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DIVISIONAL COURT.

OCTOBER 21ST, 1912.

MOORE v. CORNWALL.

4 O. W. N. 145.

Drains — Open Ditch in Highway — Overflow on Plaintiff's Land —Seepage — Injunction — Damages — Costs.

Action for an injunction and $300 damages in respect of an alleged nuisance caused by defendant corporation in that they permitted certain waters sometimes of an offensive character to flow from and seep through an open drain on the highway on to plaintiff's lands, thus ruining his crops. Defendants denied that any waters came from their drain on to plaintiff's lands and alleged another source.

CO.CT.JUDGE dismissed action with costs.

DIVISIONAL COURT, *held*, that upon the evidence plaintiff's allegations had been proven and that he had therefore shewn a good cause of action.

Smith v. *Eldon*, 9 O. W. R. 963, followed.

Appeal allowed and injunction granted, damages fixed at $200 with costs of appeal and trial on County Court scale if plaintiff consent, if not, reference to County Court Judge and question of costs reserved.

Review of authorities as to municipal negligence for damages caused by flooding, etc., by Lennox, J.

An appeal by the plaintiff from a judgment of the County Judge for the United Counties of Stormont, Dundas, and Glengarry.

The appeal to Divisional Court was heard by HON. MR. JUSTICE RIDDELL, HON. MR. JUSTICE KELLY, and HON. MR. JUSTICE LENNOX.

C. H. Cline, for the plaintiff.

R. Smith, K.C., for the defendant municipality.

HON. MR. JUSTICE RIDDELL:—The plaintiff is the owner and occupier of lot 7, south of Ninth street, in the town

of Cornwall. On a lot a short distance west of his lot is built a furniture factory. Some years ago the town constructed a tile or covered drain opposite this factory, on the south side of Ninth street, from the west nearly to the east line of lot 9—then dug an open ditch or drain east on the south side of Ninth street, past the plaintiff's lot, and on down to Fly creek. The plaintiff complains that his lot has been overflowed by water from this drain from time to time.

In 1905 a committee of the town council reported as follows: "Your committee begs to report having investigated Mr. Wm. Moore's claim to have suffered damage through water flowing over his lot No. 7 s.s. 9th St. As the principal damage was alleged to have been caused by the flow of hot water from the Cornwall furniture factory, your Committee asked Mr. Edwards and Mr. Moore to meet them and discuss the matter. As a result of this Mr. Moore consented to modify his claim of $40. Your committee now recommend that Mr. Moore be paid $20 for the hay destroyed in the years 1903 and 1904, the amount to be divided equally between this municipality and the Cornwall Furniture Company, the Company to be relieved from any further liability."

The plaintiff accepted this proposition; he was paid $10 by the municipality and $10 by the company.

But the trouble continued and the plaintiff brings his action.

At the trial it was to my mind proved beyond controversy by witnesses to whom the learned Judge gave a high character, that the difficulty is that the town constructed the open drain in such a way as that it will fill up, and they neglect to clean it out. It is true that the plaintiff might a little diminish the evil effects of the defendants' negligence by himself digging a watercourse; but he is not called upon to do that. And while it is true that some little of the damage to his lot is done by the occasional backing-up of Fly creek, it is clear that most is due to the negligence of the town.

The neglect of the town to clean out the open drain has caused the plaintiff's lot to be overflowed from time to time by the waters of the drain, and also a more continuous seepage into the plaintiff's land.

For this an action lies *Smith* v. *Eldon* (1907), 9 O. W. R. 963, and cases cited.

I do not see that there is any real contradiction by the witnesses for the defence—and I would allow the appeal with costs here and below.

It is not easy to estimate the damages on the evidence before us; and it may be that the parties will desire to have the damages assessed by the County Court Judge. If, however, the plaintiff will be content with damages assessed at $200 with costs on the County Court scale here and below, I think he should have judgment accordingly. If not, the defendants will be allowed to have the damages assessed by the County Court Judge, and costs of the action, appeal, and reference will be disposed of by one of us on application after the report of the County Court Judge.

HON. MR. JUSTICE KELLY:—On the evidence submitted to us I am unable to see how defendants can escape liability. The cause of the trouble of which plaintiff complains is found in the manner in which defendants constructed the ditch, or drain, and allowed its contents at times to overflow onto plaintiff's lands when they should have kept the ditch cleaned out. This is clearly shewn by the evidence of the witnesses called for the plaintiff, and their evidence is not contradicted to the extent necessary to remove the burden of liability from the defendants. In fact it is not difficult to find in the statements of defendants' witnesses corroboration of plaintiff's contention in material particulars.

As to the damages to which plaintiff is entitled, while I have some doubt, on the evidence, what these should be assessed at, I am inclined to the belief that the $200 suggested by my brother Riddell would fairly compensate the plaintiff. I, therefore, agree with his conclusion as to the manner of disposing of the appeal.

HON. MR. JUSTICE LENNOX:—I think the appeal is well founded. The plaintiff is entitled to relief, and, if there is not a new trial, he should be allowed a substantial sum for damages, with costs.

I have had the advantage of reading the judgment of my brother Riddell, and I agree with him as to the way in which the appeal should be disposed of.

The trial occupied two days. The learned Judge of the County Court makes no findings and gives no reasons for his judgment. Brevity is rare, and is usually commended as a distinguished virtue, but, if I may say so without offence,

it may be overdone, and its lustre obscured when shrouded in some seven hundred folios of undigested evidence, as in this case.

This thought is not at all new. The neglect of County Court Judges to assign reasons has frequently been referred to in appeals, and in a very recent case Mr. Justice Riddell is reported as saying: "The Divisional Courts have more than once said that County Court Judges should give reasons for the conclusions they arrive at; it seems necessary to repeat this once more."

I have read the evidence. It is established beyond question, almost beyond controversy, that before the construction of the sewer and drains complained of, the plaintiff was always able to grow good hay, and at times grain crops, upon the flooded land. It is also clear upon the evidence that immediately upon the construction of the drain, and ever since—except when the ditch has been temporarily kept clean—the plaintiff's land has been flooded and for the most part rendered unfit for crop of any kind. Independently, therefore, of the direct evidence of many witnesses, shewing the actual flow for the last nine years, the conclusion is practically irresistible that the drain complained of had the effect of flooding the land in question; and, whether by direct overflow or by percolation does not to my mind matter at all.

The plaintiff and his witnesses, all who appear to have impressed the learned County Judge by their knowledge of the situation and their honesty, swore specifically to seeing the water upon the plaintiff's lands from year to year since the drain was constructed, that the water came from this drain, and that the land in question, now useless, was fairly good agricultural land before the construction of the drain.

Several witnesses were called by the defence, but they left practically undisturbed the evidence put in by the plaintiff.

As to the evidence of the experts—an engineer called by each party—I think it may be left out without any sensible loss to anybody. The learned trial Judge said, concerning the expert witness called for the defence:

"When you bank everything upon an engineer's evidence you are putting theory against fact, and it is wonderful how they conflict at times. You can work out things most beautifully theoretically, but when it comes to facts things arise which conflict with theory.

Then as to the other witnesses for the defence, there are few of them who do not on some important point corroborate the plaintiff or his witnesses, or conflict with other evidence for the defence. For instance, the defendants' engineer swore that the bank at the lowest point was twelve inches high, and this would be sufficient to retain the water; but Henry Williams, who examined it on three different occasions, says "there was not much water, it might have been two or three inches deep, but the top of the water, I should say, would be on an average of two or three inches below the top of the bank"; or, in other words, from four to five or six inches deep, all told.

A persistent effort was made to ridicule and discredit the evidence which traced the source of the water on the plaintiff's land by shewing that steam was frequently rising from it and that there were disagreeable odors at times; but this evidence was in the end clearly corroborated by John Green, an engineer in the furniture factory, who shewed that the water-closets of the factory emptied into this drain, that water of high temperature was discharged into it, that in the winter he found that this drain was not frozen, and that little frogs were wintering there.

Charles Lant, the defendants' general superintendent of works, testified that when the ditch was cleaned out in June, 1911, the depth was increased from two to four inches, and that after that, there was from three-quarters of an inch to an inch and a quarter of water in it, and that the water could then rise six or eight inches without overflowing. This gives a total depth, when cleaned out, of, say, eight inches, and of from four to six inches before cleaning out. Yet, until this evidence was given, there was no pretence by the defence that six or even eight inches would be a sufficient depth to prevent an overflow.

Referring to this, and to the fact that the engineer had sworn to a depth of one foot at the lowest point, his Honour the trial Judge said: "I see the most violent conflict in this case. A number of reputable citizens have sworn to a certain state of facts which your engineer has worked out theoretically as impossible. I am not going to find out the particular reasons why these things occur. The engineers have agreed that if the ditch was flooded it would overflow. It seems to be a ditch that would very easily overflow, and a number of reputable witnesses have sworn that it did overflow."

James H. Ramsay saw the ditch after it had been cleaned out, and could detect from the banks how deep it had been. It had ranged at the lowest places from three or four inches to nine inches; and he says that in that condition "It was sufficient if no back water from the creek."

Speaking of drainage by Sidney Street, he says: "It would be a better outlet for the water, but there would be a longer distance of pipe." He is asked: "But you think, irrespective of distance, that it would be a better mode of drainage?" and he answers: "Yes, I do."

In reference to this the learned Judge said: "I cannot see why there should be any difficulty about running a pipe down Sidney street to Fly creek, and it looks reasonable that if there is anything like half-a-mile difference, that you would get better drainage down there and less liability of blocking."

There were some witnesses who were sure that the water did not come in directly from the drain in question; but their evidence was theoretical, and could not reasonably displace the testimony of reputable witnesses speaking from the actual knowledge.

It is difficult, therefore, to surmise on what the judgment is based. If I may judge from the line of cross-examination of the plaintiff's witnesses, and enquiries made from time to time by the learned Judge, the error seems to be in assuming that if the lands in a state of nature were wet and comparatively useless—receiving large quantities of water from the lands to the north and west of them—it followed, *per se*, that there was no ground of complaint. This at all events seems to me to be the only, even plausible, ground upon which the judgment could rest.

But it is clear that the defendants cannot collect and concentrate even surface water and pour it upon the plaintiff's lands. Moss, J.A., in *Ostrom* v. *Sills*, 24 A. R. 526, at p. 539; *Tucker* v. *Newman*, 11 A. & E. 40; *Fay v. Prentice*, 14 L. J. C. P. 298; *Billows* v. *Sackett*, 15 Barb. 96. In a state of nature this surface water was certainly widely diffused.

Increasing the quantity or the velocity, too, makes the defendants liable. *Malott* v. *Township of Mersea*, 9 O. R. 611.

Bringing hot and foul water, as the defendants did, from the factory, they must keep is there, at their peril; and this is the rule as to what Lord Cairns denominates "the non-natural use" of the defendants' premises, whether the thing brought there "be beast or water or filth or stenches." *Rylands* v. *Fletcher*, L. R. 3 H. L. 330. As said in *Tenant* v. *Goldwin*, Salk. 21, 361: "He whose dirt it is must keep it that it may not trespass."

