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APPELLATE DIVISION.

NOVEMBER 3RD, 1913.

ALLEN v. GRAND VALLEY R.W. CO.

Contract—Supply of Goods for Railway Construction—Action for Price—Guaranty—Defence of Sureties—Variation in Terms of Contract—Evidence—Terms of Credit—Expiry before Action Brought—Counterclaim.

Appeal by the defendants the railway company and appeal by the defendants Verner and Dinnick from the judgment of KELLY, J., 4 O.W.N. 1578.

The appeals were heard by MEREDITH, C.J.O., MACLAREN, MAGEE, and HODGINS, JJ.A.

Grayson Smith, for the appellants.

H. E. Rose, K.C., and J. W. Pickup, for the plaintiffs.

THE COURT dismissed both appeals with costs.

APPELLATE DIVISION.

NOVEMBER 3RD, 1913.

GOODWIN v. MICHIGAN CENTRAL R.R. CO.

Fatal Accidents Act—Damages for Death of Aged Father—Reasonable Expectation of Benefit from Continuance of Life—Pecuniary Loss by Premature Death—Accelerated Enjoyment of Estate—Loss of Anticipated Savings from Pension Enjoyed by Deceased—Evidence—State of Health of Deceased—Computation of Damages—Present Value of Annual Allowance for Five Years.

Appeal by the defendants from the judgment of BOYD, C., in favour of the plaintiffs, after the trial of the action before him, without a jury, at Welland, on the 21st May, 1913.

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

W. B. Kingsmill, for the defendants.

G. Lynch-Staunton, K.C., for the plaintiffs.

The judgment of the Court was delivered by MEREDITH, C. J.O.:—The action is brought by the executors of James Goodwin, deceased, on behalf of his seven children, to recover damages, under the Fatal Accidents Act, for the death of the deceased, who was killed owing, as alleged, to the negligence of the appellant company.

That the death was caused by the negligence of the appellant company is not disputed; but it is contended that the persons on whose behalf the action is brought have suffered no pecuniary loss by his death, or at all events that the damages should have been assessed at a much less sum than $1,650, the amount awarded by the Chancellor.

The facts, having regard to which the question in dispute is to be determined, are not in controversy. The deceased was a superannuated Methodist Minister, and was in receipt of an allowance of $330 a year, during his life, from the Superannuation Fund of that church, and he was possessed of property of the value of about $23,000, which by his will he left to his children in equal shares. He was eighty-two years old, and his expectation of life, according to the mortality tables, was shewn to be 3.90 years, but, according to the testimony of Dr.

Smith, a medical witness who was well acquainted with the deceased and had been his physician for several years, his physical condition was such that he "might easily have been expected to live for ten years."

The Chancellor came to the conclusion that the reasonable expectation of life of the deceased was five years; and, being of opinion that, upon the evidence, there was a reasonable expectation that what the deceased, if he had lived, would have received from the Superannuation Fund would have been saved by him and have passed at his death to his children, he assessed the damages on that basis, allowing as the pecuniary loss sustained by the children five of the yearly payments of the superannuation allowance.

In support of the appeal it was contended, first, that the children of the deceased had sustained no pecuniary loss by his premature death, because his whole estate passed to them at his decease, and they had thus been pecuniarly benefited by it; second, that at all events they had benefited by the accelerated enjoyment of his estate more than they had lost by the superannuation allowance having ceased; and third, that in any case the Chancellor erred in assessing the damages on the basis of a five years' expectation of life, and in allowing the sum of the allowance for five years instead of the capitalized value of it.

It is clear, I think, that the first of these contentions is not maintainable. Upon the evidence, the proper conclusion is, that there was a reasonable expectation that the whole of the estate of the deceased would go to his children at his death; and it would, therefore, be improper, for the purpose of ascertaining their pecuniary loss, to treat the children as being benefited by his premature death to the extent of the value of the estate. They benefited owing to his premature death only by the enjoyment of the estate being accelerated; and, had it not been found upon the evidence that there was a reasonable probability that the whole of the income of his estate would have been saved by the deceased and have passed to his children at his death, the second contention would have been entitled to prevail; but that finding is a complete answer to it.

That the Chancellor was right, in order to arrive at a conclusion as to the probable duration of the life of the deceased, in taking into consideration the fact that his life was an unusually healthy one, and on that account in finding the probable duration of it to be greater than that of the average life, is, I think, clear upon principle; and, if authority for the

proposition is needed, it will be found in Rowley v. London and North Western R.W. Co. (1873), L.R. 8 Ex. 221, 226.

