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COURT OF APPEAL.

SEPTEMBER 30TH, 1912.

*RE ONTARIO BANK.

*MASSEY AND LEE'S CASE.

Bank— Winding-up — Contributories — "Double Liability"— Bank Act, sec. 125—*Transfer of Shares after Commencement of Winding-up Proceedings—Recognition by Liquidator of Transferees as Shareholders—Estoppel—Election—Evidence—Laches—Prejudice—Powers of Liquidator.*

Appeal by John Massey and W. C. Lee from an order of BOYD, C., dismissing an appeal from an order of George KAPPELE, an Official Referee, upon a reference for the winding-up of the Ontario Bank, placing the appellants upon the list of contributories, in respect of the "double liability" upon shares standing in their names.

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

M. K. Cowan, K.C., for the appellants.

J. Bicknell, K.C., and G. B. Strathy, for the liquidator.

GARROW, J.A.:—The shares in question having been fully paid-up, the liability now sought to be imposed upon the appellants arises under the provisions of sec. 125 of the Bank Act, making shareholders liable upon a deficiency in the property and assets of the bank to pay its debts and liabilities, to an amount equal to the par value of the paid-up shares held by them.

It is admitted that the appellants were the holders of the shares in question on the 13th October, 1906, when the winding-

*To be reported in the Ontario Law Reports.

up proceedings began. The subsequent transfers by the appellants were made after the winding-up proceedings began; and, therefore, clearly fall within the prohibition contained in sec. 21 of the Winding-up Act. This difficulty in the appellants' way is, in my opinion, quite insuperable. That section provides that all transfers after the commencement of the winding-up proceedings—except transfers made to or with the sanction of the liquidator under the authority of the Court—shall be void. It is not contended, and it could not be, that the mere entry in the transfer books of the bank of such transfers was effective to relieve the appellants. That was done while the curator was in charge, long before the winding-up order was made—which, for some reason, was not actually made until the 29th September, 1908, or nearly two years after the proceedings began.

What is contended, as I understand counsel for the appellants, is, that the effect of the subsequent action of the liquidator in preparing and having settled the first list of contributories, in which the names of the transferees were inserted, and the names of the appellants omitted, in respect of these shares, was to bring the case within the exception to be found in sec. 21, as that of transfers made with the authority of the Court, or that, at all events, it amounted to an election to accept the transferees in the place and stead of the appellants; which, in itself or as coupled with the alleged laches of the liquidator in making the present claim, amounted to an estoppel.

In his judgment the learned Referee says: "Massey and Lee were not placed on the original list of contributories by the liquidator in respect of these shares. The liquidator had no reason for not placing them on, but they were left off through an oversight." How the oversight occurred is not explained; but it is not improbable that the long interval between the initiation of the winding-up proceedings and the winding-up order had something to do with it. When the books of the bank passed into the hands of the liquidator, the shares in question apparently stood in the names of the transferees of the 24th and 26th October, 1906, and it was not observed that these dates were subsequent to the 13th October, 1906, when the winding-up proceedings began. But, however the mistake occurred, that it was anything more than a mistake or oversight on the part of the liquidator is entirely unsupported by the evidence. There is not from beginning to end a particle of evidence that what was done was the result of intention or design on the part of the liquidator or the learned Referee. The liquidator alone was

powerless to accept the transfers or to release the appellants without payment. And, in the total absence of facts or circumstances indicating intention or even consideration of the matter by the learned Referee, to ascribe to his act in approving of the first list the wide effect contended for, seems quite out of the question.

Nor, in my opinion, is there in the alleged estoppel sought to be set up any answer to the liquidator's claim to aid the appellants. He asserts and relies upon a legal cause of action arising under the provisions of the statute. To such a claim mere delay in asserting it is no defence. But, in addition, there is no reasonable evidence that what delay there was, was prejudicial to the appellants. Their transferees, to whom they look for indemnity, were upon the list, were proceeded against, and judgments against them obtained, apparently in due course. And there is a total absence of anything but suggestion that the appellants could have done more to compel payment if they had themselves been originally upon the list.

And, finally, there is, in my opinion, grave doubt if estoppel could be successfully pleaded to such a claim, under any circumstances. The proceeding is a compulsory winding-up, under the direction and control of the Court. The liquidator was appointed by the Court, is an officer for the time being of the Court, and except in minor matters acts entirely under its direction. See In re Gooch, L.R. 7 Ch. 206. So limited are his powers that it has been said that he cannot even make a formal admission (sometimes said to be the foundation of an estoppel in pais) which will bind the creditors and contributories. See In re Empire Corporation Limited, 17 W.R. 431. Under sec. 36 of the Winding-up Act, he may, with the approval of the Court, compromise calls, etc., upon the receipt of such sums as are agreed upon; but, without the consent of the Court, he could not lawfully accept less than payment in full.

It would certainly be an odd result to hold that he could, by mere laches, accomplish that which he could not with deliberation and intention do. . . .

[Reference to In re National Bank of Wales, [1907] 1 Ch. 582, distinguishing it.]

See for a different view as to the effect of the lapse of time in the case of a compulsory liquidation, the Sands Case, 32 L.T. N.S. 299, 301. I would dismiss the appeal with costs.

MEREDITH, J.A., agreed in the result, for reasons stated in writing.

MOSS, C.J.O., MACLAREN and MAGEE, JJ.A., also concurred.

Appeal dismissed.

MACLAREN, J.A., IN CHAMBERS. OCTOBER 2ND, 1912.

CAIN v. PEARCE CO.

Appeal—Court of Appeal—Time for—Delay—Excuse—Refusal to Extend—Vested Right in Judgment.

Motion by the defendants in the above and four other actions to extend the time for appealing to the Court of Appeal from the order of a Divisional Court, 3 O.W.N. 1321.

D. Inglis Grant, for the defendants.
H. E. Rose, K.C., for the plaintiffs.

MACLAREN, J.A.:—The defendants move in five actions (that were tried together) to extend the time for appealing from a judgment of a Divisional Court rendered on the 23rd May last. No notice of appeal was given within the month allowed by the Rules, and it was only on the 6th September that the first step was taken towards launching the present motion, the excuse being the illness of the defendants' solicitor.

The actions were for damages and an injunction on account of the renewal by the defendants of an old dam; the defence, that an easement had been acquired by prescription. It was held that an easement had been acquired, but that the new dam, although no higher than the old one, retained the water and flooded the plaintiffs' lands for a longer time than the old one. Moderate damages were assessed, of which the defendants do not complain, if the plaintiffs are entitled to any damages. No injunction was granted.

The cases have been much litigated. The trial Judge first found that the defence of prescription was made out in part, and ordered a reference to assess the damages beyond the prescription; a Divisional Court sent the cases back to him; he held a further trial, and assessed the damages, which the Divisional Court has upheld.

The defendants complain that their easement was not defined or delimited, and urge an appeal because other actions have been taken and are threatened by other proprietors. They also complain strongly that High Court costs were given against them. They have not obtained leave to appeal on this last ground, so that it cannot be considered. Neither will such a judgment as they now seek determine future actions.

