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HIGH COURT OF JUSTICE.

DIVISIONAL COURT. OCTOBER 10TH, 1912.

McGUIRE v. TOWNSHIP OF BRIGHTON.

Municipal Corporations — Drainage — Natural Watercourse—Drainage of Surface-water into—Exceeding Capacity of Watercourse—Overflow — Injury to Land — Liability — Damages.

Appeal by the defendants, the Corporation of the Township of Brighton, from the judgment of the Junior Judge of the County Court of the United Counties of Northumberland and Durham, awarding the plaintiffs, Archibald McGuire, Frank McGuire, and Patrick McGuire, the sum of $350 damages in perpetuity, in lieu of an injunction, in an action to restrain the defendants from bringing on the plaintiffs' land a greater volume of water than naturally came thereon, which, as the plaintiffs alleged, had been done by a drain or ditch constructed by the defendants and a double culvert crossing the road opposite the plaintiffs' farm.

The appeal was heard by MULOCK, C.J.Ex.D., CLUTE and RIDDELL, JJ., on the 9th and 10th October, 1912.

E. G. Porter, K.C., for the defendants.

W. F. Kerr, for the plaintiffs.

At the conclusion of the argument, the judgment of the Court was delivered by MULOCK, C.J.:—Mr. Porter relies on what is, we think a correct statement of the law, the proposition of law that the defendants have the right to drain surface-water into the creek in question, it being a natural watercourse, provided of water than, according to its natural capacity, it can take care

of. He did not elaborate the proposition thus fully, but what I have said is a fair paraphrase of the proposition.

According to Mr. Porter, the evidence shews that, before the defendants drained any surface-water into the watercourse, it periodically overflowed its banks. It is still in its normal condition, having never been deepened or had its capacity increased. It, therefore, must follow that, when the defendants brought into it a larger volume of water, they increased the overflow; and, thus increasing the overflow, they are liable for doing what they have no right to do, namely, turning into this watercourse a volume of water in excess of its natural capacity—thus having committed a wrong for which they must answer in damages or by injunction.

As to the amount of damages, the learned trial Judge has named a very moderate sum. In actions for damages arising out of the doing of violence to another man's rights, the amount is not to be weighed, as my brother Riddell correctly observes, in scales of gold. A man who commits a wrong against the property of another must take the consequences, and cannot complain if the damages awarded should slightly exceed the actual damage sustained. The situation is brought about by his wrong-doing.

If the defendants here had been influenced by a due regard for the plaintiffs' rights, they might have negotiated with them for the deepening of the watercourse and put it into such condition that it would have taken care of the drainage, whereby all this litigation would have been avoided. Instead of so acting, they proceed in a lawless way to act without reference to the plaintiffs' rights. There is no evidence controverting the estimate made by the plaintiffs as to the damages; and the amount awarded is a moderate capital sum for the probable annual damage. Mr. Porter prefers damages to an injunction. Therefore, we will not disturb the finding of the learned trial Judge as to the amount awarded; and dismiss this appeal with costs.

RIDDELL, J., IN CHAMBERS. OCTOBER 21ST, 1912.

WELSH v. HARRISON.

Partition—Sale under Order—Payment into Court—Interest—Costs in Addition to Commission—Payment out of Court—Consent.

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.

J. A. Campbell, for all parties.

RIDDELL, J.:—On the 7th December, 1908, an order was made herein by Mr. Justice Britton, at the Whitby Assizes, for partition or sale of lands. Paragraphs 2, 3, and 4 of the order correspond with paragraphs 2, 3, and 4 of Form 158—with a 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 on the 20th March, 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 on the 7th May, 1910, and by tender on the 1st July, 1910, 15th June, 1911, and 1st August, 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 in separate parcels to four persons—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. . . ; (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.

MULOCK, C.J.Ex.D. OCTOBER 21ST, 1912.

PATTERSON v. OXFORD FARMERS MUTUAL FIRE INSURANCE CO.

Fire Insurance—Representation that Property Free from Incumbrance—Material Misrepresentation and Concealment—Onus—Innocent Non-disclosure—Act of Agent of Insurance Company—Prejudice—Absence of Evidence as to Value of Property—Failure to Prove Materiality of Misrepresentation—Concealment of Fear of Incendiarism—Failure of Proof—Statutory Declaration—Statutory Conditions 13 *and* 15*—Proofs of Loss—Particulars—Omission to Give Notice in Writing of Loss—Insurance Act, sec.* 172*—Relief from Omission—Knowledge and Conduct of Directors—Adoption of Oral Notice.*

Action 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.

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

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

Mulock, C.J.:—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 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 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 writ-

ing, 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., 2 O.W.N. 237, 1470; Lount v. London Mutual Fire Insurance Co., 9 O.L.R. 549, 555. . . .

