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HON. MR. JUSTICE MIDDLETON. JANUARY 17TH, 1914.

RE NORMAN SINCLAIR DACK.

5 O. W. N. 774.

Lunatic—Habeas Corpus—Detention in Asylum for Insane—Release on Probation—Re-commitment — Evidence—Reprehensible Conduct of Solicitor—Costs.

MIDDLETON, J., *held*, upon the return of a writ of *habeas corpus* that the applicant was rightfully detained in Brockville Asylum for the Insane and that there was no question of his lunacy.

Motion upon the return of a writ of habeas corpus, for the discharge of Norman Sinclair Dack from the custody of the hospital for insane at Brockville, where he was confined.

R. H. Holmes, for Dack.

W. Proudfoot, K.C. for respondents.

HON. MR. JUSTICE MIDDLETON:—The papers in this matter are erroneously entitled as though in an action between Norman Sinclair Dack, plaintiff, and four persons—his father, his brother, and two others said to be partners of his father, defendants. This is probably not of any moment, but it indicates a misconception of the practice.

The return of the writ made by the superintendent of the asylum shews that Dack was committed to the asylum upon the certificate of two medical practitioners in accordance with secs. 7 and 8 of the Revised Statutes of Ontario, then in force, on the 15th February, 1913. The Statute prescribes that upon the certificate of two medical practitioners in a given form the lunatic may be committed to the asylum. These certificates require that the practitioner shall have made due enquiry into all necessary facts and shall certify that he found the person in question to be insane. The

practitioner is also required in his certificate to specify the facts on which he has formed that opinion, distinguishing the facts observed by himself from the facts communicated by others. These certificates are produced, and shew examination by Dr. Crawford and Dr. Needy, both of Brockville.

In August, 1913, the patient was given into the custody of his father as a probationer under sec. 30 of the statute then in force, 3 and 4 Geo. IV. ch. 83, which permits the inmate of an asylum to "be committed for a time to the custody of his friends . . . upon receiving a written undertaking in the prescribed form by one or more of the friends of such person that he or they will keep an oversight over him."

The father coming to the conclusion that his son ought to be recommitted to an asylum, some correspondence took place with reference to placing him in a private institution; but it resulted in a telephone message desiring his re-committal to Brockville. In pursuance of this, a warrant was issued, and he was taken again to Brockville, where he now is. The production of his body on the return of the writ having been dispensed with, by the direction of Mr. Justice Lennox the writ was granted. Dr. Mitchell, superintendent of the asylum, stated that in his opinion, from the facts told him by the father, he had come to the conclusion that the patient had become dangerous to be at large.

Section 31 of the statute provides for re-commitment of a probationer who becomes dangerous to be at large; the warrant to be issued by the superintendent by whom the temporary discharge was granted. This implies that it is the superintendent who is to be satisfied of that which appears to be a condition precedent to the re-committal, namely, that the patient is dangerous to be at large.

It may well be that the effect of this is to make the judgment of the superintendent final and conclusive, and that it is incapable of review upon the return of the writ.

Dr. Mitchell further certifies that this unfortunate young man is now receiving special treatment consistent with the mental trouble he is suffering from, and that in his opinion this treatment would be much more beneficial to him in the asylum than if the treatment should be discontinued and the patient be at large. Dr. Mitchell further certifies that

the patient has not recovered, and in his opinion never will recover from his present malady.

Notwithstanding this, the discharge is sought upon the strength of certain affidavits. These affidavits were completely met and answered by affidavits of the father, Dr. Mitchell, Dr. Bruce Smith and others; but it appeared to me to be a matter of such importance that there should be no room for the suggestion that by inadvertence or malice one should be confined in an asylum unless unquestionably insane and a menace to himself or others, that I thought it desirable that an absolutely independent physician of the highest possible repute should make an examination and report.

This course was at once assented to by both counsel, though Mr. Holmes now impudently denies this, and I nominated Dr. C. K. Clarke to make the examination; selecting him because of his large experience, as he was formerly superintendent of the Rockwood Hospital for the insane at Kingston, and later of the Toronto Hospital for the insane, and is now superintendent of the Toronto General Hospital. I did this not because of any hesitation as to accepting the opinion of Dr. Mitchell or Dr. Bruce Smith, but because of what seemed to me the rash and intemperate declamation of counsel, who suggested that these men, occupying important public positions, were in league with this young man's father to oppress and imprison him, for the purpose of satisfying some private ends.

I have no doubt that counsel was instructed to make this statement. It seemed to me that it was just the kind of thing which would be expected from one rightly in an asylum; as statements of this kind, indicating persecution, etc., are one of the common symptoms of the form of insanity of which this man is said to be the victim. Yet I regarded it as of sufficient moment to warrant the most searching enquiry, so that I might be assured by entirely outside evidence, given by one of my own choice who occupied such a position as to make the impartiality of his evidence beyond question, before refusing relief. The young man's counsel stated that no possible objection could be taken to Dr. Clarke, though again he now denies this.

Dr. Clarke has now been examined, and has reported at considerable length in an affidavit in which he sets out the result of his examination, giving in detail what took place.

I need not here repeat at length the details of the symptoms. Dr. Clarke sums up thus:

"4. That it is evident that this young man is suffering from the Paranoid form of Dementia Praecox and should be kept under treatment in an institution, as with such prominent delusions of persecution it is best for himself and society that he should not be at liberty. Briefly stated, I base my opinion on the following observations:

"History of disease as detailed by patient; Grandiose Delusions; Delusions of Persecution; Absence of Judgment; Somatic Delusions; Childish Vanity.

"These are the striking characteristics of Paranoid Dementia Praecox, of which the patient is suffering. The case presents no difficulties in the way of diagnosis."

This confirms the views expressed by Dr. Mitchell and by Dr. Bruce Smith. Dr. Mitchell has had the young man under his care for a considerable time, and has made a special study of his case. Dr. Bruce Smith, than whom none can be better qualified, states that the disease is incurable, and that the nature of the disease renders it necessary that the patient should have custodial care and treatment in a hospital for the insane. Dr. Bruce Smith also states that, upon his examination of the patient subsequent to the issue of the writ, the patient stated that he was satisfied with the care and treatment he was receiving at Brockville, and that he was not a consenting party to the action being taken to secure his release. He further stated to Dr. Bruce Smith that he had been induced to enter an action for $50,000 damages against his father by one Appleby, to whom he had been induced to promise $5,000 if the suit was successful.

The affidavits of the father and of others shew that the father has, throughout, done his utmost for his unfortunate son; that he had had him under the care of Dr. Grasett and Dr. King; and the son's mental condition was either brought about or aggravated by evil habits; that everything possible has been done for his treatment with a view to his recovery, but without avail.

Against all this evidence, there is not a single opinion of any medical man or of any one in any way qualified to express an opinion upon the subject; and one only needs to realize that in the case of this terrible malady a casual acquaintance is easily deceived, and that for long periods the patient is apparently harmless, until his mind is turned in

the direction, either of his own imaginary greatness or imaginary persecution, to see how idle it is to place much reliance even upon the best evidence given by unskilled persons. But this evidence, as I shall shew, is in this case exceedingly unsatisfactory. There is not a word from the young man himself, though possibly this is not of any moment. Appleby, referred to in Dr. Bruce Smith's affidavit, is the main actor. He made the original affidavit upon which the writ was granted. After setting out the facts relating to the re-taking by the asylum official, he contents himself with the statement "the plaintiff is a perfectly sane man and never has been adjudged insane, never was insane, and is now a perfectly sane man." He then sets forth that the plaintiff—meaning, no doubt, Norman Sinclair Dack— is entitled to a large amount of money and property from his mother, which is being withheld by his father, also to a large amount of money as employee of the father and his partners.

The allegation as to money amounts to this: The mother had a small estate, which was distributed except about $100 which the father retained with the consent of all concerned, to cover his expenses of administration. The son received his share, spent it and much more. The father attempted to secure employment for the son in his own factory. The son proved to be useless there, yet the father paid him wages out of his own pocket, his partners refusing to pay wages without receiving services.

One of the son's delusions is that he, and not his father, owns the business, or a controlling share in the business, and he desires to discharge all the partners. When the absurdity of this position was pointed out, he said he expected to receive the controlling interest in the business from his father nevertheless, but "the old man is simply an ungrateful old knocker, who wants everything and gives nothing," and he has also stated that his father by reason of his wealth is bound that the Government should keep him in an asylum.

The other affidavit is by one Creighton, a solicitor employed in the office of the applicant's solicitors. He expresses his opinion, as the result of one interview with Dack, that Dack is a sane man.

Allan Macdonald, a druggist, knows and has conversed with Dack, and Dack appears to him "in every way perfectly sane, a young man of good intellect and approachable (sic) character."

The utter worthlessness of Appleby's evidence is made plain by a second affidavit which he files. This affidavit is almost altogether inadmissible. He details at some length accusations made by Dack against his father. As to the truth of these Appleby has no knowledge. He then refers to the affidavit made by Dr. Bruce Smith, to whom he refers as "a Government employ (sic) and said to be Inspector of Hospitals and Public Charities of the Province of Ontario." He says that "I believe the said affidavit is grossly prejudiced in its terms and statements, and that if such statements were obtained from the said Norman Sinclair Dack it was done by duress and fraud, and that no fare (sic) and proper investigation or proper examination was made, and that as regards clauses 13 and 14 of said affidavit" (i.e., the clauses in which Dr. Bruce Smith speaks of his conversation with Dack) "I have no hesitation in declaring them to be absolutely untrue."

Mr. Appleby, residing in Toronto, cannot possibly have any knowledge of what took place between Dr. Bruce Smith and Dack within the walls of the Brockville Hospital; yet he has no hesitation in declaring the statement as to this to be "absolutely untrue."

I asked the solicitor responsible for this affidavit how he could justify permitting any deponent to make such a statement. He told me that all that was meant was that Mr. Appleby found it impossible to believe such a statement. This indicates such ignorance on the part of the solicitor of his obligations and of the meaning of language that one's suspicion is aroused as to the *bona fides* of the application and the real meaning to be attached to any expressions used.

I have dealt with the case at altogether too great length, as it is really free from difficulty; but I desire to make it quite plain that on the perusal of the papers one cannot entertain for a moment any suspicion that a sane man is being improperly incarcerated.

The application must be dismissed with costs. If it turns out to be the fact that the application was made without instructions it may be that the solicitors making it have rendered themselves personally liable.

HON. MR. JUSTICE LENNOX. JANUARY 20TH, 1914.

CARIQUE v. CATTS AND HILL.

5 O. W. N. 785.

Fraud and Misrepresentation—Contract for Purchase of Interest in Invention—Evidence—Rescission — Amendment of Pleadings—Damages.

LENNOX, J., set aside a contract entered into by plaintiff with defendants upon the ground that it had been induced by misrepresentation and fraud and gave judgment for the plaintiff for the loss sustained by him by reason of such misrepresentation.

Action to set aside a sale by the defendants to the plaintiff of an interest in a patented lamp invention and for the return of $5,000 paid.

