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CARTWRIGHT, MASTER. DECEMBER 24TH, 1906.

CHAMBERS.

BANK OF NOVA SCOTIA v. FERGUSON.

Default Judgment—Motion to Set aside—Defence—Merits—Leave to Defend—Terms—Judgment Standing as Security—Costs.

Motion by defendant Ferguson to set aside a default judgment entered by plaintiffs.

M. R. Gooderham, for defendant Ferguson.

C. A. Masten, for plaintiffs.

THE MASTER:—Ferguson and Dickson are sued on a demand note for $5,000 and a guarantee of the account of a company of which they were treasurer and president respectively.

The company is in liquidation, but no dividend has yet been issued. Dickson entered an appearance, but, through some mistake, this was not done on behalf of Ferguson.

Both defendants have made affidavits setting up the defence which the defendants were allowed to make in Dominion Bank v. Crump, 3 O. W. R. 58. Both of them have been cross-examined, but are not shaken in their statements of the agreement made with plaintiffs' manager when the documents in question were given, when they were all present together. The joint presence of both defendants makes this case in that respect similar to the ruling case of Jacobs v. Booth's Distillery Co., 85 L. T. 262, 5 O. W. R. 49.

The plaintiffs have not moved for judgment against Dickson, nor could they hope to succeed if they did so, after the decision of Mr. Justice Street in Imperial Bank v. Tuckett, 6 O. W. R. 121. It may not be without interest to record the fact that when that case came on for trial the defendant never even put in an appearance, and judgment went as of course. Nevertheless I am still bound by that decision.

If Ferguson had not unfortunately allowed the time to go by, he could not have been prevented from having his defence tried out. As it is, the question is as to the terms on which this is to be allowed.

With the continuous non-jury sittings at Toronto, no great harm can be done to plaintiffs by allowing the matter to proceed in the usual way, provided that defendant facilitates the speedy trial of the action. He is not in any stronger position than was the defendant in Merchants Bank v. Scott, 16 P. R. 90, and I think that the judgment should stand until the determination of the action, and that the same order should be made as to costs.

If the defendant prefers to have the judgment set aside, he can do so on giving security to the amount of $3,000.

CLUTE, J. DECEMBER 24TH, 1906.

WEEKLY COURT.

RE TOWNSHIP OF NORMANBY AND TOWNSHIP OF CARRICK.

Highway—County Boundary Line Road—Deviation—Adoption of Road already Constructed—Municipal Act, sec. 654—Construction—Award—Jurisdiction of Arbitrators—Absence of Necessary Preliminaries—Counsel Attending before Arbitrators under Protest.

Appeal by corporation of township of Carrick from the award dated 8th November, 1906, of William John Hatton, Judge of the County Court of Grey, and James Millroy Thompson, Warden of the county of Grey, made under the provisions of secs. 654 and 656 of the Municipal Act, 1903,

as amended, Alexander Wellesley Robb, Warden of the county of Bruce, one of the arbitrators, refusing to join in the award.

H. J. Scott, K.C., and D. Robertson, Walkerton, for the appellants.

W. H. Blake, K.C., for the corporation of the township of Normanby.

CLUTE, J.:—The principal grounds argued were that the arbitrators had no authority or jurisdiction to act in the premises; that the road in question was not in fact a deviation road; that the road in question had never been adopted by the council of either municipality; that no by-law was passed declaring it impracticable to construct the road along the county boundary line between the township of Normanby and the township of Carrick; that after the passing of 6 Edw. VII. ch. 34, sec. 35, no application was made by the corporation of Carrick to agree to the respective shares of money to be paid or the work to be done in opening up and maintaining such alleged deviation road, and therefore that there was no refusal and no inability to agree, which was necessary, under sec. 656, to give such arbitrators jurisdiction; that the real object of the proceedings was to compel the erection of a new bridge on the road, at the joint expense of the corporations of the county of Bruce and county of Grey, under the provisions of sec. 617 of the Municipal Act.

It does not appear that any by-law in respect of this matter was passed by either township council. It does appear by the affidavit of Mr. McKay, which was not disputed, that in or about the month of August, 1904, at a special meeting of the township council of Normanby, after viewing the ground, the council passed a resolution declaring it impracticable to construct a way along the county boundary line over a portion of the county boundary line between the township of Normanby and the township of Carrick, and being that portion of the boundary line dealt with by the arbitrators in the award now sought to be set aside. The affidavit further states that the minutes of the council shew that the resolution was passed on 27th June, 1905, by the township council of Normanby, declaring that it is imprac-

ticable to construct the roadway along the county boundary line over that portion dealt with by the award.

On 20th June, 1905, the solicitor for the township of Normanby wrote a letter to the clerk of the township of Carrick pointing out the impracticability of building a road along that portion of the county line above mentioned, and requesting the councils and representatives of the councils to meet, and, if possible, to agree as to the proper deviation road, and as to the respective costs of the construction and maintenance of the same, as provided under secs. 654 and 656 of the Municipal Act, as amended by 4 Edw. VII. ch. 22, secs. 28 and 29, and further pointing out that the township of Normanby had declared that it is impracticable to construct a road along that portion of the county line. To this no reply was made by the township of Carrick.

It appears from the affidavit of the solicitor of the township of Normanby that, as he expresses it, "an attempt was seriously made to see whether the townships interested in the part of the county boundary line still unopened between the townships of Carrick and Normanby could or would mutually agree to where the deviation of the county boundary line should be built or adopted, and as to maintaining the same, and that no such agreement could be arrived at;" that the solicitor on 8th November, 1905, wrote letters to the clerks of the 4 townships of Brant, Normanby, Benton, and Carrick, to meet, and representatives from the first three townships did meet, but no one represented the township of Carrick, under advice, it is said, from their solicitor, and an attempt to arrive at some arrangement was therefore abortive.

The section was further amended in 1906, by 6 Edw. VII. ch. 34, sec. 35.

On 25th June, 1906, the reeve of the township of Carrick wrote the following letter to the council of Normanby:—

"Clifford, June 25, 1906. Gentlemen: Seeing the law has been amended in regard to deviation of county lines at the last session of Parliament, and being informed Normanby council is going to bring on arbitration in regard to deviation line, if this is correct, kindly let me know at once, as Carrick council is going to defend the action. Yours truly, Con. Schmitt, Reeve, Clifford P.O."

Proceedings were then taken to arbitrate under the Act, and the award in question was made by the County Court Judge and the Warden of the county of Grey—the Warden of the county of Bruce refusing to sign.

Before evidence was taken, counsel for the township of Carrick took the objection that "there is no foundation for this arbitration, there being no refusal on the part of the township of Carrick to agree, etc., in the matter, the inability to mutually agree set forth in Mr. McKay's affidavit being before the amendment of 1906." The objection was overruled (Robb, the Warden of Bruce, dissenting). It was further objected that, "as the object of Normanby township in this arbitration is to have an already established road in that township declared and adopted as a deviation road, and as upon that road there are two bridges coming under sec. 617 of the Act, the county councils should be notified and given an opportunity to be heard." "Objection overruled." Mr. Robertson then asked an adjournment of the arbitration, on the grounds set out in his affidavit, to allow a motion to be made to the High Court to test the correctness of the rulings on the above objections. This was also overruled, and the arbitration then proceeded, the solicitor of the council for Normanby taking part in the arbitration. . . .

Section 654 of the Consolidated Municipal Act, 1903, was amended by 4 Edw. VII. ch. 22, sec. 28, by inserting after the word "thereto" in the fifth line, the words "or of making a deviation where in the opinion of any of the said councils it is impracticable to construct a road along the said county boundary line." 6 Edw. VII. ch. 34, sec. 35, repealed the above amendment and inserted in lieu thereof the following words: "Or of making a deviation of a portion of such county boundary line or of adopting a road or highway already constructed as a part or the whole of such deviation where in the opinion of the said councils it is impracticable to construct a road along the said county boundary line."

The section now reads as follows:—

"654. Whenever the several townships interested in the whole or any part of any county boundary line road are unable mutually to agree as to their respective shares of money to be paid or work to be done or of both, in opening

or maintaining such boundary line road, or portion thereof, or of making a deviation of a portion of such county boundary line road, or of adopting a road or highway already constructed as a part or the whole of such deviation, where in the opinion of any of the said arbitrators it is impracticable to construct a road along the said county boundary line; one or more of such township councils may apply to the wardens of the bordering counties to determine jointly the amount which each township shall be required to expend on such road, either in money or statute labour, or both, and the mode of expenditure; the County Judge of the county in which the township first making the application is situate shall in all cases be the third arbitrator."

It will be seen from the above that the words "or of adopting a road or highway as already constructed as a part or the whole of such deviation" were for the first time introduced by the Act of 1906. Now the road in question is and has been for more than 50 years a road or highway, and the award adjudges that the roadway in question and therein described be adopted as a deviation of that portion of the county boundary line between the townships of Normanby and Carrick lying adjacent thereto, "it being impracticable in the opinion of the said municipal corporation of the township of Normanby to construct a road along the said portion of the said county boundary line." The award then further provides for the cost of maintenance, and appoints commissioners, and apportions the costs of the arbitration.

It is quite clear that after the Act of 1906 was passed no action was taken by the township of Normanby with a view of ascertaining whether it was possible for the interested townships to mutually agree in regard to this matter; all that had been done prior to that was the passing of a resolution by the council of Normanby declaring the county boundary impracticable, and an endeavour by their solicitors to have a meeting of the interested townships with a view of arranging the matter. The township of Carrick did not commit itself in any way, consistently taking the position throughout that there was no jurisdiction to arbitrate in the present case.

It was not contended before me that there was jurisdiction prior to the Act of 1906, and it may well be that, although the township of Carrick refused to meet the township

of Normanby prior to the passing of the Act, it might have been willing to negotiate after the passing of the Act. However this may be, I do not think that the necessary preliminary action was taken on the part of the township of Normanby after the passing of the Act and prior to the proceedings to arbitrate, to enable it to take such proceedings. It is true the reeve of Carrick wrote the letter above referred to, but he denied expressly that he had authority from the council of Carrick to write the letter. He states further that it was not discussed at any meeting of the council. This statement is again contradicted, so that the matter is left in that uncertain state.

As the township of Carrick have protested throughout these proceedings, I do not think they were bound, although they attended under protest during the taking of the evidence. There should, I think, have been clear and distinct action taken by the township of Normanby, communicating as a council with the township of Carrick, to endeavour to mutually agree before proceedings were taken. In a matter of so much importance as the present, it ought not to be left to the Court to gather from contradictory evidence whether or not any such attempt was ever really made, or whether, although an attempt was not made, the intention, in fact, was to disagree to any proposed arrangement. So that upon this ground the appeal should be allowed and the award set aside.

The Court was asked, however, by counsel for the township of Normanby to express an opinion as to whether, assuming that the preliminaries had been properly taken, the Act was broad enough to cover a case of this kind. It certainly is somewhat obscure. It was insisted that there was no power to arbitrate with the view of adopting a road or highway already constructed, and that the Act only extended to the case of the expenditure of money when the road was adopted, and that if the municipalities concerned did not see fit mutually to adopt a road as a deviation road the Act did not cover such a case and there was no remedy. The Act provides "that whenever the several townships interested in the whole or any part of any county boundary line road are unable mutually to agree as to their respective shares of money to be paid or work to be done or both in opening or maintaining such boundary line road, or a portion thereof, or of making a deviation of a portion of such

county boundary line road, or of adopting a road or highway already constructed as a part or the whole of such deviation, where, in the opinion of any of the said councils, it is impracticable to construct a road along the said county boundary line, one or more of such township councils may appoint, etc. It is insisted that this has relation simply to the expenditure of money, and the arbitration has reference simply to the respective shares of money so to be expended.

I am of opinion that the words introduced by the amendment are broader than the construction contended for, and that the intention of the legislature was to afford a means, where the municipalities could not agree, to adopt a road or highway already constructed as a part of a deviation road and also of providing for its maintenance. It seems absurd to suppose that the legislature, while providing for the means of maintaining the road, should not provide for the road itself. That, I think, is manifestly implied, and I am of opinion that the arbitrators in that regard had jurisdiction to deal with the matter. Nor do I think that the fact that the road in question is half a mile from the boundary line prevents it from being adopted as a deviation road. . . .

It is worthy of note that the road in question was established more than 50 years ago by user; at first a trespass road, probably to lead to a mill, but recognized since, as in fact it is, a deviation road, offering the convenience of a deviation road, and, in the view of the arbitrators at all events, a proper deviation road.

It was not contended before me that upon the evidence the award could be attacked, nor was it asked that either party should be allowed to put in further evidence, under sec. 464 of the Act of 1903.

Township of Fitzroy v. County of Carleton, 9 O. L. R. 686, 5 O. W. R. 615, was cited as shewing that the road in question could not be a deviation road, because it did not return to the county boundary except by a side line road already opened, but, upon reference to that case, so far as it applies, I think it rather supports the award in that regard. The road in fact does return to the boundary, although by a side road already travelled.

Inasmuch as the township of Carrick declined to consent to the matter standing until the legal question could be considered, I think the appellants are entitled to their costs.

Appeal allowed and award set aside with costs.

DECEMBER 24TH, 1906.

DIVISIONAL COURT.

RE TOWNSHIP OF AMELIASBURG v. PITCHER.

Division Courts—Jurisdiction—Interpretation of Statute — Public Health Act—Prohibition.

Appeal by defendant from order of MEREDITH, C.J., in Chambers, refusing prohibition to the 4th Division Court in the county of Prince Edward.

The appeal was heard by FALCONBRIDGE, C.J., BRITTON, J., RIDDELL, J.

C. J. Holman, K.C., for defendant.

W. S. Morden, Belleville, for plaintiffs.

RIDDELL, J.:—. . . The action was brought in the Division Court claiming payment by defendant as mother of a person infected, for whom expenses had been incurred under sec. 93 of the Public Health Act, R. S. O. 1897 ch. 248. Judgment was given by the County Court Judge in favour of plaintiffs for $100, the amount claimed. . . .

Several grounds were taken before us, all but one of which we disposed of on the argument. The sole remaining ground is as follows. It is argued that the trial Judge has interpreted the statute, R. S. O. 1897 ch. 248; that this statute gave no cause of action; and that, therefore, he had no jurisdiction.

I do not think that the position is sound. I think the true rule established by Re Long Point Co. v. Anderson, 18 A. R. 405, and similar cases, is that if it be necessary to interpret a statute in order to find out whether the Divi-

sion Court should decide the rights of the parties at all, then if the Division Court Judge misinterprets the statute, and so gives himself jurisdiction to decide such rights, prohibition will lie, but if it be necessary to interpret a statute simply to decide the rights of the parties, prohibition will not lie, however far astray the Division Court Judge may go.

This case comes within the latter category, and consequently this appeal should be dismissed with costs.

I should add that I do not suggest that the judgment is not right in law. I simply say that this Court has no right to inquire into that question.

FALCONBRIDGE, C.J., and BRITTON, J., each gave reasons in writing for the same conclusion.

DECEMBER 24TH, 1906.

C.A.

BEATTY v. McCONNELL.

Assessment and Taxes—Tax Sale—Deed by Provincial Treasurer—Registry Laws—Purchaser in Good Faith—Trustee—Fraud and Misrepresentation—Crown Patent—Evidence—Parties—Solicitor—Costs—Discretion—Appeal.

Appeal by plaintiff and cross-appeal by defendant Gregory from judgment of STREET, J., 6 O. W. R. 822, 7 O. W. R. 11, dismissing action to set aside a tax sale deed and a subsequent conveyance and to recover possession of the land comprised in the conveyances.

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

W. Nesbitt, K.C., and T. P. Galt, for plaintiff.

S. H. Blake, K.C., and T. D. Delamere, K.C., for defendant Bull.

J. H. Moss, for defendant McConnell.

I. F. Hellmuth, K.C., for defendant Gregory.

Moss, C.J.O.:—The plaintiff, J. W. Beatty, claiming to be the owner in fee of two parcels of land, being the south-east quarter of section 8 in the 8th concession, and the north-east subdivision of the said section 8, all in the township of McTavish, in the district of Algoma, as the purchaser and grantee of the same from Mr. W. H. Beatty, brought this action against defendants to set aside a deed of conveyance of the said lands made by the Treasurer of the Province of Ontario to the defendant Bull, and a deed of conveyance of the same lands made by the defendant Bull to the defendant McConnell, and to remove said deeds from the records of the registry office as a cloud on plaintiff's title.