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 authority. 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: Guardian Insurance Co. 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, Holt N.P. 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 the 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 return 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. 1897 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 Co., 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 Co. v. Standard Mutual Fire Insurance Co., 44 S.C.R. 40; Bell Brothers v. Hudson 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 that they 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 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.

DIVISIONAL COURT. OCTOBER 21ST, 1912.

MOORE v. TOWN OF CORNWALL.

Municipal Corporations—Drainage—Open Drain or Ditch in Highway—Negligent Construction—Neglect to Clean out—Overflow of Waters upon Plaintiff's Land—Seepage—Actionable Wrong—Damages—Costs.

Appeal by the plaintiff from the judgment of the Judge of the County Court of the United Counties of Stormont, Dundas, and Glengarry, dismissing the action, which was brought to recover $300 damages for injury to the plaintiff's land alleged to have been caused by the defendants bringing water thereon by means of a drain.

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

C. H. Cline, for the plaintiff.

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

RIDDELL, J.:—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 defendants 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 south side 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 defendants 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 himself by 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 defendants.

The neglect of the defendants 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. Township of 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.

KELLY and LENNOX, JJ., agreed in the result, each stating reasons in writing.

LENNOX, J., referred to the following cases: Ostrom v. Sills, 24 A.R. 526, 539; Tucker v. Newman, 11 A. & E. 40; Fay v.

Prentice, 14 L.J.C.P. 298; Billons v. Sackett, 15 Barb. 96; Malott v. Township of Mersea, 9 O.R. 611; Rylands v. Fletcher, L.R. 3 H.L. 330; Tenant v. Goldwin, Salk. 21, 361; Hodgkinson v. Ennor, 32 L.J.Q.B. 231, 8 L.T.R. 451; Wormersley v. Church, 17 L.T.R. 190; Reeve v. City of Toronto, 21 U.C.R. 60; Matthews v. City of Hamilton, 6 O.L.R. 198; City of St. John v. Baker, 3 N.B. Eq. 358; Ballard v. Tomlinson, 29 Ch.D. 155; Crossley v. Leighton, L.R. 2 Ch. 478; City of Indianapolis v. Lawyer, 38 Ind. 248; Weese v. Mason, 39 Am. Repr. 135; Burford v. Grand Rapids, 53 Mich. 98; Scroggie v. Town of Guelph, 36 U.C.R. 535; Derinzy v. City of Ottawa, 15 A.R. 712, 716; Van Egmond v. Town of Seaforth, 6 O.R. 599.

Appeal allowed.

DIVISIONAL COURT. OCTOBER 21ST, 1912.

*EADIE-DOUGLAS v. HITCH & CO.

Mechanics' Liens—Registration of Claim of Lien after Proceedings Taken by another Lienor—Mechanics' Lien Act, 10 *Edw. VII. ch.* 69, *sec.* 24—*"In the Meantime"—Benefit of Proceedings Taken—Preservation of Lien.*

Appeal by the plaintiffs from an order of the Local Master at Ottawa, in a mechanics' lien action, allowing the claimant G. W. King to prove his claim to a lien under the Mechanics' Lien Act, 10 Edw. VII. ch. 69.

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

J. E. Caldwell, for the appellants.

F. A. Magee, for the claimant.

The judgment of the Court was delivered by RIDDELL, J.:—In August, 1909, the Rideau Club of Ottawa employed H. C. Hitch & Co. to erect a building and make some additions to a building already erected on the land of the club, for $98,000. Hitch & Co., in 1910, employed the plaintiffs to furnish part of the materials for $15,250, and have paid all but $4,125 of that amount.

On the 30th June, 1911, the plaintiffs registered a claim for a lien under 10 Edw. VII. ch. 69, sec. 17; and on the 31st July,

*To be reported in the Ontario Law Reports.

1911, framed and on or about the 2nd August, 1911, filed and served a statement of claim under sec. 31 (2), (3) of that Act.

The matter came on for trial before the Master at Ottawa, under sec. 33, in October, 1911; and he gave judgment in August, 1912; but the judgment has not yet been signed.

King, a master painter carrying on business at Ottawa, had, in July, 1910, entered into a contract with Hitch & Co. for the painting and glazing of the work for $3,800. Computing extras, payments on account, etc., there was due at the completion of the work, in November, 1911, according to King's affidavit, the sum of $1,830. King did not come in in the proceedings before the Master; but on the 15th December, 1911, he registered his claim for a lien.

After some fruitless negotiations for a settlement, King applied, under sec. 37 (6) of the Act, to be let in to prove his claim; the Master made an order on the 14th September, 1912, allowing him in, he to pay the costs of the application.