For these reasons, we are of opinion that the judgment is right, except as to the computation of the damages. The pecuniary loss to the children, on the hypothesis on which the Chancellor proceeded, was not the sum of the allowance for five years, but the present value of the five yearly payments, which, capitalizing them at five per cent. per annum, amounts to $1,428.73.

The judgment should, therefore, be varied by reducing the damages to that sum, and, with that variation, should be affirmed and the appeal be dismissed.

As success is divided, there will be no costs of the appeal to either party.

NOVEMBER 3RD, 1913.

*BARTLET v. DELANEY.

Crown—License of Occupation of Lands Covered by Water—Fisheries—Lands Included in Prior Grant—Description—Island in Navigable River—Area of Lands Granted—Adjacent Marshes — Ambiguous Description — Evidence to Identify Subject of Grant — Admissibility — "Channel," Meaning of—Boundary—Channel-bank—Misrepresentation by Licensee—Suppression of Material Facts—Fraud—Presumption—1 Geo. V. ch. 6—Cancellation of License—Parties—Attorney-General.

Appeals by the defendants from the judgment of LATCHFORD, J., 27 O.L.R. 594, 4 O.W.N. 577.

The appeals were heard by MEREDITH, C.J.O., MACLAREN, MAGEE, and HODGINS, JJ.A.

McGregor Young, K.C., for the defendant Gauthier, appellant.

I. F. Hellmuth, K.C., for the original defendants, appellants.

E. D. Armour, K.C., and A. R. Bartlet, for the plaintiff.

The judgment of the Court was delivered by HODGINS, J.A., who, after setting out the facts, referred to Barthel v. Scotten,

*To be reported in the Ontario Law Reports.

24 S.C.R. 367, 368; Howard v. Ingersoll (1851), 13 How. (U.S.) 417; Alabama v. Georgia (1859), 23 How. (U.S.) 505; Iowa v. Illinois (1892), 147 U.S. 1; Benjamin v. Manistee (1880), 42 Mich. 628; Cessill v. The State (1883), 40 Ark. 501; Farnham on Waters, vol. 2, pp. 1462, 1463; Tyler's Law of Boundaries, pp. 338 et seq.; and proceeded:—

I am unable to see that the description in the patent presents any difficulty which cannot be readily solved by looking at the plan, the words of the grant, and any evidence to identify the subject-matter which can be properly considered. I refer to the evidence identifying the mainland points, the measurements of the firm and marsh land, the location of the piers and fishery establishments, and the documents and facts indicating the nature and extent of its prior title, use and occupation, and its being part of an Indian reservation: Booth v. Ratté (1889), 15 App. Cas. 188; Van Diemen's Land Co. v. Table Cape Marine Board, [1906] A.C. 92.

The construction which I would place upon the grant would give the grantee the firm and marsh land shewn upon the Bartley plan. That supplies both a visible outline . . . and visible and proper beginning and ending points, and treats the word "channel" in its ordinary significance as stretching from margin to margin; and the expressions "side of the channel" and "following the windings thereof" as indicating a course bounded partly by firm land and partly by marshy land, as shewn on the plan. In the view I take, it would not militate against this view even if the line between the marsh and the channel were in the water at places.

The principle may well be applied which was followed in the case already cited, Alabama v. Georgia, where the expression "along the western bank" was treated as allowing, where the bank was not defined, a continuance of the boundary along the line of the bed as that is made by the average and mean stage of the water. I disregard, if necessary, the bearings in relation to the mainland as being too indefinite to interfere with the clearer expression of the plan and the other words of the patent. The area thus covered is 1,339 acres, which approximates more nearly to the original 1,200 acres than to the 2,602 acres now given.

There are two points in the judgment which should be dealt with. It is therein said that the southerly end of the marsh does not end in a point, but in a line bearing east and west, and that the description, if intended to follow what is outlined in

the plan, would at the south take a bearing westerly of one-third to half a mile, instead of bearing northerly against the stream. Again, it is stated that there is no defined shore line on the island and marsh, taken together as they are shewn in Bartley's plan, and that the plan indicated that toward the north no definite line could be drawn between land and water. But, when examined, while the southern end of the marsh forms a large fish-tail, the south-east angle stretches out 800 feet further south than the south-west angle, and forms a well-defined end. If the winding of the easterly channel going southward reaches that point, there is nothing in the evidence to suggest that the current on the westerly side does not bend round the south-west point and come down to meet the easterly channel there, not on a westerly bearing, but a southerly one. If Newman's plan is looked at, the south-westerly point has apparently been softened down to a south-easterly slope, and the supposed point of meeting of the navigable channels lies far to the south of the south-east point; so that the reversed bearing, speaking roughly, runs northward. Plan 32 gives the present shape as a fish-tail, but with a greater indentation between its ends. As to the second point, I have already referred to the evidence of Lambe, who is clear that there is a defined line round the island, and of Rolliter, and I can see no difference in the way the land and water are distinguished at the north end from the way the difference is shewn on east, west, and south; nor can I find any witness who throws any doubt upon it.