To send down polluted water is always actionable. *Hodgkinson* v. *Ennor*, 32 L. J. Q. B. 231; 8 L. T. 451; *Womersley* v. *Church*, 17 L. T. N. S. 190; *Reeve* v. *Toronto*, 21 U. C. R. 60; *Matthews* v. *City of Hamilton*, 6 O. L. R. 198.

And the parties may be enjoined. *City of St. John* v. *Baker*, 3 N. B. Eq. 358; *Ballard* v. *Tomlinson*, 29 Chy. D. 155.

The plaintiff is not called upon to shew actual damage. *Crossley* v. *Leighton*, L. R. 2 Chy. 478.

The plaintiff need not have any property in the water until it actually comes upon his land, and it matters not whether it comes visibly, as by overflow, or invisibly by seepage underground. *Ballard v. Tomlinson*, above; where the whole question of pollution is fully considered.

A laboured effort was made, and much time taken up, to shew that Fly creek chokes up and blocks this drain, and that the condition of Fly creek at high water accounted for the flooding of the plaintiff's land. Perhaps it did to some extent; but does it matter at all? The defendants argue that the creek overflows and the water spreads out west and reaches the plaintiff's land. Does it alter the situation if it does? A municipal corporation is not allowed to collect water and bring it down to the plaintiff's land without providing a proper outlet. *City of Indianapolis* v. *Lawyer*, 38 Ind. 248; *Weese* v. *Mason*, 39 Am. Rep. 135; *Burford* v. *Grand Rapids*, 53 Mich. 98.

Having brought this dangerous thing down to the plaintiff's land, the defendants were bound to keep it under control and carry it safely on to a proper outlet. It cannot affect the question of their liability whether they poured it directly from their drain or emptied it into an already full reservoir where of necessity, as the defendants claim, it would overflow upon the defendants' land.

This drain was in porous mucky land; seepage was inevitable at all times, and would be rapid when the waters dammed up. The defendants knew of the damming—there was constant complaints—and even if they had only "reason to believe that the drain would choke," the municipality is liable. *Scroggie* v. *Guelph*, 36 U. C. R. 535.

They must exercise reasonable care in the construction of their works. *Derinzy* v. *Ottawa*, 15 A. R. 712, at p. 716; *Reeve v. Toronto, ante.*

The defendants were wrong *ab initio*. This drainage work was constructed at the instance of and mainly for the benefit of the factory company, and the defendants have no right to exercise their powers for the convenience of individuals: *Fontaine* v. *Corporation of Sherrington*, Q. R. 23 S. C. 532 (Ct. Rev.); and they are liable for the acts of the factory company. *Van Egmond* v. *Town of Seaforth*, 6 O. R. 599.

The plaintiff asks for an injunction, and I think the facts shew him to be entitled to have it; but damages from time to time, if the defendants are so ill-advised as to persist, will be a fairly adequate remedy; and the plaintiff himself has not regarded the injury as irreparable, if we may judge from the long delay in bringing this action.

HON. MR. JUSTICE RIDDELL, IN CHRS. OCTOBER 21ST, 1912.

WELSH v. HARRISON.

4 O. W. N. 139.

Estates — Partition — Sale under Order — Payment into Court — Con. Rule 1146 — Costs.

Motion on behalf of all parties to a partition proceeding for distribution of the moneys in Court in accordance with the report of the Local Master at Whitby.

RIDDELL, J., *held*, that the commission allowed by Con. Rule 1146 is in lieu of all costs future as well as past, and the Master taxing the disbursements should also take into account all future disbursements as well as past disbursements.

J. A. Campbell, for all parties.

HON. MR. JUSTICE RIDDELL:—On December 7th, 1908, an order was made herein by Mr. Justice Britton at the Whitby Assizes for partition, etc., paragraphs 2, 3, and 4

of which correspond with paragraphs 2, 3, and 4 of Form 158 with reference to the Master at Whitby; paragraph 5 directs an account of rents and profits received by four of the defendants, and paragraph 6 an account of the goods and chattels of the deceased received by the said defendants. The plaintiff and the defendants were tenants in common of the land.

The Master directed a sale of the lands, and an advertisement was issued for a sale by auction, March 20th, 1909, the defendant, Catherine Harrison, was declared the highest bidder, but her offer was accepted subject to the consent of the others interested, she being a party to the action. I do not know why this was necessary, Con. Rule 725; but no one complains of this, and there may have been some good reason.

It proved impossible to get this consent and subsequent attempts were made to sell by auction, May 7th, 1910, and by tender, July 1st, 1910; June 15th, 1911; August 1st, 1911, all of which attempts proved abortive.

Catherine Harrison's bid had been $3,650: she paid, at the time, $365 to the plaintiff's solicitors, and he paid it into Court. Subsequently the lands were sold by tender to four persons in separate parcels, one of them, Catherine Harrison, and by a perfectly proper agreement her payment of $365 was allowed on her purchase money. All the purchase money was paid into Court and vesting orders have been issued therefor. The Master's report has become absolute by lapse of time.

The Master has properly allowed a commission in lieu of costs under Con. Rule 1146.

I am now asked to make an order (1) that Catherine Harrison be paid the interest upon her payment of $365 from the time it was paid into Court until the time at which she could have been required to pay for her final purchase (I may say that, by a strange oversight, the date of this sale does not appear in the Master's report or in the affidavit filed); (2) that the costs of this application may be paid out of the fund in Court; (3) that payment out may be made in terms of the report.

All parties consent to the last two. As to (1) this is a proper order to make in any case: Catherine Harrison paid money into Court which she should not have paid, and the other beneficiaries are not entitled to have any advantage of the interest upon that sum.

As to (2) the application must be refused; the commission covers all costs other than disbursements. When the disbursements are taxed by the Master, he takes account of all disbursements proper to be allowed, future as well as past, and the commission covers all costs, future as well as past.

As to (3) subject to what I have said in respect of (1), the order may go.

It seems to be necessary again to call the attention of practitioners to the necessity of filing all the papers which are to be used on motions—it is too much to expect the Court to act the solicitor's clerk and hunt up the missing documents.

I have recently pointed out, also, that the Court does not act as a conduit pipe to draw orders through just because parties desire them. Mere consent will not justify the issue of an order wrong in principle.

HON. SIR WM. MULOCK, C.J.Ex.D. OCTOBER 21ST, 1912.

PATTERSON v. OXFORD FARMERS MUTUAL FIRE INS. CO.

4 O. W. N. 140.

Insurance — Fire — Misrepresentation and Concealment in Application for Policy — Want of Notice of Loss — Statutory Conditions 13 and 15—Insurance Act s. 172—Relief from Omission.

Action by a farmer, to recover on a policy of insurance against fire. Defendants alleged misrepresentation, concealment and want of notice of loss as defences to the action.

MULOCK, C.J.Ex.D., *held*, that the onus was on defendants to prove the materiality of any misstatement in the application and that they had failed to shew that a misstatement in the application, apparently filled in by the agent without plaintiff's knowledge, that the farm was unencumbered, was material.

Morton v. *Anglo-American Fire Ins. Co.*, 19 O. W. R. 870, and *Loute* v. *London Mutual Fire Ins. Co.*, 9 O. L. R. 555, followed.

That evidence by a director of defendants that the directors would have regarded such misstatement as material and would have refused the policy was inadmissible.

Burrell v. *Bederley Holtz*, N. P. C. 285; and *Campbell* v. *Richards*, 5 B & Ad. 841, followed.

That a statement in the proofs of loss that "there was no one except my own family around the place when I returned," even if false would not vitiate the policy not being one of the "particulars" mentioned in the statute.

Goring v. *London Mutual Fire Ins. Co.*, 19 O. R. 247, followed.

That the Court had power to relieve against omission to give notice of loss and it was equitable so to do in this case where the company's officers had had immediate actual notice and plaintiff did not know specific notice was required.

Prairie City Oil Co. v. *Standard Mutual Fire Ins. Co.*, 44 S. C. R. 40;

Bell Bros. v. *Hudsons Bay Ins. Co.*, 44 S. C. R. 419, followed.

Judgment for plaintiff for $2,951.70, and costs.

W. J. McMullen and James Wallace, for the plaintiff.

S. G. McKay, K.C., contra.

Hon. Sir Wm. Mulock, C.J.Ex.D.:—This action is on a fire insurance policy to recover $1,500 insurance on a barn, $200 on a shed, and $1,251 on contents of the destroyed buildings situate on the east half of lot No. 29 in the 10th concession of the township of West Zorra in the county of Oxford.

The grounds of defence as relied upon at the trial were:

1. Material misrepresentation and concealment in representing the property as free from incumbrance at the time of the application for insurance, whilst it was at the time subject to a mortgage for $4,500 and to a life charge in favour of the plaintiff's mother.

2. Concealment of the fact that the plaintiff feared incendiarism.

3. False and fraudulent statements by the plaintiff in the proofs of loss in overvaluation of certain of the destroyed chattel property, viz., certain wheat and hay, and in stating that "there was no one except my own family about the place when I returned," whilst in fact one Dennis had returned with him.

4. Omission forthwith after the loss to give written notice to the company.

Dealing with the alleged misrepresentation and concealment respecting the incumbrances on the realty. It appears that the plaintiff acquired the land in the year 1893, under his father's will, subject to a life interest in favour of his mother in a small portion of it, and, also, to her maintenance and to the payment to her of the annual sum of $50 during her life. All these interests cease on her death. She is still alive, and the plaintiff has met all charges in her favour. Except as to charges created by the will, the property was unincumbered when acquired by the plaintiff in 1893. There was no barn upon it, and in the year 1899, the plaintiff raised, by mortgage, $2,500, wherewith to erect a barn and otherwise improve the farm. In 1907, that mortgage was discharged. On the 12th of June, 1908, he mortgaged the property for $3,500. This mortgage was discharged in July, 1910, when he effected a new mortgage for $4,500. This last named mortgage was in force when, on the 10th of November, 1910, the plaintiff signed the application for the policy in question.

The application contains the following printed words: "Incumbrance, state full particulars," and following them in writing the word "none." This word "none" was written by W. H. Sutherland, the company's agent, who canvassed the plaintiff for the application, but when and by what authority is in dispute.

Then, at the foot of the plaintiff's application, above his signature, is the following printed matter: "That said applicant hereby covenants or agrees to and with the said company that the 'following' is a just, full and true exposition of all the facts and circumstances in regard to the conditions, situation, value and risk of the property to be insured, as far as the same are known to the applicant, and agrees and consents that the same with the diagram of the premises herewith, shall be held to form the basis of the liability of the said company, and shall form a part and be a condition of this insurance contract."

The condition contained in this covenant may be disregarded, it not being evidenced in manner prescribed by secs. 169 and 170 of the Ontario Insurance Act (the Act then in force).

Dealing with the first ground of defence, the onus is on the defendant company to establish the materiality of the alleged misrepresentation and concealment. *Morton* v. *Anglo American Fire Insurance Co.*, 19 O. W. R. 890; *Loute* v. *The London Mutual Fire Insurance Company*, 9 O. L. R. 555. In the latter case the defence raised was non-disclosure of a mortgage, and Street, J., dealing with the point, said: "No evidence was given of the value of the mill which the mortgage covered. No one gave any evidence from which I can judge of the materiality of the circumstances relied on and I am, therefore, unable to say that the defendants have made out their defence."