The plaintiffs now appeal under sec. 40 (3); but, for the greater caution, have obtained leave, in case Con. Rule 777 should be considered to apply.

The main contention is based upon the provisions of sec. 24 of the Act, and it may be thus stated:—

Liens are, for the purposes of the Act, divided into two classes: (1) liens for which a claim is not registered; and (2) liens for which a claim is registered. The lien is given by sec. 6, and exists independently of the registration of a claim; and, when the lien is in that condition, i.e., before registration of a claim, there are two courses open to the lienor: (a) omit to register a claim, in which case his lien will either (1) lapse or (2) be enforced by action at his own instance or that of others; or (b) make up his mind to take the other course and register his claim, in which case his lien will (1) lapse on the expiration of ninety days thereafter, or (2) he must take an action within a certain time or some one else must. In this view, the lienor who registers his claim must be taken to have abandoned all relief but what he can obtain under sec. 24.

I find no crevice in this logic. The words of sec. 24 are plain and unambiguous—that "every lien for which a claim has been registered shall absolutely cease to exist on the expiration of ninety days . . . unless . . ." something is done. It is not that the claim for a lien shall become ineffective, etc., but that the lien itself, which exists independently of the claim, absolutely ceases to exist.

What is it then that will keep alive the lien after "the expiration of ninety days after the work or service has been com-

pleted or materials have been furnished or placed, or after the expiry of the period of credit . . . ?" It is "in the meantime an action is commenced to realise the claim or in which the claim may be realised under the provisions of this Act . ."

The words "in the meantime," it is contended, must mean "between the time of registering the claim and the expiry of the time limited." No doubt, the words would bear that interpretation—but, with that interpretation, what would be the result?

A lienor has, without registering, already commenced an action; for the sake of ordinary business caution, he registers his claim—he must discontinue his action and begin de novo; otherwise the action is not "commenced . . . in the meantime."

Or, without registering, he is proceeding with the proof of his claim under proceedings instituted by another—he registers; he must stop; his proceedings in the pending action will be of no avail—he must bring another action or get some one else to do so.

This is manifest absurdity—still the Legislature may pass absurd legislation if so inclined. But, before we decide that that is the meaning of the language employed, we should see if there is no other interpretation possible which will not result in an absurdity.

"In the meantime," no doubt, has the primary signification "during or within the time which intervenes between one specified period or event and another:" Murray's New Eng. Dict., sub voce "meantime," p. 276, col. 2 A.1. The original of "mean" is the same as that of "mesne," i.e., "medianus," late Latin for "in the middle," from "medius." In strictness there is in contemplation a terminus a quo, as well as a terminus ad quem—a date or event with which the period begins, as well as a date or event with which it ends. But in no few instances the terminus a quo is not in mind at all, but it is the terminus ad quem which is the only date, etc., in contemplation (most frequently perhaps it is the present time actual or supposed which is the terminus a quo.) In such a case the words are equivalent to "before such and such an event, a date or period."

In the inquiry whether this be not the real meaning of the expression, I think the history of the legislation is all important. . . .

[Reference to 36 Vict. ch. 27, secs. 1, 2, 4; 38 Vict. ch. 20, secs. 2, 13, 14, 20; McCormick v. Bullivant, 25 Gr. 273; Grant v. Dunn, 3 O.R. 376; Walker v. Walton, 24 Gr. 209, 1 A.R. 579; Bunting v. Bell, 23 Gr. 584; secs. 14, 15, 20, and 21 of R.S.O. 1877 ch.

120; R.S.O. 1887 ch. 126, secs. 22, 23; 59 Vict. ch. 35, secs. 22, 23; R.S.O. 1897 ch. 153, secs. 23, 24; 10 Edw. VII. ch. 69, secs. 23, 24.]

The result is, that any proceeding taken during the existence of the lien (at all events) is taken "in the meantime," within the meaning of sec. 24, if taken before the expiration of the period mentioned in sec. 24—the proceedings taken by the plaintiffs were such proceedings in point of time. Section 32 provides that "an action brought by a lien-holder shall be taken to be brought on behalf of the other lien-holders"—therefore, these are proceedings "in which the claim may be realised under the provisions of this Act."

The order appealed from is right: and this appeal should be dismissed, and with costs.

DIVISIONAL COURT. OCTOBER 21ST, 1912.

*CITY OF TORONTO v. FOSS.

Municipal Corporations—Prevention of Use of Building as "Store" or "Manufactory"—Municipal Act, 1903, *sec.* 541(*a*)—4 *Edw. VII. ch.* 22, *sec.* 19—*By-law—Ladies Tailoring Business—Injunction.*

Appeal by the defendant from the judgment of MIDDLETON, J., 3 O.W.N. 1426.

