgagor shall in each and every year for the next succeeding seven years employ twenty men for a period of eleven months, ten-hour days each," and "provided also that, if the said the mortgagor shall go into liquidation, assign for the benefit of creditors, or shall discontinue business before the time within which it should have earned the right to the discharge of this mortgage by the performance of labour as aforesaid, or by payment of cash as aforesaid, the property hereby mortgaged shall revert to the said the mortgagee, without any reduction in said mortgage or any other reservation whatsoever."

There is a further proviso, not material, relating to increased credit or decreased credit where a greater or lesser number of men is employed, and providing that no part discharge of the mortgage shall be given, but it "shall remain as security for the full amount until the said the mortgagor is entitled to credit for the whole amount of labour as aforesaid or has paid to the mortgagee the unearned portion thereof."

The company commenced business, and carried it on in substantial compliance with the requirements of the by-law and mortgage for somewhat less than a year, when, becoming financially embarrassed, on the 9th November, 1912, it assigned, for the benefit of its creditors, to the defendant Ross. The assignee continued business for some little time thereafter, working up material and completing existing contracts.

On the 12th April, 1913, about a year after the company commenced business, Ross conveyed the property to the Canada

Furniture Manufacturers Limited, subject to this mortgage and to another mortgage in favour of one W. J. Taylor. The company was hopelessly insolvent, has paid nothing to its unsecured creditors, and little to those holding security.

This action was brought on the 19th July for the purpose of enforcing the mortgage security.

The Canada Furniture Manufacturers Limited has a factory already in operation in Woodstock, and it is ready to employ men in the factory in question; but the plaintiffs are not content to accept this as a compliance with the terms of the mortgage.

Several questions of importance arise. In the first place, I do not regard the proviso in the mortgage relating to the assignment as constituting any clog upon a redemption. Its true meaning is, I think, that, if the mortgagor assigns before the mortgage-debt is worked out by the continuance of the factory and the due employment of the requisite number of men, the mortgagees shall be entitled to assert against the property the full amount of the mortgage-debt. Substantially the factory had been carried on for one year; and I am relieved from considering the question of the power of the Court to relieve against the forfeiture of the $500 credit upon the mortgage, by the assent of counsel for the plaintiffs to credit being given for this $500, leaving the mortgage-debt at $3,000, instead of $3,500.

I do not think that the plaintffs are bound to accept the employment of men by the furniture company as a compliance with the proviso in the mortgage. The bonus was a bonus to a specific industry. This is what is authorised by the Municipal Act, and it was not contemplated by the parties that the advantage of the bonus should be capable of being transferred. What was sought was the establishment of a new industry in the city. This cannot, against the will of the municipality, be converted into a bonus to an industry already existing. The furniture company is already established; and, even if the enlargement of its premises involves the employment of the additional number of men, it does not follow that the municipality would receive the kind of benefit contemplated by the by-law.

It is also obvious that the employment of the number of men contemplated, in this building, may simply mean the transfer of these men from some other factory building already in operation in the town.

Apart from the obvious intention of the Municipal Act and the by-law passed under it authorising a bonus, the considerations suggested in Tolhurst v. Associated Portland Cement Man-

ufacturers, [1903] A.C. 414, indicate that in this case, regarded as a contract, the contract was one not intended to be capable of assignment.

It was then argued that the mortgage did not provide for redemption upon payment of a money sum, but upon the employment of the stipulated number of men.

I do not think that this is so. Practically the mortgage is a mortgage to secure $3,500, the amount lent, the mortgagees agreeing to accept as equivalent to the payment of $500 per annum the employment by the mortgagor of the stipulated number of men; and, upon the assignment for the benefit of creditors by the mortgagor, the property "hereby mortgaged shall revert to the mortgagees, without any reduction in the mortgage." This, though absolute in form, does not deprive the mortgagor or the mortgagor's assignees of the right to redeem within a time to be fixed by the Court. I, therefore, think that the proper judgment is, to direct that a time be fixed, six months from the date of this judgment, for redemption, upon payment of $3,000, with interest from the date of default, say the 12th April, 1912.