R. B. Henderson, for plaintiff.

H. D. Gamble, K.C., for defendant Catts.

W. E. Raney, K.C., for Hill.

HON. MR. JUSTICE LENNOX:—The defendants conspired to deceive and cheat the plaintiff. For dishonesty this case would rank fairly well with a western land deal. There can be no doubt at all that Hill was Catts's agent for the purpose of "handling" the plaintiff; and this, as well after, as before the signing of the contract. It is amazing that a man as clever as Mr. Hill is swears to the contrary. Not only does the defendant Catts say that Hill had the sole management of "the financial end" of the transaction, but Hill himself and his agent Collard establish it. All the papers, contracts, tests, reports, testimonials, drawings and the like were in Hill's hands, and he was the person to explain them. On the evidence of Hill, Collard and Catts, it is shewn that Collard, who was in the same office with Hill, and his agent to sell Porcupine-Hecla stock, was engaged by Hill, at a commission of 5 per cent. to find someone who could be induced to put $5,000 cash into the Straight Filament Lamp Patent. Collard could not interest the plaintiff in mining stock, but when he happened to recollect and mention that there was a man in an office near him—his employer Mr. Hill as it turned out—who was putting $5,000 of his own money into an industrial proposition of some kind, all delightfully vague and remote from any interest of Mr. Collard's, the plaintiff became interested and expressed a disposition to take up a

matter of that character if he got in "upon the ground floor." Collard promptly reported and was thereupon sent back to the plaintiff, when Hill's identity, the general nature of the proposition, as they call it, and Catts's address were disclosed—but not Mr. Collard's agency of course. The plaintiff called and Catts pointed out the merits of the lamp, but declined, or at all events omitted, to say whether it was true or not that Hill was putting in $5,000 of his own money, and referred the plaintiff to Mr. Hill for discussion of all money questions. The plaintiff then went over to Hill's office, but before he reached it Hill was advised by phone from Catts to expect him. From that time on Hill was the intermediary between the plaintiff and Catts in practically everything that was done.

Hill then, repudiating agency, insists that it was simply that he was helping Catts, and Catts was helping him. Well? I am disposed to look at it in this light, too. Partners, if you like, the name is not important, if they combined to conceal the real terms of the contract from the plaintiff, and they did; and more than this, I find that not only was Mr. Hill peculiarly solicitous of the interests of his co-defendant after the contract was entered into, but throughout the whole trial these two men invariably played into each other's hands. In this way, with separate counsel, the trial was most unfair to the plaintiff. Helping each other, as the defendants both swear, the question arises how was Hill to be paid, and how was he paid?

I find that shortly before the execution of the contract, and as an inducement to the plaintiff to enter into it, the defendant Catts, in the presence and hearing of Hill, stated to the plaintiff that he had made a contract with Mr. Hastings, of the Hydro-Electric, to be allowed to instal lamps at the corner of King and Yonge streets in the city of Toronto, as a test, and that the lamps were to be put up within two weeks; and the plaintiff regarded this as a very important concession, and he believed Mr. Catts's statement, and was influenced by it. Evidence given by the plaintiff satisfies me that Hill heard this statement, and his subsequent actions would indicate that he did not believe it; but it is not important to reach a conclusion upon this point. The defendant Catts had not the slightest justification for this representation, it was false in every particular, and there could be no mistake about the attitude of Mr. Hastings.

About the 30th January the plaintiff decided not to have anything to do with the patent, and Mr. Hill, no doubt with an eye upon the future, pretended that if the plaintiff did not go in he would not either. As a matter of fact the plaintiff was the last hope, there could be nothing done without him. The plaintiff was induced to reconsider his decision by Mr. Hill's offer to relieve him of the contract and give him back his money if he became dissatisfied. He does not seem to have realized that this was not quite the same as having the money in his pocket; but he was going in with "a Toronto man," a man with an amazing knowledge of lamps—acquired as the agent of Mr. Catts—a manifestly capable man, who was putting in $5,000 himself, and willing to take up the other $5,000 as well. Was he getting in "upon the ground floor," as he had stipulated? In the most explicit and positive way Hill assured the plaintiff that he was actually investing $5,000 in money, just as the plaintiff was doing. Catts knew that the plaintiff was relying upon this.

I find that the defendants, acting in concert, falsely and fraudulently represented to the plaintiff that in the matter of this sale Catts was dealing with Hill exactly upon the same terms as he was dealing with the plaintiff, and that Hill was actually and in good faith paying Catts $5,000 in money, just as the plaintiff was paying that sum, and the plaintiff accepted and relied upon these representations and but for them, although other representations had influence with him, would not have entered into the contract with the defendant Catts.

This is what happened. After this contract was executed the plaintiff and defendant Hill each deposited his cheque for $5,000 with a solicitor to be handed to Catts on the 6th of February if everything was found to be all right at Ottawa. On the 6th Catts got the cheques, and cashed the plaintiff's cheque at the Traders Bank. Hill was in the Traders Bank, when Catts was there to get the money, Hill says for identification only and for only part of the time that Catts was there. Catts handed over the $5,000 he got on plaintiff's cheque to Hill. Hill took this money to his own bank and deposited it there to meet his own cheque at about 2.45 p.m. for which he had made no provision until then—and before 3 o'clock p.m. Catts presented Hill's cheque, got it accepted, and later got it cashed at the King Edward and left for New York that night.

The defendants pretend that at this time Hill made a *bona fide* sale of Porcupine-Hecla stock to Catts for $5,000 and that the handing over of the money from Catts to Hill and the immediate repayment of it was not a sham. I have come to a different conclusion. I find upon evidence of the defendants' witness J. C. Cottrell, and contrary to evidence given by Mr. Catts, that neither Johnston nor Cottrell were in Toronto at that time, or upon the other occasion referred to, or at any time with $5,000 to pay for this stock, or with any money, or to make any arrangements to pay for this stock, and that neither Cottrell nor Johnson had any knowledge of it. This is only a light circumstance if the evidence in the main was reasonably satisfactory, but it is not; and if the probabilities were consistent with the defendants' story, but to my mind they very decidedly are not. It was money, not wild cats, that Mr. Catts was looking for. He tried to sell his patent in Montreal and failed. Before the plaintiff was approached three different attempts at syndicating in Toronto had failed. If the letter of November 29th, 1911, was written at that time it shews that Catts wanted $25,000 or $30,000 in cash for his patent, and he was not particular which, and if he could land this amount of money through the assistance of Hill he would work Hill into the syndicate upon a simultaneous exchange of funds of exactly the same character as took place on the 6th of February, 1912.

It is manifest that upon the transaction as then proposed Catts did not propose to pay one cent for the stock for he was adding $5,000 or more to his highest price.

What are the facts as to Porcupine-Hecla stock? The company was not organized, and is not shewn to have been incorporated, when this offer is said to have been made. Not a foot of land had been acquired at that time. A worthless location was conveyed to the company on the 3rd of January, 1912. The question of course is not whether this stock is of some value, but was Hill's reiterated statement and Catts, representation that Hill, like Carique, was paying $5,000 true or false? On the 4th of September 1912, Mr. Hill, for the purpose of obtaining an injunction in another action, swore that he had personally examined the property of the company, that the president and a Mr. Pope had also examined it, and assays had been made; and that "after careful investigation the conclusion of the

directors of the company is that the said mining location shews no indications of value whatever and is entirely worthless." And yet this defendant before his affidavit was produced in Court had the hardihood to swear that for anything he knew a bank might loan up to the face value upon this stock and that the $5,000 stock was the same as $5,000 in money. Even when confronted by his own affidavit he was not at the end of his resources for as he says "You cannot really be sure until the location is developed." Why of course! And who is going to develop this admittedly worthless mine? But this witness says sales were made. Of course sales were made, and stocks exchanged for promissory notes equally worthless; but there were no books produced and the one solitary buyer called, like Mr. Catts, went into the deal without investigation, and, like Mr. Catts, has never thought of making any investigation since. Sales! Do sales prove anything more than the universally admitted fact, that the fools are not all dead? Do sales prove that Mr. Catts really and honestly paid $5,000 for stock in a mine of which he neither knew, nor tried to learn, anything whatever, or that either of the defendants told the truth when he represented that Hill and the plaintiff were getting into this transaction upon the same terms? The belated letter of the 29th of November is not altogether free from suspicion, assuming that it is all right it works against the argument of two entirely independent transactions.

But in addition to all this the circumstances at least demand that the contention of the defendants should be supported by thoroughly reliable evidence. I do not mean that the onus is upon the defendants. The witnesses for the defence upon this question are the defendants and Mr. Cottrell. As already stated Cottrell distinctly contradicts Mr. Catts and weakens the whole basis of this defendant's story. I have indicated that I have no great faith in the testimony of Mr. Hill. As a matter of fact I have no confidence in the evidence of either of the defendants. Hill is a more adroit witness than Catts, but neither of them appeared to make it a point to tell the truth. Each of them gave various accounts of the alleged sale of stock. Taking the evidence of either of the defendants, it is quite impossible to reconcile his different accounts of what happened, and it is impossible to reconcile the evidence of one with the other. But aside from this neither of these men gave his evidence

in a way to inspire confidence—in neither case was it the manner of an honest man. I cannot accept the evidence of either of the defendants where it conflicts with other evidence. Neither of these defendants in November, 1911, or January or February, 1912, ever for a moment imagined that the stock in question was worth $5,000, or any substantial sum of money.

Mr. Hill's cheque was issued and the money passed from defendant to defendant and back again in pursuance of a dishonest scheme of the defendants to deceive and entrap the plaintiff; and to embarrass him and mislead the Courts in case of complaint; and there was no *bona fide* sale of stock to Catts as alleged.

Having come to the conclusions above expressed as to two of the misrepresentations charged, it becomes unnecessary to deal with the others. The plaintiff has not ratified or confirmed the contract.

Before indicating more specifically what my judgment will be, it will be convenient to refer to the claim made against Hill alone. The document by which Hill agrees to take over the plaintiff's interest in the patent and to secure and pay him $5,000 with interest was intended to be a sealed instrument as the concluding words shew, and I accept the plaintiff's evidence that it was sealed at the time of execution and delivery to him; and nothing has taken place to deprive the plaintiff of the right to enforce it according to its terms.

Whether I will make an order directing this defendant to furnish security I will determine when I endorse the record as hereinafter referred to.

There have been several applications for leave to amend. All parties will have leave to amend in conformity with the evidence, and to reply to the amendments, say within two weeks. If difficulties arise I can be spoken to. I am of opinion that it is better that the plaintiff instead of pursuing his rights against the defendant Hill under the agreement, should directly claim to recover against the two defendants by reason of the concerted fraud and misrepresentation hereinbefore found—and leave is granted to him to amend accordingly if he desires to do so.

There will be judgment setting aside the contract entered into with the defendant Catts so far as it affects the plain-

tiff and against both defendants for the loss the plaintiff has sustained, with costs of the action, but I will withhold the endorsement of the record until the amendments are made.

SUPREME COURT OF ONTARIO.

FIRST APPELLATE DIVISION. JANUARY 12TH, 1914.

MAPLE LEAF MILLING CO. v. WESTERN CANADA FLOUR MILLS CO.

5 O. W. N. 699.

Execution—Seizure of Goods—Dispute as to Ownership of—Purchase by Partnership—Partner Carrying on Separate Business under other Name—Alleged Transfer to—Evidence—Interpleader—Onus—Appeal—Costs.

Interpleader issue to determine the ownership of certain moneys, the proceeds of certain goods seized by the Sheriff. The goods in question were sold by plaintiffs to G. & H. carrying on business in partnership. H. also carried on business separately under another firm name and the goods in question were seized under an execution against this latter firm and were claimed by plaintiffs who had secured an execution against the partnership firm.

LATCHFORD, J., *held*, that the goods in question had been sold to the partnership firm but had been turned over by G. to H. and had become his property and subject to the executions of the defendants.