In cases where such an indulgence as is asked for in this case has been granted, the fact that the party desiring to appeal has taken some step within the month has been deemed important. See Ross v. Robertson, 7 O.L.R. 494; McClemont v. Kilgour Manufacturing Co., 3 O.W.N. 1351. In these cases, so far as appears, no hint was given of the intention to appeal before September. I do not find any sufficient reason for depriving the plaintiffs of the rights they have acquired after having had to go through two trials and two appeals.

In my opinion, the motion must be dismissed with costs.

HIGH COURT OF JUSTICE.

DIVISIONAL COURT. SEPTEMBER 30TH, 1912.

*WILSON v. SHAVER.

Sale of Goods—Heifer—Warranty—"Due to Calve."

An appeal by the defendant from the judgment of the County Court of the County of Halton.

The defendant, a breeder of Holstein and other cattle, advertised a sale of some of his stock. In the catalogue furnished to intending purchasers, a certain young cow was described as "due to calve" on a day stated. The plaintiff had, a short time before, visited the defendant's stock, and had been told by the defendant that this cow was "due to calve" on the said day. The plaintiff bought the cow, and it turned out that she was not in calf. He brought this action for damages for breach of warranty, alleging that the representation "due to calve" meant that the cow was in calf.

The County Court Judge gave effect to this contention, and gave judgment for the plaintiff.

*To be reported in the Ontario Law Reports.

The appeal was heard by RIDDELL, MIDDLETON, and LENNOX, JJ.

H. H. Shaver, for the defendant.

W. Laidlaw, K.C., for the plaintiff.

RIDDELL, J.:—I think the appeal must succeed.

I do not at all say that the words "due to calve" on a day named cannot import a warranty that the animal is in calf, if both parties understood it in that sense, or if the defendant knew that the plaintiff understood it in that sense, and the sale was made on that understanding. Nor could it be said that these words might not have such meaning in the business of dealing in such animals. But there is no evidence that either the defendant understood the words in that meaning or knew that the plaintiff did, or that the expression has any technical meaning. We must then decide upon the words themselves.

I think all that the words imply is similar to a definition given in the New Oxford Dictionary, vol. 3, p. 704, col. 2 (10), "reckoned upon as arriving," that is: "I expect the cow to calve on the day named; the male was admitted to her at a date which in the ordinary course of nature would, if she became pregnant, bring about parturition on that day named; I think she is pregnant, and reckon upon her having a calf upon that day."

The cow had been covered by the bull at the proper time; it is admitted that the defendant honestly thought she was in calf; the plaintiff and defendant had the same opportunity of judging of her condition; no one but a veterinary surgeon or other expert, and probably not even such person, could have told with anything like certainty whether the cow was in calf or not. I do not think there was any such warranty as is contended for. While in all such matters good faith must be kept, purchasers, if they desire a warranty of pregnancy upon which they can rely, must look for one in different terms from the present.

The appeal must be allowed with costs and the action dismissed with costs.

MIDDLETON, J., gave reasons in writing for the same conclusion.

LENNOX, J., also concurred.

Appeal allowed.

DIVISIONAL COURT. SEPTEMBER 30TH, 1912.

*ATKINSON v. FARRELL.

Landlord and Tenant—Lease of Farm by Tenant for Life—Rights of Lessee and Remainderman at Death of Life-tenant—Crops in the Ground—Manure and Straw—Covenant to Expend upon Farm.

An appeal by the defendant from the judgment of the County Court of the County of Simcoe in favour of the plaintiffs, the executors of Patrick Farrell, deceased, for the recovery of $125, in an action for damages for the removal and conversion of wheat, manure, straw, etc., from a farm leased by the deceased, who had a life estate only in the land, to one Hanley. The defendant, the remainderman, sold the wheat, etc., to one Maher.

The appeal was heard by BOYD, C., LATCHFORD and MIDDLETON, JJ.

J. E. Jones and E. W. Clement, for the defendant.

A. E. Creswicke, K.C., and J. Fraser, for the plaintiffs.

The judgment of the Court was delivered by BOYD, C.:—The appellant's contention that the lease for five years from March, 1909, was operative for that period, despite the death of the tenant for life, who made it in February, 1911, is answered, apart from its legal aspect, by his admission in the defence that the tenancy ended at the death of the lessor: paragraph 2. He admits that, "upon the death of Patrick Farrell, the estates of the said Farrell and his tenant (Hanley) became determined and at an end." This being so, the wheat then sown and in the ground became emblements belonging to the tenant, Hanley. These emblements were purchased by the executors of the lessor, Patrick Farrell, and an assignment thereof obtained under seal on the 9th March, 1911. The reversioner, the defendant, assumed to deal with as his property and make sale and conveyance of the land and these crops in July, 1911, to one Maher, whereby he became liable for their conversion under the circumstances and evidence set forth below.

The action is well-founded in this regard, and the judgment as to them in favour of the executors is right.

The other branch of the appeal is as to straw and manure on the farm at the determination of the lease. By the terms of

*To be reported in the Ontario Law Reports.

the lessee's covenant, these were to be kept and utilised on and for the land; and, according to the authorities, they were not the property of or removable by the tenant. So that the neat point is, whether this straw and manure passed to the reversioner with the land freed from the demise, or did they pass to the executors of the lessor? The judgment in appeal decides in favour of the plaintiffs, the executors, grounded on the decision of Osler, J.A., to that effect in a like case reported in Gardner v. Perry, 2 O.W.R. 683. The correctness of that decision is impeached by this appeal.

The straw-stacks and the manure-piles are the chattels of the tenant to be used in a particular way; the straw as bedding and fodder for the cattle is to be turned into manure, and the manure is to be turned into the land so as to enrich the soil and become part of it. While the tenant may be called the owner in one sense, the effect of his covenant not to remove from the premises, but to use and spend thereon, the straw and manure, is, that he has no right to take these things away from the place, nor has he any right to be paid for them: Beaty v. Gibbons, 16 East 116, 118; Roberts v. Barker, 1 Cr. & M. 808.

The law is obscure on the precise point. The dung made on the farm is spoken of as "belonging to the farm" in Hindle v. Pollitt, 6 M. & W. 529, 533. To remove this stuff, even apart from the covenant, would be a failure to work in a husbandlike manner, and would be an injury done to the inheritance: Cheetham v. Hampson, 4 T.R. 318, 319; Walton v. Johnson, 15 Sim. 352; Powley v. Walker, 5 T.R. 373. The tenant, being unable to remove because of his covenant, is to leave the straw and manure on the farm for the landlord; so it is put in Massey v. Goodall, 17 Q.B. 310, 316. The provision is with a view to benefit of the land: Richards v. Bluck, 6 C.B. 437, 441. . . . In re Hull and Lady Meux, [1905] 1 K.B. 588, 590.