I accept the plaintiff's evidence that at the solicitation of Sutherland, the defendants' agent, the plaintiff signed the application in blank, nothing having been said between them as to the existence of any incumbrance on the property, and the plaintiff not being aware that the application called for information on the point, and that subsequently Sutherland filled in the word "none."

He admits having placed the diagram on the back of the application at his own house some days after it was signed by the plaintiff, but is unable to say by what auth-

ority. Thus, the application was admittedly incomplete when received from the plaintiff, a circumstance which lends colour to the correctness of the plaintiff's statement. In canvassing the plaintiff, Sutherland was the defendants' agent, and if, as I find he did, he thought so little of the matter of the incumbrances as not to refer to them when obtaining the application, the plaintiff should not be blamed for not appreciating its importance. *The Guardian Assurance Company* v. *Connely,* 20 S. C. R. 208.

The answer "none" was not the answer of the plaintiff and he is not bound by it. The non-disclosure of the existence of the incumbrances was innocent, but, nevertheless, if a material circumstance, it was the plaintiff's duty to have made it known to the company, and the real question is whether the defendants have been prejudiced by such non-disclosure. Mr. Smith, one of the directors when the application was passed, and now the president of the company, swore that in his opinion the Board would not have passed the application if they had known of the existence of the incumbrances.

That is, doubtless, Mr. Smith's present individual opinion, but it does not follow that the Board would have taken the same view, and I think Mr. Smith's evidence on the point inadmissible. *Burrell* v. *Bederley, Holtz,* N. P. C. 285; *Campbell* v. *Richards,* 5 B. & Ad. 841. There being no evidence as to the value of the property, it is impossible to say that the existence of the incumbrances was a material fact that should have been made known to the company in order to guide them in their action. If the property was worth a substantial sum over and above the amount of the incumbrances, the company would, in my opinion, have accepted the application. For example, if it were worth $10,000, not at all an excessive value on a farm of that extent of that in question, I have no doubt that the company, with a full knowledge of the incumbrances, would have issued the policy in question. They having failed to prove the materiality of the alleged misrepresentation and concealment, this ground of defence fails.

As to the defence that the plaintiff concealed the alleged fact that he feared incendiarism; the only evidence is what he says: "I was threatened to be burnt out seven or eight years ago by Thomas Scott." That evidence does not prove the existence of any danger of incendiarism at the time

of the application or that the plaintiff then "feared incendiarism" and this ground of defence fails.

The next ground of defence, that of over-valuation and the proofs of loss as to the value of certain farm produce, I disposed of at the trial adversely to the defendants' contention.

As to the defence that in the proofs of loss the plaintiff falsely stated that: "There was no one except my own family about the place when I returned" (referring to his returning home on the night of the fire), even if this was a false statement, it would not vitiate the claim. The policy is subject to conditions 13 and 15 of the statutory conditions. (I refer to the Insurance Act, R. S. O. ch. 203, and not the Ontario Insurance Act, 1912). Sub-section (c) of condition No. 13 declares that with reference to the loss, a person claiming the insurance money is to furnish to the company a statutory declaration in regard to certain particulars, and condition No. 15 declares that any fraud or false statement in a statutory declaration in relation "to any of the above particulars" shall vitiate the claim. The alleged false statement in question is not one of the particulars required to be so furnished, and its truth or falsity would not affect the claim. *Goring* v. *London Mutual Fire Insurance Company*, 10 O. R. 247. This ground of defence is, therefore, disallowed.

As to the last ground of defence, viz., omission by the plaintiff to give notice in writing of the loss. Such notice was not given, but the Court may, under sec. 172 of the Insurance Act, if it deems it equitable, relieve from such omission. *Prairie City Oil Company* v. *Standard Mutual Fire Insurance Co.*, 44 S. C. R. 40; *Bell Bros.* v. *Hudson's Bay Insurance Co.*, 44 S. C. R. 419.

The fire occurred on the morning of Friday the 19th October, 1911, and, on the same day, the plaintiff caused his sister to telephone to the company informing them of the loss. The same day, in consequence of such notification, the president and two other directors came to the plaintiff's premises, there saw the ruins, had some conversation with the plaintiff, and stated that it was too late to do anything, but would return on another day. On the following Monday they returned, again discussed the loss with the plaintiff and obtained detailed particulars from him of the loss, which they took down in writing, and on

leaving instructed him to attend the first meeting of the directors. This the plaintiff did, and at that meeting gave them all the desired information touching the fire and the loss. The secretary of the company, who was present, prepared for the plaintiff a statutory declaration which he then made, setting forth the circumstances in connection with the fire, the particulars of the destroyed property and the extent of the loss. This, together with the policy, the secretary then obtained from the plaintiff, and the same have ever since remained in the company's possession.

The plaintiff doubtless thought that the visit of the directors to his premises and the subsequent action of the Board above referred to had to do with his claim.

On the 14th October, 1911, the company had made an assessment against the plaintiff on his premium note, which assessment he paid on the 9th November, 1911. Subsequently the parties got at arms length, and on the 31st of January, 1912, the plaintiff sent to the company a further statutory declaration dealing with the loss and claim, and on the 14th May, 1912, the company wrote to the plaintiff returning the premium note and stating that the policy was cancelled. Under these circumstances the company does not appear to have been prejudiced by the absence of a written notice of the loss. If it should have been given on or about the date of the fire, the conduct of the directors in visiting the plaintiff's premises in consequence of the verbal notice was calculated to cause the plaintiff to suppose that the verbal notice was sufficient, and I am of opinion that the conduct of the directors and the Board was an adoption of the verbal notice as sufficient, and that, therefore, the plaintiff is entitled to the benefit of the relieving section. I, therefore, disallow this objection to the claim. Thus, the various defences fail, and judgment should be entered for the plaintiff for $2,951.70, with costs.

HON. MR. JUSTICE MIDDLETON. OCTOBER 22ND, 1912.

WIGGIN & ELWELL v. BROWNING.

4 O. W. N. 155.

Broker — Shares Purchased without Authority — Evidence — Correspondence — Ratification — Estoppel.

Action by a firm of brokers against a barrister to recover $5,538.75, in respect of certain shares bought for the latter. The purchases were made by one Mills in the name of defendant who was out of the country at the time and were absolutely unauthorised. When defendant returned and discovered the purchases he repudiated them to the solicitor of plaintiff. Later on being pressed by plaintiffs in correspondence to admit liability, he wrote: "It may be that you are right in thinking that I am personally responsible and as to this I am not expressing an opinion." Plaintiffs claimed that this letter amounted to an estoppel or ratification on the part of defendant.

MIDDLETON, J., *held*, that although the letter in question was disingenuous it did not import liability.

Dominion Bank v. *Ewing*, 7 O. L. R. 90; 35 S. C. R. 133, [1904] A. C. 807.

British Linen Co. v. *Cowan* (1906), 8 F. 704 and *Mackenzie* v. *British Linen*, 6 A. C. 82, discussed.

Action dismissed without costs.

H. H. Dewart, K.C., for the plaintiff.

R. McKay, K.C., for the defendant.

Action tried at Toronto, 4th October, 1912.

HON. MR. JUSTICE MIDDLETON:—The plaintiffs are stock brokers, carrying on business at Boston, Mass. The defendant is a barrister, practising at North Bay and at Toronto. At the time of the occurrences hereinafter related he was absent from Canada.

J. F. Mills, now deceased, was a broker, carrying on business in Toronto. Browning had had business transactions with Mills, but Mills had no general authority to act for him in any way.

In July, 1911, Mills was interested in the flotation of a mining company known as the Porcupine Coronation. He had asked Browning to assist him in this. Browning had absolutely refused to have anything to do with it.

During Browning's absence, and for the purpose of forwarding his own schemes in connection with this company, Mills conceived the idea of purchasing stock in the company, from the plaintiffs, in Browning's name, and he accordingly telegraphed the plaintiffs, instructing purchase of the stock.

Some correspondence ensued; all the communications from Toronto being telegrams sent by Mills in Browning's name, and the answers, both by telegram and letter, being intercepted by Mills in some way not explained. In the result, several parcels of stock were purchased and drafts were made by the plaintiffs upon Browning, in pursuance of instructions given by Mills in his name. One of these drafts was paid by Mills, but at the end of July 25,000 shares had been purchased and there was some $8,500 due to the plaintiffs.

On the 2nd of August, Mills cabled to the defendants at London for authority to purchase for him 25,000 shares of Coronation. This cable message reached the defendant at Belfast. He wrote, refusing: "I would not give an order for 25,000 if I were on the ground. The mine may be all right, but I have too many irons in the fire to go as far as you in your gambling transactions."

On the drafts being unpaid, a member of the plaintiffs' firm came to Toronto and saw Mills. The matter was placed in the hands of solicitors, and it then became quite apparent that Mills had no authority to use Browning's name. This is clear from the letter written by the plaintiffs' solicitors to Mills on August 2nd. It is true that a letter of August 14th was tendered in evidence for the purpose of getting over the statements contained in the earlier letter; but no evidence was adduced in support of the statements contained in that letter, and I think I should disregard it.

Mr. Browning returned to Toronto in October, 1911, and was advised by the solicitors of what had taken place in his absence. He saw Mills. He says: "I asked Mills for an explanation of what he had done . . . He admitted that he had acted without authority . . . that he knew he was liable criminally, and had done what he did thinking that the stock market would act differently from the way it had gone." (Examinations for discovery.) The solicitors at this time pressed Browning to admit or assume liability. This he declined to do, and up to this point, no possible fault can be found with his conduct.

On the 14th of November he wrote a letter to Mr. Elwell, one of the members of the plaintiffs' firm, stating that since his return he had been interviewed both by

Mills and Hodgson (the solicitor) with regard to the purchase of stock made by Mills in his name, and he adds: "Mills claims that he had authority to purchase this stock; and while I am not admitting this, I do not wish for the present to take the stand that he had absolutely no right to do what he did. At the same time, I do not feel like guaranteeing the amount."

On the evidence of the defendant, which I accept, Mills not only had no authority but did not claim that he had any authority; and this letter is most disingenuous. It was well calculated to lead the plaintiffs to suppose that the question of Mills' authority was one of doubt, upon which different views might be taken.

The plaintiffs did not at once respond on receipt of this letter; but on the 22nd November they wrote a letter which might also be the subject of criticism, stating that they were "carrying the account in its present position as a personal indulgence and to enable you to avoid a loss if possible. In view of the fact that you have not repudiated liability, we are willing to give you a further opportunity of working out the account."

This was immediately replied to by a letter of the 24th, in which Mr. Browning said: "I am not admitting liability." On December 1st the plaintiffs wrote: "If we are to understand it (the letter of the 24th) as a repudiation of your liability for our account, we fancy that we cannot allow the matter to stand. We are satisfied that we have sufficient evidence to establish your responsibility, and we do not feel justified in postponing action." On the 4th of December Mr. Browning replied: "It may be that you are right in thinking that I am personally responsible, and as to this I am not expressing an opinion."

It is sought to treat this letter of the 24th November as bringing the case within the decision of *Dominion Bank* v. *Ewing* (1904), 7 O. L. R. 90; 35 S. C. R. 133; [1904] A. C. 807.