The defendant Gregory was made a party because—as is charged—he was concerned with his co-defendants in an alleged scheme to deprive plaintiff of the land.

At the trial the plaintiff applied for and obtained leave to add the Attorney-General as a party plaintiff.

The learned trial Judge in a considered judgment dismissed the action with costs as against the defendant McConnell, and without costs as against the other defendants. The plaintiff appealed on the whole case, and the defendant Gregory, by leave of the learned trial Judge, appealed from the judgment in so far as it deprived him of his costs. The main facts are sufficiently stated in the opinion delivered by the trial Judge.

After a careful consideration of the evidence, I am unable to agree with the Judge's conclusions as to the effect of the evidence concerning the dealings by defendant Bull with the certificates of the tax sale, and their subsequent receipt and retention by Mr. W. H. Beatty under the circumstances narrated in the evidence. It is not disputed that Mr. W. H. Beatty was the owner of the parcels up to the time of their sale for taxes. No question is raised as to the regularity of the sale for taxes and the purchase thereof by defendant Bull, nor as to his having received from the Provincial Treasurer the certificates required to be given to the purchaser by R. S. O. 1897 ch. 23, sec. 20. The dispute is as to what took place subsequent to these occurrences, and as to what should be the conclusion from the facts shewn in evidence.

The sales for taxes—there were two—took place on 11th November and 14th December, 1887, respectively. At these sales defendant Bull became the purchaser of some 52 parcels, and at least 49 certificates were issued to him, and among them were the certificates of the sale of the parcels in question, which were purchased at the sale held on 14th December.

The records of the Provincial Treasurer's department and the other testimony shew that the 49 certificates were sent to defendant Bull in May, 1888, and that, after the expiration of 12 months from the sales, 42 certificates, including those now in question, were returned to the department for the purpose of the issue of deeds of conveyance. The next thing that appears with reference to the certificates now in question is a letter dated 26th January from the defendant Bull to Mr. Percival, the official in the Treasurer's office having charge of sales for taxes in Algoma, saying: "Please hand to Mr. T. D. Ledyard all my tax certificates relating to any part of section 8 in 8th concession of McTavish. I do not require any deeds of this land, as I have agreed to assign it, so please do not make them out." In reply to this letter Mr. Percival wrote the defendant Bull on 28th January, saying: "The deeds already prepared embraced some of the subdivisions of 8 in 8, McTavish. However, upon receipt of $38 (there were 42 lots in all) new deeds will be prepared by the authority of the Treasurer, and the certificates referred to returned." Following this letter is a receipt dated 31st January, 1899, as follows: "Received from L. V. Percival, Esq., the four tax certificates of section 8 in the 8th concession McTavish, as per order from T. H. Bull, Esq.—T. D. Ledyard." The possession of the certificates is thus traced to Mr. T. D. Ledyard, but it seems clear that he was not the person to whom Mr. Bull had agreed to assign them. Mr. Ledyard had been acting at the sales on Mr. Bull's behalf, and, no doubt, he received the certificates from the department as the latter's agent and for the purpose of carrying out whatever arrangement had been made. The next thing that is shewn concerning the certificates is that some time after, probably in 1890, they were received by Mr. W. H. Beatty from Mr. John Leys, a barrister of Toronto, enclosed in an envelope bearing the address "John Leys, Esq., M.P.P.," in Mr. Ledyard's handwriting, through which a pen had

been drawn and the address "W. H. Beatty, Esq.," written in Mr. Leys's handwriting underneath the former address. There was probably a letter from Mr. Leys to Mr. Beatty, enclosed with the certificates, but I merely note the fact and do not refer to its contents. The envelope containing the certificates was placed by Mr. Beatty with his title deeds of the parcels, and they remained there until about the time of the commencement of this action. Mr. Beatty stated in his evidence that at or shortly after the receipt of the envelope, he paid Mr. Leys $50 in respect of the transaction, and afterwards, Mr. Leys having died, he made some further payment to one of his heirs. In explanation of this he stated that Mr. Leys was interested with him in the parcels. If so he would be interested with him in preventing them from being lost through the sale for taxes, and there can be no doubt that whether in the interest of Mr. Beatty or of himself or of both, Mr. Leys was actively intervening with that object. And Mr. Beatty further stated as an explanation of his leaving the certificates with the title without any further action upon them, that he supposed, having obtained them, that the taxes were paid down to the date of the tax sale, and that he was then the owner.

Messrs. Bull and Ledyard, unfortunately, are unable to recall any of the circumstances, though they recognize and admit the authenticity of the letter and receipt produced from the department. No imputation is made upon their good faith in this respect, and there is no suggestion of any improper dealings by Mr. Ledyard, or that the certificates reached Mr. Leys and ultimately Mr. Beatty by way of clandestine appropriation or in fraud of Mr. Bull.

Weighing these circumstances with the other evidence, I think they warrant the conclusion that Mr. Leys undertook and agreed with Mr. W. H. Beatty to redeem or get in Mr. Bull's claim under the certificates; that he was in fact Mr. Beatty's agent for that purpose; that Mr. Ledyard, who had acted for Mr. Bull in buying at the tax sales, and was conversant with the usual course of dealing with certificates, was acting for Mr. Bull in the dealing indicated in the latter's letter to Mr. Percival of 26th January, 1889; that Mr. Bull authorized the department to hand to Mr. Ledyard the certificates in question, and directed it not to prepare deeds to him of the lands embraced in them, be-

cause, as he said, he had agreed to assign them; that the certificates were thereupon given up by the department to Mr. Ledyard in order to enable the latter to complete the arrangement; that for value and by way of completion he handed the certificates to Mr. Leys, who handed them to Mr. W. H. Beatty, the owner of the land, who paid Mr. Leys therefor and deposited them with the title deeds under the supposition and belief that, having purchased and obtained possession of the certificates, he had thereby put an end to all claim of the tax purchaser to a deed of conveyance from the Provincial Treasurer, and that his title as owner was thus cleared of the tax sale; that Mr. Bull intended to part with his title to and to cease to be the owner of the certificates and to extinguish his claim under them; that, acting on the arrangement so made, he withdrew his claim to deeds for the parcels, and made no other claim until over 15 years afterwards, and then only made it when in investigating titles to other properties it was seen that he appeared to be the purchaser of these parcels at the tax sales, and he had forgotten the facts; that his claim was then put forward in entire forgetfulness of the facts, and was afforded some shew of support by the failure after search to find anything in the records of the department contrary to his claim, and the assurances of the officers of the department to the same effect; and that, if the letter of 26th January, 1889, and Mr. Ledyard's receipt for the certificates had been found and produced in the beginning, Mr. Bull would not have applied for and the department would not have issued a deed of conveyance to him.

If these findings be correct, Mr. W. H. Beatty could have restrained the defendant Bull from seeking to obtain a deed of conveyance from the Treasurer. In forgetfulness of the facts, Mr. Bull made statutory declarations which he otherwise would not have made, and the department, with the papers in its archives, but forgotten and overlooked by the officials in their searches, issued the deed of conveyance now in question.

But the statements in the statutory declarations, or the action of the department, could not and did not alter the true facts or the real position of the parties at the date of the issue of the deed. Mr. Bull was not then the owner or holder of the certificates, and could not require the treasurer to issue a deed of conveyance under the provisions of

the statute. What then is the effect of a deed to him executed by the Treasurer on his or their demand, at any time,

By sec. 20 of the statute, the Treasurer is required, after selling any land for taxes, to give a certificate to the purchaser stating certain particulars, and also that a deed conveying the same to the purchaser or his assigns will be executed by the Treasurer on his or their demand, at any time after the expiration of a year from the date of the certificate if the land be not previously redeemed. This necessarily involves the production of the certificate or a satisfactory explanation of its non-production. The effect of the certificate is not to vest the title absolutely in the purchaser. He only becomes the owner so far as to have all necessary rights of action and powers for protecting the same from spoliation or waste until the expiration of the term during which the land may be redeemed: sec. 21.

It is thus apparent that the certificate falls short of operating as a transfer to the purchaser of an absolute title to the lands. Such as the title is, it is liable to be divested by the owner redeeming within a year (sec. 22), or by the purchaser putting it out of his power to produce it and demand a deed under sec. 26. Reference to sec. 183 of R. S. O. 1887 ch. 193, which is made applicable to sales by the Provincial Treasurer under R. S. O. 1887 ch. 23, sec. 31, shews the limited effect of the certificate. That section provides that the deed to be given shall be in the form prescribed . . . and shall have the effect of vesting the land in the purchaser, or his heirs and assigns, or other legal representatives, in fee simple or otherwise according to the nature of the estate or interest sold. It is only by a deed validly executed by the Treasurer in accordance with these provisions and the provisions of sec. 26 of R. S. O. 1887 ch. 23, that the title to the land becomes vested in the purchaser. Up to that time the certificate gives the purchaser, if he continues to hold it, no more than a title to maintain or recover possession for the purposes mentioned in sec. 21 of R. S. O. 1887 ch. 23: Cotter v. Sutherland, 18 C. P. 357.

Then did the defendant Bull acquire the title to the parcels in question by the deed made to him by the Provincial Treasurer?

According to many cases decided in American Courts, what was done in this case may well be regarded as a redemp-

tion of the lands. But, whether it be a case of redemption or a case of the defendant Bull agreeing to part and parting with his property and ownership in the certificates, and extinguishing his claim under them, the result is the same.

If it were the latter, as I am inclined to regard it, it was, so far as the defendant Bull is concerned, a completed transaction, and he could lay no claim to the lands.

The power of the Provincial Treasurer to make a deed of conveyance to the purchaser is made by sec. 26 to depend on two things—the non-redemption of the lands and the continuance of ownership of the certificate by the purchaser. He can only convey to the purchaser or owner or holder of the certificate.

Here the defendant Bull, the purchaser, had parted with his ownership, and was not entitled to require or demand a deed of conveyance from the Treasurer. No doubt, the actual production of the certificate would not in every case be a bar to the Treasurer making a valid deed of conveyance. If, without the purchaser having parted or agreed to part with his property in it, it was lost or destroyed, and such loss or destruction was satisfactorily established, and it was clear that the purchaser was still the owner, though, by reason of the loss or destruction, not the holder, there would be a valid reason why the Treasurer should not make the deed which the statute provides that he is to make. But here the facts were otherwise, and, in my opinion, the Treasurer could not and did not convey the lands so as to pass any title thereto to the defendant Bull. No estate was vested with the Treasurer. He had only a power to convey upon the happening of certain events, and the power could only be executed in accordance with its terms. A deed executed otherwise is not an execution of the power.

It follows, therefore, that defendant Bull was unable to pass any title to defendant McConnell.

The registry law affords no protection to the latter, for, as neither the Provincial Treasurer nor the defendant Bull had anything to convey, they were in fact strangers to the title. The title in fee still remained in plaintiff. No deed had been made which had the effect of passing the title out of him, and the registration of a wholly invalid deed could not defeat his title any more than could the registration of a forged instrument: Doe Spafford v. Breakenridge, 1 C. P. 492, 505. The registry laws have really no application.

for no question of priority of registration is involved. The conveyance to plaintiff was registered before the conveyance to defendant Bull and defendant McConnell respectively. The question is, did the latter conveyances divest or defeat plaintiff's title? And the fact of their registration does not in any way aid in determining it.

On these grounds, I think plaintiff entitled to a declaration such as he seeks, that the deeds of conveyance to the defendant Bull and the defendant McConnell are invalid as against him and that their registration forms a cloud on his title.

With regard to the cross-appeal of defendant Gregory, I find nothing in the case to warrant his being a party to the action. His sole connection with the matter was as solicitor for defendant McConnell in carrying through the purchase of the parcels from defendant Bull.

The testimony of defendant Bull, of Mr. Percival, and of defendant Gregory himself, shews that he had nothing to do with the preparation and filing of the declarations on which the deeds issued, and never saw them until after the commencement of the action. He had no knowledge or suspicion of the existence of defendant Bull's letter to Mr. Percival or Mr. Ledyard's receipt for the certificates. In point of fact these had been filed away somewhere in the department, and, as Mr. Percival said, had not been seen by human eye for 16 years. The letter was only found on the first day of the trial, and the receipt was not found and produced until the second day. And it is probably not too much to say that without their production plaintiff's case would have been hopeless. There was no real or substantial ground for the charge of conspiracy or combination to deprive plaintiff of his title, and, so far as that branch of the case was concerned, defendants Bull and Gregory were entitled to be fully exonerated.

In my opinion, defendant Gregory was neither a necessary nor a proper party to the action. It is only necessary to refer to the cases from which citations are made in Canada Carriage Co. v. Lea, 11 O. L. R. 177, 6 O. W. R. 633, to shew the attitude of the Courts and Judges on the subject of making solicitors or agents parties to actions, when their sole connection with the matters is that they acted as such in the transaction. The charge of conspiracy or combina-

tion having failed, the prima facie right of defendant Gregory was to have the action dismissed as against him with costs, but the trial Judge acted on the rule placing the disposition of the costs of and incidental to all proceedings in the discretion of the Court or Judge. Leave to appeal has been granted, but, notwithstanding that fact, the same regard is to be had to the discretion of the Judge as in other cases in which his discretion is subject to review. In Young v. Thomas, [1892] 2 Ch. 134, Bowen, L.J., said (p. 137): "The head-note in In re Gilbert, 28 Ch. D. 549, clearly expresses the law on this point." The head-note is: "Where an appeal from an order as to costs which are left by law to the discretion of the Judge is brought by leave of the Judge, the Court of Appeal will still have regard to the discretion of the Judge, and will not overrule his order, unless there has been a disregard of principle or misapprehension of facts."

In Civil Service Co-operative Society v. General Steam Navigation Co., [1903] 2 K. B. 756, the Earl of Halsbury, L.C., discussing the language of the first part of Order LXV., r. 1, which is similar to that of Con. Rule 1130, said (p. 765): "No doubt, where a Judge has exercised his discretion on certain materials before him, it may not be and I think is not within the power of the Court of Appeal to overrule that exercise of discretion." See also the recent case of King v. Gillard, [1905] 2 Ch. 7, an action against the defendants for passing off their goods for those of the plaintiffs, in which the trial Judge gave judgment for the defendants, but, because the defendants had stated on the wrappers in which their goods were sold that they had obtained certain medals and awards at exhibitions, but did not state that they were obtained in respect of other goods and not those to which the action related, he refused them their costs. And, on appeal it was held that there was no ground for the exercise of the discretion.

In this case if it could be said, as in some of the cases I have referred to, that there was absolutely nothing before the learned trial Judge on which he could exercise his discretion, then the primary right of the successful defendant to his costs should be given effect to.

But I am unable to say that there were no materials before the learned Judge. And while I may say that if I

were dealing in the first instance with the defendant Gregory's costs I should feel no difficulty in holding that they should be paid by plaintiff, that is not now the sole question.

The difficulty now is in saying that the learned Judge was not entitled to exercise his discretion on the question. On the whole I think he was. I think, therefore, that the cross-appeal should be dismissed, but without costs.

Plaintiff's appeal is allowed with costs here and below against defendant McConnell. No costs to or against defendant Bull.

OSLER, GARROW, and MEREDITH, JJ.A., each gave reasons in writing, for the same result.

MACLAREN, J.A., also concurred.

DECEMBER 24TH, 1906.

C.A.

FAIRBAIRN v. TOWNSHIP OF SANDWICH SOUTH.

Municipal Corporations — Drainage — Petition for Work — Majority of Owners to be Benefited—Assessment for Outlet —Assumption of Award Drain—Enlargement and Extension into New Territory—Exit—Pipe under Railway Embankment—Enlargement—Effect.

Appeal by plaintiff and cross-appeal by defendants from judgment and report of J. B. Rankin, Drainage Referee, dismissing without costs an application by plaintiff to set aside a by-law of the council of defendants.

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

J. H. Rodd, Windsor, for plaintiff.

A. H. Clarke, K.C., for defendants.

GARROW, J.A.:—The Canada Southern Railway track, built about the year 1882, passes through plaintiff's lands in the township of Sandwich South.