SUP. CT. ONT. (1st App. Div.) *held*, that defendants had not satisfied the onus upon them of shewing that the goods had ceased to be the property of the partnership and had become the property of H.

Judgment of LATCHFORD, J., reversed and judgment for plaintiffs with costs.

Appeal by the plaintiff company from judgment of HON. MR. JUSTICE LATCHFORD, at the trial of an interpleader issue, by the terms of which the plaintiff company affirmed and the defendant company denied that the proceeds of the sale of certain goods seized by the sheriff under the defendant company's writs of attachment and execution against the goods of C. A. Hancock, carrying on business as The Wholesale Warehouse Company, should be applied in settlement *pro tanto*, of the plaintiff company's execution against the goods of Gallagher & Hancock in priority to the claim of the defendant company under its said attachment and execution.

By the interpleader order which was made on the application of the sheriff he was directed to sell the goods seized

and pay the proceeds of sale into Court to abide further order and that these parties should proceed to the trial of the issue, and costs and all further questions were reserved to be disposed of by the Judge at the trial of the issue or else to be disposed of in Chambers.

HON. MR. JUSTICE LATCHFORD, determined the issue in favour of the defendants, with costs of the issue and of the interpleader proceedings, and directed the payment to them of the moneys in Court. He held that the goods in question, which consisted of flour and feed, had been sold by the plaintiffs to the firm of Gallagher & Hancock, but that Gallagher had parted with the goods to his partner Hancock in the separate business carried on by the latter under the name of The Wholesale Warehouse Company and they passed into the possession of and became the goods of The Wholesale Warehouse Company and were subject to seizure under the defendant company's writs.

The appeal to the Supreme Court of Ontario (First Appellate Division) was heard by HON. SIR WM. MEREDITH, C.J.O., HON. MR. JUSTICE MACLAREN, HON. MR. JUSTICE MAGEE and HON. MR. JUSTICE HODGINS.

J. T. White, for appellant company.

R. McKay, K.C., for defendants.

HON. MR. JUSTICE MAGEE:—From the evidence it appears that Gallagher & Hancock entered into co-partnership in November, 1911, and thereafter carried on business at Porcupine as dealers in coal and wood. Hancock in January, 1912, began a separate business under the name of The Wholesale Warehouse Company at Haileybury, with a branch at South Porcupine. In this business he sold on commission and dealt in flour, feed, grain, and produce, and he had a warehouse at each of the two places. Gallagher says he was not connected with that business except as agent; and he says that until the purchase from the plaintiffs the co-partnership had nothing to do with flour and feed and dealt exclusively in coal and wood.

The two men seem to have been on intimate terms. It does not appear whether Gallagher took any active part in either business. He was Township Clerk and Treasurer. For some reason the Warehouse Company had no bank ac-

count at South Porcupine or Porcupine and all cheques and moneys received by it there were deposited in a bank account kept in the name of Gallagher & Hancock at Porcupine, and were sometimes handed to Gallagher for that purpose. Sometimes also Gallagher signed the Warehouse Company's name to drafts on customers or on endorsements of cheques for deposit. He says: "Hancock instructed me to put in moneys for collections given by Mr. Evans (Hancock's agent at South Porcupine) in to the credit of Gallagher & Hancock from which place he (Hancock) transferred them to Haileybury and he issued cheques for the payment (that is, apparently to transfer them). He never opened an account in Porcupine."

Evans was in charge of the Warehouse Company's business at South Porcupine; but although much if not all of the goods there were sold on commission, though in the Warehouse Company's name, Evans says he was not aware of it and supposed Hancock was owner and selling as such. Evans made his returns to the Haileybury office of the business done.

In June, 1912, Hancock went to the plaintiff company's office in Toronto and stated that he had entered into partnership in Haileybury with Gallagher, and he ordered in the name of the firm of Gallagher & Hancock, five car loads of flour and feed to be shipped to the firm, three of them to be consigned to Haileybury and two to South Porcupine, but all to be invoiced to the firm at Haileybury. For the price, the plaintiff company was to draw on the firm at Haileybury at thirty and sixty days, with bills of lading attached to the drafts to be delivered up on acceptance of the latter. The plaintiff company's Toronto office forwarded instructions to mills at Kenora to send on the five carloads. They were shipped from Kenora to Haileybury and South Porcupine on 27th June, and ten drafts bearing that date drawn at Toronto were sent on through a bank at Haileybury with the bills of lading attached. By that time Hancock had left the country and never returned. The drafts were accepted by Gallagher in the firm name and the bills of lading were delivered up to him and by him given to the railway with instructions where to place the cars. The drafts for the three cars were accepted by him on the 12th July and those for the two cars on the 18th July.

The five drafts at thirty days were duly paid, but those at sixty days were not met, and the plaintiff's execution against the firm is upon a judgment for their amount. The flour and feed in question is part of the two carloads shipped to South Porcupine, and we are not concerned with those which went to Haileybury, except in so far as the dealings which took place there may shew what was done with regard to the other two.

Thus we find the goods ordered by one partner in the name of the firm, and received by the other partner, who accepts in the firm name the drafts for the price, having full knowledge of what they were drawn for. The finding of the learned trial Judge that the goods were sold to the firm is fully warranted, as well as his apparent conclusion that they became and were the property of the firm.

Gallagher's statement is that "Hancock upon his own authority went to Toronto and purchased from the Maple Leaf Milling Co., these goods, and I never knew anything about it. The Gallagher & Hancock account was opened and not doing anything except anything outstanding from the old business; and, Hancock ordered these goods and he came in and told me to accept them and that there was plenty of funds to meet the responsibility, and then he disappeared after I accepted the drafts."

In fact, he had left the province about four weeks before the drafts were accepted. Counsel for defendants in the next question varied Gallagher's statement as follows: "You were accepting these (drafts) for Mr. Hancock upon his statement to you that he had plenty of funds to meet them?" To this the answer was "Yes;" but, this is not necessary contradictory of Gallagher's own way of putting the facts, with reliance upon Hancock in the affairs of the partnership. All this is quite consistent with a fuel partnership, having little or no active business going on in June and with readiness of both partners to have a dealing in another commodity. Indeed, it is not inconsistent with an agreement to go into partnership in flour and feed as asserted by Hancock to the plaintiffs.

Elsewhere, to the question "And as far as selling and dealing with flour and feed they (the firm) had nothing to do?" His answer was "Not till Hancock purchases this consignment from the Maple Leaf."

Nowhere throughout the evidence, when closely examined, is there any intimation of any objection being made by Gallagher to the purchase for the firm or any disclaimer by him of ownership in the firm.

In another place Gallagher says they did not get the goods till after the acceptance of the drafts, and that Hancock had gone at that time, but he did not know he had gone permanently and that he had left about the 15th or 20th of June. He says: "Mr. Hancock came up and told me that these were coming in about the 15th or 20th of June, that he had ordered them in Toronto, and he said to protect them—to accept the drafts."

I take this to mean probably that Hancock had told him about the 15th or 20th of June, that the goods were coming in. There is in all this nothing whatever to shew either an acquiescence by Gallagher in a purchase by Hancock for his own sole benefit in the name of the firm nor any transfer or relinquishment by Gallagher to Hancock of his interest in the goods. The two men never met afterwards.

Both at Haileybury and at South Porcupine the cars were unloaded into the warehouse of Hancock and at both places sales were made thence. Those at South Porcupine would seem to have been made in the name of The Wholesale Warehouse Company, and probably the sales at Haileybury were made in the same way, though that is not shewn. Evans says these goods were treated the same as other goods, and in making returns to Haileybury he kept these goods separate.

The fact of the sales being so made does not bear much significance when we find that the defendant's goods were being sold there in the same way, although really only held and sold on commission for the defendants. What became of the proceeds of sales at Haileybury does not appear; but the proceeds at South Porcupine went into the bank account of Gallagher & Hancock. The five drafts first falling due were met apparently out of proceeds of sales. There is no evidence that Gallagher abandoned his oversight of the goods, but the contrary. He was asked "Why did you have the goods put there?" (in the warehouse) and he answered, "A place of storage; it was for that purpose."

"Q. Did you have any conversation with Mr. Hancock or any of his employees at the time? A. I had instruc-

tions from Hancock to unload the goods at the warehouse and to protect the drafts. He had ordered the stuff, and we did so. It was not an exceptional thing.

Q. What arrangement was made for a payment? A. He asked me to protect them, see that the drafts were paid as they fell due.

Q. Did you instruct Mr. Hancock to sell these goods when you put them in the warehouse? A. Well, they were there for disposition, yes.

Q. Did you receive any money for them? A. Yes, I presume we received the money for the disposal of what goods were sold.

Q. Well, did you receive it? A. Yes, the goods that we sold were paid for and it was deposited to the credit of Gallagher & Hancock.

Q Did Gallagher & Hancock receive any money for the goods that were not sold? A. No, not to my knowledge.

Q. Or did Mr. Gallagher personally? A. No, certainly not.

Q. Did you sell these goods to The Wholesale Warehouse Company? A. No, no transfer of the goods.

Q. Did you intend to part with the possession of the goods?"

This question was objected to by counsel for the defendants. Then on cross-examination for the defendants:

"Q. You never tried to keep any account of these Maple Leaf goods? A. No, I was not looking after the details of the sale.

Q. You looked upon this purchase as a purchase by Hancock in the course of his own flour and feed business? A. No, I looked on it a little different.

Q. And he sold the goods from Haileybury and South Porcupine just as he pleased? A. Yes.

Q. And the only thing you wanted was that he make goods to you the amount of these drafts? A. Yes.

Q. And you looked to Hancock to do that? A. No, not altogether. I looked after it myself to a great extent in Porcupine.

Q. You looked to Hancock to make good to you the amount of money these drafts took out of your bank account? A. No, I looked to the receipts.

Q. To come from him? A. To come from the receipt (sic) of the sale of the goods.

Q. To come from the Warehouse Company? A. Yes."

Bearing in mind that Hancock had left the country and that to effect a transfer of the goods to him would require his assent to assume the risk, as well as Gallagher's, there is not here any evidence that he had given such assent when his partner had agreed to accept the bargain. There is not here evidence even of Gallagher having ever assented to parting with his property or the firm's property in the goods, which were his protection.

With much deference to the opinion of the learned trial Judge, the evidence of Gallagher appears to me to point all the other way. There is no evidence as to whether it was a profitable transaction or not; and Gallagher's statement a year later that he would have been satisfied to have been cleared of his liability throws no light on the question of his having no property in the goods.

The onus is clearly on the defendants to displace the undoubted sale to the firm, and in my opinion they have failed to satisfy it.

The appeal should, I think, be allowed, with costs to the appellant; and the respondent should bear the costs of the issue and the interpleader proceedings and the sheriff's costs and fees, and reimburse the plaintiff any sum paid to the sheriff therefor; and the moneys in Court, to the extent of the plaintiff's judgment and such costs and sums should be paid to the plaintiff.

HON. SIR WM. MEREDITH, C.J.O., HON. MR. JUSTICE MACLAREN and HON. MR. JUSTICE HODGINS:—We agree.

SUPREME COURT OF ONTARIO.

FIRST APPELLATE DIVISION. JANUARY 12TH, 1914.

EMPIRE LIMESTONE COMPANY v. CARROLL.

5 O. W. N. 708.

Lease—Reformation of—Delimitation of "Sand Bank"—Reference to Local Master—Findings—Appeal from—Improper Admission and Rejection of Evidence—Evidence as to Boundaries—View by Master.