To understand the precise effect of that decision is not easy. In the Supreme Court, no doubt, the majority of the Judges thought that where one learns that another had been, without authority, purporting to act in his name, he owes a duty to the person with whom the transaction has taken place, to inform him that the transaction was

without authority, and that by failing in this duty he is estopped from thereafter asserting the absence of authority.

In the Privy Council no such wide proposition is assented to. Their Lordships regard the matter as a pure question of fact, and treat the principle of *Mackenzie* v. *British Linen,* 6 A. C. 82, as governing the case. There, the principle invoked was not estoppel, but rather ratification. The silence of the defendant was treated as "very strong evidence indeed, that Mackenzie, for Fraser's sake, thus ratified Fraser's act for a time; and a ratification for a time would, I think, in point of law, operate as a ratification altogether."

In *British Linen Company* v. *Cowan* (1906), 8 F. 704, the Court of Session, while accepting to the full the decision in *Mackenzie* v. *British Linen,* also adopt the statement of the Lord Ordinary when he says:

"Upon general principles I cannot too strongly repudiate the idea that one person can fasten liability upon another, with regard to a matter with which that other has no previous concern, by writing him letters or handing him documents which *ex facie* demand an answer, and afterwards founding upon the fact of no answer being received to them as inferring liability of some sort on the part of the person to whom they were sent. I consider it to be the right of every person who receives a letter or other document regarding a matter with which he is not concerned, to destroy that document at once and take no further notice of it, and to countenance any other doctrine might, I think, be productive of most mischievous results and put honest people to a vast amount of annoyance, trouble, and expense."

It is, however, I think, my duty to accept the law, as I understand it, laid down by the majority of the Supreme Court; and I do so with the less hesitation because I think that even if there is no obligation on the part of the recipient of the letter to answer, there is, I think, an obligation upon him, if he undertakes the burden of answering, to state the truth with absolute candour.

But I do not think that this helps the plaintiff. At the time the letter was written the loss had been sustained. The plaintiffs knew that Mills had no authority. If they had learned anything between the 2nd and 14th of August to justify a change of opinion, they had the facts

before them. The solicitor's interviews with Browning were not for the purpose of seeking information upon which the plaintiffs intended to act in their dealings with Mills. It is not shewn that they in any way acted upon or relied upon the letter. What was sought was an admission by Browning of his own liability. What was given was a denial of liability, or, at any rate, a refusal to admit liability, unsatisfactory beause made in terms which import doubt on Browning's part as to the evidence of his legal position, when he had no doubt.

I think I would be extending the Supreme Court's decision unwarrantably if I were to treat it as applying to the circumstances of this case as warranting either a finding of assumption of liability or as creating an estoppel.

The action fails, and must be dismissed; but, as it has been provoked by the letter under discussion, without costs.

HON. SIR WM. MULOCK, C.J.EX.D. OCTOBER 22ND, 1912.

RE JOHNSON.

4 O. W. N. 153.

Will — Construction — Bequest of Personalty — Absolute Bequest of Life Interest.

Testator gave his wife his "house and lot together with all my money, notes, mortgages . . . for the term of her natural life she remains my widow." On his widow's death or remarriage the house and lot were given over, certain pecuniary legacies were to be paid, and by a later clause any residue was disposed of. The question asked the Court was whether the widow took a life interest or an absolute interest in the "nomey, notes and mortgages."

MULOCK, C.J.EXD., *held*, that the widow only took a life interest in the above-named property.

Costs of all parties out of the estate.

An application for the construction of the will of the testator, William Johnson, and the question was, what interest the testator's widow took in that portion of his personal estate described in his will as "all my money, notes and mortgages." She claimed to be entitled to it absolutely, whilst the daughter's contention was that she took but a life interest in it. The will was as follows:

"I give, devise and bequeath all my real and personal estate . . . in the following manner . . . I give, devise and bequeath unto my wife, Agnes Johnson, my

house and lot in Rugby . . . together with all my money, notes, mortgages and all my real and personal estate of every nature and kind whatsoever of which I may die possessed or interested in at the time of my decease, for the term of her natural life she remains my widow . . . In the event of her remarriage or death then the following legacies shall be paid forthwith if there is sufficient funds to pay the same. . . .” Then follows a list of specific, pecuniary legacies. Then the will proceeds: “From and after the remarriage or death of my wife, Agnes Johnson, I give, devise and bequeath my said house and lot together with furniture, household furnishings and effects or any live-stock and chattels, to my oldest unmarried daughter . . . if at the time of the remarriage, or death of my wife my daughters are all unmarried, then my said property shall be sold and proceeds of sale divided equally among by daughters then living. Of the residue of my estate of every nature and kind not hereinbefore disposed of, I give, devise and bequeath unto my daughters equally, share and share alike. If an unmarried daughter comes into possession of my house and lot at Rugby, at her marriage or death, if she is still possessed of it, it shall go into possession of my next oldest unmarried daughter, and so on whilst any of the unmarried daughters are alive.” Then followed the appointment of executors.

N. B. Tudhope, for the widow and one of the executors.

D. Inglis Grant, for Janet Ratcliffe, one of the daughters of the testator.

Hon. Sir Wm. Mulock, C.J.Ex.D.:—I am unable to see how, under the language of this will, the widow is entitled to the corpus of the “money, notes and mortgages.” The testator in the first clause gives her his house, together with the moneys, notes, etc., “for the term of her natural life she (sic) remains my widow.” Doubtless the word “whilst” was intended to precede the word “she.” On her death (an event which must happen), or remarriage, the house is disposed of in remainder. In the event of the widow's death or remarriage, the pecuniary legacies are to take effect. By the same set of words the testator gives his widow the house and “my money, notes and mortgages,” not absolutely, but at longest for the term of her natural life. These words would be meaningless

if she took the money, notes, etc., absolutely. In *Re Thomson's Estate, Herring* v. *Barrow*, L. R. 13 Chy. D. 144, affirmed, 14 Chy. D. 263. That the testator did not so intend is further shewn by the provision that "in the event of her remarriage or death then the following legacies shall be paid forthwith if there is sufficient funds to pay the same." The widow taking the personalty absolutely would defeat this provision. Then, from and after the marriage or death of his wife, the testator gives the house, furniture, household furnishings and fixtures, live-stock and chattels to his eldest unmarried daughter. The gift to his wife of all his money, notes and mortgages and all his "real and personal estate" for the term of her natural life would, unless cut down by other words, include his furniture, etc., but the gift over of the furniture, etc., to a daughter after his wife's death or remarriage, shews that the widow was not to take the furniture, etc., absolutely, but only during her lifetime at farthest, and leads to the same construction as to her interest in his "money, notes and mortgages." Further, the testator contemplated a residue after the widow's death or remarriage and after the payment of the legacies, and this residue he disposes of by the residuary clause of his will: "All the residue of my estate of every nature and kind not hereinbefore disposed of, I give, devise and bequeath unto my daughters equally, share and share alike," etc. If the widow took all his personalty absolutely, there would be no residue.

The will as a whole, makes clear the testator's scheme for disposing of his estate, namely, to give an interest to his wife during her natural life, or until her remarriage, and thereafter to distribute the estate amongst his children.

For these various reasons, I am of opinion that the widow is entitled to a life interest only in the testator's "money, notes and mortgages." Mr. Tudhope stated that this was the only question upon which the opinion of the Court was desired. The application was a proper one and the costs of all parties should be paid out of the estate.

MASTER IN CHAMBERS. OCTOBER 23RD, 1912.

STEWART v. HENDERSON.

4 O. W. N. 166.

Discovery — Examination of Defendant — Relevancy of Questions— Scope of Examination — Production of Document.

MASTER-IN-CHAMBERS ordered defendant to attend at his own expense for further examination and produce a certain agreement alleged by plaintiff to have been made nominally with A., but in reality with B., his business partner, for the sale of a secret process on the sale of which to B. plaintiff was by agreement with defendant to have a commission.

Costs of motion to plaintiff in cause.

Discussion of objects and scope of examinations for discovery.

Plaintiff moved for further examination for discovery of the defendant and to have him answer certain questions which he refused to answer on the advice of counsel.

J. Grayson Smith, for the plaintiff.

S. Casey Wood, for the defendant.

CARTWRIGHT, K.C., MASTER:—The action is to recover a commission of 10 per cent. under an agreement made between the parties in contemplation of a sale of an alleged valuable secret process for coverting iron into steel. The agreement is in writing and anticipated a sale to Sir Donald Mann. No such sale actually took place. The statement of claim alleges that a sale or agreement for sale has been made nominally with Sir Wm. Mackenzie, but that this was done in the temporary absence of Sir Donald Mann, and that this contract was really made with Sir Donald Mann's business partners and associates, and that he is interested with them in the undertaking and that plaintiff is, therefore, entitled to the commission of 10 per cent.

The statement of defence sets out the transactions between the plaintiff and defendant. In the concluding paragraphs it is said that defendant "did everything in his power to close a contract for the sale of the said process . . . but the said defendant was unable to close the said contract or induce the said Sir Donald Mann to take up the contract for the said process or become interested therein or to continue the said negotiations in reference thereto."

On these pleadings the issue is clearly raised as to whether a sale has really and in effect been made to Sir Donald Mann or not. It follows that everything is relevant to this issue, which may (not which must, assist the plaintiff on which may directly or indirectly enable the plaintiff to advance his case or damage that of his adversary: see Bray's Digest on Discovery (1904), Art. 10, p. 4.

Bearing this in mind, the motion should be dealt with as follows.

The questions as to whether the secret process formula was deposited with the Bank of Commerce would, at first, be sufficiently answered if put in the shape in which Mr. Wood was willing to have same answered. Then if the answer is in the negative qu. 91-92 et seq., might properly follow, so as to clear up what, on the fact of the depositions, is now obscure.

The contract, whatever it was, made with Sir Wm. Mackenzie, should certainly be produced. (It was admitted that such a document is in existence.) For this purpose the defendant must attend again at his own expense. If on the fact of the contract with Sir Wm. Mackenzie there is no mention of any interest of Sir Donald Mann or of the other business associates of Sir Wm. Mackenzie named and set out in the statement of claim, the defendant can be asked as to his knowledge, information and belief as to this. If he has none, the matter will rest there for the present.

Some opposition was made to the motion on the ground of a secret process being in question. This, of course, should not be imperilled, and at present none of the questions asked required answers that would in any way be injurious to the secrecy of the defendant's formula. The fact of its present location and the reason for its being there might assist the plaintiff in his claim and would, therfore, be relevant on discovery, however fatal to the defence. *Flight* v. *Robinson*, 8 Beaven, p. 34, cited in Bray on Discovery, where it is said: "One of the chief purposes of discovery is to obtain from the opponent an admission of the case made against him." So long as an examination is directed to relevant matters, it should not be too strictly limited. To do so might impair or even altogether destroy its usefulness.

The costs of this motion will be to plaintiff only in the cause.

DIVISIONAL COURT.

OCTOBER 18TH, 1912.

HOME BUILDING AND SAVING ASSOCIATION v. PRINGLE ET AL.

4 O. W. N. 128.

Mortgage — Subsequent Incumbrances — Judgment for Redemption or Sale — Final Order for Sale — Motion to Open up Master's Report — Assignees of Equity of Redemption — Parties.