Before the railway was built, there was apparently something in the nature of a watercourse through plaintiff's lands, which had been deepened by the township, by means of which the surface waters in times of freshet escaped in a northerly direction across what is now the railway roadbed. The lands, however, on both sides, are low-lying, and appear never to have been perfectly dry and fit for general cultivation, although before the railway was built, and for some years afterwards while the original 6-foot culvert was maintained, he was able to cultivate at least parts of them with fair results. Some 10 years ago this culvert was removed, and instead a 3-foot pipe was inserted, and ever since then his lands on both sides of the railway have suffered from flooding, and have largely ceased to be useful except for pasturage. All the lands in the vicinity appear to be flat and low. Various ditches or drains have been from time to time constructed, but none was apparently fully effective, and indeed, so far as plaintiff's lands are concerned, would seem only to have increased the nuisance, as was perfectly natural, considering that more than one award drain was carried towards the south end of the insufficient 3-foot pipe through the railway roadbed, the only exit for the water from that side, and were there left to find their way as they best could through that pipe. Another system of local drainage was carried along the Talbot road easterly, and thence northerly along the 9th concession road to another pipe beneath the railway, 5 feet in diameter, and through these two pipes all the surface water in the vicinity on the south side of the railway, seeking its natural outlet toward the north, had to find vent, or overflow the lands of plaintiff and others near the railway. In these circumstances, a petition was presented to the council asking that a certain defined area, including plaintiff's lands, might be drained by means of a drain or drains, including the assumption of what was known as the Talbot road award drain, before referred to.

The council received the petition and referred the matter to the township engineer for report, and he recommended that the Talbot road award drain should be assumed as a municipal drain, and be deepened and widened to a size sufficient to effect the purpose for which it was originally intended; and to relieve the north-east quarter of lot 301, N. T. R., from flooding, and to provide a proper

outlet for the proposed drain, he recommended that what he calls the original course through lots 10 and 11 in the 8th concession (plaintiff's lands) be opened up and the outlet extended north-east through these lots along the Fairbairn creek to the 9th concession road. He also reported that the 3-foot pipe under the railway is too small; that he had laid the matter before the Railway Committee; and that a new pipe, to be 4 feet in diameter and sunk to a depth of some 18 inches more than at present, has been ordered, which pipe has since been put in. And he submitted plans and specifications of the proposed work and an estimate of its cost and a schedule of assessments, plaintiff's amounting to $6 for benefit and $2 for outlet.

The council adopted the report, and on 11th November, 1905, passed a provisional by-law in the usual form for that purpose and to give effect to its recommendations, including the assumption of the Talbot road award drain, which was thereby assumed.

Plaintiff then began these proceedings to set aside the by-law, etc., and in the notice of application formulated his complaint thus: (1) petition insufficiently signed; (2) other preliminaries (not specified) were not complied with; (3) no proper outlet; (4) water diverted out of its natural course.

Upon the matter coming before the referee, some 20 witnesses were examined, three of them civil engineers, and in the result he upheld the by-law, but, with the consent of the engineer, amended his report so as to include the deepening of the Talbot road drain easterly to the 5-foot pipe, and dismissed the application without costs.

In the argument before this Court counsel for plaintiff renewed his contentions: (1) that the petition was insufficiently signed; (2) that the council could not assume an award drain and in the same by-law authorize its enlargement and extension; and (3) that the outlet through the 4 foot pipe is insufficient to carry away the increased waters which will under the present scheme be brought to it.

The petition was, I think, sufficiently signed by a majority of the owners to be benefited under sec. 3, sub-sec. 1, of the Municipal Drainage Act, as amended by 6 Edw. VII. ch. 37, sec. 1. Mr. Rodd contended, and it was necessary for his success on this point to contend, that one or

more of those assessed for benefit should only have been assessed for outlet, and were therefore improperly made petitioners. I am, however, very far from being convinced that the engineer's conclusion in assessing them for benefit is incorrect.

It is not disputed that a majority of the owners of the Talbot road award drain were petitioners, as required by sec. 84, but that alone would not, I think, be sufficient where, as here, the council not merely assumes the award drain, but proceeds to enlarge and extend it into or through new territory.

I can see no legal objection to the council, on a proper petition, passing a by-law assuming an award drain, and in the same by-law making it a part of a more extended scheme under the Municipal Drainage Act, which is really what has been authorized by the by-law in question.

My chief difficulty in the case has been caused by a consideration of the evidence as to the alleged insufficiency of the 4-foot pipe—whether, in other words, the alleged "improvement" is not really going to be an injury rather than a benefit to plaintiff. It is not merely a matter of relief from his small assessment. If that were all, the case would scarcely be worth considering. But there is a very respectable body of evidence which points to the probability that his lands will, in consequence of the present scheme, be still more flooded in the future than in the past. And, while I still doubt, I am not upon the whole convinced that the Referee erred in supporting the by-law and dismissing the application. Plaintiff admits that for many years his lands have been flooded to an extent which greatly impairs their usefulness. And it would seem a fair inference that this might fairly be attributed largely to the insufficiency of the 3-foot pipe. The engineers say that the 4-foot pipe has double the carrying capacity of the former one, and it has been lowered to a more useful depth. The waters which by the new scheme will be carried to it as an exit will be, it is true, increased in quantity. But not all of the waters carried in the old Talbot road award drain will go by the new way, especially with the work done directed by the amendment ordered by the Referee, of which I entirely approve. And upon the whole I am of the opinion that the weight of evidence warrants the conclusion that the new pipe in its new position will not only provide for such in-

creased water, but that it will the more speedily remove the other waters which formerly came to the old pipe, and which, failing to escape through it, overflowed plaintiff's lands. The way proposed seems the natural way; it is the shortest; it avoids some unnecessary angles; and it conserves the fall: all circumstances of importance in favour of the proposed scheme.

Plaintiff's appeal dismissed with costs, and defendants' cross-appeal also dismissed with costs.

MOSS, C.J.O., OSLER and MACLAREN, JJ.A., concurred.

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

DECEMBER 24TH, 1906.

C.A.

FEDERAL LIFE ASSURANCE CO. v. STINSON.

Mortgage — Redemption — Priorities — Execution Creditors Proving Claims in Master's Office—Payment of Mortgagee's Claim — Subsequent Statutory Assignment for Creditors—Rights of Assignee—Assignments and Preferences Act, sec. 11.

Appeal by defendant Scott from order of a Divisional Court, 7 O. W. R. 177, dismissing appeal by defendant Scott from an order of FALCONBRIDGE, C.J., allowing an appeal by defendant Swanson from a ruling of the Master at Hamilton in a mortgage action.

There was a motion by defendant Swanson to quash the appeal, which was dismissed at the hearing, the costs of it being reserved.

The appeal and motion were heard by MOSS, C.J.O., OSLER, GARROW, MACLAREN, and MEREDITH, JJ.A.

D. L. McCarthy, for defendant Scott.

H. Cassels, K.C., and R. S. Cassels, for defendant Swanson.

OSLER, J.A.:—This was an action for foreclosure of defendants' interests, plaintiffs claiming upon a mortgage made by the defendants the Stinsons. The usual judgment for foreclosure or redemption was directed, and the usual inquiries and accounts ordered to be made and taken by the local Master at Hamilton.

In the course of the proceedings before him the defendants Sullivan, Bradley, Cashman, and Campbell, 4 execution creditors of the mortgagor, were made parties to the action, and proved claims upon their respective judgments.

On 29th May, 1905, the Master made his report finding that the plaintiffs and these creditors were the only incumbrancers upon the mortgaged premises. A day was appointed by the report for payment by the latter of the amount found due to plaintiffs as mortgagees.

After the filing and confirmation of the Master's report, and shortly before the day fixed for payment, one William J. Swanson, the present respondent, obtained assignments of the judgments held by the 4 subsequent incumbrancers, and, by the Master's order of 28th November, 1905, he was, as such assignee, added as a party defendant to the action, which was continued and ordered to stand as to him and the other defendants in the same plight and condition as before.

Swanson then redeemed the mortgagees by payment of the $12,681 found due to them by the report, and the Master proceeded to take a subsequent account as between him and the mortgagors in respect of his claim on the mortgage and the judgments. By a further report dated 12th December, 1905, the Master found the total sum due to the respondent on this footing, with subsequent interest and costs up to 12th January, 1906, to be $24,340.36, which he appointed to be paid to the respondent by the mortgagors on the last mentioned day.

This report was also duly filed and confirmed.

On 2nd January, 1906, the defendant Stinson made an assignment under the Assignments and Preferences Act to one Charles S. Scott, upon whose application an order was made by Mabee, J., on 9th January, 1906, extending the time for redemption by the defendants Stinson for one month from 12th January, 1906, adding Scott as a party to

the action, and referring the case back to the Master to take a new account and appoint a new day for redemption.

On the matter again coming before the Master, he ruled and certified, inter alia, that he should open the whole mortgage account, and that the defendant and now appellant, Scott, as assignee for the creditors of Stinson, was entitled to redeem by paying the amount of the mortgage claim and in priority to the claims of the execution and judgment creditors held by the respondent Swanson. On appeal by the latter, an order was made by Falconbridge, C.J., for which no reasons seem to have been reported, setting aside the certificate, and referring the action back to the Master to take a new account of the amount due to Swanson "as assignee of the plaintiffs and as assignee of the subsequent incumbrancers, as set forth in the reports of the 29th May and 12th December, 1905," and to appoint a new day for redemption on payment by Scott to Swanson of the whole. Scott in his turn appealed from this order to a Divisional Court, contending that the Chief Justice had no jurisdiction to interfere with the order of Mabee, J., and the direction given thereby, and had erred in holding that Scott, as assignee for the benefit of creditors, did not under the statute take priority over the creditors whose claims had been proved in the Master's office and acquired by Swanson, and that Scott was not entitled to redeem the mortgage irrespective of such claims. He also moved to have the judgment of foreclosure turned into a judgment for sale, etc.

The Divisional Court dismissed the appeal, but also ordered that the appellant might have a sale, if he chose to pay into Court $300 as security for the costs and expenses of the proceeding, and complied with the other conditions imposed by the order. Further accounts were in that event directed to be taken, and the sale was to take place without the appointment of a new day. In the event of a sale taking place, it was further ordered and declared that Swanson was entitled to be paid out of the proceeds in priority to Scott, the amounts due in respect as well of the mortgage as of the judgments.

From this order Scott, being still dissatisfied, has brought the present appeal. A motion before Garrow, J.A., to quash the appeal, on the ground that the appellant had accepted a sale on the terms of the order, and had paid into

Court the sum of $300, was referred to the full Court, and argued on the hearing of the appeal.

As regards the motion to quash the appeal, the inclination of my opinion is that the appellant has waived his right to appeal by acting on the alternative given to him by the order he appeals from, and converting the judgment for foreclosure into a judgment for sale upon the conditions which the Court thought fit to impose in granting him the favour he applied for. It is not, however, necessary to decide this, as the case has been argued, and very well argued, upon the merits, and these may form the ground of our judgment.

The appellant relies altogether upon the provisions of sec. 11 of the Assignments and Preferences Act, R. S. O. 1897 ch. 147, substituted for the original sections by 3 Edw. VII. ch. 7, sec. 29: "An assignment for the general benefit of creditors . . . shall take precedence of attachments, of garnishee orders, of judgments, and of executions not completely executed by payment and of orders appointing receivers by way of equitable execution subject to the lien, if any, of an execution creditor for his costs," etc.

He contends that upon the execution of the assignment of 2nd January, 1906, all the proceedings which had theretofore been had in the action affecting the claim of the judgment creditor went for nothing, were reduced, as Lord Eldon expresses it in Ex p. Knott, 11 Ves. 609, 619, to dust and ashes, and that he became the only person entitled to redeem the mortgage, to the exclusion of all rights which the judgment creditor had theretofore acquired by such proceedings.

With this contention, leading to so extraordinary and unjust a result, I do not agree, and substantially for the reasons assigned by the learned Chancellor in the Court below.

It seems to me very plain that the case is one not within the contemplation of the Act nor provided for by it.

Before the assignment to the appellant had been executed, the judgment creditor had acquired a new and independent status. He was no longer a mere judgment creditor. As such he never had a lien on the mortgaged premises, and whatever right of that nature he had there-

tofore acquired had ceased to rest upon his executions. These it was no longer necessary for him to renew, nor, having proved his claims on the judgments, as he was required to do in the mortgage action, could he have enforced them against the lands by means of the execution: Cahuac v. Durie, 9 Gr. 485. By the adjudication of the Court in this action he was declared to have, and by it he acquired, a lien, charge, or incumbrance upon these lands, and the right as such incumbrancer to redeem the mortgagee, a right which he exercised before the appellant, pendente lite, acquired the equity of redemption by the assignment. Before this, too, his claims on the mortgage and judgments had been consolidated by the report of 12th December, 1905, and his right to be redeemed by the mortgagees, in respect of the whole, declared and adjudicated. An interest or charge of this nature is not affected by the Act any more than would be a mortgage (not obnoxious to the preference clauses of the Act) to secure the amount recovered by the judgments.

This view is supported in principle by the case of Baker v. Harris, 16 Ves. 397, cited by Mr. R. S. Cassels. The language of the Bankrupt Act there in question, 21 Jac. I. ch. 19, sec. 9, was not less stringent than that of our Act in postponing the rights of the judgment creditor, but it was held that it related only to judgments which continued merely such at the time of the bankruptcy, not to those which before then had acquired all the effect of an actual mortgage, and for which the creditor had a complete lien on the land. That lien he has acquired in the present case (it is enough to say) by the proceedings in the action. It is not necessary to determine whether as having succeeded to the rights of the first mortgagee he could merely as such, as in that case it was held he could, tack his subsequent judgment to the mortgage as against the assignee. See also Selby v. Pomfret, 3 D. F. & J. 595, and Carter v. Stone, 20 O. R. 340, 342.

On this short ground I would dismiss the appeal, and with costs, not including the costs of the motion to quash.

MOSS, C.J.O., GARROW and MACLAREN, JJ.A., agreed in the result.

MEREDITH, J.A., dissented, for reasons stated in writing.

DECEMBER 24TH, 1906.

C.A.

KERSTEIN v. COHEN.

Trade Mark—Infringement — Coined Word — Similarity — Colourable Imitation—Costs—Discretion—Appeal.

Appeal by plaintiffs from judgment of MULOCK, C.J., 7 O. W. R. 247, 11 O. L. R. 450, dismissing an action to restrain defendants from infringing plaintiffs' trade mark, and cross-appeal by defendants from the part of the same judgment which deprived defendants of the costs of their defence.

The appeal and cross-appeal were heard by MOSS, C.J.O., OSLER, GARROW, MACLAREN, and MEREDITH, JJ.A.

J. A. Macintosh, for plaintiffs.

J. H. Moss and C. A. Moss, for defendants.

MACLAREN, J.A.:—Plaintiffs have appealed from a judgment of Mulock, C.J., dismissing their action for an alleged infringement of their registered trade mark "Shur-On," which they had applied to optical goods manufactured by them.

The infringement complained of was by the use of the word "Sta-Zon," which defendants applied to their optical goods of a similar character.

Plaintiffs' trade mark was registered in Canada on 14th April, 1903, having been previously registered in the United States on 28th July, 1902.

Plaintiffs had brought a previous action against defendants for an infringement of their trade mark by the use of the word "Shur-On," and on 24th March, 1904, a consent judgment was rendered therein, by which defendants were "perpetually restrained from infringing plaintiffs' trade mark in question in this action, by using the word 'Shur-On' in any way in connection with the sale or disposition of optical goods."

Defendants registered "Sta-Zon" as a trade mark on 23rd November, 1904.

It is not necessary, in my opinion, for us, in the circumstances, to pass upon the validity or invalidity generally of either of these trade marks, or to consider how far the

special requirements of sec. 64 of the Imperial Act of 1883, as amended in 1888, and the decisions thereunder, are applicable here under the more general language of our statute, R. S. C. ch. 63, secs. 3 and 12, inasmuch as we can dispose of the case on the question of infringement raised and discussed by the parties.

Under sec. 3 of our Trade Marks Act, a trade mark may be a "mark, name, brand, label, package, or other business device" adopted and applied by any person to products or articles manufactured or sold by him.