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

W. C. Chisholm, K.C., for the defendant.

C. M. Colquhoun, for the plaintiffs.

BRITTON, J.:—The action is for an injunction to restrain the defendant from using the building and premises No. 78 Avenue road as a store or manufactory, in breach of by-law No. 4469 of the Corporation of the City of Toronto. . . .

The learned Judge held that, upon the evidence, the use of the building did not constitute it a "manufactory," within the meaning of the statute; but that the use of the building did constitute it a "store." . . .

The by-law was passed on the 4th January, 1905, and it

*To be reported in the Ontario Law Reports.

enacts that "no building shall hereafter be located, erected, or used for laundries, butcher shops, stores, or manufactories upon property, etc. . . . Nor shall any person locate, erect, or use for laundries, butcher shops, stores, or manufactories any such building . . ."

There is no question about the prohibited area. The sole question is: Is the use the defendant makes of this building such as to constitute the building a store, within the meaning of the by-law or of the statute authorising the by-law?

With great respect, I am unable to agree with the learned Judge. I think he was absolutely right, and for the reasons stated, in his conclusion that the use of the building did not constitute it a manufactory. . . .

To apply the reasoning of the learned Judge in reference to "factory" to the word "store," it seems to me that the word "store," as used by the Legislature, contemplates operations on a larger scale than merely purchasing a comparatively small quantity of material for ladies' dresses in skirt lengths, and making these up by measure and to order, charging for the furnished article.

The defendant is what is called a ladies' tailor. He keeps no general assortment of goods or commodities. His premises are not filled up with counters or shelving. When he purchases material to be made into dresses, he places this upon the piano or a chair or chairs. He now has no sign. He did have a sign, but finding out—by proceedings against him in the Police Court—that the sign was objectionable, he had it removed before the commencement of this action. The sign, as it was, was not that of "a store."

The place is not a factory. It has been held, and quite rightly, that he may have three or four persons in a sewing-room doing work. This defendant has only two at most—a man and woman helpers to make up work.

The facts must be as stated by the defendant himself. The plaintiffs rely upon these. He says it is a small business; he does not advertise, but all the same does a fairly large business for those who wear "a lot of clothes," as he says, and of excellent quality, no doubt; but his principal business in making these clothes is only for three months in spring and three months in autumn, and he gets only about a living for himself and family. This house is his family residence. Fifty per cent. of all his work is when ladies bring in their own material. Ladies bring goods bought in Europe and bring those to the defendant to be made up. Of the other fifty per cent. of work, a part is where ladies choose a dress at a store in the city, and

the defendant is authorised to purchase the cloth and make it up. The defendant gets a discount on such a purchase, and that he claims as part of his profit. He buys it for the customer; he makes it up for the customer, charging for the work, and charging for the material what the customer would be obliged to pay for it at the store in the city. . . .

No doubt, there is, in a sense, a sale of the cloth, when he sells the made-up article; but there is the broad distinction that this man makes his living by his skill and taste and labour in making dresses for society ladies, who require first-class work.

I do not think the residence of this defendant any more a store than it is a factory; it is no more a store than is the house of a lady who makes marmalade and puts it in jars for those who order and pay for it. There are ladies who make and sell cake to their friends; others who make underwear and sell it to well-to-do friends; others who make and sell to professional gentlemen bands and ties. Industrious persons who require money to aid in support of the family have a sewing-room or other room where their labour is put upon raw material, and profit derived therefrom.

It is a wrong use of words to say that such houses are either factories or stores. A store is well understood by every person to be a place "where merchandise is kept for sale," as a grocery store, a dry goods store, a hardware store, etc.

The defendant's place may be called a dress-making establishment; it is that, in a small and select way; but it is not a store, as the word is generally used, and not so within the meaning of the statute or by-law. The word "shop" may sometimes mean a "store," and is used in that way whether with or without a prefix; but the word "store" can never be properly used in reference to places that are in reality and are called shops. That is recognised in the Act when "butcher shops" are mentioned. Any enlarged meaning of the word "shop" cannot be invoked in this case to make the defendant's place a "store," when not a "store" according to the well-understood meaning of the word "store" as ordinarily used.

I think the appeal should be allowed with costs, and the action dismissed with costs.

FALCONBRIDGE, C.J., agreed with BRITTON, J., for reasons stated in writing.

RIDDELL, J. (dissenting) :—I am of opinion that my learned

brother Middleton is right, and I have nothing to add to his judgment.

Appeal allowed; RIDDELL, J., dissenting.

MULOCK, C.J.Ex.D. OCTOBER 22ND, 1912.

RE JOHNSON.

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

Application by the widow and one of the executors of William Johnson, deceased, for an order determining a question arising upon the construction of his will.