Application by two defendants in a mortgage action to open up a report on the grounds that (1) the mortgagee did not file a complete abstract of the lands shewing all subsequent incumbrances, and (2) that the said mortgagee had sold and released certain of the mortgaged lands from the mortgage sued on.

SUTHERLAND, J., *held*, 22 O. W. R. 791; 3 O. W. N. 1595, that a plaintiff in a mortgage action need not make all subsequent incumbrancers parties, his failure so to do being at his own risk.

That a mortgagee cannot be forced to marshal his securities but can take his debt out of that portion of his security which first comes available.

Application refused with costs.

DIVISIONAL COURT *held*, that as the facts had not been fully developed and the property was ample security, the matter should be referred back to the master for a further report.

Costs of application and appeal to be in discretion of Master.

Per RIDDELL, J., approving quotation from Fisher on Mortgages, 6th ed., sec. 1350: "By the sale of part of an incumbered estate the burden is thrown on the residue in favour of the purchaser.

Maitland v. *McLarty*, 1 Gr. 576, and other cases referred to

An appeal by McKillican and Smith, two defendants, from a decision of HON. MR. JUSTICE SUTHERLAND (1912), 22 O. W. R. 791; 3 O. W. N. 1595.

The appeal to Divisional Court was heard by HON. SIR GLENHOLME FALCONBRIDGE, C.J.K.B., HON. MR. JUSTICE BRITTON, and HON. MR. JUSTICE RIDDELL.

C. H. Cline, for the defendants, appellants.

F. A. Magee, for the plaintiffs, respondents.

HON. MR. JUSTICE RIDDELL:—The facts are not fully disclosed but so far as they appear and are material they are as follows:

One Peter Valley on and prior to March 1st, 1885, owned a considerable portion of land in the County of Stormont and he upon that day mortgaged it to the Hamilton P. & L. Society for $1,900 and interest. He also, February 1st, 1886, mortgaged the land to the same company for $150 and in-

terest. Making certain payments, certain portions of the land were released from the mortgage at his request.

March 26th, 1887, he made conveyance of a certain lot, part of the said land, to one J. T. by a deed which contained covenants for quiet possession further assurance, and "that he has done no act to incumber the said lands"—the defendant McKillican claims under J. T., May 24th, 1887, Valley sold another lot to M. M., giving a similar deed. The defendant Smith claims under M. M.

December 16th, 1887, the defendant Pringle bought the equity of redemption under sheriff's sale and took a quit claim deed from Valley.

Thereafter Pringle made deeds in like form of certain lots to individual purchasers. Some of these mortgaged to the plaintiffs who acquired the position of the Hamilton Co. the original mortgagees. The plaintiffs sold some of these lots so mortgaged to them purporting to act under the power of sale in the mortgages made to them by the several owners—but made a conveyance of the fee to the purchasers and discharged their first mortgage as against these lots. They applied all the proceeds of the sale upon the second mortgages without reference to the first mortgage.

In March, 1908, the plaintiffs brought an action against Pringle and other defendants (including McKillican and Smith) for $631 interest, and costs and in default of payment sale, possession, etc., Smith and McKillican defended on the Statute of Limitations and said further that the plaintiffs had received sufficient to pay their mortgage off, principal and interest.

Judgment was given February 25th, 1911, under which a reference went to the Master at Ottawa: and he, November 6th, 1911, reported a balance of $819.80 due including costs, etc., $460 being the amount found due as principal on the two mortgages.

A motion was made by McKillican and Smith, 8th June, 1912, to reopen the report on the ground of mistake, etc. Mr. Justice Sutherland refused and this is an appeal from such refusal.

The land being admittedly ample security for any amount which may be found due on the mortgages—and no great inconvenience being suggested against such a course, I think if the defendant appellants have any substantial grievance they should be allowed an opportunity to fully explain and de-

velop their case, and have such relief as the facts entitle them to—even if the omission to bring all the facts before the Master were due to the default of their own solicitor.

As the facts are not fully disclosed either on the material before us on the argument or on the further material furnished us, I do not think we should determine the rights of the appealing defendants at the present time. We should do no more than call the attention of the learned Master to the rule laid down in Fisher on Mortgages, 6th ed., sec. 1350, fully supported as it is in *Re Jones*, [1893] 2 Ch. 461; *Re Darby*, [1907] 2 Ch. 465.

"By the sale of part of an incumbered estate the burden is thrown upon the residue in favour of the purchaser."

See also our own cases: *Maitland* v. *McLarty* (1850), 1 Gr. 576; *Tully* v. *Bradbury* (1861), 8 Gr. 561; *Heap* v. *Crawford* (1864), 10 Gr. 442; *Henderson* v. *Brown*, 18 Gr. 79; *Egleson* v. *Howe* (1879), 3 A. R. 566.

The modification of this doctrine in case of several purchases spoken of by Christian, L.J., in *Ker* v. *Ker* (1869), 4 Ir. Eg., at p. 28, and by Warrington, J., in *Darby's Estate* (1907), 2 Ch., at p. 470, may also be of importance.

Upon all the facts being brought out the Master will be in a position to apply the law—in his report he should set out the facts upon which he proceeds that in case of an appeal the Court may have all necessary material.

As it may turn out that the new facts are wholly immaterial or should have been brought out by the appellants, I think we should leave the costs of this appeal and of the motion before Mr. Justice Sutherland in the discretion of the Master.

HON. SIR GLENHOLME FALCONBRIDGE, C.J.K.B., and HON. MR. JUSTICE BRITTON agreed.

DIVISIONAL COURT.

OCTOBER 19TH, 1912.

CAMPSALL v. ALLEN.

4 O. W. N. 130.

Mines and Minerals — Recording Mining Claims — Priorities — Merits of Staking—Refusal of Mining Commission to Consider.

Appeal from decision of the Mining Commissioner who had dismissed appellant's appeal from a decision of the Mining Recorder refusing to record appellant's claims. The locations in question were thrown open by the decision of the Mining Commissioner referred to in *Re Burns & Hall*, 25 O. L. R. 168, which decision was received at the Recorder's office July 5th, 1911, and on the 6th respondents filed applications proper in all respects. The applications were not recorded pending an appeal from the above decision, and on Jan. 5th, 1912, appellants applied for record but were refused on account of their not holding proper licenses. On Jan. 6th, 1912, the respondent's applications were recorded and on January 12th the appellants again applied for record, having obtained licenses, and were refused, as the locations had already been recorded. This was the refusal appealed against.

DIVISIONAL COURT dismissed appeal with costs.

Sections 60, 62, 63, 65, 66, 80, 130 and 140 of the Mining Act of Ontario, 1908, discussed.

An appeal by W. Campsall and others from a decision of the Mining Commissioner of the 4th March, 1912.

The appeal to Divisional Court was heard by HON. SIR GLENHOLME FALCONBRIDGE, C.J.K.B., HON. MR. JUSTICE BRITTON, and HON. MR. JUSTICE RIDDELL.

J. J. Gray, for the appellant Campbell et al.

H. E. Rose, K.C., for the respondent Allen et al.

HON. MR. JUSTICE RIDDELL:—On the 3rd July, 1911, the Mining Commissioner decided adversely to certain claims which are referred to in *Re Burns and Hall* (1911), 25 O. L. R. 168—the judgment is said to have been received at Mining Recorder's office July 5th, and 6th the respondent appeared at the Recorder's office with five claims based upon discoveries purporting to have been made that morning. The applications were regular in all respects, in point of form, but the Recorder thought they should not be recorded, because the time for appealing to the Divisional Court from the decision of the Mining Commissioner had not expired. The claims were accordingly filed under the provisions of sec. 62 (2) of the Mining Act of Ontario, 8 Edw. VII., ch. 21.

It is claimed by the appellants that certain discoveries were made for them January 1st, 2nd, and 3rd, 1912; they appeared at the Recorder's office January 5th, but were refused record as they had not their licenses, sec. 60.

The judgment of the Divisional Court in *Re Burns and Hall*, 25 O. L. R. 168, having been reported to the Recorder, he on January 6th, without further application by the respondents recorded their claims.

January 16th, the appellants having obtained duplicate mining licenses again tendered their claims, but the Recorder refused.

January 20th, an appeal was taken from this refusal, and also from the recording on January 6th, of the respondents' claims.

January 23rd, the Recorder granted the respondents an extension of time for the work, sec. 80.

Leave was obtained to appeal also from this extension.

March 4th, all three appeals came on before the Mining Commissioner; and he refused to go into the merits of the staking, etc., and dismissed the appeals.

This is an appeal from that decision.

I think the appeal must fail. Section 140 provides that "The Commissioner shall give his decision upon the real merits and substantial justice of the case"—but that means "the case which is properly before him."

It does not mean that any claimant may raise an issue before him at any time without regard to the provisions of the Act—and have the merits of that issue decided.

Section 62 (1) provides that when a mining claim is deemed by the Recorder to be in accordance with the Act unless a prior application is already recorded, the Recorder must file it with his records; "and every application proper to be recorded shall be deemed to be recorded when it is received in the Recorder's office, if all rquirements for recording have been complied with, notwithstanding that the application may not have been immediately entered in the record book." When the respondents presented their claims, July 6th, they should have been recorded; and must be deemed to have been recorded as of that day.

In any case, they were properly recorded January 6th, before the appellants had any right to have theirs recorded.

They should then have proceeded by "dispute" under sec. 63—see secs. 65, 66—and had their dispute passed on by the Recorder under sec. 130 (2).

The Mining Commissioner rightly refused to go into the merits.

Nor can we say that the Recorder was wrong in extending the time for doing the work.

And it is plain that the claims of the respondents being recorded, the Recorder was right in refusing to record those of the appellant.

All the appeals should be dismissed with costs.

We do not interfere with the proceedings said to have been taken under sec. 66 of the Act.

HON. SIR GLENHOLME FALCONBRIDGE, C.J.K.B., and HON. MR. JUSTICE BRITTON, agreed.

DIVISIONAL COURT.

OCTOBER 9TH, 1912.

SANDWICH LAND IMPROVEMENT COMPANY v. WINDSOR BOARD OF EDUCATION.

3 O. W. N. 1150; 4 O. W. N. 112.

Schools—Public—Expropriation of Land for Site—Action for Injunction Restraining Arbitrators from Proceeding—School Sites Act, 9 Edw. VII. c. 93—Remedy by Summary Application to County Judge—Action Dismissed—Costs.

Action by an improvement company and an individual against the board of education, Henry T. W. Ellis, John Curry and Samuel Stover, for an injunction restraining defendants from proceeding with an arbitration to fix the value of lands of plaintiffs which defendants desired to expropriate for a school site, and from taking possession of the lands, and for a declaration that defendants had no warrant nor right to arbitrate and that the arbitration proceedings and award were irregular and void, and to set aside the award and vacate the registration thereof.

KELLY, J., *held*, that the relief sought was included in sub-section 1 of sec. 20 of the School Sites Act, 9 Edw. VII. c. 93, which provides as follows: "Any question touching the validity of proceedings taken or an award made under this Act or in the case of arbitrations other than those provided for in sec. 7 as to the compensation awarded shall be raised, heard and determined upon a summary application by way of appeal to the County Judge and not otherwise" and that therefore the action was not maintainable.