LENNOX, J. (24 O. W. R. 862) dismissed an appeal from a report of the Local Master at Welland defining the limits of certain properties to be included in certain instruments as rectified by judgment of the Court, holding that though the said Local Master throughout the hearing had on occasions improperly admitted and rejected evidence, the same had not affected the conclusions reached by him, which were not shewn to be erroneous.

SUP. CT. ONT. (1st App. Div.) dismissed appeal with costs.

Appeal by the defendants from an order of HON. MR. JUSTICE LENNOX, dated 2nd of July, 1913, 24 O. W. R. 862, dismissing an appeal from the report of the local Master at Welland, dated 28th February, 1913, made under the reference directed by the judgment at the trial which is dated 25th April, 1912.

The appeal to the Supreme Court of Ontario (First Appellate Division) was heard by HON. SIR WM. MEREDITH, C.J.O., HON. MR. JUSTICE MACLAREN, HON. MR. JUSTICE MAGEE and HON. MR. JUSTICE HODGINS.

H. D. Gamble, K.C., for appellant.

W. M. German, K.C., for respondent.

HON. SIR WM. MEREDITH, C.J.O.:—The action was brought by the respondent claiming to be entitled for the term of the lease to the south-west part of lot number 5 in the 1st concession of the Township of Humberstone, which was demised to Samuel S. Carroll by a lease from Annie Benner and her husband, dated 14th April, 1899, by the terms of which the privilege was conferred upon the lessee of "removing the whole of the sand bank situate on the northern portion" of the demised land "and for no other purpose," for an injunction to restrain the appellant from going upon the land and laying any railway tracks on

it, or removing sand or gravel from it or in any way interfering with the rights of the respondent under the lease.

The appellant by a counterclaim claimed that the lease should be reformed by striking out the covenant for quiet enjoyment which it contains and substituting for it the following: "The said lessors covenant with the said lessee for quiet enjoyment as far as may be necessary for the purpose only of taking sand as aforesaid from the sand bank situate on the northern portion of the said described premises or such other words as might be deemed to be proper as expressing the true intent and meaning of the lease" which according to the allegations of the counterclaim was that it should confer upon the lessee "leave and license to remove sand from the sand bank on the northern portion of the said land, with the right to ingress and egress and such possession as might be necessary for that purpose and no other, being amply sufficient for the object in view, namely, to remove sand from the said sand bank for which purpose actual possession of the whole of the premises described in the said lease was not necessary, the said Annie Benner and Alexander Benner as the fact was to remain, as they did remain, in quiet possession and enjoyment of the said premises save and except for the purpose aforesaid until the making of the conveyance to the said Samuel S. Carroll in April, 1905, as mentioned in par. 4 of the statement of defence.

By the judgment pronounced at the trial the respondent's action was dismissed, and it was declared and adjudged that the lease should be "varied and rectified so as to limit the description in it" and certain assignments of it under which the respondent claimed "to the northern sand bank situate on the south-westerly 25 acres of the lot" and limiting the purpose of the lease and the rights of the assignees thereunder to the removal of sand from the said sand bank during the term of the said lease," and it was referred to the Local Master at Welland "to ascertain and settle the proper boundaries and description of the said northern sand bank to be substituted for that contained in the said instruments in order to carry out the provisions of this judgment."

By his report the Master at Welland found, ascertained, and settled the proper boundaries and description to be as follows: "Commencing at an iron stake in the north-east corner of the Annie Benner property thence south 8 degrees

45 minutes east 715 feet to a point in the Halpin road, thence westerly on a curve of 400 feet radius a distance of 628 feet 3 inches thence south 54 degrees 30 minutes west a distance of 280 feet to the westerly boundary of lot number 5, thence north measured along the west boundary of lot number 5 a distance of 400 feet to the north-west corner of the Benner lot, thence north 65 degrees east a distance of 1,000 feet 5 inches to the place of beginning."

The contention of the appellant is that this description includes more than is comprised in the northern sand bank, and whether or not that is the case is the sole question on the appeal.

There is nothing in the evidence adduced before the Master to shew that any part of the sand bank had acquired the name of or had come to be known as the northern sand bank, and the question in issue must be decided according to what is the proper view, having regard to the configuration of the sand banks as to what falls within that description.

There is upon the land described in the lease a sand bank or a series of sand banks somewhat in the form of the letter S., which at the north almost touches the northerly limit of the Benner lot, and reaches at the south almost to its southerly limit, and which extends at the northerly and easterly and westerly into the adjoining lots and near the southerly end extends into the lot lying to the west of the Benner lot.

The Master viewed the property and came to the conclusion that the southerly limit of the northern sand bank was the line of the Halpin road, which lies in a depression or valley several feet deep, crossing the sand bank from east to west, and down to which the banks on either side slope.

It may be quite true, as Mr. Gamble pointed out, that there may have been some difficulty from an observation on the ground in determining where the southerly end of the northern sand bank is situate, owing to the greater part of the most northerly portion of it, and much of the sand at the north-east having been removed, but notwithstanding this fact the Master must have been much aided in coming to a proper conclusion by the observation which he made on the ground.

If the Halpin road is not to be taken to be the southerly boundary there is great difficulty in selecting any other as that boundary. As it seems to me none of the other points

at which it was contended the southerly line should be drawn would suggest themselves as points where the northern sand bank terminated and another sand bank began. The point most relied on by the appellant's counsel is where there is a slight depression crossing the bank from the north-east to south-west, but no one looking at the bank as it existed before the sand was removed would, I think, have pointed that out as the southerly boundary of the northern sand bank. What would have presented itself to his eye would have been a practically continuous bank with but a slight depression, which may or may not have been at the point at which, geologically speaking, two separately formed banks met, but which present to the eye the appearance of a single bank, with an undulation in it at the point just referred to extending to the Halpin road, and for the purpose of construing the lease as reformed, irrespective of what a geologist might say, that part of the sand bank which lies northerly of that road must, I think, be taken to be what the contracting parties meant by the expression "northern sand bank."

It is perhaps not without significance that in the lease the expression which the parties used to describe the right to remove the sand is "the privilege of removing the whole of the sand bank situate on the northern portion of the said described premises." Why that expression is not to be used in the reformed lease does not appear, but the fact is that it is to be described in it not as "the sand bank situate on the northern portion," but as "the northern sand bank situate on the south-westerly 25 acres . . .," and it is probable that the expressions were treated as being synonymous, though it is manifest that the former is wider than the latter, and I apprehend that if it had been used in the judgment it must have been held to include all that is claimed by the respondent.

Upon the whole, I am of opinion that the Master came to a right conclusion, and that the appeal should be dismissed, and I see no reason why the rule as to the costs of an unsuccessful appeal should not be followed.

HON. MR. JUSTICE MACLAREN, HON. MR. JUSTICE MAGEE, and HON. MR. JUSTICE HODGINS:—We agree.

HON. MR. JUSTICE KELLY. JANUARY 8TH, 1914.

FINE v. CREIGHTON.

5 O. W. N. 677.

Vendor and Purchaser—Action for Specific Performance—Objections to Title—Clause allowing Rescission in Case of Unwillingness or Inability to Remove—Tender of Conveyance—Non-acceptance—Termination of Agreement—Damages—Costs—Dismissal of Action.

KELLY, J., *held*, that where a contract for the sale of certain lands provided that if the purchaser made objections to title which the vendor should be unwilling or unable to remove, the agreement should be null and void, and objections were made which the vendor was unable to remove, but where nevertheless he made a tender of a signed conveyance which was not accepted, that the agreement was at an end and the purchaser could not ask for specific performance.

Action by purchaser for specific performance of a contract for the sale of certain lands or for damages.

A. Cohen, for plaintiff.

L. E. Awrey, for defendant.

HON. MR. JUSTICE KELLY:—There is little of merit in the plaintiff's case.

Briefly, the facts are the following: Levee, an agent, approached defendant on October 3rd, 1912, with a view to seeing if he would sell this property. Levee was not acting for defendant; but on the same evening he returned with a written offer to purchase signed by plaintiff, and containing a term that time was to be of the essence of the offer. Defendant then accepted this offer, having stipulated with Levee that he was not to be liable for the payment of any commission; and he notified him, as the fact was, that he had not received the deed of the property. Levee received from the plaintiff a cheque for $50, intended as a deposit, which, however, he did not turn over to the defendant.

Other terms of the offer were that the sale was to be completed on or before November 1st, 1912, that the purchaser was to be allowed 10 days to investigate the title, and that if within that time he should furnish vendor in writing with any valid objection to the title which the vendor should be unable or unwilling to remove and which purchaser would not waive, the agreement should be null and void and the deposit should be returned without interest and the vendor should not be liable for costs or damages.

In his evidence plaintiff admitted that he bought property for speculation alone. On October 10th, he and one Turkel, who, though it did not so appear in writing, had a half interest in the agreement for purchase, entered into a contract with one Rebecca Levi for the assignment to her of the agreement with defendant, the contract with Mrs. Levi, however, being defeasible if the agreement with defendant should not be closed by reason of any default on his part or because of any defect in title. Plaintiff did not within the 10 days allowed for that purpose submit written objections to title, but on October 17th, 1912, defendant's solicitor having some days previously submitted to plaintiff's solicitor for approval a draft conveyance, plaintiff's solicitor delivered to defendant's solicitor written requisitions on and objections to title.

On October 24th, defendant's solicitor made reply thereto giving answers to some of the requisitions but stipulating that the doing so was without prejudice to defendant's rights under the contract and merely for the purpose of assisting plaintiff's solicitor in his search. This was followed by a letter of October 26th, from defendant's solicitor, also written without prejudice, stating that defendant was unable to furnish any evidence in answer to the requisitions and returning the draft mortgage which had been forwarded by plaintiff's solicitor with the requisitions on title on October 17th.

On November 1st, the day fixed by the contract for the closing of the sale, a clerk from the office of defendant's solicitor attended at the office of plaintiff's solicitor with a conveyance signed by defendant and his wife, and stated to the clerk in charge of that office—the plaintiff's solicitor not then being at the office—the object of his call; and he asked for someone who would close the transaction, to which he received the reply that there was no one there who could close. Failing in his object he left the office, and defendant and his solicitor thereafter treated the transaction as at an end.

Plaintiff's solicitor seems to have regarded the answers to the requisitions as insufficient, while the defendant's solicitor asserted that he had made all the answers that it was possible for defendant to give.

On this condition of things the plaintiff has brought this action for specific performance or in the alternative for damages. Beginning with the manner of making the offer, the

whole transaction seems to have been very loosely carried on for and on behalf of the plaintiff. Plaintiff's object was undoubtedly to speculate upon the property and turn it over immediately at a small profit incurring as little expense as possible in the transaction. Soon after entering into the contract of purchase he was "peddling" the property for sale, and on October 10th, he entered into an agreement for the disposal of the interest of himself and Turkel in it on terms which would give him a return of $175 or $125—as to which sum the contract is not just clear. After the delivery of the requisitions on title the only serious effort made to carry out the transaction was on the part of the defendant, who was ready to deliver a conveyance signed by himself and his wife and who through his solicitor tendered the same at the office of the plaintiff's solicitor, with the result above mentioned.

It is true the title was not then in the condition which was acceptable to the plaintiff, but had his representative on that date met the defendant's solicitor with the cash payment which was then payable, other objections to title might have been removed. There were still further objections which clearly defendant could not remove, though it is equally clear that he made reasonable efforts to satisfy plaintiff's demands in that respect. Plaintiff being so unwilling to complete without a further clearing up of the title, defendant fell back on his rights under the contract and treated the matter as at an end.