N. B. Tudhope, for the applicant.
D. Inglis Grant, for Janet Ratcliffe, one of the daughters of the testator.

MULOCK, C.J.:—The question is, what interest the testator's widow takes in that portion of his personal estate described in his will as "all my money, notes, and mortgages." She claims to be entitled to it absolutely, whilst the daughter's contention is that she takes but a life interest in it. The will is 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 my 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 follows the appointment of executors.

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, 13 Ch. D. 144, affirmed, 14 Ch. 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 furnishing and fixtures, livestock 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.

MIDDLETON, J. OCTOBER 22ND, 1912.

WIGGIN AND ELWELL v. BROWNING.

Contract—Shares Purchased for Defendant without Authority —Evidence—Correspondence—Assumption of Liability—Ratification—Estoppel.

Action to recover $5,538.75, being a balance of the price of stock alleged to have been purchased by the plaintiffs for the defendant.

The stock was purchased by one Mills, now deceased, purporting to act on behalf of the defendant, and a part of it was paid for by Mills; but he had in reality no authority to use the defendant's name. When the defendant first heard of it, in October, 1911, and was pressed by the plaintiffs' solicitors to admit or assume liability, he declined to do so; but on the 14th November he wrote to one of the plaintiffs as follows: "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 authority to do what he did. At the same time, I do not feel like guaranteeing the amount." On the 22nd November, the plaintiffs wrote to the defendant 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." On the 24th November, the defendant wrote to the plaintiff, "I am not admitting liability." On the 1st December, the plaintiffs wrote: "If we are to understand it," i.e., the letter of the 24th, "as a repudi-

ation of your liability . . . 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 December, the defendant 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.

H. H. Dewart, K.C., for the plaintiffs.
R. McKay, K.C., for the defendant.

MIDDLETON, J. (after setting out the facts):—It is sought to treat the letter of the 24th November as bringing the case within the decision of Dominion Bank v. Ewing, 7 O.L.R. 90, 35 S.C.R. 133, and [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 Co., 6 App. Cas. 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 . . . in point of law operate as a ratification altogether." . . .

[Reference to British Linen Co. v. Cowan (1906), 8 F. 704.]

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 plaintiffs. 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 August to justify a change

of opinion, they had the facts before them. The solicitors' 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 because 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 should 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.

RIDDELL, J., IN CHAMBERS. OCTOBER 24TH, 1912.

RE CANADIAN SHIPBUILDING CO.

Company—Winding-up—Appeal—Leave — Extension of Time for Giving Security—Interpretation of Statute—Matters in Question upon Proposed Appeal—Refusal of Leave—Solicitors' Slips.

Motion by the liquidator of the company, under secs. 101(c) and 104 of the Winding-up Act, for leave to appeal to the Court of Appeal from the judgment of RIDDELL, J., 26 O.L.R. 564, and also for an extension of the time for giving security.

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

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

H. E. Rose, K.C., for the Hamilton and Fort William Navigation Company Limited.

RIDDELL, J.:—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

Lumber 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 satisfy the statute.

The main 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, don't 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 rigour 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:" per Hamilton, J., in Attorney-General v. Exeter Corporation, [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.

BRITTON, J. OCTOBER 24TH, 1912.

QUIST v. SERPENT RIVER LOGGING CO.

Master and Servant—Injury to Servant—Workmen's Compensation for Injuries Act—Notice of Injury—Failure to Give within Proper Time—Reasonable Excuse—Mistake as to Name of Master—Absence of Prejudice—R.S.O. 1897 *ch.* 160, *secs.* 9, 13, 14.

Action for damages for injuries sustained by the plaintiff while in the service of the defendants owing to the negligence of the defendants or their other servants.

The action was tried at Sault Ste. Marie before BRITTON, J., and a jury.

W. A. Henderson, for the plaintiff.

J. E. Irving, for the defendants.

BRITTON, J.:—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 the defendants were submitted to the jury, and the answers, if warranted by the evidence, entitled 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 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 made his home at the village of Cutler. Cutler is the chief place of business of Lovelace & 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 & Stone or the defendants' business, thought he was in the employ of Lovelace & 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 & Stone on the 30th March, 1912. On the 6th May, 1912, a writ was issued in due course against Lovelace & Stone, and it was not until after that date that the mistake was discovered, and it was then more than 12 weeks from the time of the accident. On the 2nd July, the plaintiff commenced this action against the defendants, who were the employers of the 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 the defendants and of the supervision given by the 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.

BRITTON, J. OCTOBER 25TH, 1912.

RE BRENNAN AND WALDMAN.