Now these chattels are the tenant's, but he cannot avail himself of them in any way, because, by the death of the life-tenant, the tenancy is at an end, and these are not emblements. But not only is the tenancy at an end—the estate and interest of the lessor as landlord is at an end. No title was in him during his life which could at his death pass to his executors, as held by the learned County Court Judge in this case, following the decision under consideration of Gardner v. Perry. In the case of a living landlord, the straw and hay at the end of the tenancy would be left on the land, and would fall under the control of the landlord, by virtue of his ownership of the land. The straw and manure may be regarded as constructive fixtures, the

destiny of which is to be incorporated in the soil. That points the way to the proper conclusion in this appeal, viz.: the death of the life-tenant ended his interest in the land and everything lying upon it that could not be legally removed; but his death brought, forthwith and eo instanti, into virtual possession the estate in fee of the remainderman, who, as lord of the land, takes the farm with the straw and manure thereon as "accessories of the soil." (See Amos and Ferard on Fixtures, 3rd ed., p. 215, n.)

I think the decision in 2 O.W.R. is not to be followed on this point, and that the judgment in appeal should be varied by restricting it to the value of the wheat in the ground, $90, and dismissing it as to the straw and manure on the ground ($35), which passed to the defendant as remainderman, to the exclusion of any claim on the part of the executors of the life-tenant.

This conclusion is fortified in another way. The provision of the lease to till and manure in a good, husbandlike, and proper manner, and to spend, use, and employ in a proper, husbandlike manner all the straw and manure which shall grow, arise, or be made thereon, and not to remove or permit to be removed from the premises any straw of any kind, manure, etc., are usual and customary provisions for the right farming of the land, which apply generally, not only when set out, but as of course in farming leases, unless the contrary is expressed. Such is the law of England, and is alike applicable to the farm lands of this Province: Brown v. Crump, 1 Marsh. 567, 569, quoting the language of Buller, J. . . .

As to the costs, perhaps the best disposition of them would be to give costs on the Division Court scale to the plaintiff, without set-off, and no costs to either party of this appeal.

DIVISIONAL COURT. SEPTEMBER 30TH, 1912.

*REDFERNS LIMITED v. INWOOD.

Estoppel—Representing Woman as Wife—Goods Supplied by Tradesmen on Credit and Charged to her—Liability—Credit, to whom Given.

The defendant Inwood, not being married to the defendant Mrs. Zimmerman, but living with her as his wife, introduced

*To be reported in the Ontario Law Reports.

her to the plaintiffs (retail traders) as his wife, and she obtained goods (articles of personal attire) from them on credit. Some of the goods were paid for by Inwood. This action was brought in the County Court of the County of York, against both, for the price of goods not paid for, but for which Inwood had promised to pay, when dunned. The action was afterwards discontinued against Inwood, who was said to have absconded.

The goods were charged by the plaintiffs in their books to the defendant Zimmerman under the name of "Mrs. F. G. Inwood Jr.;" but it was explained in the evidence that it was the custom of the plaintiffs to charge goods to the person actually buying; it was not the custom to charge the husband, unless he asked it or the wife asked it in his presence. On several occasions when Mrs. Zimmerman ordered goods, Inwood was present in the plaintiffs' shop with her. All the articles bought were what might fairly be considered necessary for a woman in her apparent station of life.

Judgment was given by DENTON, Jun. Co. C.J., in favour of the plaintiffs against the defendant Zimmerman, who appealed.

The appeal was heard by FALCONBRIDGE, C.J.K.B., BRITTON and RIDDELL, JJ.

T. N. Phelan, for the appellant.

M. L. Gordon, for the plaintiffs.

The judgment of the Court was delivered by RIDDELL, J., who (after setting out the facts) referred to Bowstead on Agency, 4th ed., p. 38; Watson v. Threlkeld (1798) 2 Esp. 637; Ryan v. Sams (1848), 12 Q.B. 460; Blades v. Free (1829), 9 B. & C. 167; 21 Cyc. 1233; and proceeded:—

The facts are amply sufficient to bring the case within what I consider the true rule—a rule that has not been controverted in any of the cases and which is sound on principle. Where a man represents a woman to be his wife, and a third party acts upon that representation, the man is estopped from saying that she is not his wife; "his representation that she was his wife would have been conclusive against him:" per Lord Ellenborough in Munro v. DeChemant (1815), 4 Camp. 215, at p. 216. And where the defendant, having been married before, went through a ceremony of marriage with another woman (his wife living), "he was estopped to set up bigamy . . . he had given the woman . . . every appearance of being his wife:" per Lord Ellenborough in Robinson v. Nahon (1808), 1 Camp.

245, at p. 246. See also Watson v. Threlkeld, 2 Esp. 637. A case in our own courts is to the same effect, Hawley v. Ham (1826), Tay. 385, in which Campbell, C.J., says (p. 390): "The woman having been recognised by the defendant as his wife . . . renders him liable."

The learned County Court Judge, in his considered judgment, does not dissent from this view: but, assuming that the defendant Inwood would be in precisely the same position as though he and Mrs. Zimmerman had been lawfully husband and wife, he thinks credit was not given to Inwood but to the woman.

I can find no evidence to justify this view. There can be no doubt that the woman was thought by the plaintiffs to be Inwood's wife and was treated as such by them. It was just as in the ordinary case of a wife buying necessaries for her own use. Then we have the visit of Inwood to introduce her, his accompanying her at least twice on her purchasing visits, his paying the account twice, and promising to pay the balance—and also the fact that no inquiry was made as to the woman's means, no establishing of a line of credit for her—no one swears that the goods were furnished on her credit—the book-keeping entries, the charges, etc., are just such as in the practice of the plaintiffs are made in the ordinary case of a wife buying as agent of her husband; and so (even if not self-serving evidence) do not assist in shewing that the woman was the person credited.

In all the case I find nothing to indicate that the defendant was buying or the plaintiffs selling on any but the credit of Inwood.

Paquin Limited v. Beauclerk, [1906] A.C. 148, may be looked at on this question.

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

DIVISIONAL COURT. SEPTEMBER 30TH, 1912.

REIFFENSTEIN v. DEY.

Trial—Jury—Unsatisfactory Findings—New Trial without a Jury Directed by Court.

Motion by the plaintiff for a new trial, or for judgment in the plaintiff's favour, after trial before RIDDELL, J., and a jury, at Ottawa, and judgment dismissing the action.

The action was brought by two ladies to recover damages for injuries sustained as the result of a running-down accident, occasioned, it was said, by the negligence of the defendant.

The motion was heard by BOYD, C., MIDDLETON and LATCHFORD, JJ.

G. F. Henderson, K.C., for the plaintiffs.

A. E. Fripp, K.C., for the defendant.

MIDDLETON, J.:—The jury have answered in the defendant's favour all the questions submitted by the trial Judge; and, in ordinary circumstances, their decision would be final. But upon some of the questions it is clear that the answers of the jury are not warranted by any possible view of the evidence. Upon other questions there was evidence from which the findings might well be in the defendant's favour.