I do not see how plaintiff can succeed under the conditions which present themselves here, and my finding is against him. Had my conclusion been otherwise, the most he could hope to obtain by way of judgment, would be—not a decree for specific performance—but the profit which he and Turkel lost by reason of not being in a position to carry out the resale to Mrs. Levi. That amount was such that even had he so far succeeded, he could not have hoped to be awarded costs except on the lower scale, with the probability of a set-off against him of costs on the higher scale.

The action must be dismissed with costs.

HON. MR. JUSTICE KELLY. JANUARY 12TH, 1914.

LANG v. JOHN MANN BRICK CO., LTD.

5 O. W. N. 765.

Negligence—Master and Servant—Death of Superintendent of Works—No Defect in Plant or System—Deceased Responsible for Same—Findings of Jury—Motion for Non-suit—Dismissal of Action.

KELLY, J., dismissed an action brought for the death of defendants' superintendent smothered to death in a mixing hopper of defendants, holding that no defect in the plant or system had been shewn and that in any case deceased was responsible for the sufficiency of the same.

Action by administratrix of estate of W. F. Lang deceased for damages for his death by suffocation in a mixing hopper in defendants' works where he was employed as superintendent.

W. A. Hollinrake, K.C., for plaintiff.

J. Harley, K.C., for defendants.

HON. MR. JUSTICE KELLY:—At the close of the plaintiff's case a motion was made for a nonsuit on which I reserved my decision, subject to which the case proceeded. The jury found negligence on the part of the defendants in not having the ladder in the hopper protected, and assessed the damages at $1,000.

William Frederick Lang was in the employ of the defendants at their brick manufacturing plant, and on April 1st, 1913, met his death in a large hopper in which sand and lime are placed and from the bottom of which these materials pass to the machine by which the bricks are made. On the outside of the hopper is a ladder leading up to a platform near its top around which is a railing. Inside the hopper is a ladder leading downwards from its top. The sand and lime in the hopper have a tendency to clog which necessitates at times some operation to start again the flow towards the opening at the bottom.

On the afternoon of the day of the accident Lang was found dead in the lower part of the hopper, the sand and lime having run in upon him and smothered him.

Plaintiff is the administratrix of deceased's estate and she brings this action alleging negligence on the part of defendants which caused the death. Substantially the evidence submitted for plaintiff and on which she rests her claim, is that deceased who was a machinist was in defendants' em-

ploy about 2 years; at the time of his death he was superintendent of the factory and had charge of the men and the plant, his duties being to run the plant and see that the bricks were turned out and to do repairs; he was manager on the repairs; alterations had been made to the hopper previously by Morrison, deceased's brother-in-law, under deceased's direction; an iron rod was provided for use by persons standing on the platform, outside and near the top of the hopper in starting the sand and lime running at times when they became clogged or inert; a muzzle to go over the nose and mouth was kept in the office, under charge of deceased, for the use of those having occasion to enter the hopper and which would have protected him had he used it. It was stated by one of plaintiff's witnesses that it was possible to have put a guard on the ladder, but that he did not think it could be placed far enough down to be of any use.

Another witness called for plaintiff said there was no necessity for deceased's entering the hopper, that the sand was running all right that afternoon, and that the sand and lime were not clogged and did not stop.

It is true some of the witnesses called for plaintiff thought the iron bar could not be satisfactorily operated, while others suggested possible improvements or alterations to the hopper which they thought might overcome the clogging of the sand and lime; on their own shewing, however, these were not persons of mechanical skill; they were inexperienced in the working of this part of the plant, or of hoppers in general, and so were not competent to say if any other system of operation or any other design of or addition to the hopper was more satisfactory than the one in use. There was not as a matter of fact any evidence that any other system was superior to or safer than this one. I fail to see that there is any evidence that defendants committed a breach of their common law duty towards deceased, especially when one keeps in mind the position which he occupied in the conduct of defendants business.

There was equally an absence of the evidence necessary to render defendants liable under the Workmen's Compensation for Injuries Act. I am also satisfied that what the jury found to be defendants' negligence, namely, failing to have the ladder protected was not in the circumstances negligence for which they are liable.

The result is, therefore, that the action must be dismissed with costs. There will be a stay of 30 days.

HON. MR. JUSTICE MIDDLETON. JANUARY 12TH, 1914.

McNALLY v. ANDERSON.

5 O. W. N. 751.

Dower—Ascertainment of Value of Dower Rights—Alienation by Husband Subject to Dower—9 Edw. VII. c. 39, s. 23—Subsequent Permanent Improvements—Rise in Value—Income—Capitalization—Report of Local Master on Reference—Appeal from—Variation.

MIDDLETON, J., *held*, that in estimating the value of a widow's dower where lands have been alienated by her husband subject to her dower rights and subsequent permanent improvements to the lands have been made by the purchaser, the provisions of 9 Edw. VII. c. 39, s. 23, must be strictly followed, so that she is entitled to one-third of the income of the property in its state at the date of alienation, plus any increase in value since, if any, and any permanent improvements made by the purchaser are therefore to be disregarded.

Report of Local Master at St. Thomas varied.

Appeal from report of Master at St. Thomas upon a reference upon the judgment herein to be found in 24 O. W. R. 182. Argued on 7th January, 1914.

W. R. Meredith, for plaintiff.

F. S. Mearns, for defendant.

HON. MR. JUSTICE MIDDLETON:—James McNally is the owner in fee simple of the lands in question. On the 10th of May, 1899, he made an assignment for the benefit of his creditors, but his wife did not join for the purpose of barring her dower. McNally died some 12 years later, on the 22nd October, 1911. The assignee sold the land subject to the wife's dower right, realising a comparatively small sum. After the purchase the then existing buildings were pulled down, and several erected upon the land.

The action was tried on the 5th of March, 1913, and the reasons for judgment are reported 24 O. W. R. 182. The plaintiff was held entitled to her dower, and the action was referred to the Master to fix the value of the dower; the parties apparently assenting to her receiving a sum in gross. The Master by his report has allowed $116.48. The principle upon which this computation was made is now attacked.

The old saw mill is not of great value, and probably would, at the time of the death, have had no value. The Master has assumed to find the value of the land at the time

of the alienation and to add to it the value of so much of the material of the old buildings as was used in the construction of the new, and then give the widow the capitalized value of the one-third of the income that would be produced upon the investment of this sum.

Prior to the statute which governs this case now found as 9 Edw. VII. ch. 39, sec. 23, the widow would have been entitled to take one-third of the rental produced by the property as it was on the date of her husband's death. By this statute it is provided that "the value of permanent improvements made after the alienation of the lands by the husband . . . shall not be taken into account, but the damages or yearly value shall be estimated upon the state of the property at the time of such alienation . . . allowing for the general rise, if any, in the price and value of land in the particular locality."

In case of the owner who has made improvements the legislature has substituted an arbitrary standard "the state of the property at the time of the alienation." The widow may shew a general increase of value, and so increase the amount coming to her; but she is not subject to having the amount cut down either by a general depreciation of the value of land or upon any hypothetical view that apart from the improvements the value would have depreciated.

The witness Deo shews that at the time of the alienation the property would have rented at from $300 to $350 a year. There is no evidence which would justify any finding that there had been a general increase in value.

Wallace v. *Moore,* 20 U. C. R. 560, is in accordance with this; and so also is *Robinet* v. *Pickering,* 44 U. C. R. 327.

The widow is 67 years of age; and, taking her share of the rental as $100 per annum, she would now be entitled to $722, on the basis of interest at 5 per cent., the legal rate, and also entitled to $200, for the 2 years, which have elapsed since the death of her husband; a total of $922.

It is some satisfaction that this value of dower is in accord with the view taken by the prospective purchaser, who valued the land at $2,000 as free from dower but only offered $700 for it subject to dower; stating that he would have gone as high as $1,000.

The report will be varied accordingly, and I can see no reason why costs should not follow the event.

HON. MR. JUSTICE SUTHERLAND. JANUARY 10TH, 1914.

KOSTENKO v. O'BRIEN.

5 O. W. N. 689.

Negligence—Master and Servant—Employee Injured by Felled Tree Falling on Him—Workmen's Compensation for Injuries Act—Lack of Notice—Defective System — Common Law Liability—Damages.

SUTHERLAND, J., *held* that for a contractor to fell trees which might fall into the path of employees engaged in the carriage of logs, without proper superintendence of such operations, was a defective system for which defendants were liable at common law.

Kreuszynicki v. *Can. Pac. Rw. Co.*, 25 O. W. R. 262, and *Fairweather* v. *Owen Sound Stone Quarry Co.*, 26 O. R. 604, distinguished.

Action for damages for injuries sustained by plaintiff while in the employ of defendants through their alleged negligence, tried at Port Arthur, without a jury, on the 15th December, 1913.

A. G. Slaght, for plaintiff.

T. W. McGarry, K.C., for defendant.

HON. MR. JUSTICE SUTHERLAND:—While a claim under the Workmen's Compensation Act was set up in the statement of claim, it was admitted at the trial that as no notice that the injury had been sustained had been given within the time limited by that Act, and the action itself had been commenced too late, the plaintiff could have no remedy thereunder.

At the conclusion of the argument I disposed of the general facts and fixed the damages at $900, in case I should determine that the plaintiff was entitled to succeed at common law. I reserved judgment mainly to consider whether, upon the evidence, it could be held that the defendants were doing their work under a defective system, and that the accident resulted in consequence thereof, but also to enable counsel to put in additional authorities.

The system under which the defendants were carrying on their work was discussed by me in dealing with the general facts of the case. The work which the plaintiff was directed to do, and was doing at the time of the accident, namely, assisting other men in carrying the logs from the pile to the dump, was a part of the system adopted by the

defendants in carrying out their construction contract, as was the work of those who were felling the trees.

For the defendants to perform their work in such a way as that trees would be felled so close as to fall across the paths along which men were obliged to carry logs and thus make it likely that the trees would fall upon the men, without any supervision to prevent injury to them, was, in my opinion, adopting and following a negligent system. What might reasonably have been expected to happen, and might easily have been averted, was what did happen. It was this negligent system of carrying on the work which I think occasioned the accident.

Reference to *Sword* v. *Cameron*, 1 Sc. Sess. Cas. 2nd. Series 493; *Smith* v. *Baker*, [1891] A. C. 325, at 337 and 339; *Williams* v. *Birmingham Battery & Metal Co.*, [1899] 2 Q. B. 338; *Ainslie Mining and Rw. Co.* v. *McDougal*, 42 S. C. R. 420; *Brooks* v. *Fakkema*, 44 S. C. R. 412.

I was referred by counsel for the defendants to the case of *Kreuszyniki* v. *Canadian Pacific Rw. Co.*, 25 O. W. R. 262, which is, I think, distinguishable. The work being done in that case was not work in connection with the general system of the railway's operation but an isolated piece of work required to be done and which was being done under the direction of an apparently competent foreman.

The case of *Fairweather* v. *Owen Sound Stone Quarry Co.* (1895), 26 O. R. 604; was also referred to but does not, in my opinion, assist the defendants. I quote from p. 607; "The manner of working the quarry ought to be known to the governing body of the corporation defendants, and they should be answerable if the system is dangerous or negligently conducted," *Rex* v. *Medley*, 6 C. & P. 292.

There will be judgment for the plaintiff for $900 with costs of suit.

HON. SIR G. FALCONBRIDGE, C.J.K.B. JAN. 10TH, 1914.

HOME BANK OF CANADA v. MIGHT DIRECTORIES LTD.