Vendor and Purchaser—Title to Land—Deed to Person as Trustee for Infant Son—Death of Son in 1882—*R.S.O.* 1877 *ch.* 105, *sec.* 22—*Heirship of Father—Right of Mother—Dower.*

Application by the vendors, under the Vendors and Purchasers Act, for an order declaring that Matilda Agnes Hay, wife of Robert John Hay, the grantor in a deed to John and Margaret Brennan (the vendors) dated the 22nd May, 1903, had no right to dower and no other interest in the land therein described.

W. J. Clark, for the vendors.

J. T. Richardson, for the purchaser.

BRITTON, J.:—Robert John Hay and his wife lived together until about the 1st 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 December, 1881, and in the conveyance the words describing Robert Hay are "as trustee for William 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 1st January, 1880. The infant son died on or about the 30th June, 1882.

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 the 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 an order declaring that the wife is not, if living, entitled to dower.

It seems to me unnecessary formally to decide the question 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 R.S.O. 1877 ch. 105, sec. 22. Robert John Hay was the sole heir-at-law of his son William John. The mother of the infant took no interest in the land other than an inchoate right of dower.

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

CLUTE, J. OCTOBER 25TH, 1912.

HALLIDAY v. CANADIAN PACIFIC R.W. CO.

Master and Servant—Wrongful Dismissal of Servant—Contract of Hiring—Right to Notice—Damages—False Imprisonment—Malicious Prosecution—Costs.

Action against the railway company and James H. Hughes for wrongful dismissal of the plaintiff by the railway company from his employment as a conductor and for false imprisonment and malicious prosecution.

The action was tried before CLUTE, J., without a jury, at Sudbury, on the 30th September, 1912.

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

W. H. Williams, K.C., for the defendants.

CLUTE, J.:—I disposed of the action at the trial in so far as the issues arising out of the charge for false imprisonment and malicious prosecution were concerned. I further found that the plaintiff had been wrongfuly dismissed. The plaintiff had been in the employment of the defendant company for some

twelve years, and during that period had borne a good character. His engagement with the company had been continuous, and, as stated by the superintendent, he was during all that period in the employ of the defendant company. Under the custom and practice of the company with their men, an employee in the grade of the plaintiff was not to be dismissed without inquiry. His dismissal was on account of liquor having been found in the caboose of the train of which he was conductor. This train started from Cartier to White River. There was a collision, and the train was delayed. At the place where the collision occurred, the débris arising therefrom had to be removed, and a number of workmen, twenty or thirty, were engaged in this work. The night was very cold, some fifty degrees, it was stated, below zero, and the men were constantly going into the caboose to get warmed. The plaintiff, as was his duty, was at the station to be ready to start his train when the road was clear. One of the cars of the train was broken into at this time, and a case of liquor taken therefrom. The plaintiff had been without sleep for over fifty hours. It was discovered that the car had been broken into and some bottles extracted, and the superintendent, searching the plaintiff's caboose, found one bottle and part of another bottle in the caboose. The plaintiff was arrested and charged with stealing liquor, and immediately suspended. The case was tried before Judge Kehoe, and the plaintiff honourably acquitted. He was, however, dismissed the day before the Judge had appointed to give his decision.

Upon the evidence before me, I was satisfied that the plaintiff was not guilty of the theft, and did not know that the liquor had been secreted in his caboose. In my opinion, under the evidence disclosed, he was wrongfully dismissed, under such circumstances, having regard to his hiring, as entitled him to three months' notice: African Association v. Allen, [1910] 1 K.B. 396; Harnwell v. Parry Sound Lumber Co., 24 A.R. 110; Bain v. Anderson, 27 O.R. 369, 24 A.R. 296, 28 S.C.R. 481; Gould v. McCrae, 14 O.L.R. 194; and see Green v. Wright, L.R. 1 C.P. 591; Speakman v. City of Calgary, 1 Alta. L.R. 454; Henderson v. Canadian Timber and Saw Mills Limited, 12 B.C. R. 295.

The certificate given by the defendants to the plaintiff shewing the time he had served the company, without which it was difficult to get employment in another company as conductor, was worse than useless, as it contained a statement that he was dismissed on account of liquor having been found in his car.

I suggested on the trial that, the plaintiff having been honourably acquitted by the County Court Judge, the company

might so modify the certificate as to shew the facts, and thus enable him to make an engagement with another company.

Upon the whole case, I think the conduct of the company towards the plaintiff was harsh and unfair in dismissing him the day before judgment was to be given. The costs in the case were not appreciably increased by the other issues raised; and, under all the circumstances of the case, I do not think the defendants should have the costs of the issues in which they were successful, viz., those arising out of the charge of false imprisonment and malicious prosecution.

Having regard to the plaintiff's earning power while with the defendant company, I assess the damages at $480, with full costs of action. Any amendments that may be necessary to meet the case as disclosed in the evidence may be made.

DIVISIONAL COURT. OCTOBER 25TH, 1912.