After careful and anxious consideration, we have come to the conclusion that the answers of the jury to some of the questions are so entirely against the evidence that it is apparent that for some reason the jury must have given effect to some improper consideration, or have acted unreasonably, and that there has not been a fair and impartial trial. We have spoken to the learned trial Judge, and he agrees with us that the result must be regarded as unsatisfactory.

In view of the fact that the case had already been tried before Mr. Justice Britton—when the jury disagreed—and of the fact that the jury notice was given by the plaintiff, and the plaintiff now desires trial without a jury, we think it proper to direct a new trial before a Judge without a jury.

We are much impressed by the view that a new trial ought not lightly to be given; but in this case the danger of a miscarriage of justice, if the present verdict is allowed to stand, appears so great that we think this case may be treated as exceptional.

We were pressed by the plaintiff's counsel to pass upon the evidence ourselves, instead of directing a new trial. We do not think we should do this, in view of the conflicting evidence upon some of the issues raised.

As a new trial is directed, it is not desirable that we should now comment upon the evidence.

No costs of the last trial or of this appeal.

LATCHFORD, J., agreed with MIDDLETON, J.; and BOYD, C., agreed in the result.

New trial without a jury directed.

DIVISIONAL COURT. OCTOBER 2ND, 1912.

MILLS v. FREEL.

Highway—Forced Road Substituted for Road Allowance—Right to Portion of Road Allowance in Lieu thereof—Municipal Act, secs. 641, 642.

Appeal by the plaintiffs from the judgment of RIDDELL, J., 3 O.W.N. 1240.

The appeal was heard by BOYD, C., LATCHFORD and MIDDLETON, JJ.

J. M. McEvoy and A. G. Chisholm, for the plaintiffs.

W. R. Meredith, for the defendants.

LATCHFORD, J.:—I see no ground for interfering with the judgment appealed from. The defendant Freel was acting for the municipality, and within the scope of his instructions as pathmaster, in removing the plaintiffs' fence. As against the municipality, the plaintiffs can assert no right of possession, unless they can bring themselves within the provisions of sec. 641 of the Municipal Act, 3 Edw. VII. ch. 19, and establish that they or their predecessors in title had laid out and opened, "in place" of the concession road, the road now known as the "given road," across their property, without receiving compensation therefor: or that, "in lieu" of the original allowance for road, the "given road" had been laid out and opened, and no compensation had been paid to the owners for the land so appropriated.

Upon the evidence, it is clear that the road across the plaintiffs' property was not laid out or opened "in lieu" or "in place" of the original concession road, but was made in addition to the concession road. The original road allowance was not only not abandoned but it was opened for public use. It was actually used by the public throughout its entire length—not, indeed, to any great extent between the gravel pit and the Thames—but even for that short distance occasionally travelled when the river was low and fordable. As the concession road was not "unopened," sec. 642 has no application.

It may be observed that even north of the point of departure of the "given road" from the concession road, the plaintiffs' fence encroaches upon the concession line, there admittedly in continuous public use for upwards of fifty years.

The appeal should be dismissed with costs.

MIDDLETON, J., agreed with LATCHFORD, J.

BOYD, C., agreed in the result.

Appeal dismissed.

RIDDELL, J. OCTOBER 3RD, 1912.

RE STEELE.

Will—Construction—Trust Fund—Disposition of Income—Period in Lifetime of Beneficiary Unprovided for—Implication.

Motion by Catherine Loretta Smith (formerly Steele), upon an originating notice, for an order determining a question arising upon the construction of the will of John Steele, deceased.

W. B. Northrup, K.C., for the applicant.
B. N. Davis, for John Alexander Steele.

RIDDELL, J.:—The late John Steele in a codicil to his will made the following provision: "I hereby revoke the bequest to my granddaughter Catherine Loretta Steele contained in the fourth (4th) paragraph of my said will and in place of said paragraph I hereby will give and bequeath unto my grandson John Alexander Steele of Sidney aforesaid farmer and Robert Fraser of the town of Trenton in said county of Hastings

Customs officer the sum of two thousand dollars ($2,000.00) upon trust to place the same at interest either in some chartered bank in Canada or upon first mortgage upon lands in Ontario and shall pay over the interest accruing therefrom from time to time annually or oftener to my said granddaughter Catherine Loretta Steele so long as she lives and is unmarried and if she dies without having married or if married without issue then the said sum of two thousand dollars shall at her death go to and be paid over to my said grandson John Alexander Steele and in case of his having died before such period then to such of his children as may be living at the period of the death of my said granddaughter, but if my said granddaughter Catherine Loretta Steele marries and has a child or children then the said trustees shall pay the said principal sum of two thousand dollars ($2,000.00) to my said granddaughter at such time thereafter as the said trustees shall deem best in the interests of my said granddaughter and her child or children.''

There is no residuary clause in will or codicil.

The granddaughter is married, without issue; and the question arises, ''Is she entitled to the interest upon $2,000.''

I made an order that John Alexander Steele should represent all those in esse or otherwise who would be entitled to this interest, in case the granddaughter is not.

It seems to me that the case may fairly be said to be covered by Bird v. Hunsdon (1818), 2 Swans. 343. There the provision was: ''The rest of money to be put into government security . . . and the said Mary Morris to have the said interest to maintain her as long as she lives single, and no child; and when it shall please God to call her, that money shall come to my brother's and sister's children.'' Mary Morris married, but had no child. The Master of the Rolls (Sir Thomas Plumer) said (pp. 345, 346): ''The testator contemplated three periods: 1st, her minority; 2nd, her remaining single, without a child; 3rd, the interval between her marriage and death. . . . To the third period, the interval between her marriage and her death, there are no words expressly applicable; but the interest being first given to a favoured object, and the capital not given over till the death of that person, the Court is driven to the necessity of saying, either that there is an intestacy during the remainder of her life, or that she is to take during her whole life. The latter seems the more reasonable alternative. I cannot suppose that the testator meant to leave a partial interest in the property undisposed of; and that, on the marriage of

Mary Morris, the dividends, during her life, should devolve on those for whom the will expresses no intention to bequeath more than a legacy of £50 to one.''

Theobald on Wills, 7th ed., p. 735, says: ''Some of the earlier cases, in which a life interest has been implied, would probably not now be followed;'' and mentions Bird v. Hunsdon. But in Humphreys v. Humphreys (1867), L.R. 4 Eq. 475, at pp. 478, 479, Sir John Stuart, V.-C., says that Bird v. Hunsdon has never been overruled—and I cannot find that any later case deals with the matter. Roe d. Bendale v. Summerset (1770), 5 Burr. 2608, may also be looked at. In Ralph v. Carrick (1877), 5 Ch.D. 984, at p. 995, Hall, V.-C., mentions Bird v. Hunsdon without disapproval, and distinguishes that case from the case he was then considering. Ralph v. Carrick, 5 Ch.D. 984, and (1879), 11 Ch.D. 873, and In re Springfield, [1894] 3 Ch. 603, shew us how careful we must be in applying Bird v. Hunsdon, but they by no means overrule it.