5 O. W. N. 690.

Party Wall—Evidence—Openings for Joists—No Record of Rights—Injunction—Easement—Damages.

FALCONBRIDGE, C.J.K.B., *held*, that the fact that where there were openings in a wall between two old buildings for the insertion of joists and timbers of the adjoining building did not constitute such wall a party wall where all other evidence pointed to a different conclusion.

Action for an injunction and damages in respect of an alleged trespass by defendants upon the wall of plaintiffs' building on Church street in the city of Toronto.

E. D. Armour, K.C., and A. E. Knox, for plaintiffs.

G. Grant, and D. I. Grant, for defendants.

HON. SIR GLENHOLME FALCONBRIDGE, C.J.K.B.:—Owing to causes beyond my control, this judgment has been too long delayed.

The facts are little, if at all, in dispute, and the arguments have been extended with extracts from the authorities to which I have added some marginal notes.

It is quite evident and it is practically admitted, that plaintiffs' building was erected before defendants'.

I am of opinion that defendants have failed to establish that plaintiffs' south wall is a party wall.

First, the title deeds, leases, &c., favour the plaintiffs' contention, reserving nothing to defendants.

Second, so does the general appearance of the buildings and of the wall in question.

Third, so also does the construction of the wall. Mr. C. J. Gibson, architect, called by defendants, could not recall a case of a party wall being built like this one. It is plumb on the south (i.e., the far) side, with steps or jogs on the Home Bank side. The base is about 22 inches thick, the first floor 18 inches, the second floor 14 inches, and above that there is a parapet of 9 inches. If, then, this were a party wall and the line in the centre thereof at the base, the bank would own less and less of the wall as it goes up until the parapet would be entirely on defendants' land.

The only matter which has given me any trouble is the fact that there are openings in the south side of the wall for the insertion of joists and timbers from the other building and into these openings joists and timbers have been inserted. There are also spaces for fire-places leading to chimneys in two places—in one of these, the fire-place has been used by defendants or their predecessors. The other fire-place looks out into empty space, being above the level of defendants' building.

There being nothing of record shewing a grant or reservation to defendants' predecessors of any right to use the wall, it may be the case that the owner and builder thereof had in his mind the event of another building being erected to the south, the owner of which might pay for the privilege of using these appliances.

No doubt defendants have acquired an easement for the support of their joists, &c., and for their smoke, as matters stood when they began to erect their present structure and the injunction, which I now make perpetual, does not affect this.

Judgment for plaintiff with $5 damages and costs.

Thirty days' stay.

HON. MR. JUSTICE MIDDLETON. JANUARY 12TH, 1914.

SCOTT v. WHITE.

5 O. W. N. 766.

Vendor and Purchaser—Objection to Title—Conveyance to Trustees —Merger of Beneficial Interest and Legal Estate—Evidence of Discharge of Trust not Required.

MIDDLETON, J., *held*, that where lands were conveyed to trustees in trust for A. B. and later were conveyed by such trustees to A. B. that it was unnecessary for a subsequent vendor of such lands to prove upon what trusts the lands were held for A. B. and that such trusts had been discharged.

H. R. Welton, for vendor.

G. T. Walsh, for purchaser.

A petition under the Vendors and Purchasers Act to determine the validity of an objection to title.

HON. MR. JUSTICE MIDDLETON:—On the 26th September, 1893, the lands in question were conveyed in fee simple to Macdonald and Barnhart, "trustees for Catharine Barnhart." In the grant these words are repeated.

On the 9th of November, 1895, Macdonald and Barnhart, again described as trustees, convey the land to Catharine Barnhart, she joining in the conveyance for the purpose of expressing her consent thereto. The title is registered. All the parties are dead. The objection is that evidence should be produced shewing the trusts upon which the trustees held the land, that these trusts had been fully carried out and that the trustees had the right to convey.

I do not think that this objection is well taken. What the registered title discloses is that while the legal estate was vested in Macdonald and Barnhart they held it in trust for Catharine Barnhart. They have conveyed with her assent and approval. There is no room, upon the known facts, for the suggestion that there was ever any trust deed or any trust other than a simple trust for Catharine. The objection taken indicates no defect in the vendor's title.

So declare. Costs will follow the event unless there is an agreement between the parties.

HON. MR. JUSTICE MIDDLETON. JANUARY 10TH, 1914.

McAVOY v. RANNIE.

5 O. W. N. 688.

Municipal Corporations—Police Officer—Liability for Acts of—Statement of Claim—Striking out as Disclosing no Cause of Action.

MIDDLETON, J., *held*, that a police officer is not *ipso facto* the servant of a municipality and any facts relied on to establish the liability of the municipality for his acts must be expressly pleaded.

Motion by the city of Toronto for an order striking out the city as party defendant upon the ground that the statement of claim discloses no cause of action against it.

Irving S. Fairty, for the city.

R. H. Holmes, for the plaintiff.

HON. MR. JUSTICE MIDDLETON:—Upon the argument some question was raised as to how the corporation became added in the action. The writ appears to have been against

Rannie only, and no order can be found justifying the addition of the city.

Be this as it may, it is clear that there is no cause of action against the city. What is alleged is that Rannie, a constable, conspired and colluded with the Singer Sewing Machine Co. to assault, beat and unlawfully imprison and detain the plaintiff. This is followed by the allegation, without any facts being stated to justify it, that the corporation of the city of Toronto is liable to the plaintiff for the wrongful acts of Rannie.

The motion is allowed with costs.

SUPREME COURT OF ONTARIO.

FIRST APPELLATE DIVISION. JANUARY 12TH, 1914.

THERRIAULT v. COCHRANE.

5 O. W. N. 704.

Municipal Corporation—By-law—Imposing Rate for Separate School Purposes—Requisition of School Board—Separate Schools Act, 3 & 4 Geo. V. c. 71, ss. 67, 70—Public Schools Act, 9 Edw. VII. c. 89, ss. 47, 72 (n) — Contrast in Machinery of Statutes—Powers of Council under Former Act Limited to Collection of Rate—By-law Collecting Larger Sum than that Requisitioned to Provide for Contingencies—Quashing of By-law—Costs.

LENNOX, J. (24 O. W. R. 964) refused to quash by-law No. 81 of the town of Cochrane, imposing a rate on all property liable for Separate School purposes.

SUP. CT. ONT. (1st App. Div.) *held*, that under s. 70 of the Separate Schools Act, 3 & 4 Geo. V. c. 71, the council of a corporation has no power to impose a rate for Separate School purposes, but that this action must be taken by the School Board, the duties of the Council being confined to collecting the rate so imposed.

Semble, that a body imposing a rate has implied power to impose a rate slightly in excess of that apparently necessary in order to provide for the contingencies of non-collection, etc.

Appeal allowed and by-law quashed in part without costs.

Appeal by Louis Therriault from an order dated 2nd September, 1913, 24 O. W. R. 964, made by HON. MR. JUSTICE LENNOX, dismissing without costs an application made by the appellant to quash by-law number 81 of the respondent "as regards the rate on all property liable for taxation for Separate School purposes."

The appeal to the Supreme Court of Ontario (First Appellate Division) was heard by HON. SIR WM. MEREDITH, C.J.O., HON. MR. JUSTICE MACLAREN, and HON. MR. JUSTICE MAGEE.

J. M. Ferguson, for appellant.

S. A. Jones, K.C., for respondent.

HON. SIR WM. MEREDITH, C.J.O.:—The Separate School Board of Cochrane, assuming to act under the Separate Schools Act, 3-4 Geo. V. ch. 71, sec. 70, requested the municipal council to levy from the supporters of the schools of the Board $3,608.70, which was the sum required for the support of the schools for the current year.

By-law number 81 was passed to fix and provide for levying the tax rate for the year 1913. It recites that "the amount of money required for the purposes of the requisitions of the Separate School Board is the sum of $3,608.70," and it provides that "there shall be levied upon all rateable property in the town of Cochrane and in the unorganised district adjacent thereto liable for taxation for school purposes" certain rates, and among them "a rate of 23 mills on all property liable for taxation for Separate School purposes." This rate, if the taxes were all collected, would produce $4,150, a sum exceeding by $541.30 the amount of the School Board's requisition; and the controversy is as to the right of the Council to raise this excess.

The Council claims to be entitled to add to the amount mentioned in the requisition a sum sufficient to cover the contingency of part of the rates not being collectible, and this is disputed by the appellant.

It is difficult to understand why any such question should have arisen. If the School Board insisted on a rate being struck sufficient to produce the exact sum mentioned in the requisition, why should the Council have objected? All that the corporation is bound to do is to pay over the rates and taxes as and when collected to the School Board not later than the 14th December; and if it should turn out that a part of them was then unpaid, owing to the inability of the collectors to collect it, any resulting loss or inconvenience would be borne by the School Board and the Separate School supporters, and not by the corporation.

It is equally difficult to understand why the School Board should object to the course taken by the Council. If more

should be collected than the $3,608.70, the excess would not belong to the corporation, but to the School Board; and why the Board should insist upon a rate being struck which in all probability would not produce the sum required for the support of its schools, I do not understand.

It could hardly be that the motion to quash was made in the belief that if the rate which it is contended by the appellant the Council should have imposed did not produce the amount mentioned in the requisition the Council would be bound to make up the deficiency out of its general funds, and in that way cast upon public school supporters part of the burden of the support of the Separate Schools. For such a belief the Separate Schools Act affords no foundation. It is true that where the Board adopts the plan provided for by sec. 67, and collects its own rates, the Council of the municipality in which the Separate School is situate is required to make up the deficiency arising from uncollected taxes charged on land, out of the funds of the municipality; but the uncollected taxes belong to the municipal corporation, and, being charged on land, the corporation runs no risk and can incur no loss, as the interest would be added to the arrears and the whole collected if necessary by the sale of the land. There is no provision where the Board acts under sec. 70; but, as I have pointed out, in that case all that the corporation is required to pay the Board is what is collected as it is collected.

If I had come to the conclusion that sec. 70 confers upon the Council power to impose the rates for the support of Separate Schools, I should also have concluded that the contention of the appellant is not well founded. In the nature of things it is necessary, and is, I think, the invariable practice of all taxing bodies in making estimates for the purpose of fixing the rates to be levied, to provide for them to include a sum to meet the contingency of some of the persons upon whom or upon whose property the rates are imposed failing to pay them, and the rates being uncollectible; and I find nothing in sec. 70 to indicate that it was not intended, if power to impose the rates is conferred upon the Council, that the Council should not be at liberty to make the rate to provide the sum required by the School Board sufficient to allow for the contingency I have mentioned.

I am, however, of opinion that sec. 70 does not confer on the Council power to impose the rates. The scheme of the

Act seems to be that the Board itself shall impose the rates, and, having imposed them, it has two courses open to it for the collection of them: Either as provided by sec. 67 (1), to collect them by its own collector, or, as provided by sec. 70 (1), to require the Council to collect them by its collectors and other municipal officers.