BUCKNALL v. BRITISH CANADIAN POWER CO.

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.

Appeal by the defendants from the judgment of MIDDLETON, J., 3 O.W.N. 1138.

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

J. Bicknell, K.C., and J. Lorn McDougall, for the defendants.

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

The judgment of the Court was delivered by RIDDELL, J.:—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 maintaing 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 cl. 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 feet 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 and Wishart (1912), 27 O.L.R. 70, 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.

BOLAND V. PHILP—DIVISIONAL COURT—OCT. 21.

Vendor and Purchaser—Contract for Sale of Land—Formation of—Husband of Vendor—Authority—Statute of Frauds—Specific Performance.]—Appeal by the plaintiff from the judgment of KELLY, J., 3 O.W.N. 1562. The appeal was heard by BOYD, C., LATCHFORD and MIDDLETON, JJ. The Court dismissed the appeal with costs. W. R. Smyth, K.C., for the plaintiff. J. J. Gray, for the defendants.

STEWART V. HENDERSON—MASTER IN CHAMBERS—OCT. 23.

Discovery—Examination of Defendant—Relevancy of Questions—Scope of Examination—Production of Document.]—Motion by the plaintiff for an order for further examination for discovery of the defendant and directing him to answer certain questions which he refused to answer, on the advice of counsel. The action was 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 converting iron into steel. The agreement was in writing and anticipated a sale to Sir Donald Mann. No such sale actually took place. By the statement of claim it was alleged that a sale or agreement for sale had been made nominally with Sir William 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 was interested with them in the undertaking, and that the plaintiff was, therefore, entitled to the commission of 10 per cent. The statement of defence set out the transactions between the plaintiff and defendant. In the concluding paragraph it was said that the 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." The Master said that on these pleadings the issue was clearly raised as to whether a sale had really and in effect been made to Sir Donald Mann or not; and everything was relevant to that issue which might (not which must) assist the plaintiff, or which might, directly or indirectly, enable the plaintiff to advance his case or damage that of his adversary:

see Bray's Digest of Discovery (1904), art. 10, p. 4. 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 counsel for the defendant was willing to have the same answered. Then, if the answer was in the negative, certain questions asked upon the examination might properly follow, so as to clear up what on the face of the depositions was obscure. The contract, whatever it was, made with Sir William Mackenzie, should certainly be produced. It was admitted that such a document was in existence. For this purpose the defendant must attend again at his own expense. If, on the face of the contract with Sir William Mackenzie, there was no mention of any interest of Sir Donald Mann or of the other business associates of Sir William Mackenzie named and set out in the statement of claim, the defendant could be asked as to his knowledge, information, and belief as to this. If he had none, the matter would rest there for the present.—Some opposition was made to the motion on the ground of a secret process being in question. The Master said that this 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 of its being there might assist the plaintiff in his claim, and would, therefore, be relevant on discovery—however fatal to the defence: Flight v. Robinson, 8 Beav. 34, cited in Bray on Discovery, where it was 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. Costs of the motion to the plaintiff only in the cause. Grayson Smith, for the plaintiff. Casey Wood, for the defendant.

SUNDY V. DOMINION NATURAL GAS CO.—DIVISIONAL COURT—OCT. 22.

Contract—Construction—Supply of Natural Gas—Breach—Damages.]—Appeal by the defendants from the judgment of SUTHERLAND, J., 3 O.W.N. 1575. The appeal was heard by BOYD, C., LATCHFORD and MIDDLETON, JJ. The Court dismissed the appeal with costs. J. Harley, K.C., for the defendants. J. A. Murphy, for the plaintiffs.

KEENAN WOODWARE MANUFACTURING CO. v. FOSTER—DIVISIONAL COURT—OCT. 24.

Contract—Supply of Timber Bolts—Construction of Contract—Breach—Counterclaim—Damages.]—An appeal by the defendant from the judgment of the Judge of the County Court of the County of Grey, in favour of the plaintiffs, for the recovery of $500 upon their claim with costs, and dismissing the defendant's counterclaim with costs. The action was to recover $500 paid by the plaintiffs to the defendant for getting out timber bolts under a contract, or $500 damages for breach of the contract. The counterclaim was for damages for breach of the contract. The appeal was heard by BOYD, C., LATCHFORD and MIDDLETON, JJ. The judgment of the Court was delivered by BOYD, C., who said that the breach of contract was not on the part of the defendant, as the County Court Judge had found, but on the part of the plaintiffs. 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, as the Court construed it. The action, therefore, failed. Upon the counterclaim, the Court allowed the defendant $199. Appeal allowed with costs; action dismissed with costs; and judgment for the defendant upon the counterclaim for $199 with costs. W. M. Douglas, K.C., for the defendant. W. S. Middleboro, K.C., for the plaintiffs.