The defendants argued, in the alternative, that this mortgage should be regarded merely as security for any damages which the plaintiffs might be able to prove as resulting from the default of the mortgagor. I do not think that this is the way in which the mortgage in question should be construed. Bald and ineffective as the document is, it is security for the money advanced, not to be enforceable if the mortgagor lived up to the covenant as to employment; and the conveyancer has avoided the difficulties found in some of the cases cited.

It is true that there is no express covenant to repay this loan; but the cases collected in Fisher shew that there is an implied obligation, enforceable in a personal action.

The mortgagees are entitled to add the costs of the action; and possibly some other items ought to be taken into account. If this cannot be agreed upon, I may be spoken to.

MIDDLETON, J. DECEMBER 18TH, 1913.

McBAIN v. TOWNSHIP OF CAVAN.

Municipal Corporation—Drainage—Watercourse — Agreement with Land-owner—Absence of By-law and Corporate Seal—Executed Transaction—Benefit Received by Corporation—Damages—Mandatory Order—Costs.

Action for damages for breach of an agreement between the plaintiff, a land-owner, and the Corporation of the Township of Cavan, the defendants, to keep open a certain watercourse so as to prevent injury to the plaintiff's land and to compel the defendants to live up to their contract in the future.

The action was tried without a jury at Peterborough on the 25th November, 1913.

I. F. Hellmuth, K.C., and J. E. L. Goodwill, for the plaintiff.

R. Ruddy, K.C., for the defendants.

MIDDLETON, J.:—The plaintiff is the owner of the east half of lot number 19 in the 13th concession of the township of Cavan. A small stream runs across the north end of this lot. This stream is sinuous in its course, and opposite the plaintiff's land crosses the road four times, two loops entering upon the plaintiff's land. This was a matter of importance to the plaintiff, because the living stream flowing through his land afforded him water for his cattle.

In the year 1907, the defendants constructed a drainage ditch along the north side of the concession line, intercepting the stream wherever it crossed the highway; the idea being apparently to divert the whole flow of the stream to the ditch, so that it would cross the highway at one point only. The plaintiff had only a small amount of low-lying land, which would be in no way benefited by the drainage that the ditch would provide; and he alleged that he would suffer substantial injury by the loss of the flowing stream at which his cattle watered. He appealed from the assessment; and, when before the Court of Revision, the defendants took the position that it was not intended to obstruct the flow of water in the stream, and that the water would still be permitted to flow through the plaintiff's lands; the ditch, being constructed on the same

level, would afford better outlet in the time of flood, but would not prevent water reaching his land.

Relying upon this, the Court of Revision confirmed the assessment. When the ditch was constructed, it was found that a quantity of material was brought by the stream down the ditch, and that it lodged in the loops of the original stream, entering the plaintiff's land, and completely filled them up. The plaintiff drew the attention of the township officials to the unexpected development, and they at once recognised that the situation thus inadvertently created was contrary to the understanding upon which the assessment had been confirmed; and the defendants opened up the watercourse through the plaintiff's land.

In the year 1910, the watercourse was again obstructed in the same way, and an action against the defendants was threatened; the grievance alleged being the diversion of the running water from the plaintiff's property through the operation of the Cavan drain. The Reeve promised to take the matter up with the municipal council, after conference with the plaintiff; and on the 11th January, 1911, the council passed a resolution instructing its committee "to deal with Mr. McBain on the following terms, namely, the council to open channel and protect it by gates on culvert, Mr. McBain to close the said gates in proper time to protect the channel from filling up by spring freshets; council to keep the channel open; said offer to be without prejudice." This was communicated by the council to Mr. McBain, who on the 13th January acknowledged receipt, saying: "In reply I would like to express my pleasure at the way in which you have tried to overcome the difficulty, and I accept and agree to your resolution."