The only place where any reference to the imposition of the school rates occurs is in sub-sec. 1 of sec. 67, which confers upon the School Board power to impose them. What the Council under sec. 70 (1) has to do is "through their collectors and other municipal officers" to "cause to be levied in such year upon the taxable property liable to pay the same all sums of money for taxes imposed thereon in respect of Separate Schools." The sub-section contemplates that the rates have been already imposed—that is, I think, by the School Board—and it is these rates that the Council is to cause to be levied through its collectors and other municipal officers. Imposing a rate is an act of the Council, and it is not done through the collector or any other municipal officer; and "levied" must therefore be read as meaning "collected." The misapprehension on the part of the Council which has led to the adoption of the course it has taken must, I think, have arisen from confounding their duties under sec. 70 with those in respect to public schools. Under the Public Schools Act, 9 Edw. VII. ch. 89, the School Board submits to the Council the estimate for the current year of the expenses of the schools under its charge. Section 72 (n) and sec. 47 make it the duty of the Council to levy and collect upon the taxable property of public school supporters the sum so required. Under the Separate School Act, the municipal machinery is used at the option of the School Board, but only for the collection of the rates imposed by the Board, and there are no provisions in the Act similar to those of the Public Schools Act to which I have referred.

So much of the by-law as provides for levying the rate of 23 mills on "all property liable for taxation for Separate School purposes" must therefore be quashed; but there will be no costs to either party of the proceedings before my brother Lennox, or of this appeal.

Although the appellant has succeeded in his attack upon the by-law, he has failed upon the ground on which the attack was based; and his success will result in the Separate School Board, of which he is the secretary-treasurer, being

deprived of the means of carrying on its schools during the present year, unless the Board may yet exercise the powers conferred by sec. 67 of imposing the rates and collecting them by its own collector.

HON. MR. JUSTICE MACLAREN, and HON. MR. JUSTICE MAGEE:—We agree.

HON. MR. JUSTICE KELLY. JANUARY 20TH, 1914.

STROH v. FORD.

DUENCH v. FORD.

5 O. W. N. 786.

Fraud and Misrepresentation—Action for Damages—Sale of Bonds—Dismissal of Action.

KELLY, J., dismissed actions brought in respect of alleged fraud and misrepresentation upon the sale of certain bonds to the plaintiff from or through the defendant, holding that no fraud or misrepresentation had been proven.

Action for damages for alleged fraud and misrepresentation arising out of the purchase of certain bonds from or through the defendant by the plaintiffs.

W. H. Gregory, for plaintiffs.

N. Jeffrey, for defendant.

HON. MR. JUSTICE KELLY:—These two actions arose out of purchase by the plaintiffs of bonds of the National Agency Company, Limited, the various purchases having been made from or through defendant Ford. The first purchase made by plaintiff William Duench of a bond for $4,000, was made in December, 1911, or January, 1912, and this bond was issued in favour of the plaintiff Mary Duench, wife of William Duench. Duench's second purchase (of a bond for $2,000) was made in April, 1912, and Stroh's purchase of a $2,500 bond was made in October, 1912.

The ground of these actions is that the sales of the bonds were induced by fraud and misrepresentation on the part of the defendant.

The evidence does not satisfy me that the plaintiffs are entitled to succeed. William Duench, who was a retired

farmer and was seeking an opportunity of investing his moneys, had negotiations with defendant to that end, defendant being a shareholder in the National Agency Company, Limited. In the course of these negotiations it is alleged by Duench that defendant made the misrepresentations which induced him to make the purchases. Defendant denies any such misrepresentations, but candidly admits telling Duench that he thought the debentures were a good investment, and that he was not making a mistake in investing his money in that way, explaining to him that the Union Life Insurance Co. and the Home Life Insurance Company were the chief assets of the National Agency Company, Limited; that these two insurance companies were regularly inspected by the Government and for that reason he considered the investment good. I am quite satisfied that that was defendant's belief and that it continued to be his belief.

Duench in his evidence sets up statements by way of misrepresentation alleged to have been made by defendant, but I am not able to agree with his view. His evidence was not of that clear and candid sort that one can readily accept without misgivings. He is contradicted not only by the defendant, but by the witness Josephine Hedrick, the defendant's step-daughter, and—more material still—by the witness Jeanerett. Of the evidence of the latter there can be no doubt, and he is quite clear in supporting the testimony of the defendant, if indeed it requires to be supported, either as against the statements of Duench or of Stroh. Duench, prior to his first purchase, discussed the matter with Jeanerett, who also had purchased one of these bonds, and I have much doubt as to the extent to which he relied on anything said by the defendant, even if defendant had made the statements fraudulently and with intent to mislead or deceive the plaintiff, which I fail, however, to find.

In the matter of Duench's second purchase, that was brought about by Duench himself, he having sought out Ford for that purpose, and after some negotiations the purchase was carried out. Then a bargain was made by which Ford was to allow Duench one per cent. commission on any sales of bonds which he might effect. Following this, Duench got into contact with Stroh and learned that he had moneys to invest, and he brought about an interview between Ford and Stroh, he—Duench—being present. Defendant advised Stroh

to take his time in the matter, and suggested his seeing his banker or another person whom he named. Some weeks afterwards Duench and Ford again saw Stroh, and following that interview a sale was made to him of the bond for $2,500, and on this sale Duench was allowed by defendant a commission of one per cent.

It is not difficult to come to the conclusion that if Stroh relied on the statements of any person it was those of Duench, who was interested in making the sale and who was instrumental in carrying out the sale on which he was to receive and did receive a commission. It may be and perhaps was the case, that there was confusion in Duench's mind between the National Agency Company, Limited and the insurance companies which both Stroh and Duench admit were mentioned by the defendant. Duench seems to have had difficulty in understanding the relationship between these companies as it was explained by Ford, and several times he had to have the explanation repeated to him.

Much as one may regret the unfortunate circumstances in which these plaintiffs have suffered so severe a financial loss, it is impossible to find that they have proven against the defendant such fraud or misrepresentation or statements as would justify a decision in their favour.

It might be mentioned as an element shewing Ford's confidence in these securities that he had an investment of $4,000 in the enterprise, and that after all these happenings in respect of which the action is brought he embarked further in it by the investment of an additional sum of $1,100 in the Home Life Insurance Company.

The actions, therefore, fail, and must be dismissed with costs.

HON. MR. JUSTICE MIDDLETON. JANUARY 19TH, 1914.

MULVENNA v. CANADIAN PACIFIC RW. CO.

5 O. W. N. 779.

Pleading—Particulars—Statement of Claim—Fatal Accidents Act—Plaintiff's Son Killed by Derailment of Train — Residence of Plaintiffs out of Jurisdiction — Knowledge by Defendants of Facts—Res Ipsa Loquitur — Order for Particulars Oppressive—Particulars of Damages Impossible—Order Set Aside.

MIDDLETON, J., set aside an order for particulars in an action for alleged negligence of defendants causing the death of plaintiff's son by reason of the derailment of defendants' train, holding that where the plaintiffs resided in Ireland and the facts were within the knowledge of the defendants an order for particulars of negligence was oppressive and an abuse of the practice and that particulars of damage under the Fatal Accidents Act were unheard of and impossible to give.

Appeal by the plaintiff from order of the Master-in-Chambers, dated 23rd December, 1913, directing delivery of certain particulars.

E. T. Hearn, K.C., for the plaintiff.

Walrond (McMurchy & Co.), for the defendant.

HON. MR. JUSTICE MIDDLETON: — Patrick Mulvenna recently came to this country from Ireland. He there, it is alleged, aided in supporting his parents, and was going to Western Canada with the view of bettering his circumstances and enabling him to render more efficient assistance in their maintenance. While a passenger on a west-bound train of the defendant railway, a little west of Ottawa, the coach in which he was became derailed and wrecked, and he was instantly killed. His parents, still residing in Ireland, sue to recover damages, alleging that the son's death was caused by the negligence of the railway.

The defendants demanded particulars of the alleged negligence; and particulars which were in truth more or less illusory were served. The negligence, it is said in the particulars, was (a) in permitting the coach to become derailed, (b) in permitting it to become derailed owing to defects in the rails, roadbed or train or to negligence in operating the train. The Master has now ordered better particulars. He permits an examination to be had "of the company" before defence

is filed, particulars being directed to be delivered after such examination and before defence. The plaintiffs appeal.

I do not think the order can be supported. The plaintiff can establish negligence without being able to prove exactly how the accident happened. As put by Sir Frederick Pollock, pref. vol. 133 Revised Reports, "when damage is done by something getting out of control which normally ought to be under the control of the person using or profiting by it, there is a presumption, *i.e.*, a rational inference of fact, that the mishap is due to the negligence of the user or his servants, unless he can explain it otherwise."

Upon the argument counsel for the railway appeared to entirely misapprehend the meaning of this doctrine, and pressed for a direction that if the plaintiff intended to rely upon the principle *res ipsa loquitur*, the allegation of negligence should be stricken out of the pleading.

That is not the meaning of the rule. It is that the occurrence, when proved, warrants a finding of negligence.

The order made by the learned Master appears to me to be oppressive and an abuse of the practice. If it means anything, it means that these people residing in Ireland are not to be permitted to present their case to our Courts unless they can explain to the railway the cause of the accident by whch their son was killed—a proposition so monstrous as to need nothing beyond this statement for its refutation.

While every precaution must be taken against allowing pleadings to become meaningless, by reason of the use of vague and general language, the tendency, now too frequently manifested, of making an order for particulars an instrument of oppression, must be sternly repressed. The particulars here are sought as an aid to pleading. No suggestion is made indicating how the pleader would be aided by the information sought.

The learned Master also made an order requiring particulars of the damages sought. I find it impossible to understand exactly what is meant by the order in question. It is as follows:

"It is ordered that the plaintiffs shall deliver to the defendant further particulars of the actual damage suffered by the plaintiffs as a result of the death of the said Patrick Mulvenna in the accident complained of, but not of the

special damages, if any, which the plaintiffs may be found entitled to at the trial."

Special damages are not sought in the action, in the ordinary sense in which that term is used. Had they been claimed particulars might well have been ordered of them. An order for particulars of the damages claimed under the Fatal Accidents Act has never heretofore been made. The damages are to be such sum as the jury may estimate as representing the probable pecuniary benefit the plaintiffs would have received from the continuance of the life of the deceased. How particulars could be given of this it is impossible to suggest.

Counsel stated that what he really desired was a statement of the benefits that the parents had received in the past from their son. This is not what has been ordered, nor would it be proper that it should be ordered, as it would be compelling the plaintiffs to give particulars of the evidence by which they intend to support their claim. Moreover, all information which the defendant is entitled to have can be obtained upon discovery.

I think the appeal should be allowed, and that the motion should be dismissed, both with costs.

HON. SIR G. FALCONBRIDGE, C.J.K.B. JANUARY 26TH, 1914.

CORNISH v. BOLES.

5 O. W. N. 799.

Lease—Covenant not to Assign or Sub-let without Leave—Arbitrary Withholding of Consent to Assignment by Lessor—Damages—Declaration—Reference.

FALCONBRIDGE, C.J.K.B., *held*, that where a lessor had unreasonably and arbitrarily withheld his assent to an assignment of lease that he was liable in damages for so doing.

Action for a declaration of the plaintiff's rights in respect of assignments of a lease and option and for damages and other relief, tried at Toronto.

R. R. Waddell, for plaintiffs.

H. M. Mowat, K.C., for defendant.

HON. SIR GLENHOLME FALCONBRIDGE, C.J.K.B.: — By indenture of lease dated 15th January, 1912, defendant leased to plaintiff McNeil for 3 years the lands in question, and it was "understood and agreed" in and by said lease, that the said lessee, McNeil, his heirs, executors, administrators and assigns should have the right to purchase same at any time during the said term at a price per foot frontage on Murray street.

And the lessee McNeil covenanted that he would "not assign or sub-let without leave, but such leave shall not be wilfully or arbitrarily withheld."