In this case the trade mark in question is the hyphenated name or word "Shur-On."

Assuming that plaintiffs have a valid trade mark, they have by sec. 3 of the Act, the exclusive right to use the same, and by sec. 18 the right to maintain an action against any person using the "trade mark or any fraudulent imitation thereof."

Have defendants interfered with such exclusive use or been guilty of fraudulent imitation?

It is not pretended in this case that they have used the entire trade mark, but it is said that they have taken its essential features, and have used a colourable or fraudulent imitation of it.

The trial Judge found that there was really no evidence to establish actual deception, and this part of his judgment was not complained of before us.

It only remains then to consider the two words themselves, and I think the conclusion arrived at in the Court below is the proper one to be drawn from their examination or comparison.

The two appeals in such cases are to the eye and to the ear.

As to the former, it was not very strongly contended before us that there was any great similarity in appearance between the two words. And, indeed, it is only necessary to look at them, either together or separately, to see how essentially different they are in this respect. If the inventor of the second really intended an imitation of the first, he can scarcely be congratulated on his skill or the outcome of his attempt, so far at least as the appearance of the two words is concerned, in any imaginable kind of type or writing that could possibly be applied to the goods in question.

As to judging by the ear, I think the trial Judge was right in assuming that, whether "Shur-On" be viewed as a compound word joined by a hyphen or as a simple word of two syllables separated by a hyphen, in either case the natural pronunciation and that adopted by nearly everybody would be that with a short u. If it is a simple word, every pronouncing dictionary would place the hyphen before the r to give a long sound to the vowel u. The ordinary pronunciation would, perhaps, suggest that the word might have some reference to the wilderness of Shur, through which the Children of Israel journeyed, rather than to the word "sure," as indicating the adhesive or staying qualities of the eyeglasses to which it is applied.

But, even if the first part of "Shur-On" were pronounced like "sure," the sound of the two words would not be any nearer alike than if pronounced as it ordinarily would be, and the ear would not detect any similarity of sound or any suggestion of copying or imitation, fraudulent or otherwise.

But, if plaintiffs' claim is based, not upon any similarity of the two words themselves as to sight or sound, but as to some quality of the goods more or less remotely indicated or to be inferred from the words used, or from the words of which they may be said to be a mis-spelling, then I think it is based upon a fallacy.

Under sec. 3 of the Act, it is the "marks, names, brands, labels, packages, or other devices," themselves, that are trade marks, and that must be infringed, copied, or imitated in order to give a right of action, and not some idea or quality expressed or suggested by them, and descriptive of or embodied in the goods to which they are to be applied.

If a person registers as a trade mark words that describe some quality in the class of goods to which he applies them, he does not thereby acquire the right to object to the application by others of synonymous words expressive of like qualities existing in their goods.

A like rule applies to marks or brands. If, for example, the figure of a horse's head was registered as a trade mark for horse food or medicine, it could hardly be said to be infringed by the figure of a horse's tail, although both figures would naturally suggest the idea of a horse.

We were not referred to any case, nor have I been able to find one, in which it was held that a trade mark composed of words or figures was infringed by other words or

figures bearing no resemblance to them, merely because the latter described a quality or suggested an idea which also existed in the goods to which the latter were applied.

For a full discussion and statement of our law where words in trade marks more or less descriptive of the goods to which they were applied were in question, see Provident Chemical Works v. Canada Chemical Co., 2 O. L. R. 545, and Gillett v. Lumsden, 8 O. L. R. 168, 3 O W R. 851.

Plaintiffs' appeal dismissed with costs.

Defendants' have, on leave obtained from the trial Judge, brought a cross-appeal from that part of his judgment which dismissed plaintiffs' action without costs. This was a matter within his discretion, and an appellate court should not interfere with its exercise unless he acted on a wrong principle. There was evidence before him on which he based his exercise of discretion, and I do not think we should interfere with it. The cross-appeal also is dismissed with costs.

OSLER, J.A.:—I agree in dismissing the appeal, substantially for the reasons, or some of them, given in the judgment below. To me the words or distortions which the parties are disputing about are neither visually nor phonetically alike, though the idea intended to be conveyed by each may be the same.

MEREDITH, J.A., gave reasons in writing for the same result.

MOSS, C.J.O., and GARROW, J.A., agreed in the result.

DECEMBER 24TH, 1906.

C.A.

HEATH v. HAMILTON STREET R. W. CO.

Negligence—Injury to Person Bicycling by Overtaking Street Car—Unusual Position of Car—Speed—Defect in Fender—Failure of Plaintiff to Look behind — Contributory Negligence—Proximate Cause of Injury—Evidence for Jury—Findings of Jury.

Appeal by defendants from order of a Divisional Court (ante 32) dismissing appeal by defendants from judg-

ment of MABEE, J. (7 O. W. R. 459), in favour of plaintiff, the widow of Arthur G. Heath, in an action to recover damages for his death caused, as alleged, by the negligence of defendants. Deceased was a member of the fire brigade of the city of Hamilton, and, having been on duty all night, was returning to his home at a few minutes after 7 o'clock in the morning of 4th October, 1905, on his bicycle, when the accident occurred. York street, upon which the accident happened, was being repaired by the city corporation, and, in consequence of the work going on, a car coming behind the deceased was going westward upon the southerly track, but he, supposing it to be on the northerly track, as was usual, turned off the devil strip upon the southerly track, when the car overtook and killed him. The jury assessed damages at $2,500, and judgment was given for that amount by the trial Judge, and affirmed by the Divisional Court, it being held that there was some evidence of negligence which could not be withdrawn from the jury.

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

E. E. A. DuVernet and W. B. Raymond, for defendants.

G. S. Kerr, Hamilton, and G. C. Thomson, Hamilton, for plaintiff.

MOSS, C.J.O.:— . . . The sole question is, whether there was evidence proper to be submitted to the jury on which they could reasonably find against defendants on the issues presented. One is not called upon to say whether, if he was one of the jury, or was trying the case without a jury, he would find against defendants on the whole evidence. There was a conflict of testimony upon some material points, and it would have been for the jury, if it had been submitted to them, to determine which account they would accept.

There was evidence to the effect that when the deceased turned on to the south track the car was from 50 to 60 feet behind him. If that were so, there was ample time to have allowed the motorman to stop the car or to properly trip the fender before reaching the deceased, unless the car was going at a very rapid pace. The car was moving in a westerly direction on the south track, contrary to the usual and well known practice, and it seems evident that the deceased was not alive to the fact.

It is said that he was riding leisurely along in front of the car, and he was, no doubt, under the impression that the car, the sounds of which he must have heard, was proceeding on the north track. The position, as described by some of the witnesses, was such as to call for the exercise of extra care and diligence on the part of the motorman, for, even if the car was not moving at a very rapid pace, and it probably was not, yet it was moving faster than the deceased, and was fast gaining upon him. The motorman testified that the deceased remained on the devil strip, where he was in safety, until the car was within 8 or 10 feet of him, when he suddenly turned on the track in front of the car, too late to permit of anything being done effectively, and in this he is to some extent supported by other testimony.

But the testimony supporting the other view could not have been withdrawn from the jury, whose province it would have been to decide between the conflict of statements.

Appeal dismissed with costs.

OSLER, J.A.:—I do not dissent; it would serve no purpose to do so. But I cannot say that I view the result with satisfaction.

MEREDITH, J.A., gave reasons in writing for the same conclusion; he cited Brydges v. North London R. W. Co., L. R. 6 Q. B. 377, L. R. 7 H. L. 213; King v. Toronto R. W. Co., ante 507.

GARROW and MACLAREN, JJ.A., concurred.

MACMAHON, J. DECEMBER 26TH, 1906.

WEEKLY COURT.

E. B. EDDY CO. v. RIDEAU LUMBER CO.

Contract—Lumbering Operations—Cleaning out Stream—Allowance for Proportion of Cost—Driving Timber—Breach of Contract—Construction of Contract—Impossibility of Performance—Failure to get Logs out—Measure of Damages—Destruction of Logs by Fire—Negligence—Nominal Damages—Interest—Costs—Claim and Counterclaim.

Appeal by defendants and cross-appeal by plaintiffs from report of local Master at Ottawa in an action referred to

him for trial. The reasons of the Master are reported ante 361.

G. F. Henderson, Ottawa, for defendants.

J. F. Orde, Ottawa, for plaintiffs.

MACMAHON, J.:—Plaintiffs' claim is for work and labour alleged to have been performed for defendants in clearing out a stream know as the Jean Baptiste creek, near Lake Temiskaming, and for moneys advanced in paying the wages and board of the men, etc., amounting to $706.04, the particulars of which are set out in the statement of claim.

The defendants admitted all but the last three items in the particulars, amounting in the aggregate to $292.67.

The learned Master allowed these three items, and finds there is due from the defendants to the plaintiffs $706.04.

The defendants appeal against the Master's finding as to these items, alleging that, according to the oral contract entered into, it was intended that the cleaning of the Jean Baptiste creek was to be completed in the autumn of 1903, and they did not dispute their liability for the work done during that year, amounting to $515.37, but for the work done in the spring of 1904, for which plaintiffs claimed $292.67.

The Master in his reasons for judgment says that the cleaning out was not completed in the autumn of 1903, and that over a considerable part of the stream no work whatever was done during that autumn, when operations had to be suspended because of the cold weather; that the cleaning out was completed in the following spring, without which no driving of timber could have been done on the stream.

The great weight of evidence is that defendants' agent agreed to pay "their share" for the work done, and that the "cleaning out" was not to be confined to what could be done during the autumn of 1903.

Defendants' appeal as to the three items mentioned fails, and must be dismissed with costs.

Defendants by paragraphs 13 and 14 of their counterclaim allege that they agreed to drive certain logs and timber belonging to plaintiffs on the stream known as Hudson's creek, for which plaintiffs agreed to pay the actual

cost of driving the logs and timber, which work defendants allege they performed at the actual cost to them of $1,106.70.

By consent defendants were allowed the sum of $214.20 for this work.

All the above causes of action arose out of oral agreements entered into by the agents of plaintiffs and defendants.

By an agreement in writing, dated 18th March, 1904 (clause 2), defendants on their part agreed to drive, sweep, out, and boom out, at the mouth of the Wabis creek, all the certain logs and timber which were the property of plaintiffs, and plaintiffs on their part agreed to drive and sweep certain logs and timber, the property of defendants, in or on the banks of Jean Baptiste river and Blanche river; and that each of the parties thereto should "dump" into their respective streams the logs and timber belonging to the other party on the bank of such stream, and should be paid for so doing the usual or customary price for dumping logs and timber similarly situated.

"3. It is further agreed by and between the said companies that all timber or logs on the banks of the said rivers or creeks, to be driven as aforesaid, and which is not dumped into the waters of said rivers and creeks when required so to be for that purpose, shall be dumped by that company hereby required to drive same, and a proper statement, shewing what logs and timber, if any, were so dumped, furnished forthwith to the company owning some, and such last mentioned company shall be liable for the usual sum paid for dumping logs and timber similarly situated, and pay to the company dumping same said sum or sums, if any, on demand.

"5. And it is further agreed that each of the said companies, their successors and assigns, shall make every reasonable effort under the circumstances to fulfil their respective parts of this agreement during the driving season of this year, and if at any time either company fail to do so, the other company may give notice thereof in writing to such company offending, and in case such demand is reasonable and not complied with by a time to be specified for that purpose by the company giving notice, such last mentioned company may perform such service itself at the expense and cost of the company so in default."

The learned Master points out in his reasons for judgment that "the agents who acted in the matter for the respective parties agree in saying that clause 5 was inserted by the solicitor who prepared the agreement, without specific instructions from them, and that owing to the extreme shortness of the driving season the portion of it relating to notice of default, etc., was altogether unworkable."

The defendant company performed all the provisions of their written contract of 18th March by driving and sweeping all plaintiffs' logs and timber on the Wabis creek.

Defendants' counterclaim (paragraphs 3 and 4) sets up that by reason of the failure of plaintiffs to perform the terms of their contract as aforesaid—to drive and sweep all the logs and timber of defendants placed in or on the banks of the Jean Baptiste and Blanche rivers,—3,000 pieces of timber purchased by defendants from C. McNaughton were left on the banks of the Jean Baptiste river, and it became impossible to bring the same down the said stream during the season of 1904; and during the summer of 1904 the said 3,000 pieces of timber were destroyed by fire, and defendants suffered loss to the extent of $1,590.

"6 and 7. That by reason of the failure of plaintiffs to perform their contract, 650 pieces of timber purchased from Stallwood & Gunn were left on the banks of the Jean Baptiste river, and it became impossible to bring the said timber down the said stream during the season of 1904, and during the summer of 1904 the said timber was destroyed by fire, and the defendants' loss thereby is $176.67.

"9. By reason of the failure of plaintiffs to perform their contract, a further large quantity of timber belonging to defendants, consisting of 6,500 pieces, containing 826,201 feet board measure, was left along the banks of the said streams, and could not be brought down until the following season of 1905, which was brought down by defendants at the cost to them of $409.97."

The Master finds that there is due to the defendants by the plaintiffs, in respect to the failure to drive and sweep the logs and timber referred to in paragraph 9 of the counterclaim (the grounds on which he based his findings being fully set out in his reasons for judgment), the sum of $516.37, made up as follows:—

"Defendants' expenses in bringing down 6,500 logs in the year 1905, which the plaintiffs failed to bring down in the year 1904, being a proportionate part of the sum of $1,000 expended by the defendants in bringing down 31,667 logs, of which the 6,500 in question formed part	$291 37
"One year's interest on the value of the logs at the rate of 6 per cent.	225 00
Total	$516 37"

I fully concur in the finding made by the Master, and the plaintiffs' appeal is dismissed with costs.

Deducting the $706.04 allowed plaintiffs from the two sums of $214.20 and $516.37 allowed defendants, the Master finds there is due from plaintiffs to defendants a balance of $24.53.

Plaintiffs are awarded the costs of the action, and defendants the costs of the counterclaim.

The Master also finds that defendants are entitled only to nominal damages for the failure of plaintiffs to drive and sweep the logs and timber known as the McNaughton and the Stallwood & Gunn logs, referred to in paragraphs 3 and 4 and 6 and 7 of defendants' counterclaim,—which logs and timber were left on the banks of the Blanchd and Jean Baptiste rivers, and were destroyed by fire during the summer of 1904, before they could be brought down by the defendants.

The defendants appeal from the findings of the Master on the above paragraphs of the counterclaim.

[The Judge then quoted the Master's reasons for judgment, ante pp. 364, 365, 366.]

I agree with the learned Master in thinking that in the face of his finding "that there was plenty of water in the rivers all summer," and "that fires are of common occurrence in that country and the danger from them is a constant menace to shanties and to timber left behind in the spring," it would be most unfortunate if the defendants should be held not entitled to recover as damages the value of the Stallwood & Gunn logs and timber destroyed by fire. And I think, having regard to the rule laid down by the Court of Appeal in McMahon v. Field, 7 Q. B. D. 591,

and to other cases to which I shall presently refer, that they are entitled to recover as damages the value of the Stallwood & Gunn timber. . . .

[Reference to Godkin v. Monaghan, 83 Fed. R. 116; Robson v. Mississippi Logging Co., 61 Fed. R. 900; Railroad Co. v. Hoyt, 149 U.S. 14; McMahon v. Field, 7 Q. B. D. 591; Lilley v. Doubleday, 7 Q. B. D. 510; Parmalee v. Wilks, 10 Barb. (N.Y.) 339; Story on Agency, sec. 218.]

The loss to defendants in the present case was caused by plaintiffs' negligence and breach of contract in leaving the logs on the bank of the stream, when they could have been easily driven to its mouth and delivered to defendants. The negligence, then, was the occasion, though not strictly the cause, of the loss; and the loss may be fairly attributed to it. Or, to use the language of Brett and Cotton, L.JJ., in McMahon v. Field, the damage to defendants "is such as is the natural and probable result of the breach of contract."

The defendants cannot recover in respect of the burning of what is known as the McNaughton logs and timber, as their servant set out the fire by which those were destroyed, and the defendants' appeal as to those fails.

But, for the reasons stated, the appeal against the Master's report as to the Stallwood & Gunn logs and timber must be allowed, and there will be a reference back to him to assess the damages to which defendants are entitled in respect to the destruction of those logs and timber.