Were there nothing more here than a gift to John Alexander Steele of the $2,000 upon the death of Loretta without issue, these cases would or might apply; but there is more. There are substantially the characteristics which differentiated Bird v. Hunsdon, spoken of by Hall, V.-C., in 5 Ch.D. at p. 995, as ''a trust of the income for maintenance of the person named, and a gift over after her death.'' With the proper changes, the result is not very unlike Bird v. Hunsdon. The testator here contemplated: 1st, the time before her marriage; 2nd, the time thereafter before a child was born; 3rd, the time thereafter. For the first period, he has provided by giving her the income; for the third by giving her the principal; but for the second, which may last for the whole of her married life, he has made no provision in so many words. Must he not, however, have meant that during that period also she was to be provided for? The very tempting argument was advanced that what the testator must have meant was that when she got married her husband should take care of her—and when she had a child she would receive the principal for the support of herself and child. But the husband in Bird v. Hunsdon might equally well be expected to support Mary Morris.

Without overruling that case, I think I should hold that Loretta is entitled to be paid the interest during her life—and, although I am not wholly satisfied with the reasoning in the principal case or its exact application to the present case, I will so declare.

Costs of all parties out of the corpus of the $2,000 fund.

LENNOX, J. OCTOBER 3RD, 1912.

*STODDART v. TOWN OF OWEN SOUND.

Municipal Corporations—Local Option By-law—Repealing By-law—"Submission to Electors"—Irregularities in Taking Vote—Disregard of Provisions of Municipal Act—Violation of Secrecy of Ballot—Right of Council to Submit By-law again without Waiting for Three Years—Declaratory Judgment—Mandamus or Direction to Council—Costs.

Action for a declaration that a by-law for the purpose of repealing a local option by-law of the Corporation of the Town of Owen Sound was not submitted to the vote of the electors in the manner provided by law; that what was done should not stand in the way of submitting a repealing by-law in January, 1913; and for a mandamus or direction to the defendants' council to submit a repealing by-law.

W. H. Wright, for the plaintiff.

R. W. Evans, for the defendants.

LENNOX, J.:—In January, 1906, the Town of Owen Sound adopted local option by a by-law numbered 1172. This was before the enactment of 6 Edw. VII. ch. 47, sec. 24; and this by-law could, therefore, be repealed, by another by-law, on a bare majority vote.

On the 1st January, 1912, being the polling-day for the election of councillors, the Municipal Council of Owen Sound submitted, or purported to submit, a by-law, number 1494, for the repeal of their local option by-law.

There are fourteen polling subdivisions in Owen Sound; and in seven of these, contrary to the policy and direction of sec. 536 of the Municipal Act, there are more than 300 qualified electors: the lowest number being 316, and the highest 393.

In addition to the repeal by-law, there were several money by-laws to be voted upon, and there was a contest for election between about eighteen councillors and four or five school trustees. There was, therefore, likely to be, and there was in fact, a very heavy vote cast, in all some 3,400 votes. For the repeal by-law there were 1,268 counted ballots cast and 1,393 against it. The repeal movement, therefore, failed.

*To be reported in the Ontario Law Reports.

Section 141 of the Liquor License Act provides that a local option by-law shall not be finally passed until it has "been duly approved of by the electors of the municipality in the manner provided by the sections in that behalf of the Municipal Act;" and sub-sec. 6 of sec. 141, as enacted by 6 Edw. VII. ch. 47, sec. 24, provides that no such by-law shall be repealed "until after a by-law for that purpose has been submitted to the electors and approved by three-fifths of the electors voting thereon, in the same manner as the original by-law," etc.; "and, in case such repealing by-law is not so approved, no other repealing by-law shall be submitted to the electors until the polling at the third municipal election thereafter. Provided that any by-law heretofore passed under sub-section 1 of this section may be repealed with the approval of a majority of the electors voting upon such repeal."

Disregarding to some extent the exact language of the statement of claim, the plaintiff comes into Court to have it declared that the repeal by-law in question was not submitted to the vote of the electors in the manner provided for by the Municipal Act; that what was done does not, or at all events shall not, stand in the way of submitting a repealing by-law in January next; and for a mandamus or direction to the Municipal Council of Owen Sound to submit a repealing by-law.

Dealing first with the question of a mandamus, I am of opinion that, whether the plaintiff requires or is entitled to a declaratory judgment or not, he clearly is not entitled to this relief; and that it is still a matter entirely in the discretion of the council whether they will or will not submit a repealing by-law.

In 1906, the Legislature made it compulsory upon a municipal council to submit a local option by-law if petitioned for by 25 per cent. of the qualified voters of the municipality; but there is no corresponding provision, nor any provision of law, so far as I am aware, compelling a council to submit a by-law for the repeal of a local option by-law. As to "a direction," whatever that may mean, it is not the practice of the Court, I think, to give a direction which it cannot make effective. This branch of the relief asked for is refused.

Before dealing with the other branch of the plaintiff's case, upon the merits, I will dispose of the preliminary objection urged upon me, viz., that I have no jurisdiction to pronounce the declaratory judgment asked for. The Ontario Judicature Act, sec. 57, sub-sec. 5, provides that "no action or proceeding shall be open to objection on the ground that merely a declaratory

judgment or order is sought thereby, and the Court may make binding declarations of right, whether any consequential relief is or could be claimed or not.'' This is the same as the English Order XXV., Rule 5. . . .

[Reference to Stewart v. Guibord, 6 O.L.R. 262; Honour v. Equitable Life Assurance Society, [1900] 1 Ch. 852; Thomson v. Cushing, 30 O.R. 123; Bunnell v. Gordon, 20 O.R. 281; Barraclough v. Brown, [1897] A.C. 615; Grand Junction Water Works Co. v. Hampton Urban District Council, [1898] 2 Ch. 331; Attorney-General v. Cameron, 26 A.R. 103; London Association of Ship Owners and Brokers v. London and India Docks Joint Committee, [1892] 3 Ch. 242; Re Van Dyke and Village of Grimsby, 19 O.L.R. 402.]

Upon the whole, with some reluctance, I have come to the conclusion that I have jurisdiction to pronounce a declaratory judgment of the character the plaintiff asks, if the facts justify it.

What are the facts? Summarised, they present a singular disregard of many of the most important provisions of the Municipal Act relating to voting at elections and on by-laws, and particularly of those affecting the secrecy of the ballot. . .

[Reference to secs. 145, 168, 169, 170, 173, 198, 199, 200, and 351 of the Municipal Act, 1903; and summary of the evidence.]

It is frequently said that in municipal contests and voting upon by-laws we must not look for literal compliance with every provision of the statute. I quite agree. There will always be cases arising in which, the provisions of the Act being, in the main, substantially complied with, the Courts will, even without reference to sec. 204, overlook isolated and trifling irregularities.