The earliest license of occupation, which shews what Paxton was in possession of, covers an area of about 1,200 acres, and gives the alternative names of Fighting Island and Isle aux Dindes, and the Bartley plan shews that there were two fishing establishments on the extreme margin of the marsh, west of the firm land marked "Fighting Island."

I think, in view of all these considerations, that the words of the patent cannot be said to be ambiguous, and that they conform to the plan, and that the words "side of the channel" and its windings are satisfied by the meaning ordinarily ascribed to a channel; that is, what is bounded by the shore lines past which the body of the river flows—a line clearly indicated on the plan and distinguished from, and as being the border of, the marshy land.

To adopt the modern navigable channel as the meaning of the words in question is to narrow the words from their ordin-

ary signification, which is wide enough to include a passage which, while not wholly navigable for large vessels, may well have been navigable for small ones, especially those which might have effected a landing at the edge of the marsh where two of the fishing establishments are actually placed . . .

There is a consideration which should not be overlooked. The channels are spoken of in the patent as the American and British channels. These are colloquial designations indicating passages in the river rather than definite navigable channels owned wholly by each of the two nations. There are four channels in the river Detroit in this locality spoken of in the Ashburton Treaty of 1842, article VII., and the word "channel" between the islands in the river is therein used interchangeably with the word "passage," and all these four channels and those near the junction of the St. Clair river and lake are declared to be equally free and open, not only to ships and vessels, but to boats of both parties to the treaty.

There seems to be much force in the consideration given by Mr. Justice Sargant in Eastwood v. Ashton, [1913] 2 Ch. at p. 50, to the nature of the subject-matter which is being described, in determining whether a plan is to be treated as the vital and essential portion of the description. . . .

The Act 1 Geo. V. ch. 6 was passed on the 24th November, 1911. If the patent in question expressly grants the bed of the river Detroit, out to the navigable channel-bank, then of course the statute does not apply, and cannot limit it.

Two matters were argued in addition to the main question: one, whether the judgment for possession against the defendants other than Gauthier was proper, in view of the circumstances; and the other was directed to the judgment voiding Gauthier's license.

I do not think that the defendants (other than Gauthier) can be as summarily foreclosed as the respondent contends. There is a usual and proper way of terminating contracts where time has long ceased to be of the essence of the contract. These defendants claim to have paid $7,400; they are properly in possession under what they claim is a contract; and they are willing to complete it if they get the land out to the bank of the navigable channel. The main difference between the parties is as to what was bought and sold, but the plaintiff alleges that the defendants had no contract, but only an option to purchase.

In the view I have taken, the plaintiffs were not the owners of the land in dispute. It is a not unusual thing for the Court to refuse specific performance of a contract for the sale of

land where the contract presents a hardship on one side or the other (Davis v. Covey, 40 Ch.D. 601), or where there is a real dispute as to the area covered (see Earl of Durham v. Lepard, 34 Beav. 11, and Rudd v. Lascelles, [1900] 1 Ch. 815, 819); and I think the original defendants are not entitled at present to such a judgment against the plaintiff. No evidence was given, and only the options or contracts and letters put in; and the statements in the correspondence are not, as I read the evidence, admitted as proved. There is a question as to what was represented as the thing to be sold. After a careful reading of what has been filed, I am unable to say that there is no binding contract. I do not find any definite acceptance, but much money has been paid, and letters written on behalf of the plaintiff treat the matter as more than an unaccepted option. But it would not be fair at this stage to decide the matter in favour of one side or the other.

The parties must be left to work out their rights in some other way upon the basis of the present judgment or in case of appeal, when the question between the plaintiff and Gauthier is finally settled. I do not think, however, that, if they fail to arrange their differences, this judgment should be a bar to another action by either party at any time if it is necessary to bring this long-standing transaction to an end one way or the other. But, even if the plaintiff was entitled to possession, he is not entitled to mesne profits under the circumstances appearing in evidence. The judgment as to the defendant Gauthier declares that his license of occupation is void and should be cancelled. This is based upon what is called a deliberate fraud on his part. I have always understood that a charge of fraud should be clearly and specifically made when it is relied upon by any of the parties to an action. In this case it is not made at all in the pleadings, and was not supported before us; nor, in reading the evidence, can I see that attention was directed to it.