In pursuance of this agreement, in the early summer of 1911 the defendants opened up the channel; but, before the gates were erected, the channel was again filled, as the result of an unusually heavy rain-storm. In the autumn the channel was again opened by the defendants, and the gates were erected. In the spring freshets of 1912, the gates were properly closed by the plaintiff, but the freshet was of such violence as to break through and undermine the whole structure, so that the watercourse was again filled up.

The defendants refused to do anything further, and the plaintiff ultimately brought this action, claiming damages for the inconvenience he had suffered. He could have cleaned out the ditch himself in 1912 for the sum of $10; and in 1913, if

it had again filled up, for a like sum. This, I think, fixes his damages at $20. He is not justified in asserting that he has suffered greater loss from the inconvenience which he could have remedied for this trifling sum.

The defendants now seek to evade liability, upon the ground that the contract is not under seal, and that there was no by-law. They then plead that any right which the plaintiff had to claim damages in respect of his grievances is lost by reason of the lapse of time and of the limitations contained in the Drainage Act. The dishonesty of this defence is such as to cause some surprise, and goes far to justify the statement of Lord Coke that corporations have neither soul nor conscience.

I am glad to say that I do not think that this defence has any more foundation in law than in morals. Our Courts have always refused to allow a municipality to set up the absence of a seal or by-law when the transaction is an executed one, and the municipality has received the benefits coming to it under the contract. Whether the plaintiff had a valid claim at the time of making the bargain, is not the point. Whatever claim he had, he abandoned. He cannot be put in the same position, for the defendants now rely upon the Statute of Limitations, after having lulled the plaintiff to sleep by his unsuspecting confidence in the validity of the unsealed contract.

The plaintiff could have recovered his $20 in a Division Court. He seeks a mandatory order directing the defendants to comply with its contract and keep the watercourse clear in the future. I do not think that he is entitled to this mandatory order. I think that this remedy is to perform, himself, the work contracted for, and to sue for its cost as damages sustained upon each succeeding breach.

In all the circumstances, I think that the proper disposition is, to give judgment for the sum named, $20, with costs fixed at $100, as this litigation has in effect determined the wider question raised by the defendants, the validity of the contract.

MIDDLETON, J. DECEMBER 20TH, 1913.

TINSLEY v. SCHACHT MOTOR CAR CO. OF CANADA.

Contract — Company-shares — Settlement of Former Action — Specific Performance—Nominal Damages—Costs.

Action for specific performance of an agreement or for damages.

The action was tried, without a jury, at Hamilton, on the 28th October, 1913.

G. Lynch-Staunton, K.C., for the plaintiff.

W. N. Tilley, for the defendants.

MIDDLETON, J.:—In a former action, wherein the plaintiff was plaintiff, and the Schacht company and the National Credit Clearing Company Limited were defendants, the plaintiff charged that a subscription by him for stock in the Schacht company, for the face amount of $5,000, upon which $3,500 had been paid, was obtained by fraud, and sought to recover the $3,500 paid and to cancel his subscription. The defendant Muntz was much interested in the two companies in question.

After the action was at issue, Muntz undertook to negotiate a settlement of the plaintiff's claim. Negotiations were at this time on foot for the sale of the assets of the Schacht company to the Monarch Motor Truck Company Limited; the Monarch company undertaking all liabilities of the Schacht company, and agreeing to issue to the shareholders of the Schacht company shares of its stock, share for share.

A memorandum was drawn up embodying the terms of the settlement arrived at. This document, although prepared by the plaintiff's solicitor, was in the form of an offer coming from the defendants, and was marked "accepted," and signed by the plaintiff's solicitor. Put shortly, it provided that the balance of the unpaid subscription on the Schacht stock, $1,500, should be cancelled; that the defendants should give to the plaintiff $3,500 fully paid preference shares in the Schacht company, in addition to the $3,500 stock already paid for, and to exchange the whole $7,000 for an equal amount of the Monarch stock. The plaintiff's solicitor added to the memorandum the further term that the costs of the action, $300, should be paid. This term was possibly not any part of the oral agreement, although the solicitors may well have understood that it was intended.