Section 204, which is by sec. 351 made applicable to voting on by-laws as well, enacts that ''no election shall be declared invalid . . . by reason of any irregularity if it appears to the tribunal having cognizance of the question that the election was conducted in accordance with the principles laid down in this Act, and that such non-compliance, mistake, or irregularity did not affect the result of the election.''

This section clearly indicates the bounds beyond which I ought not to go. The onus of shewing that the omission, mistake, or irregularity did not affect the result is upon those who assert that it did not: Re Hickey and Town of Orillia, 17 O.L.R. 317. There was no attempt made to prove that the result was not affected by the conditions which generally characterised this

election; and, although there is a considerable difference in the votes pro and con, I am very far from being able to say that, with these conditions eliminated, and the statute complied with, the majority might not have been the other way.

But at most this is only a secondary consideration. The initial condition is, that the by-law is submitted and the vote taken in accordance with the principles of the Act. Without specific provisions at all, a ballot per se imports secrecy; and, when voting by ballot was adopted, the Legislature thereby wholly abandoned and repudiated open voting. With this, and the specific sections referred to, secrecy is now a basic principle of our municipal voting; and, if it is important in a municipal contest, it is vital in a vote upon a tense social question such as this.

It is not enough to say that the method pursued was just as good as, or even better than, the statutory method. It is the statutory method that gives meaning and validity to the vote. The vote without the statute is of no effect, is meaningless, binds nobody.

Almost every witness was asked, "Could the voters not conceal their votes if they wanted to?" That is not enough. The dangerous voter, the bribed voter, is the one who does not want to conceal his vote. The aim of the statute is not alone that the voter can conceal, but that while voting he shall not disclose—shall not be in a position to disclose—how he votes. To ignore the observance of the latter requirement would be to enable the bribed voter to prove himself entitled to the bribe, and thus remove one of the greatest obstacles from the briber's path.

There was no evidence as to polling subdivision number 12. In all the others there were grave, if not gross, irregularities; and in eleven out of a total of fourteen subdivisions the voting, speaking of it generally, was characterised throughout by a flagrant, callous, and wholly inexcusable disregard of the plain provisions of the statute.

The irregularities are somewhat of the same class, but disregard of the law was far more general, in this case than in Re Hickey and Town of Orillia, 17 O.L.R. 317; Re Quigley and Township of Bastard, 24 O.L.R. 622; or Re Service and Township of Front of Escot, 13 O.W.R. 1215.

It cannot be argued for a moment that the vote in this case was taken in accordance with the principles of the statute, or that there was an opportunity afforded for "a full, fair, and untrammelled vote of the electorate;" and I find that this vote was not so taken.

Nor can it be contended, that what took place on the 1st January last was a bona fide submission of a repealing by-law, within the meaning of 6 Edw. VII. ch. 47, sec. 24, or—subject of course to the discretionary will of the council—that this so-called submission and vote stands in the way, or should be allowed to stand in the way, of the exercise of the people's franchise upon this question until January, 1915; and I find that it was not a bona fide submission or vote within the meaning or intent of sec. 24.

I have not overlooked that, even with jurisdiction and sufficient evidence, as stated in Austen v. Collins, 54 L.T.R. 903, and in other English as well as Canadian cases, it is not always advisable for the Court to pronounce a declaratory judgment where there can be no immediate result, or relief; but I am of opinion that this is a case in which the uncertainty incident to what has happened should not be allowed to continue.

There will be judgment for the plaintiff declaring that the repealing by-law in question was not submitted or voted upon in the manner provided for by the Liquor License Act and the Municipal Act, or according to law, and that the alleged vote upon the said by-law does not—or at all events shall not hereafter—prevent the Municipal Council of Owen Sound from submitting a by-law of this kind, in January next or thereafter, if they desire to do so.

There will be no costs to either party. The persons promoting the by-law, with whom the plaintiff is, no doubt, identified, stood by and watched the irregularities without protest. The matter did not come upon them suddenly. It is said that the voting was very much as it had been. They, perhaps, were taking a double chance. The same thing may possibly be surmised as to the other side: at all events, if the voting was of the same character six years ago, they have no great cause for complaint.

If difficulty arises as to the wording of the judgment, I may be spoken to.

RIDDELL, J., IN CHAMBERS. OCTOBER 5TH, 1912.

SALTSMAN v. BERLIN ROBE AND CLOTHING CO.

Mechanics' Liens—Action to Enforce—Order Staying Proceedings as against Owner until Building Completed—Ascertainment of Amount Due to Contractor—Work Left Uncompleted—Building to be Finished by Owner—Question of Law.

An appeal by the plaintiffs from an order of the Deputy Judge of the County Court of the County of Waterloo staying all proceedings in this action, which was brought for the enforcement of mechanics' liens.

M. A. Secord, K.C., for the plaintiffs.

J. C. Haight, for the defendants the Berlin Robe and Clothing Company.

RIDDELL, J.:—The plaintiffs are workmen who were employed by the defendants the W. A. McNeill Contracting Company in the erection of a brick building, which that company had contracted to build for their co-defendants, the Berlin Robe and Clothing Company. The contract provides for payment of 80 per cent. of the value of the materials and labour done, on the 10th of each month, as the work progresses, and the remainder when the work is all complete and after the expiration of 30 days.

The work began under the contract in April; it was found necessary to order certain extras; and, about the 1st August, the McNeill company found themselves in financial difficulties and unable to pay their workmen: work on the building almost ceased; the workmen, being unable to get their pay, refused to work longer. Thereupon the Berlin Robe and Clothing Company took possession of the work themselves, and it is probable that they will have to complete the building by day-labour. The estimated value of the McNeill company's work and materials is $4,111, and 80 per cent. of that has been paid to the McNeill company. The Berlin Robe and Clothing Company say that it will be impossible to ascertain at the present time what will be the cost of completing the work—and that it will be impossible to ascertain what amount, if any, is justly and lawfully due until the completion of the building.

The plaintiffs having delivered their statement of claim, the defendants the Berlin Robe and Clothing Company applied, on affidavit setting out the above as the facts, for an order staying the action.

The Deputy Judge of the County Court in Chambers made an order staying the action as against the Berlin Robe and Clothing Company until the completion of the building, reserving leave to the plaintiffs to apply, if at any time it should appear to them that the company were not proceeding with the building with due diligence, and reserving the question of costs.

The plaintiffs now appeal.

I am of opinion that the order cannot stand.

The learned Deputy Judge is said to have proceeded upon the ground that the plaintiffs can recover from the Berlin Robe and Clothing Company only the amount which, on the completion of the building, is due from that company to the McNeill company. But there are two answers to such an argument.

(1) Such a question of law should not be determined in Chambers on an interlocutory application; and I do not intend to determine it now. It should either be set down for argument as a question of law arising on the pleadings under Con. Rule 259—or preferably determined by the Judge at the trial. In either case the question can be made the subject of appeal in the regular way.