SMYTH v. HARRIS—MASTER IN CHAMBERS—OCT. 24—MIDDLETON, J.—OCT. 25.

Pleading—Statement of Claim—Action to Restrain Nuisance—Joinder of Plaintiffs—Property Rights and Interests—Embarrassment—Prejudice—Joinder of Causes of Action—Election—Attorney-General.]—Motion by the defendants (1) to strike out the names of Robins Limited and F. W. Tanner and F. W. Gates as plaintiffs; (2) to compel the plaintiffs to amend by electing in which plaintiff's name the action will proceed, to strike out the other name or names, and to stay the action meanwhile; (3) to strike out of paragraph 1 of the statement of claim the clauses beginning "The plaintiffs Robins Limited" and "The plaintiffs Tanner and Gates," or to compel the plaintiffs to disclose what interest those plaintiffs have; (4) to strike out that part of paragraph 4 beginning "On the last occasion," as contrary to Con. Rule 298 and embarrassing, and also the words "and property," for the same reason; (5) to strike out of paragraph 4 the clauses

dealing with Robins Limited and Tanner and Gates; (6) to strike out such parts of those paragraphs as referred to the Toronto City Estates Limited and the Monarch Realty and Securities Corporation Limited, and alleged a consent; (7) to strike out paragraph 6 as unfair, irrelevant, and calculated to prejudice the trial; (8) to strike out paragraph 9 or stay the action until the Attorney-General should be made a plaintiff. The action was to restrain the defendants from continuing a nuisance. See the note of a motion before RIDDELL, J., ante 134. An appeal from the order of RIDDELL, J., was pending when the present motion was made. Dealing with the first, third, fifth, and sixth branches of the motion, the Master said that Robins Limited and Tanner and Gates alleged that they had a substantial interest in and were occupants of and had the management and sale of tracts of land within a mile of the defendants' factory; but it now appeared that the Robins block was vested in the Toronto City Estates Limited, and the Tanner and Gates blocks in the Monarch Realty and Securities Corporation. Both of these companies had signified their willingness to be joined as plaintiffs, and notice had been given of an application to the trial Judge for that purpose. As to the interest of Robins Limited and Tanner and Gates, it was understood that particulars had been given or would be given forthwith. It seemed, therefore, that no injury or embarrassment could accrue to the defendants by these allegations: Warnik v. Queen's College, L.R. 6 Ch. 716, cited in Odgers on Pleading, 5th ed., p. 21.—As to the second branch of the motion, it was argued that here there was no transaction or series of transactions within the meaning of Con. Rule 185, as shewn by Mason v. Grand Trunk R.W. Co., 8 O.L.R. 28, where it was said by Anglin, J., that several plaintiffs cannot 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." The Master said that in that case 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 was conclusive against the present motion on this point.—As to the fourth branch of the motion, the Master said that it did 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 the plaintiff Smyth had no "property rights" which were injuriously affected, this would appear at the trial and be dealt with accordingly. But to that tribunal it belonged, and there it must be sent. Nor did there appear to be any embarrassment to the defendants in the statement that, on the last occasion when

the plaintiff Smyth requested them to abate the nuisance, their answer was that they "could do nothing 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 branch of the motion, the Master said that paragraph 6 was irrelevant, and should be struck out: Pender v. Lushington, 6 Ch. D. 70, at p. 75. The only question was, whether the defendants were violating the maxim "sic utere tuo ut alienum non lædas." If it is held that they are acting within their rights, their motives cannot be inquired into. Otherwise an inquiry might be necessary as to the value and sales of all the adjacent property. The inconvenience of such an addition to the present inquiry was sufficiently obvious.—The 8th branch of the motion was 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." The Master said that these last words seemed to render any decision on this point unnecessary. Where a nuisance which is a public nuisance inflicts on an individual some special or particular damages, he has a private remedy: Odgers Broom's Common Law, p. 232. This was sufficiently alleged for the present. If it should afterwards appear that the Attorney-General should have instituted an information, this objection could 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 made was, that paragraph 6 of the statement of claim be struck out, and that the defendants should at once plead so that the order of RIDDELL, J., should not be interfered with so long as in force. Costs of this motion to the plaintiffs in the cause. F. E. Hodgins, K.C., for the defendants. H. E. Rose, K.C., for the plaintiffs.

The defendants appealed from the order of the Master in Chambers, and the appeal was argued by the same counsel before MIDDLETON, J., in Chambers, on the 25th October, 1912. The learned Judge said that the question of law sought to be raised by the appeal was not within the jurisdiction of the Master; and the Master's order should be affirmed; the right to raise the question of law in any appropriate way being reserved to the defendants. Costs to the plaintiffs in any event.