Mr. Muntz returned the memorandum of settlement, with the clause providing for the payment of costs deleted, and with the following clause added: "I herewith personally undertake and guarantee, on behalf of the Schacht Motor Car Company of Canada Limited and the National Credit Clearing Company Limited, to carry out the above settlement."

The solicitors insisted on payment of costs, and wired "Settlement off unless costs paid." Mr. Muntz replied that at a meeting of the Credit Clearing Company they agreed to the payment of costs. This letter was acknowledged, and new stock was asked for, both parties assuming that the litigation was then entirely at an end.

On the 14th February, Mr. Muntz wrote with reference to the stock, stating that the British Colonial Company was acting as transfer agents; that notices were being sent out to all shareholders; and that, as soon as the Monarch shares were issued, they would be made out in Mr. Tinsley's name and sent forward. A circular letter was sent forward about the same time, and, in response to this Mr. Tinsley, on the 17th February, signed the necessary documents to secure the transfer of the Motor Truck stock.

The costs were not actually paid until the 14th March, although some correspondence took place with reference to the stock, which does not appear to be of much importance until the letter of the 6th June, 1913, when Mr. Muntz informed the plaintiff's solicitors that, by reason of the Schacht company's shareholders failing to fall into line and to send in their shares for transfer, the situation had become difficult, as the Monarch people would not do anything until all the Schacht shares were ready to be transferred. He then offered to turn over to the plaintiff the whole $7,000 Schacht shares. The plaintiff's solicitors declined to accept these as a settlement, and wrote in reply on the 11th June: "If the settlement cannot be carried out as guaranteed by you, our client wants his money." The writ in this action was then issued.

At the hearing, it appeared that the Monarch company was still-born. It has never issued any shares, has no assets, and the whole contemplated transaction between the Schacht company and the Monarch company is at an end. The plaintiff claims specific performance of the agreement, and, in the alternative, damages.

The companies deny that the settlement created any obligation upon them. They state their readiness to give the stock in

the Schacht company, and that the agreement cannot be carried out unless and until the exchange of shares between the Schacht company and the Monarch company can be completed, and that the defendants are not responsible for the failure of the completion of the contemplated exchange. Muntz denies liability upon his so-called guaranty, and substantially repeats the same allegation as set up by the company.

At the hearing, both counsel insisted that the litigation had been settled. Although the Schacht stock has not been handed over, it is available to the plaintiff. His real grievance is, that he has not obtained, and manifestly cannot obtain, the stock in the Monarch company. The Schacht company is worth nothing, and the Monarch company stock is, if possible, worth less. Specific performance is out of the question, and damages can be nothing more than nominal, as the plaintiff is not injured by failure to receive one worthless thing in exchange for another of no value.

This view of the case renders it unnecessary to determine whether there ever was any obligation on the part of the company or on the part of Muntz. The proper solution of the difficulty appears to me to be to dismiss the action without costs. If I should award nominal damages, I would not give costs; so that the precise form of judgment is not material.

PHILLIPS V. CANADA CEMENT CO.—FALCONBRIDGE, C.J.K.B.—DEC. 8.