(2) Even if the law were clear, the plaintiffs are entitled to prove as against the Berlin Robe and Clothing Company the amount of their claim against their employers—quite a different thing from proving this as against the employers themselves. Working men must be more or less liable to change their residence: and it is nothing but simple justice to enable them to have their rights determined at the earliest possible moment.

I can conceive of no good end to be attained by the order in appeal. The parties can go to trial; the amount of the claims of the plaintiffs will be determined; if then it be considered that the amount to be recovered from the Berlin Robe and Clothing Company is the statutory percentage of the amount due and payable at the end of the contract, the Judge will so declare—or, if the view of the plaintiffs be accepted, the law will be laid down in that sense. In either case, in all probability, there will be a reference to the Master to determine the amount. How the Berlin Robe and Clothing Company can be injured by such proceeding, I cannot see.

I think the application should not have been made, and that

the appeal should be allowed with costs here and below payable forthwith.

The defendants will have until Wednesday the 9th October to plead as they may be advised.

JENKINS V. MCWHINNEY—MASTER IN CHAMBERS—SEPT. 30.

Lis Pendens—Writ of Summons—Endorsement—Statement of Claim—Refusal to Sign "Option" of Purchase of Land—Vacating Registry of Certificate.]—On the 16th August, 1912, the plaintiff began this action. By the endorsement of the writ of summons, the plaintiff's claim was stated to be for a commission on the sale of lands, and for a certificate of lis pendens against the lands, i.e., as to the interest of the defendants or either of them in the east half and north-westerly quarter of lot 6 in the 2nd concession west of Yonge street, in the county of York, and in lots 20 to 61, both inclusive, on plan 1480 in the registry division of East Toronto. The plaintiff having obtained and registered a certificate of lis pendens, the defendants moved to vacate the registry. The notice of motion was served on the 25th September, 1912. On the 27th September, the plaintiff delivered a statement of claim, in which, after setting out the facts on which the claim to commission was based, he alleged, in paragraph 10, that the defendants agreed to give the plaintiff "a ten-day option" (running from the 1st August) "to sell the balance of the farm, and a letter was drawn up to that effect, which the defendant McWhinney took possession of and agreed to sign and have the defendant Radford sign and hand over to the plaintiff, which was not so handed over." In paragraph 11, a refusal by the defendants to sign this "option" was alleged. Nothing was said as to any similar agreement in respect of the East Toronto lots. Besides the claim for commission, the plaintiff claimed damages for refusal to deliver written option agreed on. The Master referred to Brock v. Crawford, 11 O.W.R. 143; Sheppard v. Kennedy, 10 P.R. 242, at pp. 244, 245; Burdett v. Fader, 6 O.L.R. 532, 7 O.L.R. 72; and said that, even assuming that a certificate of lis pendens issued on a defective endorsement could be rehabilitated by a sufficient allegation in the statement of claim, there was here at most nothing definite or precise as to what "the balance of the farm" was—it was nowhere stated in the pleading what quantity of

land there was in the lot in question. In no possible circumstances could the facts as set out in the pleading give any right to the plaintiff in respect of the lands. Order made vacating the registry with costs to the defendants in any event. J. R. Roaf, for the defendants. J. J. Hubbard, for the plaintiff.

CUMMING V. CUMMING—LATCHFORD, J.—SEPT. 30.

Deed—Action to Set aside—Evidence—Parent and Child.]—Action by a mother against her son to set aside a quit-claim deed of a farm and for other relief. The learned Judge, after discussing the evidence and an attempted settlement, said that, on the evidence, the claim to set aside the deed and the other claims made in the action entirely failed; and he had no power to deal with the question of contributions from her children for the plaintiff's support during her declining years. Action dismissed without costs. E. F. Lazier, for the plaintiff. S. F. Washington, K.C., and J. W. Lawrason, for the defendant.

BARBER V. ROYAL LOAN AND SAVINGS CO.—MASTER IN CHAMBERS —OCT. 1.

Interpleader—Stakeholder — Want of Neutrality — Architects' Commission.]—Motion by the defendants for leave to pay into Court a sum admitted to be due either to the plaintiff or to Chapman and McGiffin, and for an order in the nature of an interpleader. The plaintiff sued for $1,000 for services as architect. The defendants admitted that $923.05 was due as architects' fees in respect of a building erected for them, and this was claimed by Chapman and McGiffin, to whom the defendants had already paid $925, without the plaintiff's consent. It appeared that both the plaintiff and Chapman and McGiffin were actually employed upon the work. The defendants disclaimed any agreement or arrangement with the plaintiff, asserting that the plaintiff's connection with the building was through the other architects. The Master said that it was not a case for interpleader; the defendants did not stand neutral, but recognised Chapman and McGiffin, and disclaimed any relation with the plaintiff. The Master referred to Re Scottish American Co. and Rymal, 14 O.W.R. 685; Re Smith and Bennett, 2 O.W.R.

399; Re Elgie Edgar and Clemens, 8 O.W.R. 33, 299; Elgie & Co. v. Edgar, 8 O.W.R. 307; Elgie v. Edgar, 8 O.W.R. 944, 9 O.W.R. 614. Motion dismissed; costs to the plaintiff in the cause; costs to Chapman and McGiffin forthwith after taxation. O. H. King, for the defendants. Grayson Smith, for the plaintiff. G. H. Kilmer, K.C., for Chapman and McGiffin.

POLLINGTON V. CHEESEMAN—MASTER IN CHAMBERS—OCT. 3.

Parties—Third Parties—Motion to Set aside Third Party Notice—Time for Moving—Employers' Liability Insurance—Terms of Policy—Action for Damages for Death of Employee.] —Motion by the Travellers Insurance Company, third parties, to set aside the third party notice served upon them by the defendant. The defendant objected that the motion was too late, the company having appeared; but the Master said that Holden v. Grand Trunk R.W. Co., 2 O.L.R. 423, was no longer an authority on this point: see Donn v. Toronto Ferry Co., 6 O. W.R. 973; and the motion must be dealt with on its merits.—The action was for damages for the death of the plaintiff's son while in the service of the defendant. The third parties had insured the defendant against liability for accidents to employees; and, in accordance with the provisions of the policy, the defence was at first undertaken by the company and an appearance entered by their solicitors, without prejudice to the right of the company to decline to go on with the defence on further investigation. Later, the company declined to accept the risk of the accident to the plaintiff's son and relinquished the defence. The defendant then defended by his own solicitor, and served the third party notice upon the company.—The company contended that the issuing of the third party notice was in violation of clause E. in the policy, providing that no action should lie against the company to recover any loss, unless for loss actually sustained and paid in money in satisfaction of a judgment, etc. The Master said that, if this condition was to be construed literally, it would prevent the issue of a third party notice if such notice was to be considered equivalent to bringing an action against the company. This surely could not be a tenable position, as it would enable an insurer at his will to prevent the application of the third party procedure—at least it could not be so decided on an interlocutory application. —The second ground of objection was that the defendant had

admitted to an officer of the company that the deceased, at the time the injuries complained of were sustained, was not engaged in the business operations of the defendant as described in the policy. This was stated on affidavit, but the opposite was averred in the affidavit of the defendant. The Master said that effect could not be given to this objection at the present stage, though both objections might avail the company to escape liability if the plaintiff succeeded against the defendant. In the meantime, it would seem to be the company's proper course to be present at the trial and support the defence as against the plaintiff; if that defence should fail, it would still be open to the company to shew that the defendant had no recourse against the company under the terms of the policy. Reference to Pettigrew v. Grand Trunk R.W. Co., 22 O.L.R. 23; Swale v. Canadian Pacific R.W. Co., 25 O.L.R. 492; Walker and Webb v. Macdonald, ante 64. Motion dismissed with costs to the defendant in the third party issue in any event. T. N. Phelan, for the company. Frank McCarthy, for the defendant.