Action dismissed with costs, such costs to be only those which would have been incurred if a motion for judgment had been made on the pleadings.

Divisional Court dismissed appeal from above judgment with costs.

An appeal by the plaintiffs from the following judgment of HON. MR. JUSTICE KELLY, who tried the action without a jury, at Windsor, on March 16th, 1912.

Plaintiff J. L. Murphy, in person.

No one appeared for the other plaintiff.

A. R. Bartlett and W. G. Bartlett, for the defendants.

HON. MR. JUSTICE KELLY (25th April, 1912):—Plaintiffs, claiming to be the owners of or interested in certain lands in the city of Windsor, on October 20th, 1911, brought this action for an injunction restraining the defendants from proceeding with an arbitration then pending to fix the value of these lands, which the defendants, the Board of Education, wished to expropriate for a school site, and from registering the award, and from taking possession of the lands; and for an order that the defendants have no warrant or right to arbitrate, that the arbitration proceedings and award are irregular and void, and to set aside the award and vacate the registration thereof.

The writ of summons was served on defendants prior to October 25th, and on that date the arbitrators considered the questions submitted to them and made their award.

Plaintiffs took no part in the arbitration, or in the proceedings leading up thereto.

On the opening of the trial, defendants moved that the action be dismissed on the ground that under sec. 20 of the School Sites Act, 9 Edw. VII. ch. 93, the action is not maintainable.

Sub-section 1 of section 20 is as follows:—

"Any question touching the validity of proceedings taken, or an award made under this Act, or, in the case of arbitrations other than those provided for in sec. 7, as to the compensation awarded, shall be raised, heard and determined upon a summary application by way of appeal to the County Judge and not otherwise."

I think the questions raised in this action are intended by this section to be heard and determined on summary application in the manner therein provided, and not by this Court. For that reason, I dismiss the plaintiffs' action.

I allow defendants such costs only as they would have been entitled to had they specially pleaded this sec. 20 and then brought on the matter by way of motion for judgment on the pleadings.

Plaintiffs' appeal to Divisional Court from above judgment was heard by HON. SIR WM. MULOCK, C.J.Ex.D., HON.

MR. JUSTICE CLUTE, and HON. MR. JUSTICE RIDDELL, on the 9th October, 1912.

D. W. Saunders, K.C., for the plaintiffs, appellants.

C. A. Moss, for the defendants, respondents.

Their Lordships (V.V.), dismissed the appeal with costs.

DIVISIONAL COURT.

OCTOBER 9TH, 1912.

ROBINSON v. REYNOLDS.

4 O. W. N. 112.

Principal and Agent — Agent's Commission on Sale of Land — Purchaser Procured who Refused to Carry out Purchase — Right of Agent to Commission.

Action to recover commission on sale of defendant's property. Plaintiff procured one Foster to make an offer for the purchase of the property which defendant accepted. Later Foster refused to complete and plaintiff brought action claiming that their duty had been performed when a binding contract had been entered upon.

BRITTON, J., *held*, 22 O. W. R. 124; 3 O. W. N. 1262, that the facts established that the commission was "to be paid out of and form part of the purchase money, and as no purchase money had been paid plaintiffs could not recover. Action dismissed with costs.

DIVISIONAL COURT affirmed above judgment.

See *Hunt* v. *Moore*, 19 O. W. R. 73.

An appeal by the plaintiffs from a judgment of HON. MR. JUSTICE BRITTON, 22 O. W. R. 124; 3 O. W. N. 1262.

The appeal to Divisional Court was heard by HON. SIR WM. MULOCK, C.J.Ex.D., HON. MR. JUSTICE CLUTE, and HON. MR. JUSTICE RIDDELL, on the 9th October, 1912.

G. H. Watson, K.C., for the plaintiffs, appellants.

C. A. Moss, for the defendants, respondents.

THEIR LORDSHIPS (V.V.), dismissed the appeal with costs.

MASTER IN CHAMBERS. OCTOBER 24TH, 1912.

SMYTH v. HARRIS.

4 O. W. N. 168.

Pleading—Statement of Claim—Nuisance — Action to Restrain — Joinder of Plaintiffs—Joinder of Causes of Action—Election.

Motion by defendants to strike out the names of two real estate firms as plaintiffs and certain paragraphs of the statement of claim in an action by certain property-owners to abate a nuisance.

MASTER-IN-CHAMBERS *held* that as the firms in question alleged an interest in certain lands alleged to be affected by the alleged nuisance and were willing to give particulars of such interest they should be allowed to continue as plaintiffs on the record.

Warnik v. *Queen's College*, L. R. 6 Ch. 716, referred to

That the various plaintiffs having a common right alleged to be violated by defendants were entitled to proceed in the one action.

Bedford v. *Ellis*, [1910] A. C. 1, 12, followed.

Mason v. *Grand Trunk Rw. Co.*, 8 O. L. R. 28 distinguished.

That an allegation that defendants "are continuing to inflict the wrongs complained of herein upon the neighborhood in general and the plaintiffs in particular" could be sustained even though the Attorney-General were not added as a party plaintiff.

Paragraph 6 of statement of claim struck out, and, save as above motion dismissed. Costs to plaintiffs in cause.

On the 15th October inst. on motion for interim injunction an order was made by HON. MR. JUSTICE RIDDELL, directing *inter alia* that the action be set down for trial before him at the non-jury sittings here on 4th November, and enlarging the motion to same place and date.

Defendants have appealed against this order. Their appeal has been set down and will probably be heard on 29th inst.

Defendants have meantime moved before the MASTER-IN-CHAMBERS for an order as follows:—

1. Striking out the names of Robins Limited and F. W. Tanner and F. W. Gates as party plaintiffs.

2. Compelling plaintiffs to amend by electing in which plaintiff's name the action will proceed and striking out the other name or names and staying the action meanwhile.

3. Striking out from paragraph one of the plaintiffs statement of claim the clauses beginning "The plaintiffs Robins Limited, etc.," "The plaintiffs Tanner & Gates, etc.," or compelling plaintiffs to amend by disclosing what interest Robins Limited, and Tanner & Gates respectively have whether as owner, tenant, etc.

4. Striking out from paragraph four, that part of the paragraph beginning "on the last occasion, etc.," as being

an infringement of Rule No. 298, and calculated to embarrass the defendant, and to prejudice the fair trial of this action, and the words "And property," for the same reason.

5. Striking out from paragraph four the clauses dealing with Robins Limited and Tanner & Gates.

6. In any event striking out those parts of said paragraphs as refer to Toronto City Estates Limited and Monarch Realty Corporation Limited and allege a consent.

7. Striking out paragraph six as unfair and as irrelevant and calculated to prejudice the fair trial of this action.

8. Striking out paragraph nine or staying the action until the Attorney-General has been made a party plaintiff thereto, or for such other order as may be just.

There was also a motion for certain particulars of the statement of claim. But it was agreed that this should stand over to see if the particulars given were sufficient—with leave to renew the motion if defendants were not satisfied with what was given.

F. E. Hodgins, K.C., for the motion.

H. E. Rose, K.C., shewed cause.

CARTWRIGHT, K.C., MASTER:—Paragraphs, 1, 3, 5, and 6, of the notice of motion can best be dealt with together.

It seems that Robins Limited and Tanner & Gates allege "a substantial interest in and are occupants of and have the management and sale," the first named of a tract of over 100 acres, and Tanner & Gates, of two tracts of which the extent is not given—all of these properties being within a mile of defendants' factory, and some of them much nearer.

It now appears that the Robins block is vested in the Toronto City Estates, Ltd.; and the Tanner & Gates blocks in the Monarch Realty & Securities Corporation. Both of these companies have signified their willingness to be joined as plaintiffs, by a resolution in each case of the board, and notice has been given of an application to the trial Judge for that purpose. As to the interest of the Robins Co. and Tanner & Gates, I understood that particulars had been given or would be forthwith.

It seems, therefore, that no injury or embarrassment can accrue to the defendants by these allegations. The case does not seem to differ in principle from that of *Warnik* v. *Queen's College*, L. R. 6 Ch. 716. That case is cited in Odgers on Pleading, 5th ed., p. 21, as shewing that "All

persons who have a common right which is invaded by a common enemy, are entitled to join in attacking that common enemy in respect of that common right, although they may have different rights *inter se*"—and, therefore, no doubt, in some cases different remedies. This leads up to paragraph 2, which was the point most strenuously pressed.

It was said that here there was no transaction or series of transactions within the meaning of Consolidated Rule 185, as shewn by *Mason* v. *Grand Trunk Rw. Co.*, 8 O. L. R. 28. There it was said by Anglin, J., that several plaintiffs can not join "where the only connection between their several and distinct grievances is the motive or purpose by which they suggest that the defendant was actuated.

There, however, the learned Judge approved of what was said on this point by Lord Macnaghten in *Bedford* v. *Ellis*, [1901] A. C. 1, 12—and a perusal of that case seems to me conclusive against the present motion on this point.

There it was said by respondents' counsel, p. 5: "The claims all arise out of the same transaction or series of transactions, "the management of the market." In this case it is the alleged mismanagement of the defendants' factory.

Lord Macnaghten said that this question was one "of very small importance." The appellant if successful "would gain nothing by success. He would only lose to some extent security for costs. The joinder of the individual plaintiffs in one action cannot embarrass or delay the trial." And in conclusion he says: "Whether I am right in this or not, it seems to me that the question, if it be a question, ought not to be disposed of adversely to the plaintiffs at this stage of the action." The motion on this ground, therefore, fails at present.

As to paragraph 4, it does not seem in accordance with the present practice to strike out any part of the first clause of paragraph 4 of the statement of claim. If Mr. Smyth has no "property rights" which are injuriously affected this will appear at the trial and be dealt with accordingly. But to that tribunal it belongs, and there it must be sent. Nor does there appear to be any embarrassment to defendants in the statement, that on the last occasion when Mr. Smyth requested defendants to abate the nuisance, their answer was that they "could do nothing further towards stopping the nuisance." This if not denied or explained might be of weight in deciding the Court to grant a remedy by way of

injunction instead of giving time to see if some remedy could not be devised.

As to the 7th paragraph of the notice of motion, I agree that paragraph 6 is irrelevant and should be struck out. It was said by Jessel, M.R., in *Pender* v. *Lushington* (1877), 6 Ch. D. 70, at p. 75: "In all cases where men exercise their rights of property, they exercise their rights from some motive adequate or inadequate, and I have always considered the law to be that those who have the rights of property are entitled to exercise them whatever their motives may be for such exercise."

Here the only question is whether the defendants are violating the maxim "*sic utere tuo ut alienum non laedas.*" If it is held that they are acting within their rights their motives cannot be enquired into. Otherwise an enquiry might be necessary as to the value and sales of all the adjacent property. The inconvenience of such an addition to the present enquiry with its scores of affidavits on both sides is sufficiently obvious. The 8th paragraph of the notice of motion asks to have paragraph 9 of the statement of claim struck out or that the action be stayed until the Attorney-General of the province has been made a party plaintiff.

This is based on the statement that the defendants by their operations "are continuing to inflict the wrongs complained of herein upon the neighbourhood in general and the plaintiffs in particular."