After vainly endeavouring to get defendant's consent to an assignment by plaintiff McNeil to plaintiff Cornish, plaintiff McNeil, by indenture dated 8th February, 1913, assigned the said lease and the said option to his co-plaintiff Cornish.

And plaintiff Cornish, after applying without success to defendant for his consent to an assignment by him to a realty company, signed a memo. agreeing to sell the said lease and option to the said company.

It is needless to say that both these assignments were at a profit to the vendors.

Plaintiffs now bring this action, claiming an order directing defendant to execute such instruments as may be necessary to give consent to above assignments and agreement.

Mr. Mowat announced that he offered no evidence to support par. 4 of the statement of defence (that defendant signed without competent and independent advice and did not understand the meaning and effect of it, etc.)

Paragraph 5 as to defendant's alleged understanding of instrument was not only not supported by evidence, but it was shewn to be utterly false by the testimony of an independent solicitor and his stenographer, who proved that it was read to defendant and that he perfectly understood the same.

Then as to the facts in dispute—which are principally as to conversations with defendant by different persons trying to get him to execute a consent—I have no hesitation in giving credence to plaintiffs and their witnesses as against the defendant. This I do having regard to the demeanour of the deponents and by the application of the other standards adopted by jurists, in determining the relative value of conflicting statements.

The pretention that there could be any personal element in the choice of a tenant or that the tenant should live on the property is, having regard to the nature and condition of the land and the dilapidated building thereon, utterly untenable and absurd.

I find, therefore, that defendant did wilfully and arbitrarily withhold his consent to both assignments. His true reason for so doing was of course a dislike of seeing anyone else make any money out of the transaction.

The law is quite clear: "The proviso is not construed as implying a covenant on the part of the lessor not to refuse his consent arbitrarily or unreasonably, but if in fact it is so refused, the result is that the lessee is at liberty to assign without the lessor's consent; and he can obtain a declaration by the Court of his right to do so."

Halsbury, vol. XVIII., p. 579, sec. 1111 *et seq.;* Woodfall, L. & T. 19th ed., 776 *et seq.;* Foa, L. & T. 4th ed., 270 *et seq.,* and cases cited in all these, and several Canadian cases which I have consulted.

Owing to the delay caused by defendant's recalcitrance (I use the word advisedly, because he had been advised by Mr. J. E. Jones, barrister and solicitor, that he (Jones) did not see any reason why he did not give his consent) the realty company assumed to cancel and rescind their agreement with Cornish, so that company is entitled to damages on that head.

At the trial an amendment was added to the statement of claim claiming possession of the premises and damages, or *mesne* profits. I find that the defendant did enter and take possession without colour of right. Rent had been tendered, and he had no other right of forfeiture.

There will be a declaration that plaintiff McNeil was entitled to assign the lease and option to plaintiff Cornish, and that plaintiff Cornish is entitled to assign same to the Allen Edwards Spiers Realty Co. Limited, without the consent, written or otherwise, of the defendant.

2. Damages for defendant's refusal and neglect to give such consent.

3. Damages or *mesne* profits under the added count. Reference to Master as to last two items.

4. Costs of action and counterclaim, which is dismissed, to plaintiff.

5. Further directions and subsequent costs reserved until after Master's report.

Thirty days' stay.

HON. MR. JUSTICE MIDDLETON. JANUARY 15TH, 1914.

RE JONES AND TUCKERSMITH.

5 O. W. N. 759.

Way—Highway—By-law Closing Same—Dedication—No Acceptance by Municipality—Surveys Act, 1 Geo. V. c. 42, s. 44—Registry Act, 10 Edw. VII. c. 60, s. 44, s.-s. 6—Quashing of By-law.

MIDDLETON, J., *held*, that where a highway had been dedicated but never accepted by the municipality the latter could not by by-law assume to close the same and sell it.

Motion by certain ratepayers of the township of Tuckersmith to quash by-law number 3 of 1913, being a by-law to close and dispose of part of Mill street in the village of Egmondville.

W. Proudfoot, K.C., for applicant.

R. S. Robertson, and R. S. Hays, for the township.

HON. MR. JUSTICE MIDDLETON:—Upon the argument of the motion there was some confusion as to the facts. Supplementary material has now been put in, satisfactorily disposing of the matters in doubt.

The village of Egmondville is an unincorporated village in the township of Tuckersmith. It forms part of lots 10 and 11 in the second concession, Centre street corresponding with the division between the two lots. According to plan registered on the 8th September, 1857, Mill street extends north from Bayfield street through Queen street one block west of Centre street. On this plan it does not extend north of Queen street.

On the 16th June, 1875, a by-law was passed by the township council "to open up certain streets known as Water and Mill streets in the village of Egmondville, being composed of parts of lots 10 and 11 in the township of Tuckersmith as shewn in the original map of the said village of Egmond-

ville, as registered in the Registry office of the county of Huron." This clearly refers to Mill street between east Bayfield street and Queen street as shewn on the plan of 1857.

In 1873 a plan had been registered of lands to the north of the lands covered by the old plan of 1857, and this shewed an extension of Mill street from the north side of Queen street northward. I do not think that this portion of Mill street was intended to be affected by the by-law of 1875, as it refers to the street as shewn upon the original plan.

The southern portion of Mill street was opened up and has been used as a travelled road for many years. The portion north of Queen street has never been opened. Lots have been sold in accordance with the plan of 1873; but as far as the material shews the municipality has in no way adopted this portion of Mill street and the street has never been opened.

Richard Kruse owns land adjoining Mill street extension, and for some time there has been a conflict between him and the other land owners. They have recently petitioned to have the street opened up, but the municipality has refused. He has desired to have it closed and sold. The street is probably of no great use as it now is, and Kruse desires to use it in connection with his brick yard.

On November 16th, 1912, according to the minutes, Mr. Kruse applied to the council for the purchase of that portion of Mill street in the village of Egmondville north of the intersection of Queen street for use in connection with a brick and tile yard;" whereupon the council resolved "that as in our opinion Mill street will not be required for purposes as a street, we grant the request of Mr. Kruse, and arrangements be made for the sale of land, necessary notices posted up and advertised, and the reeve be authorized to employ a solicitor in the matter." On 23rd December the council met, heard the parties interested and resolved "that in the matter of the opening and sale of Mill street no action be taken at this meeting until further consideration of the question be given."

On the 13th January, the new council met and without any notice to the objecting owners passed a by-law on three readings for the closing and sale of the street. In pursuance of this the street has been conveyed by the municipality to Kruse for $136.

Several serious objections are urged to the validity of the by-law. I do not need to consider all, as I think it is plain that the municipality having failed to accept the proper dedication of the street as a highway cannot assume to close and sell it and keep the proceeds. Section 632 of the Municipal Act of 1903 relates to original road allowances and other public highways, roads, streets or lanes.

A road allowance shewn upon a plan which has not been assumed by the municipal corporation for public use does not fall within this designation. For some purposes the street is a highway; but, subject to the rights of the public, it remains to be governed by the Surveys Act, 1 Geo. V. ch. 42, sec. 44. Such a road may be closed under the provisions of the Registry Act, 10 Edw. VII. ch. 60; and by sub-sec. 6 of sec. 44 the allowance, upon the road being closed, and the public rights extinguished, belongs to the owners of the land abutting thereon, and not to the municipality. The Surveys Act gives the fee to the adjoining lot owner in place of the original owner.

The by-law is therefore bad, and should be quashed. Costs should follow the event.

SUPREME COURT OF ONTARIO.

FIRST APPELLATE DIVISION. JANUARY 26TH, 1914.

McINTOSH v. COUNTY OF SIMCOE.

5 O. W. N. 793.

Negligence—Independent Contractor—Municipal Corporation—Cement Mixer on Highway—Frightening of Horse—Dangerous Object—Knowledge of Corporation—Liability of.

SUP. CT. ONT. (1st App. Div.) *held*, that "an employer cannot divest himself of liability in an action for negligence by reason of having employed an independent contractor, where the work contracted to be done is necessarily dangerous, or is, from its nature likely to cause danger to others, unless precautions are taken to prevent such danger" and consequently a municipality was liable for damages caused by the frightening of a horse by the operation of a cement mixer being operated by an independent contractor.

Halliday v. *National Telephone Co.*, [1892] Q. B. D. 392, referred to. Judgment of Jun. J. Co. Simcoe, reversed.

Appeal by the plaintiff from a judgment of the County Court of the county of Simcoe, dated 30th September, 1913, which was directed to be entered by the Junior

Judge of that Court after the trial of the action before him sitting without a jury on the 23rd and 24th June, 1913.

The action was brought against the Corporation of the County of Simcoe and the Corporation of the Township of Sunnidale, and the appeal was against the judgment in so far as by it the action was dismissed as against the last-named corporation.

The appeal to the Supreme Court of Ontario (First Appellate Division) was heard by HON. SIR WM. MEREDITH, C.J.O., HON. MR. JUSTICE MACLAREN, and HON. MR. JUSTICE MAGEE.

W. A. Boys, K.C., for appellant.

A. E. H. Creswicke, K.C., for respondent.

HON. SIR WM. MEREDITH, C.J.O.: — The claim of the appellant is that his horse was injured owing to the presence on the highway on which it was being driven of a cement mixer, which was being used for mixing cement to be used in the construction of a sidewalk; that the cement mixer was a thing calculated to frighten horses, and that it frightened the appellant's horse, causing it to run away and to be seriously injured by coming into contact with a plough which was lying upon the highway.

The sidewalk was being laid by Joseph Dumond, who had been employed by the respondent to lay it, the respondent supplying the materials and the work being done by Dumond; the mixer was used for the purpose of mixing the ingredients —gravel, cement and water—and the mixture was used to form the sidewalk.

The learned Judge found that the injury to the appellant's horse was caused by its taking fright at the mixer, and that it was "negligent and improper to have a machine operating as this one was on the highway without proper precautions being taken to prevent horses from coming near enough to prevent fright;" and he acquitted the driver of the horse of contributory negligence, but held that the respondent was not liable, because, as he also found, Dumond was an independent contractor.

The findings of fact of the learned Judge are supported by the evidence, but his conclusion that the respondent was not answerable for the negligence which caused the injury was, in our opinion, erroneous.

The law is well settled that "an employer cannot divest himself of liability in an action for negligence by reason of having employed an independent contractor, where the work contracted to be done is necessarily dangerous, or is, from its nature, likely to cause danger to others, unless precautions are taken to prevent such danger:" Halsbury's Laws of England, vol. 21, sec. 797, and cases there cited: See particularly *Halliday* v. *National Telephone Co.*, [1899] 2 Q. B. 392.

It is clear upon the evidence that it was in the contemplation of the parties that Dumond would use the cement mixer in the way in which it was used. He had been doing cement work for the respondent for several years, and during the last four years before the accident he had invariably used a cement mixer.

James Martin, the reeve, and Henry Lawrence, a member of the respondent's council, were appointed by the council to construct the sidewalk, and they made the contract with Dumond; both of them knew that the mixer would be used, and Lawrence, whose place of business was near the work, saw it in use and knew that it was an object calculated to frighten horses.

This brings the case clearly within the rule of law I have mentioned, and the respondent is answerable for the negligence which it has been found caused the injury to the appellant's horse, and it follows that the appeal should be allowed and the judgment dismissing the action as against the respondent should be reversed and judgment entered for the appellant against the respondent for $200 (the amount of the damages as found by the Judge) with costs, and the respondent should pay the costs of the appeal.

HON. MR. JUSTICE MACLAREN, HON. MR. JUSTICE MAGEE, and HON. MR. JUSTICE LENNOX, agreed.