No doubt in certain cases the Court can, as pointed out by the learned trial Judge, in the absence of the Attorney-General, set aside a grant by the Crown if procured by fraud. But this remedy appears to be confined to cases where, if the patent is voided, the land reverts to the Crown. See remarks of Moss, C.J.O., in Florence Mining Co. v. Cobalt Lake Mining Co. (1909), 18 O.L.R. at p. 284.

It does not seem to have been extended to claims where the Crown has already parted with the *locus in quo* to another

party, and where, therefore, the theory that, upon the land reverting to the Crown, it can do justice to the rival claimants, is not applicable. This point was not taken in argument.

In the case of Farah v. Glen Lake Mining Co. (1908), 17 O.L.R. 1, it was asserted that the defendant's counterclaim could not be proceeded with unless a fiat from the Attorney-General had been obtained, but it was decided that a fiat was unnecessary. . . . In a case where possession is claimed and it is sought to oust the licensee of the Crown, it would seem to be reasonable that the Crown should be entitled to be heard and to defend that possession, if the title to the property is brought in question. Here a notice of some sort was served on the Attorney-General, but I am unable to find any authority for a summary notice to the Attorney-General except in 3 & 4 Geo. V. ch. 19, sec. 33, upon a constitutional question being raised.

But, apart from that, the point here is that there has been no charge of fraud, no investigation of fraud, and no notice to the defendant Gauthier that he was to defend himself against such an attack. It is as much contrary to natural justice to pronounce a person guilty of fraud or perjury, if in the proceedings taken he had no knowledge that such a charge was made or was being inquired into, and had no thought of meeting it, as it is to proceed against him in his absence; and the principle stated in Nicholls v. Cummings (1877), 1 S.C.R. 395, is carried to that extent. See also Maxwell on Statutes, 4th ed., p. 546.

In this case no charge of fraud, misrepresentation, or suppression is made against the defendant Gauthier. The pleadings disclose a case of overlapping boundaries only. The sole item of actual misrepresentation mentioned in the reasons for judgment is, that his lease did not cover the water front or the fisheries in any way, but only the shore, and that instead of one lease there were several which should have been mentioned. On looking at the lease of 1907, to which it is evident reference was made, the statement that it did not cover the water front or the fisheries in any way, but only the shore, is an accurate statement. . . .

The suppressions charged, summarised, are of facts which would go to shew that the Paxtons had exercised rights over the water lots in question, and therefore had a title or claim. In the reasons for judgment, it is stated that the defendant Gauthier could, as the leases to him had expired, question these rights, and that the Crown had knowledge of an adverse claim.

It had knowledge of more than that; for on its file there is, as I have mentioned, an express statement on behalf of the Palms estate, through Clarke, Cowan, & Bartlet, their Windsor solicitors, in 1904, that the water lots surrounding the island had not been granted to them, and asking for a patent. The lease of January, 1907, was made by the Palms estate four years after the defendant Gauthier had been openly operating the fisheries.

The express disclaimer of the Palms estate was repeated in November, 1909, by the Detroit attorneys of the estate, to Behan; and that position was maintained in this action until after the defendant Gauthier was added; the original defendants pleading (par. 3) that they bought out to the channel-bank, and the plaintiff joining issue on that statement. The Ontario Government were not likely to be ignorant of the fact, if it be a fact, that the Dominion Government operated these fisheries from 1892 to 1903.

No witness from the Department of the Ontario Government concerned was called—and naturally so, where the only allegation was that the Crown grants overlapped; so that there is nothing to shew their state of knowledge at the time, a reasonable step to take if the fraud was said to be perpetrated on them. This is the more necessary, as the Minister's letter refers to evidence being before the Department when the license was granted. This may and probably was Gauthier's evidence; but that should not be left to surmise. It is not enough that a judgment may be right; it must be founded on evidence of the facts on which it rests.

Under these circumstances, and apart from the principle I have alluded to, I think there is no such proof as is required from a party alleging fraud in another, and that that must be the test where a finding of fraud is made, although not asked for in the pleadings or adopted by any of the parties.

The judgment should be reversed, and the proper declaration made as indicated as to what passed under the patent to Paxton. As to the original defendants, so much of the judgment as orders them to give up possession to the plaintiff should be set aside, and judgment entered dismissing the claim for possession and mesne profits, and also dismissing the counterclaim of these defendants for specific performance, with a declaration that the dismissal of these claims is not to be a bar to any subsequent action arising out of or by reason of the alleged contract or contracts. There should also be a declaration that the rights of the plaintiff, if any there be, arising out of any practice of the

Department of Crown Lands, in dealing with owners of the shore or arising because of their ownership thereof, are not interfered with by this judgment.

There should be no costs of the action or counterclaim between the plaintiff and the original defendants. The judgment annulling Gauthier's license of occupation should be set aside, and the action as to him dismissed with costs.