These last words seem to render any decision on this point unnecessary. Where a nuisance which is a public nuisance "inflicts on an individual some special or particular damage, he has a private remedy, he can claim damage, and an injunction in a civil action in the High Court of Justice. But "It is only where he sustains some special damage differing in kind from that which others suffer that he has a personal remedy."

Odgers Broom's C.L. 232. This is sufficiently alleged for the present. If it afterwards appears that the Attorney-General should have instituted an information this objection can be raised and given effect to at the trial or even later as in *Johnston* v. *Consumers' Gas Co.*, 23 A. R. 566, where it was so held in the Court of Appeal.

The order will, therefore, be that paragraph 6 of the statement of claim be struck out, and that defendants do plead this week—so that the order of October 15th, which

may be upheld on appeal be not interfered with so long as it is in force.

The costs of this motion will be to plaintiffs in the cause.

HON. MR. JUSTICE RIDDELL. OCTOBER, 24TH, 1912.

CHAMBERS.

RE CANADIAN SHIPBUILDING CO.

4 O. W. N. 157.

Appeal—Leave to Appeal—To Divisional Court—From Trial Judge—Extension of Time for Giving Security—Mistake of Solicitors—Inequitable to Cure.

RIDDELL, J., refused with costs to extend the time for giving security for appeal and leave to appeal from his judgment herein, 26 O. L. R. 564; 22 O. W. R. 585, on the ground that it was inequitable to cure the mistake of the solicitors for one party in order to enable them to take advantage of the mistake of the solicitors of other party, and, further, that there was no important question to be determined by the appeal.

Motion by the liquidator for leave to appeal to Divisional Court, from a judgment of HON. MR. JUSTICE RIDDELL (1912), 26 O. L. R. 564; 22 O. W. R. 585; 3 O. W. N. 1476, made under sec. 101 (c) and 104 of the Winding Up Act, for leave to appeal and also for extension of the time for giving security.

The liquidator attempted to appeal to Divisional Court, without leave, but the case was struck off the list for want of jurisdiction.

J. A. Paterson, K.C., for the motion.

H. E. Rose, K.C., contra.

HON. MR. JUSTICE RIDDELL:—It is contended that the question raised by my judgment is of great public importance, and that the Court of Appeal did not decide it though raised in *Re Rainy Lake L. Co.* (1888), 15 A. R. 749. There are several answers to this argument.

In the first place the question is not of a common law or equitable right, but as to the interpretation of a statute. If my interpretation be not that intended by the Legislature, the matter can be set right by a simple amendment, retroactive or otherwise, a mere drop in the bucket of annual legislation.

Again, the matter cannot be very important in the sense of frequently recurring as raised a quarter of a century ago, no case seems to have occurred again till the present.

Then, too, as there are two grounds upon which the judgment may be supported either of which is sufficient, it might happen as in the *Rainy River Case*, that the Court of Appeal would proceed on the ground taken by the learned Referee, and leave this point undecided.

But the objection to granting leave goes much deeper.

It would not profit the applicant at all to have a judgment in his favour reversing my decision, and holding that he is entitled to take advantage as a "creditor" of the Bills of Sale and Chattel Mortgage Act, unless he could go further and succeed in convincing the Court of Appeal that the learned Referee was wrong in holding that the bills of sale in the present case satisfies the statute.

The plain fact is that the liquidator is saying: "The navigation company are not entitled to hold the property because their solicitors made a mistake in drawing up the documents—my solicitors made a mistake in not going to the Court of Appeal—help me by enabling my solicitors to take advantage of the mistake of the other solicitors by nullifying theirs."

It is the proverbial rule of fair play "If you can't help the man, do not help the bear." And it would, in my view, be monstrous for the Court to assist one litigant to take advantage of a slip of his opponent by lifting him over a slip of his own.

Whatever advantage any litigant can derive from a statute, he must have—the Court cannot mitigate the vigour of a statute, however great injustice it may work in the particular instance. "The words of the Legislature are the text of the law and must be obeyed," see Hamilton, J., [1911] 1 K. B. at p. 1101. The Legislature can legislate only in general terms, and every general rule will work hardship in particular cases—but with that the Court has nothing to do. "The statute is like a tyrant; where he comes, he makes all void," said Hobart, C.J., according to Twisden, C.J., in *Maleverer* v. *Redshaw* (1670), 1 Mod. 36, and Wilmot, C.J., in *Collins* v. *Blantern* (1767), 2 Wils. 351. No one can withstand that tyrant when he attacks; but when all danger of an attack is over, it is a matter for the sound discretion of the Court whether the tyrant is to be called back and empowered to make an attack. In the present case

the navigation company made a perfectly legitimate, honest, and usual agreement; they spent money on the strength of it; they are guilty of no fraud or impropriety; they are unquestionably entitled to the property unless their solicitors have made a slip in preparing documents. I think they would have every reason to complain if a slip of the solicitors of their opponent were healed by the Court to take advantage of a slip of their own solicitors which the Court cannot heal.

Of course, I could not limit the appeal to the one ground, which would not dispose of the case; the Court of Appeal has quite enough to do to give actual litigants their rights in actions properly before it, without taking up academical questions—at all events, if that be desired the initiative must come from another source.

The motion will be dismissed with costs.

HON. MR. JUSTICE BRITTON. OCTOBER 24TH, 1912.

QUIST v. SERPENT RIVER LOGGING CO.

4 O. W. N. 159.

Negligence—Master and Servant—Notice of Injury—Failure to give Within Proper Time—Reasonable Excuse—Mistake as to Name of Master—Absence of Prejudice—R. S. O. (1897), c. 160, ss. 9, 13, 14.

BRITTON, J., *held*, that where plaintiff, a foreigner, had been confined to the hospital following upon a dynamite explosion by which he had lost his eyesight, and had through ignorance erroneously instructed his solicitors as to the name of his employers thus causing them to serve notice of accident upon the wrong parties, there was reasonable excuse for want of notice and defendants had not been prejudiced thereby as their foreman knew of the accident and all their witnesses were available, and that therefore the jury having found negligence plaintiff was entitled to recover.

Tried at Sault Ste. Marie, with a jury.

W. A. Henderson, for the plaintiff.

J. E. Irving, for the defendants.

HON. MR. JUSTICE BRITTON:—The plaintiff was a workman in the employ of the defendants. The defendants were constructing a road—over which, it was their intention to haul timber from limits owned by them. In the construction of this road, it was necessary to remove rock by blasting. The plaintiff alleges that he was inexperienced in the

use of dynamite and other explosives—and the persons in the employ of the defendants under whose orders and direction the plaintiff was working, had no reason to think otherwise.

The plaintiff was ordered to do this work of blasting, and in doing it he was injured by a premature explosion of dynamite, to such an extent as to lose the sight of both eyes. He was rendered totally and permanently blind. Questions in reference to negligence of defendants were submitted to the jury, and the answers, if warranted by the evidence, entitle the plaintiff to the damages assessed, unless the plaintiff's remedy is barred by reason of his not having given the notice in respect of his injury as required by secs. 9 and 13 of "The Workmen's Compensation for Injuries Act." No notice within the time was served upon these defendants. The accident occurred on the 16th of January, 1912. The plaintiff was at once thereafter brought to the Toronto General Hospital, where he remained for a considerable time under treatment. He is a foreigner, and did make it his home at the village of Cutler. Cutler is the chief place of business of Lovelace and Stone. Their large mill is there. They have many men in their employ, and they are reputed owners of extensive timber limits. The plaintiff not knowing personally the proprietors, of either the Lovelace and Stone or the defendants' business, thought he was in the employ of Lovelace and Stone, and made the mistake of so instructing his solicitors. That was a mistake of fact—not of law. The plaintiff's solicitors served the notice upon Lovelace and Stone, on the 30th March, 1912. On the 6th May, 1912, a writ was issued in due course against Lovelace and Stone, and it was not until after that date that the mistake was discovered, and it was then more than 12 weeks from time of accident. On the 2nd July, the plaintiff commenced this action against the defendants, who were the employers of plaintiff.

The defendants in their statement of defence do not allege want of notice, but on the 28th September, pursuant to sec. 14, caused to be served upon the plaintiff's solicitors the notice of their intention to rely upon want of notice of injury as a defence to this action. The defendants' road foreman was well aware of the accident and injury, and all particulars. He was present at the time. All who knew anything connected with the plaintiff's employment—or who knew of the instructions given by, and of the supervision

given by defendants—were present, and so far as is known, gave evidence at the trial.

I am of opinion that there was reasonable excuse for the want of notice of injury, and that the defendants have not thereby been prejudiced in their defence.

Upon the answers by the jury to the questions submitted, and upon my findings there should be judgment for the plaintiff for $1,500 with costs.

Thirty days' stay.

DIVISIONAL COURT.

OCTOBER 24TH, 1912.

KEENAN v. FOSTER.

4 O. W. N. 168.

Timber Bolts—Contract for Getting Out—Construction of Contract—Breach—Counterclaim—Damages.

Action to recover $500 paid by plaintiffs to defendants for the getting out of timber bolts under a contract, or for $500 damages for breach of the contract. Defendants counterclaimed for breach of contract.

Co.C.J. of Grey Co., gave judgment for plaintiff for $500 and costs and dismissed defendants' counterclaim with costs.

DIVISIONAL COURT *held*, plaintiffs in default under contract in that they were not ready to receive the timber bolts when brought out by defendants.

Appeal allowed and action dismissed with costs. Judgment for defendant upon counterclaim for $199 and costs.

An appeal by the defendant from a judgment of the Judge of Grey County.

The appeal to Divisional Court was heard by HON. SIR JOHN BOYD, C., HON MR. JUSTICE LATCHFORD, and HON. MR. JUSTICE MIDDLETON.

W. M. Douglass, K.C., for the defendant appellant.

W. S. Middleboro, K.C., for the plaintiffs, respondents.

HON. SIR JOHN BOYD, C.:—This case appears to have been decided as it was by importing into the contract an alleged condition that poplar logs or bolts should be dried upon the bank for a period varying from one to three months before it should be put into water for flotation to the place of delivery; and also by reading a subsidiary part of the

contract providing for part payment in advance on certain conditions, as if it controlled the whole contract.

The contract is clear enough that the bolts were to be delivered in the water on the loader provided in the vessel sent to transport the wood, and only what were so delivered were to be paid for. The plaintiff was notified that the bolts were in the water and were going down to the place of delivery towards the end of April, and took no steps to have any vessel there to accept them. The time of delivery contemplated by the contract was as soon after the 1st May as the ice was out of the river. The channel was open and free from ice before the 21st April, but the plaintiff for some reason neglected the notice of the expected arrival of the wood, and took no steps to ascertain the state of navigation. The breach of contract was not on the part of the defendant, as the Judge has found, but on the part of the plaintiff. The defendant had the quantity of bolts ready to be shipped at a proper place, and the plaintiffs made default in providing means for their transportation according to the contract.

The action, therefore, fails, and it remains to consider the defendant's claim for damages in respect of the plaintiff's default. I think he places his loss at too high a figure, and it is not very satisfactory to read his evidence and contrast that with the details of loss as claimed in the pleadings.

I would allow cost of saving the logs by drawing out of the water at Root river $193
And at Echo lake 197

$390
The claim of 20 cords in paragraph 11 of pleading $ 65
Loss of 75 cords by icebergs, after the first week in May 244

$699
Deducting $500 received $500

Leaves balance of $199

The action should be dismissed with costs and judgment on counterclaim for defendant for $199 and costs. The defendant should also have costs of appeal.