Defendants are entitled to the costs of the appeal and of the reference back arising out of the 6th and 7th paragraphs of their counterclaim.

There will be no costs of the appeal as to the McNaughton logs.

TEETZEL, J. DECEMBER 26TH, 1906.

TRIAL.

ELGIE v. EDGAR.

Equitable Assignment—Fund in Hands of Chattel Mortgagees—Written Order by Mortgagor—Mistake as to Balance Due—Assignment by Mortgagors—Rival Claimants of Fund—Interpleader Application—Dismissal—Subsequent Interpleader Action—Disposal of Fund—Costs.

Interpleader action, tried without a jury at Toronto.

F. Arnoldi, K.C., for plaintiffs.

C. J. Holman, K.C., for defendant Clemens.

F. E. Hodgins, K.C., and T. E. Godson, Bracebridge, for defendant Edgar.

TEETZEL, J.:—Many of the difficulties and misunderstandings in this case are traceable to the omission of plaintiffs to credit Sieling with the two car-loads of lumber shipped by him on 2nd February and 5th March, 1906, respectively, as they were stripped, the value of the two being $306.56.

This was followed by plaintiffs omitting to take them into account in the statement of 28th March made by plaintiffs to defendant Clemens, in which they shewed the balance due them by Sieling on his mortgage to be $796.70, while in fact it should have been $360.56 less than that sum.

On the faith of $796.70 being the correct balance, Clemens purchased the property from Sieling, the consideration in the bill of sale being expressed to be "$300 and the payment of a chattel mortgage to Elgie and Jarvis Lumber Company, on which there is now due and payable the sum of $796.70."

One question for decision is, whether the $306.56 should be paid to defendant Edgar by virtue of the order of 15th February, 1906, given to him by Sieling on plaintiffs for $400, which was not accepted by plaintiffs except in a letter of 10th March in these words: "We are not yet paid, ourselves, on Mr. Sieling's account. However, we will apply the surplus on account of this order as soon as we clean ourselves;" or whether it belongs to Clemens by virtue of his purchase of 2nd April without notice of the $400 order.

Clemens claims the benefit of all errors and omissions in the statement of the mortgage account furnished by plaintiffs as mortgagees.

Whether under the bill of sale and assignment to Clemens this position is well founded as between Sieling and Clemens, notwithstanding that there was a mutual mistake as to the amount due under the mortgage, I need not decide; but I think it cannot prevail as against Edgar by reason of his prior order filed with plaintiffs.

If there had been no sale to Clemens, and Sieling had paid plaintiffs $796.70, thinking by mistake that that amount was owing under his mortgage to plaintiffs, and after paying that sum had then refused to ship more lumber to plaintiffs, the unappropriated $306.56 in plaintiffs' hands would clearly be surplus and subject to Edgar's order. This amount not having been applied on the mortgage, and the balance represented to be owing thereon having been assumed and paid by Clemens as part of the purchase price, I think, as against Clemens, it must be treated as surplus in the hands of plaintiffs, to which the order would attach.

Under the facts here, the order was in respect of a fund which might arise in the ordinary course of events in favour of the prospective creditor (Sieling) under an existing arrangement between him and the prospective debtors (plaintiffs), and which fund did in fact arise.

The three parties expected that there would be a fund to which the order might attach, and to which all intended it would attach if it should come into existence.

These facts, I think, distinguish this case from Thomson v. Huggins, 23 A. R. 191, Hall v. Prittie, 17 A. R. 306, and Brown v. Johnson, 12 A. R. 190, cited by Mr. Holman, and bring it more within Lane v. Dungannon Driving Park Association, 22 O. R. 264, and enable me to find that there was an equitable assignment to Edgar covering the $306.56.

Defendant Edgar endeavoured to establish against the plaintiffs a personal liability for the $400 quite independently of whether there was in fact a surplus in plaintiffs' hands, but I think he has completely failed in this.

Defendant Edgar having claimed the $400, and defendant Clemens the whole $730.44, plaintiffs applied to the Master in Chambers for an interpleader order, which was refused, and the Master's order was affirmed in appeal. (See ante 33, 299.)

Both defendants have pleaded that the disposition of the interpleader application is an estoppel to plaintiffs in this action on the ground of res judicata. I am of opinion that this defence cannot prevail as to the $306.56, now a common fund in dispute, inasmuch as upon that application the material did not disclose the facts relating to the two items making up the $306.56. These facts only became known to defendants upon plaintiffs' examination for discovery shortly before the trial.

Plaintiffs have paid the $730.44 into Court, and judgment should be entered declaring that of that sum defendant Edgar is entitled to $306.56, and defendant Clemens to the balance.

The costs of trial might have been avoided if upon discovery of the facts the parties had agreed to this division, but defendant Edgar continued to claim the whole $400 on the ground of plaintiffs' personal liability therefor, and defendant Clemens also continued to claim the whole $730.44 as passing to him under his purchase from Sieling.

Defendant Edgar having failed to establish personal liability for $400, and having only succeeded in recovering anything by reason of plaintiffs' mistake in omitting to credit the $306.56 on Sieling's mortgage when they furnished the statement to Clemens, and the latter having claimed and failed to establish his right to this sum, I do not think either of the defendants should be awarded costs.

On the other hand, the act of plaintiffs, both on the interpleader application and in their statement of claim, in not disclosing the particulars as to the two car-loads of lumber, coupled with their failure to credit the proceeds thereof on Sieling's mortgage in the statement to Clemens, is sufficient, I think, to deprive them of their costs of this action.

Judgment accordingly.

Leave is given to each party, if desired, to appeal against this judgment respecting costs.

CARTWRIGHT, MASTER. DECEMBER 27TH, 1906.

CHAMBERS.

JORDAN v. MACDONELL.

Venue—Motion to Change—Convenience—Witnesses—Affidavit—Solicitor.

Motion by defendant to change venue from Ottawa to North Bay.

J. E. Jones, for defendant.

J. R. Code, for plaintiff.

THE MASTER:—This action was begun on 14th August last, being in respect of the death of plaintiff's husband on 6th July. The statement of claim was not delivered until 10th October and statement of defence on 22nd October.

The husband was killed while a passenger on defendant's train; and negligence is charged in the operation of the train in question, as well as defects in the brakes and couplings, and in using too many cars for the motive power employed, so that the train broke into two parts, and the rear part ran down grade and caused the collision which led to the husband's death. The defendant says that plaintiff's husband was killed through his own negligence in being on the platform of the carriage; that he was a trespasser, and had not paid any fare. Defendant also denies that the breaks or couplings were defective or that the appliances were defective.

The venue was laid at Ottawa, as plaintiff resides at Carleton Place, and notice of trial for the Ottawa assizes beginning on 7th January next was given on 25th October.

On 20th December defendant gave notice of this motion.

. . . .

All the undisputed facts of the case point to North Bay as the natural place for the trial. All the evidence on the points in controversy must be near North Bay, so that, in the words of Osler, J.A., in McDonald v. Park, 2 O. W. R. 972, "this is eminently a case for trial at" North Bay. This is confirmed by the material. Defendant swears to at least 15 witnesses who all reside at or near New Liskeard, which is 113 miles from North Bay, the latter place being 337 miles from Ottawa. This, it is said, would involve an extra cost of at least $220. Plaintiff's solicitor makes the only affidavit in answer. I have several times pointed out that such an affidavit in strictness cannot be received. Even if it could, it only speaks of 3 witnesses resident in Carleton Place and of one at New Liskeard. No intimation is given of what these 3 can prove. This leaves 16 witnesses at New Lisekard as against 3 at or near Ottawa, which establishes the necessary preponderance, and brings the case within the principle of Hamilton v. Hodge, ante 351.

Mr. Code properly emphasized the unexplained delay in making the motion. In answer it was pointed out that plaintiff's own delay had prevented the action being tried at the last jury sittings at North Bay, so that, if that is the proper place, there will not be any delay which can properly be charged to defendant.

If defendant will provide free transportation to plaintiff and one witness from Carleton Place, I think the order should go.

Costs in the cause.

BRITTON, J. DECEMBER 27TH, 1906.

TRIAL.

ROBINSON v. ÆTNA INS. CO.

Interest—Assignment of Insurance Policy in Trust to Secure Debt and Future Premiums—Contract for Payment of Interest—Construction—Rate and Mode of Computing Interest—Interest Act—Application—Statute of Limitations—Trustee—Costs—Subrogation—Counsel Fees—Question between Defendants.

Action by a creditor of John Canavan, deceased, for a declaration that the proceeds of a policy of insurance issued by defendant company on his life were available for payment of plaintiff's claim and claims of other creditors, etc., and for further relief.

At the close of the trial BRITTON, J., found: (1) that the policy of insurance in question was not effected and premiums were not paid with intent to defraud plaintiff or the creditors of John Canavan, deceased; (2) that the assignment of the policy to defendant McBride was not fraudulent; and (3) that there was no assignment by defendant John Canavan the younger, or by defendant Minnie Canavan, of his or her interest in the policy to plaintiff; and gave judgment dismissing the action with costs.

The defendants Minnie Canavan and John Canavan the younger by their statement of defence asked that, as between them and defendants McBride and Duff, all proper

accounts might be taken for the purpose of ascertaining the amount which defendants McBride and Duff might be entitled to under and by virtue of a certain trust instrument dated 1st March, 1894; and defendants McBride and Duff asked that their rights should be determined inter se.

The questions so arising were argued after the dismissal of the action.

W. T. J. Lee, for defendants Minnie Canavan and John Canavan the younger.

W. J. Tremeear, for defendants Thomas Duff, the creditor, and James McBride, trustee.

BRITTON, J.:—The instrument called the assignment and agreement of 1st March, 1894, was carefully drawn, and seems to have been fully understood. The terms of it, according to the plain, ordinary reading of the instrument, are hardly capable of being misunderstood, and must prevail unless there is some legal difficulty in the way, and I see none, unless upon the one point, viz., compounding interest half-yearly after 1st March, 1896, on the debt due to Duff.

All the defendants except the insurance company are parties to the agreement, in which the object is clearly set out by way of recital and otherwise. The intention was to secure the indebtedness of John Canavan to Duff, and to provide for payment of future premiums to keep the policy alive. The debt of John Canavan to Duff was fixed at $1,296.92 as of 1st March, 1894, and, in consideration of Duff giving time for payment of that debt, those interested in the policy assigned it to McBride as trustee for the purposes therein mentioned. The time given was two years; payment to be made in 4 half-yearly instalments; so the whole amount became due on 1st March, 1896.

The trustee had the right to assign and pledge the policy, but not prior to 1st March, 1896, to the amount of the indebtedness and interest and premiums paid and interest on such debt and premiums, computed at 6 per cent. per annum, and compounded half-yearly with rests, but the policy was not pledged by the trustee, so it is not necessary to consider what the pledgee or assignee could have done.

. . . .

The rights of the trustee and creditor are to be determined by the following proviso. The policy was to be held in trust "to pay and satisfy the indebtedness of the said John Canavan to said party of the third part (Duff), together with interest thereon, at the rate of 6 per cent., computed half-yearly with rests, to repay the said party of the third part any and every premium or premiums on said policy which it may be necessary or which the said party of the third part may see fit to pay in order to keep . . . the same in force, together with interest thereon at the rate of 6 per cent. per annum, computed from date or dates of payment of premium or premiums, compounded half-yearly with rests, and to pay and satisfy the costs and expenses of the said party of the third part and of the said party of the second part (McBride) in any wise in connection with the carrying out of these presents . . . it being understood and agreed that in any dealings or in taking of any steps or in the drawing of any amounts the party of the second part shall be entitled to receive the usual fees and charges as solicitor (notwithstanding the fact that he is acting as trustee) as though he were not a trustee but acting simply as solicitor for the parties hereto."

Then there is the power to pledge after 1st March, 1896, repeated in the instrument.

I am of opinion that upon the debt to Duff the interest should be computed at 6 per cent. per annum and compounded half-yearly with rests for two years, viz., until 1st March, 1896, and then only interest on the amount of debt and interest due on that day from that day to the date of payment of the money by the Ætna Insurance Company. In so deciding, I think I am within the principle of the cases Goodchap v. Roberts, 14 Ch. D. 49; Archbold v. Building and Loan Association, 15 O. R. 237; Powell v. Peck, 15 A. R. 138.

Upon the premiums paid, the trustee and creditor should be allowed interest at 6 per cent. per annum from date of payment of such premiums, compounded half-yearly down to date of payment by the insurance company.

The Act to amend the Acts respecting interest, 63 & 64 Vict. ch. 29 (D.), expressly provides that it shall not apply to "liabilities" existing at the time of its passing. The money secured by the policy in question was subject to the liability created on 1st March, 1894. In my opinion,

the recovery of interest cannot be limited to the 6 years next before the death of the insured. The Statute of Limitations has no application to this case. The trustee is not bringing any action. He has a right to the money; for the purposes of this inquiry it is money in his hands impressed with a trust.

As to costs, the trustee is entitled under the agreement, and it seems to me that he is fully protected if he gets, as he is entitled to get as solicitor, pay for all the work he has done or may do in executing the trust.

If the costs of defence of the trustee and creditor are not recoverable from the plaintiff, against whom the action was dismissed with costs, then these costs should be paid out of the insurance money, and deducted therefrom before payment to Minnie Canavan and John Canavan the younger of the balance. In that event defendants Minnie Canavan and John Canavan the younger must be subrogated to the right of the trustee and creditor to recover against plaintiff.

The argument in this matter must be considered as part of the counsel work at the trial, and no separate costs as of a new motion to any party to be allowed.

DECEMBER 27TH, 1906.

DIVISIONAL COURT.

AVERY v. FORTUNE.

Way—Private Right of Way—Prescription—User for 40 Years—Interruption—Evidence—Fresh Evidence on Appeal—Costs.

Appeal by defendant from judgment of CLUTE, J., at the trial, in favour of plaintiff for an injunction and $5 damages in an action for trespass to land, defendant asserting a right of way.

J. A. Hutcheson, K.C., for defendant.

H. A. Stewart, Brockville, for plaintiff.

The judgment of the Court (FALCONBRIDGE, C.J., BRITTON, J., RIDDELL, J.), was delivered by

RIDDELL, J.:—This is an action of trespass, brought to determine the right of defendant to a way over the land of plaintiff, being part of lot 24 in the 5th concession of the township of Escott. . . . On the appeal troublesome questions as to pleading arose, and further evidence was said to be available, so that, with the consent of both parties, we ordered the appeal to stand over, the pleadings to be amended, and either party to be at liberty to adduce such evidence as he saw fit before my brother Britton at the then approaching non-jury sittings at Brockville. We also directed an examination de bene esse of an aged witness. This has been done, and we are now able to dispose of the case.

The subsequent evidence given being of a very cogent character, it is important to know how far it is to be believed. My brother Britton says that he believes the evidence taken before him on behalf of defendant. As regards the evidence taken de bene esse, we must treat that in the ordinary way and test it, if it becomes necessary, by the ordinary methods.

The evidence thus adduced would probably, had it been before him, have modified the opinion of Clute, J. I am not sure, had the evidence remained as it was before him, that I should not have come to the same conclusion as he did. However that may be, as the case now stands, I think the facts are as follows:

Plaintiff's land is the south-east quarter and defendant's the south-west quarter of lot 24 in concession 5 of Escott. As far back as 1805, Peter June, the father of the witness Mrs. Asselstine, became the owner of both portions of land, and in 1821 he sold the south-west quarter to his brother John Fairchild June, who in 1827 sold it to Duncan De Wolfe. John F. June moved into the homestead about the time he bought. During the time that John F. June occupied the house, he used the way in dispute in this action to pass to the highway to the east of him. This was on the land of Peter June, and John F. June had no other way of getting out to the highway. The use of the way in question, then, began about 1826, or probably a few years before, and was open, peaceable, and certain, nec clam, nec vi, nec precario.

De Wolfe used it in the same way, as did his successor in title, the father of defendant, who acquired the land in

1838. And this use continued not only when Peter June was the owner of the south-east quarter, but also when and after Isaac Avery became the owner. Isaac Avery is the predecessor in title of plaintiff.