NOVEMBER 3RD, 1913.

*McDOUGALL v. SNIDER.

Water and Watercourses—Overflow of Mill-pond—Injury to Neighbouring Property—Opening of Flood-gates—Evidence—Absence of Negligence—Heavy Rainfall—Act of God—Proper Precautions—Grounds for Apprehension—Cause of Action—Prima Facie Liability for Escape of Water.

Appeal by the plaintiff from the judgment of the Senior Judge of the County Court of the County of Waterloo, after trial without a jury, dismissing an action brought in that Court to recover damages for injury to the plaintiff's land and other property by flooding.

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

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

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

The judgment of the Court was delivered by MEREDITH, C. J.O.:—The respondent is the owner of a mill, operated part of the time by water power, and, for the purposes of it, his predecessor in title constructed, and the respondent had for many years maintained, a mill-pond, in which the waters of a small stream are collected and from which they are led to the mill through a raceway at the entrance, to which are gates for controlling and regulating the flow of the water, and the water is returned to the stream in the ordinary way by means of a tail-race. The appellant is the owner of a lot which lies contiguous to the stream and below the dam, and upon it he has erected a house in which he lives with his family, a stable, and some outbuildings.

*To be reported in the Ontario Law Reports.

On the morning of Sunday the 1st September, 1912, as the statement of claim alleges, the water from this mill-pond overflowed its banks and "ran to and overflowed" the appellant's lots, causing injury to it and to the house and damage to his furniture and some other personal property.

The appellant bases his claim upon two grounds: (1) a breach of the duty which he contends rested on the respondent to take such precautions as would have prevented the waters of the mill-pond from escaping and doing damage to others; (2) negligence of the respondent in the management of the flood-gates and in failing to control the flow of the water so as to prevent its doing damage to others.

The evidence as to the main question involved was not contradictory and the learned Judge, upon a full consideration of it, came to the conclusion that the negligence charged had not been proved; and with that conclusion we agree.

It is not open to question that during the day upon which the appellant's lot was flooded, and part of the previous night, there had been very heavy rains, which caused the waters of the stream to rise; and it is a fair conclusion upon the evidence that, when the mill was shut down about six o'clock on the previous Saturday evening, for want of sufficient water to run it, there was no reason to apprehend any abnormal rise in the height of the water, and nothing to suggest that exceptional precautions would be necessary to prevent the banks of the mill-pond being overflowed or to prevent damage being done to the appellant's property.

The evidence preponderates strongly against the view that there was any negligence on the part of the respondent's servants in the way in which the flood-gates were operated, when it was discovered that, owing to the rise in the height of the water and the volume of it that was coming down the stream, it was necessary for the preservation of the dam that the flood-gates should be opened. The immediate object of the respondent's servants in opening the flood-gates was, no doubt, to prevent the loss to their employer which would have resulted from the dam being swept away; but the evidence establishes beyond doubt, we think, that, had the dam been carried away, greater damage would have been done to the respondent's property than was occasioned by the opening of the flood-gates.

It was contended by the appellant's counsel that the flood-gates should have been opened when the mill was shut down on Saturday; but there was, as I have said, nothing to indicate that it was necessary that that should be done; and the result of doing it,

had the exceptional increase in the volume of water not occurred, would have been to empty the mill-pond and so prevent the mill from being operated until the flood-gates had been closed, and the pond again filled, a proceeding which, under normal conditions, would have required several days to accomplish. Besides this, the evidence establishes that, if the gates had been opened, as the appellant contends they should have been, the damage to his property would not have been avoided.

In our opinion, therefore, the appellant's case, so far as it is based on negligence, fails.

The contention that it was the duty of the respondent to prevent at all hazards the waters of the mill-pond from escaping from it to the injury of others is also, in our opinion, not well-founded. The appellant in support of this contention invokes the rule laid down in Fletcher v. Rylands (1866), L.R. 1 Ex. 265; Rylands v. Fletcher (1868), L.R. 3 H.L. 330. . . .

The question of law left undecided in Fletcher v. Rylands came up for decision a few years later in Nichols v. Marsland (1876), 2 Ex. D. 1. . . . In that case, as in the case at bar, the plaintiff invoked the rule in Fletcher v. Rylands; but the Court held that the question of law left undecided in that case—whether the defendant could excuse herself by shewing that the escape of the water was due to vis major or the act of God—should be answered in the affirmative.

The rule was also considered by the Judicial Committee of the Privy Council in the recent case of Richards v. Lothian, [1913] A.C. 263; and what was laid down in Nichols v. Marsland was approved and was held to apply where the escape was due to the malicious act of a third person—"if indeed," as Lord Moulton said in stating the opinion of the Committee, "that case is not actually included in the phase vis major or the King's enemies" (p. 278).