ARMES v. MANCIL—LATCHFORD, J.—OCT. 4.

Contract—Architect—Preparation of Plans and Specifications—Remuneration—Liability—Evidence—Agency—Ratification.]—Action by an architect to recover from the defendants $934.53 for plans and specifications alleged to have been prepared by the plaintiff upon the instructions of the defendants. The learned Judge finds that the plaintiff was in fact employed by the defendant Best and two other persons not parties to the action, and was not employed by the defendants Mancil and Woods; that none of the three who employed the plaintiff was the agent of either Mancil or Woods; and that Mancil did not adopt or ratify the acts of Best and the other two persons. As against Mancil and Woods, action dismissed with costs. Judgment for the plaintiff against Best for $500 and costs. F. Morison, for the plaintiff. W. Bell, for the defendants.

CHRISTIE BROWN & CO. LIMITED v. WOODHOUSE—MASTER IN CHAMBERS—OCT. 5.

Discontinuance of Action—Con. Rule 430—Proceedings Taken after Delivery of Statement of Defence—Issue of Order to Produce and Appointment for Examination of Defendant.]—Motion by the defendant to dismiss the action, which was

brought to recover possession of land. The principal defence was the Statute of Limitations. The action was begun on the 21st February, 1912; a statement of defence was delivered on the 18th May. Two days later, the plaintiffs took out the usual order for production by the defendant and an appointment to examine the defendant for discovery on the 29th May. The examination was not proceeded with. Issue was joined before the 1st July, 1912. On the 13th September, the plaintiffs served a notice of discontinuance. On the 1st October, the defendant gave notice of this motion—to dismiss the action "or for such other order as may seem just." Upon the motion coming on for hearing, it was objected by the plaintiffs that the motion should have been to set aside the discontinuance. The Master said that the objection was probably well taken; but the notice of motion could be amended, as the simple point for decision was, whether the plaintiffs were within clause (1) of Con. Rule 430, or must proced under clause (4). Clause (1) provides that "the plaintiff may, at any time before receipt of the statement of defence . . . or after receipt thereof before taking any other proceeding in the action (save an interlocutory application) . . . wholly discontinue his action." Clause (4) provides that, save as before provided, it shall not be competent for the plaintiff to discontinue without leave. The Master was of opinion that what was done by the plaintiffs to obtain discovery after the delivery of the statement of defence was "taking any other proceeding." Reference to Schlund v. Foster, 10 O.W.R. 1005; Spincer v. Watts, 23 Q.B.D. 352, 353; Vickers v. Coventry, [1908] W.N. 12. The plaintiffs should have leave to discontinue in the terms approved of in Schlund v. Foster, 11 O.W.R. 60, 175, 314; and, if the plaintiffs should take that order, the costs of the motion would be costs in the cause. If the plaintiffs desired to proceed, the notice of discontinuance would be set aside with costs to the defendant in any event. E. Meek, K.C., for the defendant. W. B. Milliken, for the plaintiffs.

YOUNG V. PLOTYMEKI—RIDDELL, J.—OCT. 5.

Vendor and Purchaser—Contract for Sale of Land—Default—Rescission—Forfeiture of Sums Paid—Judgment—Costs.]—Motion by the plaintiffs for judgment on the statement of claim in default of defence in an action for a declaration that the plaintiffs (vendors) were entitled to determine an agreement for the sale of two lots of land in Fort William and to retain any sum or sums paid under the agreement, for rescission of the

agreement, and for possession. RIDDELL, J., after consideration, directed that the usual judgment for rescission and forfeit of deposit and sums paid on account and for costs should be issued. J. D. Bissett, for the plaintiffs. No one appeared for the defendant.

WALKER V. MAXWELL—LENNOX, J.—OCT. 5.

Vendor and Purchaser—Contract for Sale of Land—Condition—Representations—Failure to Prove Truth of—Rescission—Evidence—Exclusion.]—Action for the rescission of a conditional contract entered into by the plaintiff for the purchase from the defendants of 320 acres of land in Saskatchewan, for the delivery up of a promissory note made by the plaintiff, for the repayment of money paid in connection with the contract and interest, and for damages. There were four defendants—White, Robertson, Maxwell, and Smith.—The trial was begun before LENNOX, J., without a jury, at Owen Sound, on the 18th June last. At this time, counsel for the different defendants agreed that they did not wish any distinction made between the defendants, but would be content with a judgment for or against all. The case was then adjourned for argument at Toronto, and was taken up on the 19th September. Counsel for the defendants Maxwell and Smith then asked leave to call evidence to shew the relations existing between these two defendants and the other two defendants, with the view of ultimately arguing that, even if White and Robertson were liable, Maxwell and Smith were not. All the other parties objected to this; and the learned Judge, having regard to the previous conduct of the case, and the very great inconvenience and injustice involved in the admission of this evidence, refused to admit it.—To induce the plaintiff to sign the formal contracts of sale and purchase, the defendant Robertson, representing all the defendants, drew up, signed, and delivered to the plaintiff the following document: "Owen Sound, April 19th, 1911. This writing is to certify that James D. Walker, of Owen Sound, agrees to sign and settle land bought in the vicinity of Battleford" (describing it) "upon the condition that the land upon inspection is as represented, good farm land, clay loam, slightly rolling, and located close to G.T.P. Ry,, otherwise contracts to be *refunded* together with cash paid." Thereupon the plaintiff signed the formal contracts, paid the sum of $320 by cheque, and gave his promissory note

for $952. The learned Judge construes this to be not an absolute but a conditional contract, conditional and partly executed, and to take effect only if, upon inspection, the land turned out to be as represented. The plaintiff made his inspection promptly, and at once refused to take the property. The learned Judge finds as a fact that none of the representations contained in the writing quoted were true. Judgment for the plaintiff for the relief claimed (except damages) with costs. W. H. Wright and J. A. Horning, for the plaintiff. I. B. Lucas, K.C., for the defendant White. McEwan, for the defendant Robertson. A. G. MacKay, K.C., and H. G. Tucker, for the defendants Maxwell and Smith.