Master and Servant—Injury to Servant—Action for Negligence—Findings of Jury—Contributory Negligence—Nonsuit.] —Action by a workman employed by the defendants in their works to recover damages for injuries sustained by him by reason of an air-drill which was being moved by his fellow-workmen toppling over and falling upon him. The action was tried with a jury at Belleville. The learned Chief Justice, referring to the finding of the jury that the foreman was guilty of negligence, said that there was no indication by the jury as to wherein the negligence of the foreman consisted, and it would be difficult to point it out. The plaintiff sat down by the fire, with his back to the air-drill, when, he said, the defendants' servants were either moving the air-drill or had just stopped; and his own witness Schriver said that they had finished moving it when the plaintiff sat down. He paid no atten-

tion to what was going on behind him, and the machine fell over on him. It was a clear case of contributory negligence; and the case might properly have been withdrawn from the jury. Action dismissed with costs, if exacted. E. G. Porter, K.C., and W. Carnew, for the plaintiff. W. B. Northrup, K.C., and R. D. Ponton, for the defendants.

RE SMITH AND WILSON—LENNOX, J.—DEC. 15.

Vendor and Purchaser—Application under Vendors and Purchasers Act—Reference—Partnership Property—Mortgage—Executions—Registration of Conveyance—Costs—Judgment.]—Appeal by the purchaser from the report or judgment of the Local Master at Ottawa in a proceeding under the Vendors and Purchasers Act. See ante 437. The learned Judge finds and declares that the property in question is partnership property; that the vendor and purchaser hold their respective shares subject to a mortgage; that, subject to the mortgage, each party is entitled to a lien upon the property, and to be repaid whatever sum he put into it for building, improvements, up-keep, betterments, taxes, or other outlays, with interest; and that the difference between the aggregate of these sums and the value of the property is the net profits made by the vendor and vendee by the purchase and handling of the property. He also finds and declares that neither party is entitled to any allowance for his labour, management, or care upon or in connection with the property; that the proposed deed from the vendor to the purchaser has not been delivered; that the four execution creditors have a lien upon and are entitled to participate in the vendor's share of the net profits and in the moneys, if any, which he contributed from his own means as aforesaid; but that the Sheriff cannot realise upon the vendor's interest, and it cannot be made available without the assistance of the Court; and, with the consent and approval of all parties, he declares the total value of the property to be the sum of $5,000.—In order to avoid unnecessary expense, and with the consent of counsel aforesaid, the learned Judge orders and directs that the four creditors who have executions in the Sheriff's hands be and they are hereby added as party claimants in this matter, and that this matter be referred back to the Local Master to take an account of the amount of mortgage-money charged upon the property, including the interest thereon

to the date of taking the account, the amount which each of the parties hereto has put into the property, with interest to the date of taking the account; and, after deducting these several sums from the sum of $5,000, to ascertain and declare the total net profits, and to declare that each of the parties hereto is entitled to and has a share in the property to the extent of one-half of these net profits and the sum with interest thereon which he has put into the property ascertained as aforesaid; and that the Master shall certify all these matters to the Court.—The learned Judge further declares and adjudges that the costs of the counsel appointed to represent the execution creditors shall be paid out of the moneys representing the share and interest of the vendor; and that the balance shall be paid to the Sheriff, to be distributed by him according to law among the several creditors of the vendor who have executions in his hands at the time of the registration of the deed as hereinafter provided; that there shall be no costs to the other counsel appearing for creditors; and that the other costs of the proceedings herein shall be borne by the vendor and purchaser in the proportion of their shares as ascertained.—The learned Judge also declares and adjudges that, upon payment by the purchaser of the several sums directed to be paid by him, he shall be at liberty to register the deed referred to in these proceedings; and, upon registration thereof, at the time of payment to the Sheriff the property in question shall become and be absolutely freed and discharged of the claims of all execution creditors then having executions in the Sheriff's hands against the lands of the vendor.—He also orders and directs that, if it should happen that executions against the lands of the vendor, other than the four referred to, are placed in the hands of the Sheriff pending the final winding-up of this matter, these creditors shall be added as party claimants, and they shall have a right to be heard before such final winding-up.—The purchaser will be entitled to a certificate of this judgment for registration, and to an order staying the said several executions as against the lands in question, upon complying on his part with the terms of this judgment. J. E. Caldwell, for the purchaser. W. C. McCarthy, for execution creditors. A. A. Magee, for certain other creditors. C. L. Bray, for the vendor.