It may be also that the case at bar is one that does not come within the principle laid down in Fletcher v. Rylands, for the reasons given by Lord Moulton, at p. 280. "It is not," said he, "every use to which land is put that brings into play that principle. It must be some special use bringing with it increased danger to others, and must not merely be the ordinary use of the land or such a use as is proper for the general benefit of the community." It is, however, unnecessary for the purposes of this case to consider it from that point of view. . . .

[Quotation from the judgment of the Court delivered by Mellish, L.J., in Nichols v. Marsland, 2 Ex.D. at p. 5.]

The appellant's case fails for the same reason that that of the plaintiff in Nichols v. Marsland failed.

In addition to these reasons, the appellant's case also fails for the reason which led to the failure of the plaintiff in Thomas v. Birmingham Canal Co. (1879), 49 L.J.Q.B. 851. The facts of that case were not unlike those of the case at bar.

. . .

[Quotation from the judgment of the Court delivered by Lush, J.]

Appeal dismissed with costs.

NOVEMBER 3RD, 1913.

WATERS v. CITY OF TORONTO.

Malicious Prosecution—Responsibility of Municipal Corporation for Prosecution of Offender against By-law—Evidence.

Appeal by the plaintiff from the judgment of DENTON, Jun. Co.C.J., dismissing an action brought in the County Court of the County of York to recover damages for malicious prosecution, and tried without a jury.

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

H. H. Dewart, K.C., and N. S. Macdonnell, for the plaintiff.

C. M. Colquhoun, for the Corporation of the City of Toronto, the defendants.

The judgment of the Court was delivered by MEREDITH, C.J.O.:—The action is for malicious prosecution, and the allegations of the statement of claim are: that the respondent corporation on the 30th October, 1912, falsely and maliciously and without any reasonable or probable cause, caused the appellant to be arrested and imprisoned (par. 2); and that on the following day the respondent corporation, falsely and maliciously and without any reasonable or probable cause, caused a police constable named David MacKenney to appear as informant before a Justice of the Peace, and to charge that the appellant had been disorderly on the previous day, contrary to a by-law of the respondent corporation (par. 3).

Evidence was adduced by the appellant establishing that on the 30th October, 1912, he was arrested by Sergeant Martin, a member of the police force of Toronto, and afterwards taken to the police station; that the reason for the arrest was the refusal of the appellant to stop the work which he was superintending of erecting steel poles and putting up transmission wires on a city street for the Toronto and Niagara Power Company. It was also shewn that McKenney acted in obedience to the direction of Sergeant Verney, acting Inspector of No. 7 Division, and that the latter acted under the written instructions of the Chief Constable.

It was proved that on the 31st October, 1912, McKenney laid an information before the acting Police Magistrate for the city, charging the appellant and eight other men with having been disorderly, contrary to a city by-law; that they were remanded from time to time until the 30th of the following December, when they were all acquitted; and an endeavour was made to fix the respondent corporation with responsibility for these proceedings.

It appeared in evidence that previous to the arrest of the appellant there had been disputes between the respondent corporation and the power company as to the latter's right to erect its poles in the city streets; that on the 2nd October, 1912, the Mayor had written to the Chief Constable authorising him "to prevent the erection of certain steel towers by the Toronto Power Company," and that an attempt on that day to erect the poles had been stopped owing to the intervention of the police, acting under the authority of this letter. On the following day, a letter was written by the chief engineer of the power company to Mr. Harris, the respondent corporation's Commissioner of Works, in which, after stating that, owing to a misunderstanding of the company's foreman of construction, he had started to erect the poles, although he asserted that he had no intention of stringing wires, he went on to say: "I trust that you will consider this a misunderstanding rather than an attempt to put this through without your consent and apologise for the situation that has arisen;" and concluded by asking Mr. Harris to forward his consent or advise of his objection.

On the 12th October, 1912, Harris replied to the chief engineer advising him that the consent would not be given.

In the meantime, at a meeting of the Board of Control held on the 8th of the same month, a communication was read from the City Solicitor advising that he had received an application

on behalf of the Toronto and Niagara Power Company to erect poles for the purpose of crossing the Hydro-Electric power line on Davenport road and Bathurst street, and that the drawing No. 329, accompanying the application, shews the erection of towers instead of poles as mentioned in the application, and recommending that the application should be refused; and there was also read a communication from the Commissioner of Works forwarding a copy of a letter from the chief engineer of the Toronto Power Company Limited, covering the matter of the application referred to in the solicitor's communication, whereupon it was ordered "that the City Solicitor and the Commissioner of Works be advised that the Board of Control, on behalf of the city, refuse to locate the poles mentioned in the application of the Toronto Power Company, and further order that the police department be authorised to prevent the poles in question being erected."