During the greater part, if not all, of this time, the predecessor in title of defendant kept bars at the line fence between the south-east and the south-west quarters of the lot, and also at the east end of the way at the highway. The way had well-defined and fixed locus a quo and locus ad quem, and was thoroughly well-defined throughout, although not fenced.

Isaac Avery, about 1855 or 1856, in a conversation with the father of the witness Scott, speaking of the then owner of the south-west quarter letting the bars down and so allowing his (Avery's) cows to get out on the highway, and being asked why he did not close up this way, said, "It has been there too long." On being asked how long, he said, "It was there when I bought my place."

Again, "somewheres between 45 and 50 years ago," say about 1860, Isaac Avery, in a conversation with the father of the witness Andrews, said that Fortune (the then owner of the south-west quarter) was hounding him that he might get that piece of land north of this way across his (Avery's) lot; and, as the witness puts it, "He (Avery) says, 'I told him that he hadn't money enough to buy it, and at any rate he didn't need it, for he had the right of way.'"

This evidence, cogent as it is, and believed as it is by the Judge who saw the last two witnesses, was not before Clute, J.

No interruption of this use of the way is pretended until about 36 or 37 years ago, say 1869 or 1870, or . . . 1868. By this time there had been an actual enjoyment without interruption by persons claiming as of right for more than 40 years. The statute then in force was C. S. U. C. ch. 88, sec. 37, which is totidem verbis R. S. O. 1897, ch. 133, sec. 35.

Any interruption that did take place was, I think, in any case an interruption, simply, of the use of the way without keeping up the bars, and it did not continue more than a few months, certainly not one year: C. S. U. C. ch. 88, sec. 39.

The right, in my opinion, became absolute and indefeasible before any act of interruption. This relieves us of the necessity of considering the question of a prior permission given orally: C. S. U. C. ch. 88, sec. 37; but I do not find anything to indicate or prove any permission given from time to time or at any time.

Even had the enjoyment been for the shorter period of 20 years only, I think there is nothing in the case, as it now appears, to prevent defendant from succeeding. The trial Judge inclined to the opinion that there was sufficient evidence of user after the death of Isaac Avery, and, as I understand the judgment, he would have found for defendant, had he not been of the opinion that the statute was not running during the lifetime of Isaac Avery. I agree with him in the former opinion, but disagree as to the latter, for the reasons stated.

Defendant is at fault in not having his evidence at the trial in the first instance, plaintiff in not having his pleading in proper form—on the appeal before us both parties asked to have the case opened. A proper order to make as to costs is, that defendant will have the general costs of the action, that there will be no costs of the proceedings before Clute, J., or of the appeal to us in the first instance, that the costs of the proceedings before Britton, J., and of the final appeal to us, will be to defendant.

Defendant submitting, the judgment will contain a clause that the right is subject to his keeping up bars or gates at the two ends of the piece of land over which the right of way is claimed.

MOSS, C.J.O. DECEMBER 27TH, 1906.

C.A.-CHAMBERS.

VIVIEN v. KEHOE.

Appeal to Court of Appeal—Leave to Appeal from Order of Divisional Court Reversing Judgment at Trial — Small Amount Involved — No Special Circumstances — Leave Refused.

Motion by plaintiff for leave to appeal to the Court of Appeal from order of a Divisional Court (16th November,

1906), allowing appeal by defendant from judgment of BOYD, C., in favour of plaintiff in an action for specific performance, tried at Sault Ste. Marie.

T. D. Delamere, K.C., for plaintiff.

W. E. Middleton, for defendant.

MOSS, C.J.O.:—Viewed in whatever light it may be, the action involves nothing more than the liability of plaintiff to pay a sum of $435 or $436 to defendant. The action is in form for the specific performance of two several agreements for the sale to and purchase by plaintiff of some parcels of lands, but there is no dispute as to the making of the agreements or their terms or as to the title to the lands. The sole question is whether plaintiff has paid the full amount of the purchase money, upon payment of which it is conceded that he is entitled to a conveyance from defendant.

The title is vested in defendant, but he holds for a syndicate composed of himself and two others named Byrne and Morin (the latter now deceased), they being interested in unequal shares. Morin acted for the syndicate in the collection of the purchase moneys, and was accountable to the others. This was known to plaintiff and all payments were made by him to Morin. Morin was indebted to plaintiff in the sum of $1,000, and by arrangement between them the sum of $435 or $436 now in dispute was set off against Morin's indebtedness, but without the knowledge of the other members of the syndicate. In a statement rendered by Morin to defendant this sum appeared as having been received from plaintiff, and the question at the trial was whether, on the facts appearing, this was to be deemed a payment by plaintiff so as to entitle him to a declaration that he had paid the full amount of the purchase money.

The Divisional Court, differing from the trial Judge, determined that it was not.

There is nothing either in the facts or the law of a special or important nature. The sole ground urged in favour of a further appeal is the difference of opinion between the trial Judge and the Judges of the Divisional Court. The latter were unanimous, but their reasons have not been reported, judgment having been, it is said, de-

livered orally on the day after the argument. Their conclusion appears to be one that might well be arrived at upon the evidence. It is certainly not so unsatisfactory as to furnish a reason, standing alone, for allowing a further appeal, and there are no other exceptional circumstances to support the application.

Motion refused with costs.

FALCONBRIDGE, C.J. DECEMBER 28TH, 1906.

CHAMBERS.

REX v. FERGUSON.

Factories Act—Meaning of "Factory"—Application of Act to Tailor Shop—Sanitary Conveniences—Neglect to Provide—Duty of Owner of Building Leased for Shop—Duty of Lessee as Employer—Construction of Act—Conviction of Owner.

Case stated by the police magistrate for the city of St. Thomas, in the county of Elgin, under the provisions of sec. 900 of the Criminal Code.

1. On 1st February, 1906, an information was laid, under oath, before the magistrate, by James T. Burke, for that Frank H. Ferguson, being the alleged owner of a factory, known as No. 343 on the north side of Talbot street in the city of St. Thomas, did not on 31st January, 1906, and for 6 months previously, provide a sufficient number and description of privies, earth or water closets, and urinals for the employees of such factory, including separate sets for the use of male and female employees, and did not have separate approaches to the same, as required by the Ontario Factories Act, R. S. O. 1897 ch. 256, and amendments thereto, and that the said Frank H. Ferguson for 30 days prior to 31st January, 1906, refused and neglected to comply with the above requirements, after being notified in writing in regard to the same by the Factories' Inspector.

2. On 2nd February, 1906, the charge was heard before the magistrate, in the presence of both parties, and, after hearing the evidence adduced, he found that Frank H. Fer-

guson was not guilty of the charge preferred against him, but at the request of the Crown Attorney for the county of Elgin, representing the Attorney-General for the province of Ontario, he stated this case for the opinion of the High Court.

The facts of the case and the reasons for the conclusion of law arrived at appear in the opinion of the magistrate, which forms part of this case. The Crown-Attorney, representing the Attorney-General for the province of Ontario, desiring to question the decision on the ground that it is erroneous in point of law, the question submitted for the judgment of the Court is:—

Whether Frank H. Ferguson, upon the facts found by the magistrate, should or should not have been convicted of the offence charged.

The following was the opinion of the magistrate:—

The defendant is the owner of a store on the north side of Talbot street in the city of St. Thomas, occupied by Messrs. Beal & Martin as his tenants. The lease under which they occupy the premises is in statutory form, and contains no restrictions upon the tenants as to the kind of business to be carried on by them. They have occupied the premises since 1st May, 1896, under the lease, and have during that time carried on the business of merchant tailors. The rear part of the building is used as a tailoring department, and the front part as a sales department. They have been employing upon an average 14 persons in the tailoring department, 6 males and 8 females. There is only one closet upon the premises, and that is in the basement of the store, and there is only one approach to it, and it is used in common by male and female employees of Beal & Martin. Section 15 (1) (a) of the Factories Act provides: "The owner of every factory shall provide a sufficient number and description of privies, earth or water closets, and urinals for the employees of such factory, including separate sets for the use of male and female employees, and shall have separate approaches to the same, the recognized standard being one closet for every 25 persons employed in the factory." The inspector of factories laid an information against the defendant for non-compliance with the foregoing section of the Factories Act.

It was admitted on the hearing that the defendant had been notified in writing in regard to the complaint, as required by the Act, and that he refused to do anything.

Section 2 of the Factories Act provides as follows:—

"1. 'Factory' shall mean: (a) any building, workshop, structure, or premises of the description mentioned in schedule A to this Act, together with such other building, structure, or premises as the Lieutenant-Governor in council from time to time adds to the said schedule: and the Lieutenant-Governor in council may, from time to time, by proclamation published in the Ontario Gazette, add to or remove from the said schedule such description of premises as he deems necessary or proper."

"(c) Any premises, building, workshop, structure, room, or place wherein the employer of the persons working there has the right of access and control, and in which, or within the precincts of which, any manual labour is exercised by way of trade or for purposes of gain in or incidental to the following purposes, or any of them, that is to say: the making of any article or part of any article; the altering, repairing, ornamenting, or finishing of any article; or the adapting for sale of any article."

The Crown Attorney argued that the defendant came within one or the other of the above provisions, and that he ought to be convicted. I shall therefore consider clause (a) first. The clause refers to schedule A of the Act, and, unless the business carried on by Beal & Martin can be said to be a clothing factory, the defendant cannot be convicted under the authority of that clause. The word "factory" means the same thing as the word "manufactory," and, in my opinion, a merchant tailor is not a manufacturer within the meaning of the Ontario Factories Act. A merchant tailor may be a manufacturer in the narrow sense of the word, but I do not think that is the meaning which ought to be given to it in construing the Factories Act. It should be construed in its popular sense, and construing the Act in that way, a manufacturer is a person who produces goods from a raw state by manual skill and labour, and goods which are commonly turned out of factories; and, in my judgment, a merchant tailor cannot be regarded as a manufacturer. He merely cuts and fashions a suit of clothes as

ordered, from cloth purchased by him and kept to be made up as suits are ordered by customers. In speaking of a city as a manufacturing centre, or having factories within it, the ordinary understanding is that it has factories where articles of use are made in considerable quantities by the aid of many hands or of machinery, and generally to be supplied to retail dealers. Viewing the Act in this light, I do not think that tailor shops, or merchant tailors not engaged in wholesale trade, can be included among the factories and the manufacturers of a place.

The Crown Attorney also contended that the word "owner" in sec. 15 meant the legal owner of the building, but I do not agree in that. "Factory" is defined to mean any building, workshop, structure, or premises of the description mentioned in schedule A. If the business carried on in this case can be said to be a clothing factory, the defendant is not the owner of the factory—Beal & Martin are the owners.

I shall now consider clause (c). This clause may be sufficient to include a merchant tailor, but, even so, I do not think that it applies to the defendant by reason of the words contained in it, namely, the following words, "Wherein the employer of the persons working there has the right of access and control." The defendant is not the employer in this case. He has no right to go upon the premises except to view state of repair under the covenant in the lease giving him that right. If he were to go upon the premises except to view state of repair, he would be a trespasser; and, if the Factories Act imposes any duty upon him requiring him to make any alterations in or additions to the premises, there is nothing in the Act exempting him from liability; and, that being so, I do not think the legislature intended to include the legal owner of the building, who has no interest whatever in the business carried on by others. I may also add that the Factories Act imposes substantial penalties for violations of its provisions, and it ought for that reason to be construed strictly in favour of the accused, and in any case where it is doubtful whether a particular provision applies to a person charged with a violation of such provision, the person charged ought to be given the benefit of the doubt. For these and the other reasons which I have given, I think the defendant ought not to be convicted, and I, therefore, dismiss the charge.

This is, I understand, the first case of this kind in which a charge has been laid under the Act.

The stated case was heard by FALCONBRIDGE, C.J., in Chambers.

J. R. Cartwright, K.C., and A. McCrimmon, St. Thomas, for the Attorney-General and the Inspector of Factories.

J. B. Davidson, St. Thomas, for defendant.

FALCONBRIDGE, C.J.:—The facts appear in the case and in the judgment which is made part of the case.

With great respect I am unable to concur in the view taken by the learned magistrate on either branch of the case.

1. I am of the opinion that the premises in question are a "factory," as defined by the Factories Act, R. S. O. 1897 ch. 256 (as amended . . .), sec. 2, sub-sec. 1, clause (c). It is a "building . . . wherein the employer of the persons working there has the right of access and control, and in which . . . manual labour is exercised by way of trade . . . in or incidental to . . . the making of any article . . . or the adapting for sale of any article."

It is nihil ad rem for the purposes of the definition that the employer is not the person here charged.

2. Then I turn to sec. 15, which provides that the owner of every factory (a) shall provide a sufficient number . . . of privies, etc. . . . for the employees . . . including separate sets for the use of male and female employees . . . etc. . . . with separate approaches to the same . . . ; (b) shall be held responsible for effluvia arising from a drain, etc.; (c) shall arrange for a supply of pure drinking water.

This is plainly meant to apply to the owner of the building. These duties relate to the substantial, structural condition of the premises.

The duties imposed on the employer (who is defined by sec. 2, sub-sec. 3) relate to the domestic economy and interior management of the factory. By sec. 16, he is to (a) keep the factory in a clean and sanitary condition and free from effluvia arising from refuse. (Note here the sharp contrast, the landlord being as stated above liable for

effluvia arising from structural defects or disrepair; (b) keep privies, etc., in good repair, and shall be held responsible for keeping closets separated for male and female employees (the owner's duty being as stated before to provide them); (c) to regulate the temperature; (d) to ventilate the factory; (e) not to allow over-crowding; (f) the inspector may require him to provide spittoons, and so on.

Our legislation on the subject is therefore very precise, and the American cases cited, having regard to the statutes which they are said to interpret, are not in point.

I have also considered the case of Toller v. Spiers & Pond, 19 Times L. R. 119. I fancy that in the present case no serious opposition will be raised by the tenant if the landlord desires to enter on the premises in order to carry out the provisions of the law. Every one is supposed to know the law, and people have no right to enter into covenants or engagements which tend to put it out of their power to obey the law.

The preamble to the original Factories Act, 47 Vict. ch. 39, was: "Whereas special provision should be made for the safety, health, and well-being of operators employed in and about factories and like places within Ontario." I take it that "well-being" includes moral as well as physical well-being, and that it tends to the moral well-being of the 6 male and 8 female persons employed in this factory that the ordinary decencies and proprieties of life should be observed. Wherefore, if my opinion on the subject were not even so strong as it is, I should endeavour to see that this important duty should not be made a shuttle-cock between the "owner" and "employer." Doubtless the latter, if attacked, would produce arguments equally specious and perhaps better founded to shew why he should not be held answerable for breach of this particular duty, but it cannot be that it is the duty of no one to carry out this provision of the law.

The answer to the question will be that the respondent Frank H. Ferguson should have been convicted of the offence charged. The matter will therefore be remitted to the magistrate with this opinion, in order that he may deal with it according to law.

MABEE, J. DECEMBER 28TH, 1906.

TRIAL.

IREDALE v. LOUDON.

Limitation of Actions—Real Property Limitation Act — Title by Possession to Upper Storey of Building with outside Landing and Staircase—Declaratory Judgment — Refusal of—Injunction Restraining Defendants from Interfering with Possession of Portion of Building—Easement.

Action for a declaration that plaintiff was the owner in fee of "the workshop above the street" on the west side of Bay street, in the city of Toronto, known as street No. 186, together with the landing and staircase leading to the workshop, the same having a frontage of about 13 feet, 6 inches, on the west side of Bay street, commencing 63 feet, 11 inches, southerly from the south limit of Queen street, by a depth of about 53 feet running westerly from the westerly limit of Bay street, and for an injunction restraining defendants from entering upon these premises, and removing or damaging the buildings thereon, and from wrongfully interfering with the premises to the detriment of plaintiff.

Strachan Johnston and R. H. Parmenter, for plaintiff.

E. D. Armour, K.C., and W. D. McPherson, for defendants.

MABEE, J.:—. . . The building in question is a two-storey wooden structure, the only entrance to the upstairs portion being from a street door at the north-east corner, on Bay street; there is a small landing, the floor being on the ground, about 3 feet wide and 5 feet deep; from there the stairs go up to the portion of the building claimed by plaintiff. The street door is usually kept locked when the shop above, occupied by plaintiff, is closed; there is also a door at the top of the staircase; there is no excavation or basement.