KENNER v. PROCTOR—LENNOX, J.—DEC. 18.

Fraud and Misrepresentation—Contract for Purchase of Interest in Land—Misrepresentations of Vendor's Agent—Action of Deceit Brought against Agent—Evidence—Findings of Fact of Trial Judge.]—Action for damages for fraud and misrepresentation in the sale to the plaintiff of a one-tenth interest in land by the defendant as agent for the vendor. The learned Judge said that the plaintiff was bound to make out a clear case. It must appear that he was induced to enter into the contract by false and fraudulent representations of the defendant, knowingly made or made with a reckless disregard as to whether they were true or false. The learned Judge was not satisfied that the evidence shewed conclusively that the defendant did not honestly believe that the statements he made to the plaintiff were true. Discussing the question whether the contract was brought about by the representations complained of, the learned Judge said that he was inclined to believe that the plaintiff was more influenced by his communications with other persons than by anything said by the defendant. Action dismissed without costs. R. McKay, K.C., and R. T. Harding, for the plaintiff. R. S. Robertson, for the defendant.

MEXICAN NORTHERN POWER CO. v. PEARSON—HOLMESTED, SENIOR REGISTRAR—DEC. 19.

Particulars—Statement of Claim—Former Order for Particulars not Complied with—Ability to Furnish Particulars—Discovery—True Function of Particulars—Penalty for Default in Delivery—Costs.]—The plaintiffs claimed damages for breach of a contract to design and construct a hydro-electric power plant on the Conchos river, in Mexico. In the original statement of claim, paragraph 6, the plaintiffs set forth, in various clauses, *a* to *v* inclusive, particulars of the defendants' alleged failure and neglect. In July, 1913, the defendants demanded particulars; and on the 10th October, 1913, an order was made by FALCONBRIDGE, C.J.K.B., requiring the plaintiffs to furnish better particulars of paragraphs 6 and 9. The plaintiffs thereupon delivered an amended statement of claim, purporting to comply with the order; and the defendants now moved for better particulars of some of the matters included in paragraph 6 of the

amended statement of claim. The learned Registrar said that, upon the facts appearing before him, he ought not to conclude that the plaintiffs were unable to furnish the required additional particulars. He also said that discovery is not a substitute for particulars; and referred to the statement as to the function of particulars in Halsbury's Laws of England, vol. 22, p. 453. He was also of opinion that as to some of the clauses the former order had not been complied with. Order made for particulars of certain of the clauses of paragraph 6 of the amended statements. In default of particulars being delivered within a period to be fixed upon the settlement of the order, the clauses of which particulars are ordered will be struck out. Costs of the motion to be paid by the plaintiffs in any event. Glyn Osler, for the defendants. A. J. Thomson, for the plaintiffs.

HAYNES V. VANSICKLE—MIDDLETON, J.—DEC. 20.

Discovery—Examination of Defendant—Action to Establish Partnership—Postponement of Discovery until Right to Participate Established.]—Appeal by the plaintiff from an order of HOLMESTED, Senior Registrar, in Chambers, dismissing an application to strike out the defence of the defendant VanSickle for refusal to answer certain questions upon examination for discovery. The learned Judge said that the case fell within the principle of Bedell v. Ryckman, 5 O.L.R. 670, and that further discovery should not be granted until the right to participate in a certain Buffalo undertaking (in which the plaintiff claimed a share as partner) should be established. Appeal dismissed. Costs to the defendant VanSickle in any event. J. M. Langstaff, for the plaintiff. E. F. Lazier, for the defendant VanSickle.

CORRECTION.

In Hudson v. Napanee River Improvement Co., ante 467, on p. 469, eighth line from the end of the judgment, "*He* waited to see" should be "*We* waited to see."