This action of the Board of Control was not communicated to the police authorities, nor was it reported to the Council.

On the 17th October, 1912, a letter was sent by the power company to the Commissioner of Works, informing him that the city's consent had been asked "as a matter of courtesy only," notifying him that the company proposed to carry out the work with the least possible delay, and asking to be informed of the city's attitude in the matter. To this letter the Commissioner replied, on the 25th of the same month, that he had nothing to add to his letter of the 12th October.

There was no evidence of any other communication, written or verbal, from the Mayor to the Chief Constable or the police authorities after the letter of the 2nd October to which I have referred; and it was assumed at the trial—although there was not a tittle of evidence to support the assumption—that the action of the police authorities of which the appellant complains was taken under the impression that it was authorised by that letter.

We are of opinion that the letter of the Mayor of the 2nd October did not authorise nor assume to authorise any such action as was taken by the police authorities, and that the resolution of the Board of Control was not a ratification of what the Mayor had done, nor would it have been, even if it had been communicated to the police authorities, any authority for their action.

The authority in both cases was to prevent the erection of the poles or towers, and was not, and cannot by any process of

reasoning be treated as, an authority to arrest or to prosecute anybody.

What really happened, I have no doubt, was that in the carrying out of the Mayor's directions to the Chief Constable the appellant resisted the members of the police force, and in so doing was, in the opinion of the police sergeant, guilty of disorderly conduct within the meaning of the city by-law, and that the officer, as a conservator of the peace, and not under the authority of the Mayor's letter, did the acts of which the appellant complains.

The appellant's case, therefore, failed on the facts; but I agree that if it had been otherwise, and the authority given by the Mayor had been to arrest, the appellant must have failed, for the reasons given by the learned Judge; the case being not distinguishable from Kelly v. Barton (1895), 26 O.R. 608, 22 A.R. 522.

The appeal should be dismissed with costs.

NOVEMBER 3RD, 1913.

VANDEWATER v. MARSH.

Building Contract—Mistake in Construction of Foundations—Failure in Performance of Conditions of Contract—Refusal of Architect to Certify for Payment of Contractor—Absence of Fraud or Collusion—Condition Precedent—Extras—Absence of Written Sanction of Architect—Costs—Discretion.

Appeal by the plaintiff from the judgment of KELLY, J., 4 O.W.N. 882.

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

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

W. S. Morden, K.C., for the defendant company.

W. N. Tilley, for the defendant Herbert.

The judgment of the Court was delivered by MEREDITH, C.J.O.:—The action is brought to recover the contract-price for "the excavating, erection of wooden forms and concrete work, and supplying the materials therefor, for a foundry building," for the respondent company, and the value of extra work done and materials provided by the appellant in connection with the building.

The contract is dated the 10th May, 1912, and provides that the work shall be done conformably to the plans, specifications, and details prepared by the respondent Herbert, who was the architect of the building, and that it shall be done "in all things to the entire satisfaction of the architect."

The provision as to payment for the work is made subject to the condition that the covenants, conditions, and agreements of the contract have been in all things strictly kept and performed by the appellant; and the contract also provides that no payment shall be made without the production of the architect's certificate "as in the conditions provided."

The contract contains no other provision as to the architect's certificate; and no other document was adduced providing that the production of it should be a condition precedent to the right of the appellant to claim payment.

The appellant has been unable to obtain the certificate of the architect; and in his statement of claim—presumably because the production of the certificate was, in the opinion of the pleader, a condition precedent to the right of the appellant to claim payment, and to get rid of the supposed effect of that condition—it is alleged that the appellant performed the work and supplied the material as provided by the contract, and that, "after all necessary times had elapsed," he requested the respondent Herbert "to issue to him the usual certificate to enable him to receive his payment from the defendants Marsh and Henthorn Limited (the respondent company), but the said defendant Herbert refused to grant the said certificate and still refuses to grant the same, with the knowledge of his co-defendants Marsh and Henthorn Limited, and the said Marsh and Henthorn Limited, although requested by the plaintiff to pay him the amount of the said contract-price, refused and still refuse to do so."

The reason for the refusal of the architect to give the certificate was due to the fact that the appellant had so laid out one of the buildings and done the concrete work that the walls of the foundation were so placed that it was not, and the building to be erected on it would not, have been, as they were designed and shewn on the plans and drawings to be, rectangular in form, which necessitated a change in the structural steel work for the building, and other changes, which involved considerable additional expense to the respondent company.