Defendants are, and have for years been, in possession of the ground floor, except the landing at the foot of the staircase. Plaintiff has occupied the upper floor since

1889 without paying rent, and he and his customers have used the landing and staircase for access to and egress from the shop above.

Plaintiff has not since 1889 slept upon the premises; in the summer he usually closed up at midday on Saturdays, returning on Monday morning, and once in July, 1899, went to New York for 3 weeks, leaving his goods on the premises, intending to return, and putting his brother, one of the defendants, in charge for him during his absence. I mention these facts as it was contended by Mr. Armour that this prevented the statute running, particularly as to the absence in New York. I do not think so. There was no abandonment at any time, and I think plaintiff had actual, continuous, and peaceable possession, adverse to defendants, at least since October, 1890.

There was no period when defendants could not have taken proceedings to eject him: Agency Co. v. Short, 13 App. Cas. 783. This possession was well known to defendants, and in June, 1891, when leasing the adjoining premises, which defendants also owned, they included in that lease "the ground floor, as it now exists, of the shed or building immediately adjoining the said demised premises." This is the building in question, and at that time plaintiff was in possession of the upper floor.

I think the possession of plaintiff was sufficient to extinguish the title of defendants to the upper floor of this building, as well as the space of ground at the foot of the stairs, being 3 feet on Bay street and 5 feet deep. On 20th June, 1906, the solicitor for defendants notified plaintiff that he was forbidden to further use the passage-way leading to the stairs, and the stairs leading to the floors above, and also "that it is our intention as owners forthwith to remove the structure which supports that part of the building at present occupied by you." On 29th June, 1906, plaintiff was again notified that it was the intention of defendants to commence removal operations at any time after 6 p.m. on Tuesday 3rd July, whereupon plaintiff applied for and obtained an interim injunction restraining defendants from interfering with the building, and this was afterwards continued until the trial. While I think the possession of plaintiff has extinguished the title of defendants to the upper floor and landing at the foot of the

stairway, it does not necessarily follow that plaintiff is entitled to a declaration of ownership in fee of those portions of the premises.

The statute operates to extinguish the paper title of defendants, and to leave plaintiff, as against them, entitled to possession; it does not vest in plaintiff the title formerly held by defendants, and nothing appears in the statute under which the disseisor acquires anything. It has been said that the effect of the Act is to make a parliamentary conveyance of the land to the person in possession, after the statutory period has elapsed, but, though it is true that the possessory owner, after the statutory limit has been passed, is placed by the Act in a position analogous to that which he would have occupied if the fee simple had been absolutely conveyed to him, yet his title under the Act is acquired solely by the extinction of the right of the prior rightful owner, not by any statutory transfer of the estate: Dart, 7th ed., pp. 472, 473. . . .

[Reference to Gray v. Richford, 2 S. C. R. at p. 454; Dart, p. 471; James v. Bonner, 33 W. R. 64; Scott v. Dixon, 3 Dr. & War. 388; Sands v. Thompson, 22 Ch. D. 614; Darby & Bosanquet, 2nd ed., p. 493; Dixon v. Gayfere, 17 Beav. 421; Tichbourne v. Weir, 8 Times, L. R. 713.]

A declaratory judgment, however, rests in the sound discretion of the Court, and, while I think plaintiff has, by his possession, acquired title, I do not think it a proper case for the Court to make such a declaration as against the person whose title has been lost, and that the better course is to leave plaintiff where the statute leaves him. Nor is such a declaration necessary in this case; the real reason for bringing the action was the threat made by defendants to pull down the building, and, had that not been made, it is hardly conceivable that an action would have been brought for a declaration of title merely, and had such an action been instituted I cannot think it would have succeeded.

It was not contended for defendants that a grant could not be made of a room or rooms, part of a building, or that the title of an owner could not be extinguished by possession of a room or rooms for the statutory period, but Mr. Armour argued that, even had plaintiff the possession required by the statute, yet he had no right to restrain de-

fendants from pulling down or dealing with their part of the building, as he could only claim access to the upper storey, or support for it, as an easement, and the necessary time had not elapsed to enable plaintiff to set up such a right.

Plaintiff here is not in the same difficulty as was plaintiff in McLaren v. Strachan, 23 O. R. 120 n., as here plaintiff has a title by possession to a direct entrance from the street. In the view I take . . . plaintiff has a right, as against defendants, to the possession and enjoyment of the upper floor, staircase, and landing at the foot. Defendants' enjoyment of their portion of the building, therefore, must not interfere with the rights plaintiff has acquired against them; and it necessarily follows that defendants are not entitled to put into execution the threats contained in their letters to plaintiff.

Plaintiff, of course, has not acquired any easements against defendants, and counsel for plaintiff did not so contend, but he has acquired title to these premises, and to permit defendants to carry out the intention expressed in their letters would be an invasion of the rights so acquired, and something plaintiff is not bound to submit to.

In Raines v. Buxton, 49 L. J. Ch. 473, it was held that the plaintiff had acquired a good title under the statute to a cavity used by him as a cellar under the defendant's house. So why may a man not acquire title to the whole upper storey of defendants' house?

I think any act of defendants that interferes with the right of possession and enjoyment by plaintiff of the premises now occupied by him would be a trespass, and that he is entitled to enjoin defendants from changing, altering, pulling down, or in any way dealing with their portion of the building in question, in such a way that the possession, use, and enjoyment of the . . . upper floor, staircase, and landing occupied by him, is interfered with or prejudicially affected.

Plaintiff will have the general costs of the action, but must pay to defendants all costs relating to or occasioned by the claim which was abandoned.

MACMAHON, J. DECEMBER 28TH, 1906.

TRIAL.

PINKERTON v. TOWNSHIP OF GREENOCK.

Water and Watercourses—Overflow of River—Injury to Adjacent Lands—Bridge Constructed by Township Corporation—Effect of, in Damming Water back—Extraordinary Freshets—Employment of Competent Engineers—Non-liability of Corporation.

Action for damages for injuries to plaintiff's lands by flooding, caused as alleged by a bridge built by defendants.

W. M. Douglas, K.C., and A. R. Clute, for plaintiff.

A. G. MacKay, K.C., and D. Robertson, Walkerton, for defendants.

MACMAHON, J.:—Plaintiff is the owner of lots 1 and 2 in the village of Pinkerton, in the township of Greenock, containing about two acres, on which are erected a dwelling-house, grist mill, woollen mill, saw mill, and barn. . . .

The Teeswater river at this place is somewhat in the shape of a shoe, and plaintiff's two acres are bounded to the south and west by the river, and to the east by a pond, which is connected with the north bend of the river by three race-ways used for running the woollen, saw, and grist mills. . . . The whole of plaintiff's land is very flat, but the part fenced in as a garden has been raised by dressings of earth in places from 3 to 8 inches above the bed of the stream. Plaintiff said that the subsoil being gravel the water percolated through it from the river to the cellar of his house . . . which was more or less flooded every year.

At the south-east end of plaintiff's land there is a stone and timber dam across the Teeswater river, 90 feet long; and down the river 750 feet from the dam, and near the north-west corner of plaintiff's two acres, there was a stone and wooden bridge across the river, constructed about 45 years ago, which I find was 105 feet in length between the abutments, and supported in the centre by a wedge-shaped pier 18 or 20 feet in length and 10 to 12 feet wide at its

broad end, which had a water displacement of 18 feet 9 inches, so giving a clear space for the water flow under the bridge of 86 feet 3 inches.

In 1901 the township council concluded to erect a new bridge partly on the site of the old one, and James Warren, an engineer, was engaged by the council, and prepared plans and specifications for a bridge 90 feet in length, and having inside of the abutments a clear span at water level of 85 feet 6 inches, and being between 7 and 8 feet high above the ordinary water level in the river. The abutments were of stone, supporting steel or iron girders. In the autumn of 1901 the abutments were completed, but the pier had to remain for a time, as the floor of the old bridge had to be utilized until the steel superstructure was ready to be placed in position, which was in 1902.

Plaintiff in his statement of claim alleges:—

"8. The defendants caused the abutment of the new bridge on the east bank to be extended into the channel or bed of the river 25 feet further than the abutment of the old timber bridge.

"9. The defendants in constructing the new bridge built a coffer dam and deposited in the river certain materials, parts of which dam the defendants have left in the river, and the flow of the water is thereby obstructed.

"10. The defendants have further obstructed the flow of the water in the river by allowing portions of the pier to remain in the channel, notwithstanding that said pier is not required or used in any way for the purposes of the new steel bridge.

"11. That by reason of the abutment of the new bridge being extended into the channel and by reason of the obstructions referred to, the channel is narrowed and obstructed, and the flow of water past plaintiff's lands was obstructed and impeded; and, as a consequence of such obstruction and penning back, his lands along the side of the river were in the spring of 1904 and 1905 flooded."

In 1895 plaintiff had complained to the township council that his property had been flooded in the spring freshets of that year, and stating that the west abutment extended too far into the stream, and he considered it an obstruction to the flow of the water, and asked for relief.

On 12th August, 1895, the council passed a resolution stating that the township "is prepared to remove any gravel which may obstruct the free flow of the water within the road allowance and under the east span of the bridge as soon as Mr. Pinkerton removes the gravel obstructing the free flow of water on his property to the roadway and bridge in said plan." . . .

Plaintiff had forgotten all about his complaint to the council in 1895, although he said the water that year was flooding him more than formerly. A number of witnesses speak of there being an unusually heavy fall of snow during the winter of 1894-5, and that in the spring of the latter year the freshet was very high.

Mr. Warren, who prepared the plans and specifications for the new bridge, is an engineer of large experience, having designed between 20 and 30 bridges for various municipalities in the county of Bruce, and is spoken of as being a thoroughly competent engineer. He said that he knew the locality and made calculations as to the amount of water coming over the dam during the spring freshets, and concluded that the length of the new bridge was ample to allow that water to pass. He is corroborated as to that by Robert R. McDowall, a civil engineer also of large experience, having drawn plans and superintended the construction of a large number of bridges, and who was associated with Warren in the designing and preparation of the plans for the new bridge. The bridge cost $2,300.

The township council considered the plans and specifications submitted and adopted them.

In building the new bridge, the engineer placed the western abutment 5 feet further west than the old one, and also placed the eastern abutment 25 feet further west. He (Warren) says the eastern abutment of the old bridge, though not in deep water, caused an obstruction to the flow of the water of 18 feet.

Mr. Fielding, an engineer called by plaintiff, took the levels along the banks of the Teeswater and through plaintiff's property, and these coincide almost exactly with the levels taken by Mr. McDowall, but there is a wide divergence between the calculations made by Mr. Fielding as to the quantity of water passing under the old bridge and flowing over the dam and the calculations made by Mr. McDowall and Mr. Warren. . . .

I accept the statement of McDowall and Warren that the quantity of water that flowed under the old bridge was 3,960 cubic feet per second. . . .

I consider the calculation made by McDowall and Warren as to the flow over the dam to be the more accurate. They make the flow under the new dam, based on an 86 feet 2 inches span between the abutments, 3,483 cubic feet per second.

Then as to the allegation in the 8th paragraph of the statement of claim, it is, I consider, clear that the new abutment did not extend into the channel of the river. . . .

As to the 9th paragraph, I find that the whole of the coffer dam was removed, except one stick of timber 12 feet long, which was the bottom stick of the coffer dam, and, as there was trouble from the old west abutment, the stick was left there close to the bottom of the new abutment to prevent its being undermined. It was only 2 or 3 inches above the bed of the river, and caused no perceptible obstruction to the flow of the water. The only other parts of the coffer dam left there were 3 or 4 boulder stones, 12 or 14 inches in diameter, beside or on the stick of timber.

As to the 10th paragraph. No portion of the pier was left in the river. John B. Campbell, in the autumn of 1902, removed all the timber from the pier to its lowest course. . . .

In the years 1882-3, 1894-5, 1903-4, and 1904-5, a large number of witnesses testify to there being very heavy snow storms, resulting in great floods along the Teeswater river during the spring of each of these years. . . .

The width of the river just below the dam is 106 feet, and 240 feet below the dam it is 75 feet wide, and 570 feet below it is only 60 feet in width, and at 50 feet from the bridge it is only 45 feet wide. There is a fall of nearly 5 feet between the foot of the dam and the bridge. With a torrent of water rushing over the dam during a freshet, and with the river 106 feet wide immediately below the dam and 31 feet narrower 240 feet below, and 46 feet narrower 570 feet below, one can easily understand with what rapidity the water would spread where the river banks were hardly perceptible, and where a portion of the adjoining land belonging to plaintiff was but a few inches higher than the river.

Plaintiff's theory . . . is that the new bridge, because of the alleged incapacity to carry the water during an ordinary spring freshet, caused it to back up on to his land and inundate it. But while the old bridge was in existence, and is represented as being adequate to carry off all the water that came over the dam, and had a capacity, according to Mr. Fielding, of 1,000 cubic feet per second in excess of what came over the dam, yet during the ordinary spring freshets each year the flats and part of plaintiff's orchard were flooded from the river. Plaintiff did not assert that these latter inundations were caused by the backing up of the river from the bridge, for the water, he said, entered on his land from the south-west of his house, and spread from the flats to the part of the orchard. . . .

The present bridge with a clear span of 85 feet 6 inches between the abutments has almost the same capacity as the old bridge of 105 feet between the abutments, but with a centre pier having a water displacement equal to 18 feet 9 inches, which would make a clear water way of 86 feet 3 inches. There is, therefore, a difference of only 9 inches in the water-carrying capacity of the two bridges.

I am satisfied from the evidence that during the freshets of 1904 and 1905 plaintiff's property was not flooded by the backing up of water from the new bridge; but that the water entered on his land from the south and west, and was flooded in that way. The snowfall preceding the flood of 1904 was the greatest in many years, and the freshet was of an unusual character; and the freshet of 1905 was unusual by reason of the quick melting of the snow, causing the Teeswater river and its tributaries to fill up with extraordinary rapidity. Against these unusual contingencies defendants were not called upon to provide: Dixon v. Burnham, 14 Gr. 594.

As Mr. Warren is an engineer of experience and as he had associated with him in preparing the plans, etc., Mr. McDowall, also an engineer of large experience (having prepared the plans and superintended the construction of 25 bridges varying in cost from $1,200 to $25,000), and as the plans and specifications had been submitted to the council and approved of by them, that alone would have been sufficient to free defendants from liability: Hill v.

Taylor, 9 O. L. R. 643, 4 O. W. R. 284, 5 O. W. R. 85; McCann v. City of Toronto, 28 O. R. 650; Denton on Municipal Negligence, p. 187. But I thought it better for the satisfaction of both the parties that I should make my findings on the evidence as it presented itself to me.

Mr. Douglas argued that the defendants could not claim exemption from liability although they employed a competent engineer, as they did not disclose to him that a complaint had been made by plaintiff in 1895, and his reasons therefor.

If there was no member of the council of 1895 who was a member in 1901, it is not surprising that the incident was overlooked, particularly when plaintiff, who was the party most interested, had altogether forgotten it. But there is another reason why it might not have been thought of. The council thought it would be useless, and therefore a waste of public money, to remove the gravel from under the east span of the bridge unless plaintiff agreed to remove the gravel obstructing the free flow of the water on his property to the roadway and bridge.

Adam Knox, the assessor for the township, thought the house and lot would sell for $700.

I assess the damages contingently at $300.

There will be judgment for defendants dismissing the action with costs.

DECEMBER 28TH, 1906.

DIVISIONAL COURT.

PAYNE v. MURPHY.

Contract—Sale of Logs—Action for Price—Subsequent Agreement—Finding of Trial Judge—Appeal—Costs—Discretion—Payment into Court.

Appeal by plaintiff from judgment of MABEE, J., at the trial, in so far as against plaintiff, in an action to recover a balance of $516.57 alleged to be due under a contract for the sale by plaintiff and purchase by defendant of a supply

of pulpwood logs. The defence was that by a subsequent contract plaintiff agreed to pay a proportion of the cost of driving the logs down the Wahbe river, which proportion amounted to $277.73. Defendant paid the difference, $238.84, into Court. At the trial judgment was given for plaintiff for $5 in addition to the amount paid into Court, but plaintiff was allowed costs only up to the time of the payment into Court.