HON. MR. JUSTICE LATCHFORD and HON. MR. JUSTICE MIDDLETON, agreed.

DIVISIONAL COURT.

OCTOBER 25TH, 1912.

BUCKNALL v. BRITISH CANADIAN POWER COMPANY.

4 O. W. N. 164.

Mines and Minerals — Unpatented Mining Claims — Destruction of Value — Damage by Flooding — Lease by Crown of Water Power Location — Construction — Erection of Dam — Act of Crown — Intra Vires.

Action to recover damages for flooding of plaintiffs' mining locations by reason of the construction of defendants' dam on the Mattabitchewan river. The Crown on 29th May, 1909, leased to defendants' predecessors in title a water power location upon the river in question, and by the terms of this lease the lessees could overflow the lands demised and all Crown lands, but if any other lands were overflowed the Crown was not to be answerable in damages. Plaintiffs had located the mining claims in question in March and May, 1908, prior to the making of the lease, had done the requisite work thereon, and on March 4th, 1912, certificates were issued by the Mining Recorder shewing that the requirements of the Mining Act had been fully complied with. There was no dispute as to the flooding nor the damage, but defendants claimed the right to flood the lands in question.

MIDDLETON, J., *held*, that a location made under the Mining Act is a property right, in a sense inchoate, but a statutory title which the Crown must not be taken to have derogated from or interfered with by its lease.

Judgment for plaintiffs for $3,627 and costs.

DIVISIONAL COURT *held*, that the holder of an unpatented mining location is a mere tenant-at-will against the Crown, that the expression "Crown Lands" in the lease in question comprised plaintiffs' locations and that plaintiffs therefore had no cause of action.

Re Clarkson v. *Wishart*, 22 O. W. R. 901, followed.

Appeal allowed and action dismissed, both with costs.

An appeal by the defendants from the following judgment of HON. MR. JUSTICE MIDDLETON.

The action was tried at North Bay, on the 9th April, 1912.

S. A. Jones, K.C., for the plaintiff.

L. Lorne McDougall, for the defendants.

HON. MR. JUSTICE MIDDLETON (23rd April, 1912):— When this case came on for hearing it was arranged that the jury should ascertain the extent of the injury done by the defendants to the plaintiffs' mining claim and that I should try all the other issues without a jury.

The claim is by the plaintiffs, as the owners of certain mining claims, for damages sustained by flooding occasioned

by the construction by the defendants of a dam upon the Mattabitchewan river.

By instrument dated the 29th May, 1909, the Crown leased to the Mines Power Limited a water power location upon the river in question, the limits of which are defined upon the plan attached thereto. These limits do not include the plaintiffs' mining locations. The lease was granted pursuant to Statute 61 Vict. ch. 8, and the regulations passed pursuant to the Act. It contains a clause—13—providing that the lessee shall not, by virtue of the lease, have power to overflow or cause to be overflowed any lands other than those demised, and providing that if any such lands are overflowed or damaged the Crown shall be in no way responsible for damage done to the owners. It also confers the right to flood any Crown lands along the river and its expansions.

Prior to the granting of this lease, the mining claims in question had been located; the discovery being in the case of four of the claims, March, 1908, and in the case of the fifth claim, May, 1908. The working conditions were duly complied with in the case of each of these claims; and on the 4th March, 1912, certificates were issued by the Mining Recorder shewing that the requirements of the Mining Act had been fully complied with.

The main work done on these claims was the sinking of a small shaft near the surface of the water of Bass lake. When the dam was erected by the defendants it raised the water forty feet. It is admitted that the water was not raised to an amount exceeding that authorized by the lease. As a consequence of the raising of the water, the work that had been done upon the mining claim was completely lost. The plaintiffs were entitled to obtain a patent for their claims, but did not do so, because this involved the payment of the Government charge, and it is said that they refrained because of the complete destruction of all real value in the claims by the flooding.

The Mining Act recognizes a mining claim as a property right. It is true that this right is in a sense inchoate; but upon compliance with the requirements of the statutes it ripens into a full title; and I think that the destruction of the value of the mining claim, although the title is inchoate, is an injury for which an action will lie. The

title of the owner of the mining claim had its inception in the discovery and the recording of the discovery.

It is said that the Water Power Company made application for the lease in 1907, prior to the plaintiffs' discovery, and that by parity of reasoning its rights ought to date back to the date of the original application and, therefore, would be superior to the rights of the plaintiffs. I do not think that this follows. It may well be that the Crown Lands Office will deal with applicants for power leases in the order of their priority; but the application for the lease confers no title whatever; it gives no right to the applicant, and his title is derived from the lease and from the lease alone. When the lease purports to give, as it does, "the right to overflow any Crown lands along the shore of the Mattabitchewan river and its lake expansions and tributaries," I think this is not intended to derogate from or interfere with the inchoate title of the locatees of mining claims; nor do I think that it would be competent for the Crown to defeat this statutory title by any lease.

I left the question of damages to the jury; and, while they have awarded the amount sworn to by the plaintiff as having been expended upon the property, I asked them upon their return if they intended to allow the items so claimed. They told me that they did not; that they had allowed the same amount, setting off the value of the claim, as a claim against the exaggeration of the amount expended in the statement put in. They also explained to me that they had not included in the sum named the value which they fixed for the wood upon the flooded land. This amount, at the figures given by the jury—forty cords per acre, 25 cents per cord, for the forty flooded acres—would give an additional sum of $800; so that the damages would be $3,627. I can see no reason why the plaintiff should not be allowed for the timber.

The appeal to Divisional Court was heard by HON. SIR GLENHOLME FALCONBRIDGE, C.J.K.B., HON. MR. JUSTICE BRITTON, and HON. MR. JUSTICE RIDDELL.

Jas. Bicknell, K.C., and J. L. McDougall, for the defendants, appellants.

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

Their Lordships' judgment was delivered by

HON. MR. JUSTICE RIDDELL (25th October, 1912):—Most of the material facts are mentioned in my learned brother's written reasons for judgment; it may be well to supplement his statement in one or two particulars.

The lease to the defendants read "demise and lease . . . all and singular, that certain parcel or tract of land and land covered by water . . . more particularly described as follows and designated, as water power location R. L. 450, composed of land and land under the water," here follows a description, and the document proceeds, "together with the right to hold and maintain the waters in the Bass lakes and the Mabitchewan river and tributaries to a height of not more than forty feet above the high water mark at the ordinary stage of the water in First Bass lake . . . and the right to overflow any Crown lands along the shore of said Mabitchewan river and its lake expansions and tributaries, which may be overflowed by the raising and maintaining of the water to the said height."

Clause 13 reads:—

"13. The said lessees shall not have the power or authority under these presents to overflow or cause to be overflowed any land or lands other than those hereby demised; and it is distinctly understood and agreed that should any lands other than those hereby demised be overflowed or damaged, the Crown or the Government of Ontario shall in no wise be responsible for damage done thereto to the owner or owners thereof."

It is admitted that to raise the water to the 40-ft. level would necessitate an overflow of the plaintiffs' claims to a depth of 10 feet.

It is argued that the "lands . . . hereby demised, mentioned in clause 13, are simply the water power location R. L. 450, specifically mentioned and described in the operative part of the deed; and effect was given to this in the trial Court. But in the operative part of the deed an express right is given to overflow Crown lands, and if the "lands hereby demised" were only the location, there would be a repugnancy. It is, of course, necessary to read the deed so as to give effect to every clause; and that can be done by considering the deed as leasing for the purpose

of overflowing the Crown lands which would be overflowed along the river and lake when the water was raised to the 40-ft. level; otherwise, this part of the express grant would be rendered wholly nugatory.

The next question is as to the effect of this conveyance on the rights of the plaintiffs.

We had recently, in *Re Clarkson* v. *Wishart* (1912), 22 O. W. R. 901; 3 O. W. N. 1645, to consider the position of the owner of an unpatented mining claim. The matter was considered from a somewhat different point of view in that case, and it may be that some of the conclusions arrived at were not necessary for the judgment. I have, however, reconsidered the question with the assistance of the very able arguments advanced in this case, and I am unable to depart from the opinion expressed in that case. The result is that the plaintiffs had no rights as against the Crown, and the Act of the Crown was not ultra vires. The Crown had the right to give, and did give, the defendants the right to overflow the claims as they have done.

I am of opinion that the appeal should be allowed with costs, and the action dismissed with costs.

HON. SIR GLENHOLME FALCONBRIDGE, C.J.K.B. and HON. MR. JUSTICE BRITTON, agreed.

HON. MR. JUSTICE BRITTON. OCTOBER 25TH, 1912.

RE BRENNAN AND WALDMAN.

4 O. W. N. 161.

Vendor and Purchaser — Title — Deed to Father as Trustee for Infant Son — Son Died in 1882 — R. S. O. (1877) c. 105, s. 22 — Heirship of Father — Mother Deserted Father — No Right to Dower.

BRITTON, J., *held*, on a Vendor and Purchaser application that where a father was trustee of certain lands for his infant son who died in June, 1882, leaving no brother nor sister but only his father and mother, that the father took the lands as sole heir at law, the mother having deserted her husband not being entitled to dower.

An application by vendors for an order declaring that Matilda Agnes Hay, wife of Robert John Hay, the grantor in a deed to John and Margaret Brennan, dated 22nd day of May, A.D., 1903, registered 30th day of May, 1903, had no right to dower in the land therein described, viz., lot No.

14 on the north side of Richmond street west, on a plan of part of lot 7, sec. C. military reserve, as more particularly described in said deed.

W. J. Clark, for the vendors.

J. T. Richardson, for the purchaser.

HON. MR. JUSTICE BRITTON:—The facts are the following:—

Robert John Hay and his wife lived together until about the first day of January, 1880, and the only child born to them was one son, named William John Hay.

The land mentioned was purchased by Robert John Hay and conveyed to him by deed, dated the 23rd day of December, 1881, and in the conveyance the words describing Robert John Hay are "as trustee for Wm. John Hay"—his son. It is said that the age of the son was then about two years.

Matilda Agnes Hay deserted her husband about the first of January, 1880.

The infant son died on or about the 30th June, 1882.

The said Robert John Hay did not sign the deed—and he never signed any deed of trust. It was argued that he never was trustee in fact. Certain it is that the land was purchased by Robert John with his own money. He remained in possession until 22nd May, 1903, when he sold to John and Margaret Brennan the present vendors.

It is now suggested that Matilda Agnes, if living, may be entitled to an interest—by reason of her husband taking the land in trust for the son.

The facts are sufficient to warrant the order declaring that the wife is not, if living, entitled to dower.

It seems to me unnecessary to formally decide the questions of trusteeship. The son died on the 20th June, 1882, leaving no brother or sister, but only his father and mother. The law then in force in regard to descent of real property in Ontario was ch. 105, sec. 22, R. S. O. 1877. Robert John Hay was the sole heir at law of his son Wm. John. The mother of the infant took no interest in the land other than that of her inchoate right of dower.

The order should go declaring that the said Matilda Agnes Hay is not entitled to any interest in said land. No order as to costs.