The appeal was heard by FALCONBRIDGE, C.J., BRITTON, J., CLUTE, J.

H. D. Gamble, for plaintiff.

R. McKay, for defendant.

FALCONBRIDGE, C.J.:—The judgment appealed from was delivered orally at the close of the argument, and it is contended for plaintiff that it contains no finding of fact as to the alleged subsequent agreement respecting the cost of driving the timber, but rests solely on defendant's supposed right in law to charge plaintiff with the cost of driving the logs, in the absence of any contract therefor.

I am not sure that the criticism is well-founded, because the trial Judge twice uses the phrase "I find upon the evidence," and this particular question of fact was the one most particularly in issue on the evidence.

We have consulted the Judge, and he says that he intended and intends to find the fact to be as stated by defendant, and that he thought he had done so.

Defendant is corroborated to some extent by the witness Edwards, and we should probably be justified in coming to the same conclusion, and we certainly could not ignore the opinion of the Judge who saw the witnesses.

The discussion, therefore, of what defendant's rights would otherwise be, becomes purely academic.

The motion to interfere with the trial Judge's disposition of the costs is entirely without merits. The award of $5 depends on whether $490 or $495 was paid on account, and there is no very clear evidence as to which sum is correct, plaintiff's counsel having remarked . . . "The $5 is not here or there between us."

The trial Judge had full power under Rule 1130 to determine the question of costs as he did. Henderson v. Bank of Hamilton, 25 O. R. 641, was a very exceptional case in which the trial Judge himself thought proper to apply strictly the old practice where defendant failed to pay into Court a sufficient sum.

The appeal will be dismissed, but, in the peculiar circumstances of the case, without costs.

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

CLUTE, J., concurred.

DECEMBER 28TH, 1906.

C.A.

RE SINCLAIR AND TOWN OF OWEN SOUND.

Municipal Corporations—Local Option By-law—Motion to Quash—Vote of Ratepayers—Town Divided into Wards—Right of Persons Owning Property in Different Wards to Vote more than once—Confusion from Colour of Ballot Papers—Persons Voting Without Right—Irregularities in Taking of Vote—Effect on Result—Municipal Act, sec. 204.

Appeal by William Henry Sinclair, the applicant in the Court below, from an order of a Divisional Court (ante 460, 12 O. L. R. 488), reversing an order pronounced by MABEE, J. (ante 239), quashing by-law number 1172 passed by the council of the town on 15th January, 1906.

The by-law was enacted under the local option provisions of R. S. O. 1897 ch. 245, known as the Liquor License Act, to prohibit the sale by retail of spirituous liquors within the municipality; and on 1st January, 1906, before it was finally passed by the council, it was submitted for the approval of the electors of the municipality as provided by sec. 141 of the Act.

The result of the polling as declared shewed a majority of 476 in favour of the by-law.

A number of objections were taken on the motion to quash, but the main one was that persons who were ratepayers in respect of property situate in different wards were not permitted to vote more than once on the by-law.

Effect was given to this objection by MABEE, J., but the Divisional Court were of the contrary opinion.

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

W. Nesbitt, K.C., J. Haverson, K.C., and W. H. Wright, Owen Sound, for W. H. Sinclair, the appellant.

F. E. Hodgins, K.C., and J. W. Frost, Owen Sound, for the town corporation.

MOSS, C.J.O.:—After carefully considering the grounds upon which the appeal was supported in argument, I find myself unable to adopt them.

The provisions of the Municipal Act, 1903, to which we are referred by sec. 141 of the Liquor License Act, are those comprised in secs. 338 to 375, inclusive, so far as the same are applicable.

If these sections only dealt with one species of by-law, a certain degree of support would be lent to the appellant's contention. But it is plain that there is a broad distinction made between expressing an opinion or voting on a by-law for contracting a debt and on other by-laws requiring the assent of the electors. Sections 338 to 352, inclusive, may be said to apply generally to all voting for the purpose of ascertaining the opinion of the electors on a by-law requiring their assent. By the incorporation of secs. 138 to 206, inclusive, a code of procedure is created for submitting the by-law to the electors, including the proceedings at the poll and for and incidental to the same and for the purposes thereof: sec. 351.

Looking at all these provisions, there is nowhere to be found any provision expressly enabling any elector to vote more than once except in the specified cases of aldermen or councillors, where in cities or towns the aldermen or councillors are elected for the wards, in which case every elector

rated in any ward for the necessary qualification may vote once in each ward for each alderman or councillor to be elected for the ward: sec. 158 (3).

And, throughout, the general common law rule of one vote where a poll is demanded is taken for granted. The very term "poll" implies the singular, for the poll is the numbering the polls of the electors who may tender their votes, taking their votes individually and separating them from those who have no votes: see Heywood's County Elections, p. 354. And at common law a freeholder could not poll twice at the same election for Knights of the Shire: see p. 425 et seq.

The appellant, however, places special reliance on sec. 355.

Sections 353 and 354 deal only with one closs of by-law to be voted on, namely, that for contracting a debt. They deal with the qualification required in order to entitle a person to vote, and they provide that he or she must be a ratepayer (not an elector as in the preceding sections), and a freeholder, or a leaseholder for a term extending for the period of time within which the debt to be contracted or the money to be raised by the by-law is made payable, who has covenanted in his lease to pay all municipal taxes in respect of the property leased.

Sections 356 and 357 also deal with by-laws for contracting debts, and it is significant that in all these sections ratepayers are spoken of. The distinction between by-laws to be voted on by electors and by-laws to be voted on by ratepayers is further emphasized by sec. 365, which prevents the clerk of the municipality from giving a casting vote. The language used is, "where the assent of the electors or of the ratepayers or of a proportion of them is necessary to the validity of a by-law. . . ." The legislature has thus shewn that it had in mind the two classes of by-law, viz., those to be voted on by electors generally, and those to be voted on by ratepayers, a more limited class.

Turning then to sec. 355, we find that it speaks of ratepayers, and deals with their rights of voting. It is clearly not intended to regulate voting generally. If it were not in the Act, its absence would not prevent any elector from voting on a by-law. It says that certain electors, i.e., ratepayers, may under certain circumstances vote in more than

one ward, and the question is whether that privilege is general or confined to a special class of by-law. The language, read, as it should be, in the light of the context, shews that the ratepayer spoken of there is the ratepayer referred to in the two preceding sections, and the case dealt with is that of voting on a by-law for contracting a debt, while its grouping with the sections immediately preceding and following shew that it was the intention to confine it to that case. So confining it does not interfere with the right of other electors to exercise their franchise in the manner and according to the other provisions of the Act in every case in respect of which they possess the necessary qualification. The section extends to one class of electors a special privilege to be exercised in a special case. The words "shall be so entitled to vote" indicate a voting under some particular or special circumstances. And these are ascertained by reference to the two preceding sections, which define the ratepayers who are entitled to vote on a by-law for contracting a debt. And I think that the fair interpretation to be put upon sec. 355 is that each ratepayer, as defined in the preceding sections, is to be entitled to vote, in respect of a by-law for contracting a debt as mentioned in the same sections, in each ward in which he has the qualification necessary to entitle him to vote on the by-law.

In this section we have the only other instance in which the right to vote more than once on any subject is expressly given by the Municipal Act. There are other instances in which, perhaps, the right may be given by implication by a provision enacting that a by-law is to be assented to by the electors in manner provided for in respect of by-laws for creating debts—or declaring that the persons entitled to vote thereon shall be the electors qualified to vote on by-laws for the creation of debts, e.g., secs. 19 (1), 28, and 565 (3).

When there are found instances where the right is expressly conferred, why should we infer an intention to recognize a similar right in all cases? Ought we not rather to infer that the general intent is against any such right, and that it exists only in the instances in which the legislature has said in terms that it may be exercised?

Stress was laid in argument on the language of sec. 348 as indicating an intention to give to all persons whose names are found in the voters' list to be supplied to the

deputy returning officers of each ward or polling subdivision, a right to vote on any by-law. This would appear to involve declaring that the intention was to give all named in the list a right to vote on a by-law for contracting a debt, as well as on other by-laws, a conclusion quite opposed to the whole policy governing voting on a by-law for contracting a debt.

All the necessary directions as to voters' lists, poll books, etc., appear to be contained in secs. 148 to 154, inclusive, which, with the exception of sec. 179, are amongst those made to apply, so far as applicable, to voting on a by-law. And unless, notwithstanding the recent change in its language, sec. 348 is still to be treated as applying only to voting on a by-law for contracting a debt, it appears to be superfluous. As it was before the change, it clearly applied only to such a by-law, and I do not think that, even now, we are driven to say that it is to be extended further. The direction to the clerk to supply a voters' list containing the names of all the persons appearing by the last revised assessment roll to be entitled to vote in the ward or polling subdivisions, does not necessarily involve a declaration that the deputy returning officer in each ward or polling subdivision must accept their votes upon all questions to be voted on, no matter what the subject may be.

In the view I take of the legislation, it is not necessary to refer to the historical aspect of it, but I think an examination of the previous legislation will shew that during the whole period, except possibly between the date of the coming into force of R. S. O. 1897 ch. 223, and the passing of the Municipal Act of 1903, there was no general legislation enlarging the ordinary common law manner of signifying an assent or dissent, viz., by show of hands, if there is an open meeting, and by recording one vote when there is a poll, and the rule prevails unless there is some enactment or regulation providing otherwise. And, as regards the period above mentioned, the legislature, by the amendment of 1903, brought the rule back to where it was before the revision.

The fact that in the recent enactment, 6 Edw. VII. ch. 34, sec. 2, the legislature made a special provision, can scarcely be taken as an affirmation that the general rule was otherwise. It may well be deemed as an affirmance of the

general principle made ex majore cautela in the particular case.

In my opinion, the Divisional Court came to the proper conclusion.

As to the other objections, the most formidable as presented in argument was the action of the clerk in inserting in the notice of the election a warning against voting more than once on the by-law. This is now answered by shewing that his view of the law was correct, and that, however unnecessary or outside the scope of his duty, the giving of the warning could not, and in fact did not, prevent any elector from giving one vote.

With regard to the other objections, I agree with the Divisional Court that an inspection of the respective ballot papers for voting on this and another by-law shews that there is nothing in the objection based on a supposed confusion by reason of the colours of the papers, and that, as respects the remaining objections, they are not sufficiently made out in some cases, and the remaining cases are not such as to affect the validity of the by-law.

The appeal should be dismissed.

OSLER and GARROW, JJ.A., gave reasons in writing for the same conclusion.

MACLAREN, J.A., also concurred.

MEREDITH, J.A., dissented, for reasons stated in writing.

Moss, C.J.O. DECEMBER 29TH, 1906.

C.A.—CHAMBERS.

HOGABOOM v. HILL.

Appeal to Court of Appeal—Leave to Appeal from Order of Divisional Court Reversing Judgment at Trial.

Motion by plaintiffs for leave to appeal to the Court of Appeal from order of a Divisional Court (ante 815) revers-

ing judgment of MacMahon, J. (ante 352), and dismissing the action.

I. F. Hellmuth, K.C., for plaintiffs.

G. H. Kilmer, for defendants.

Moss, C.J.O.:—Having read the evidence and the judgments delivered in this case, I am unable to say that it presents any exceptional or special circumstances justifying the allowance of a further appeal.

The facts are not in dispute. The conclusion drawn from them by the trial Judge was, not that the property sought to be rendered exigible under plaintiffs' judgment was the property of defendant Byron J. Hill, but that he had an interest in it as the outgrowth of what the trial Judge considered to be the investment by that defendant of $300 in the business of the Hill Printing Co.

The Divisional Court found this conclusion not sustainable on the facts, and held, in effect, that the business was one carried on by defendant Mrs. Hill, in which her husband had no proprietary right. This finding might well be made on the evidence. The judgment at the trial expressly confined plaintiffs' remedy to the satisfaction of their judgment, amounting to about $300 for debt and costs, out of defendant Byron J. Hill's supposed interest in the property. That is the amount directly in controversy in the appeal. It is said that plaintiffs hope or expect to recover judgment in a short time against Byron J. Hill for a large sum. But Mrs. Hill, the substantial defendant here, is not to be affected in her rights by any proceeding not now before the Court. In the eye of the law, though doubtless only in theory in this case, the interest of her husband appears to be with plaintiffs, for payment of their claims relieves him of his indebtedness. But his wife is entitled to insist that, in accordance with the policy of the legislature, the litigation shall be brought to an early conclusion unless some good and sufficient grounds for its further continuance as against her can be shewn. She has a unanimous decision of the Divisional Court in her favour, upon practically undisputed facts, which give rise to no difficult or important questions of law, and, in the absence of more special reasons than have been made to appear upon this application, she should not be subjected to a further appeal.

Motion refused with costs.

DECEMBER 24TH, 1906.

DIVISIONAL COURT.

PRITTIE v. RICHARDSON.

Principal and Agent—Agent's Commission on Sale of Land—Purchaser Introduced by Third Person—Sub-agency of Third Person—Evidence of.

Appeal by plaintiff from judgment of MEREDITH, C.J., at the trial, dismissing without costs an action to recover commission on the sale of a hotel property by defendant to one Falconer. Plaintiff alleged that the property was brought to the notice of Falconer through the instrumentality of one Fawcett, who was Falconer's uncle, and plaintiff's agent, as plaintiff alleged.

John MacGregor, for plaintiff.

H. E. Rose, for defendant.

The judgment of the Court (MULOCK, C.J., ANGLIN, J., CLUTE, J.), was delivered by

CLUTE, J.:—Had credit been given to plaintiff's evidence by the trial Judge, sufficient would have been made out to entitle plaintiff to succeed, as it would have established the agency of Fawcett, under whose advice his nephew bought the property in question, after Fawcett had declined; but the trial Judge felt unable to accept plaintiff's evidence in this regard, and points out that in the examination de bene esse of Fawcett not one word of corroboration is found.

Plaintiff to be entitled to succeed must either shew that Fawcett was authorized to act as his agent, or that he assumed to act as his agent, and that he (plaintiff) ratified Fawcett's action. From the earliest times it has been established that no ratification is effectual unless the act has been done by the agent on behalf of the person who ratifies: Evans on Principal and Agent, 2nd ed., p. 64.

I have examined the evidence of Fawcett to ascertain whether anything can be found therein indicating the intention on his part to act as the agent of plaintiff in what took place between himself and his nephew. I can find no

such evidence and nothing from which an intention of the kind can be properly inferred. Fawcett was introduced to defendant, and he looked over the place, and said to defendant that if he did not buy it himself he could perhaps induce his nephew, Falconer, to do so. Plaintiff was standing alongside of him at the time; a single statement would have settled the matter, but he no where hints that what he did or said was on behalf of plaintiff. He was asked: "Through whom did your nephew purchase the Richardson House?" A. "I do not know who he purchased it through, any more than I was the man who spoke to him first about it, and suggested to him that he should buy it, for he would have a good place, and there would be no danger of a cut-off." On cross-examination he does not mention that plaintiff was even present. He is asked: "Was there anybody else present with Mrs. Richardson?" A. "No, she just stayed in the office by herself." Falconer was asked: "Did you receive any communication from plaintiff in connection with this?" A. "No, I did not receive any personally." It seems that he saw a letter from plaintiff to Fawcett; but the letter was not produced, and no foundation was laid for secondary evidence. The result is that there is nothing that I can find which connects Fawcett with plaintiff as his agent, or that Fawcett assumed to act on behalf of plaintiff.

Plaintiff's counsel relied upon Wilkinson v. Auston, 48 L. J. N. S. Q. B. 733, and Lincoln v. McClatchie, 36 Conn. 136. A careful reading of Wilkinson v. Auston will shew, I think, that there is an essential difference between that case and the present. The continuity there was not broken. It could be in point if it could be shewn that in the present case Falconer had engaged Fawcett to act as his agent, and, acting as the agent of Falconer, Fawcett had purchased through plaintiff.

The trial Judge expressly found, and I think the evidence fully supports the finding, that Fawcett was not acting as plaintiff's agent in the communication that he made to Falconer, and that it was not even at plaintiff's request that Falconer was spoken to by Fawcett. That, in my opinion, entirely distinguishes the present case from the cases relied upon by plaintiff.

Appeal dismissed with costs.