It was sought by the appellant to throw the responsibility for this mistake on the respondent company, because, as it

was said, the appellant when beginning his work was misled by stakes which had been planted by the engineer of the respondent company, and which the appellant assumed were intended to indicate the position which the building was to occupy. In this attempt the appellant failed at the trial; and we see no reason for differing from the conclusion of the learned trial Judge as to it.

It was also contended that, as the respondent company had gone on with the erection of the superstructure upon the foundation which the appellant had constructed, instead of requiring him to rectify the mistake, as he contended he could have done at a comparatively small expense, the respondent company was now not entitled to rely upon the departure from the terms of the contract which the mistake involved.

This contention also failed at the trial, and rightly so, we think. What was done by the respondent company was really in ease of the appellant; and the proper conclusion upon the evidence is, that the appellant was informed that, while the respondent company would not insist upon the foundation walls being rebuilt, there would be deducted from the contract-price of his work the amount of any additional expense the respondent company should be put to in connection with the work the other contractors were to do, and that the appellant assented, or at least did not object, to that course being taken.

No case was made, on the pleadings or at the trial, of collusion between the respondents so as to dispense with the necessity of the production of the architect's certificate, if, by the terms of the contract, the production of it was a condition precedent to the right of the appellant to claim payment for his work.

The appellant is not, in our opinion, entitled to recover, even if the production of the architect's certificate is not a condition precedent to his right to be paid. It was by the contract a condition precedent to the right of the appellant to be paid the contract-price that the covenants, conditions, and agreements of the contract should have been in all things strictly kept and performed by him, and that the work should have been done conformably to the plans, specifications, and details prepared by the architect and in all things to his entire satisfaction, and neither of these conditions has been performed by him.

It is open to grave question whether the production by the appellant of the architect's certificate is necessary. The provision of the contract as to this is incomplete. The words "as in the conditions provided" qualify the preceding words "but

no payment to be made without the production of the architect's certificate." There is, as I have said, no other provision as to it in the contract, and no other document to which the contract refers, containing any provision as to it; and it may be, therefore, that the provision of the contract which the respondents invoke has no effect. It is, however, unnecessary, in the view we take as to the effect of the other provisions of the contract to which I have referred, to decide that question.

The claim for extra work and materials, so far as it is in question on the appeal, is for work done and materials supplied owing to an increase in the size of the building. The contract provides that no claim for any work in addition to that shewn in the drawings or mentioned in the specifications, unless it was sanctioned by the architect in writing previous to its having been done, shall be allowed.

There was no written sanction of the architect for the doing of the extra work and supplying the extra materials, payment for the value of which the appellant claims, and the right to recover it is, therefore, excluded by the contract.

The work was done and the materials were supplied upon the verbal order of the architect, and there is no just reason why the appellant should not be paid for it.

If the respondent company stands upon its strict right and will not pay for them, it will be proper, in the exercise of our discretion as to the costs, to deprive the company of the costs of the appeal.

The result is that the judgment must be affirmed and the appeal dismissed with costs if the respondent company elects to pay for the extras, but otherwise without costs.

We cannot part with the case without expressing regret that the litigation should have been rendered necessary by the refusal of the appellant to agree to what appears to be the reasonable deduction from the contract-price which was proposed by the respondent Herbert.

NOVEMBER 3RD, 1913.

*McLEAN v. CROWN TAILORING CO.

Negligence—Excavation in Public Lane—Absence of Guard—Loss of Horse Falling into Hole—Findings of Jury—Use of Lane for Unhitching Horse—Reasonable Use—Excavation Made by Independent Contractor—Danger to Persons Using Lane—Liability of Person for whom Work Done—Contributory Negligence—Relief over against Contractor—Maintenance of Barricade—Contract—Time—Oral Evidence—Admissibility—Questions submitted to Jury.

Appeals by the defendants Brandham and Strath from the judgment of DENTON, Jun. Co.C.J., upon the findings of a jury, in favour of the plaintiff, in an action in the County Court of the County of York; and appeal by the defendant Brandham from the judgment of the same learned Judge dismissing Brandham's claim against his co-defendant Strath for relief over.

The appeals were heard by MEREDITH, C.J.O., MACLAREN, MAGEE, and HODGINS, JJ.A.

A. J. Russell Snow, K.C., for the defendant Brandham.

W. A. McMaster, for the defendant Strath.

R. D. Moorhead, for the plaintiff.

The judgment of the Court was delivered by MEREDITH, C.J.O.:—The action is brought to recover damages for the loss of a horse of the plaintiff, which, at about eight o'clock in the evening of the 2nd February, 1913, fell into an excavation adjoining and extending for about two feet into a public lane about twelve feet wide, and was killed. The excavation had been made by the defendant Strath under a contract with the defendant Brandham, one of the provisions of which is, that Strath shall "form barricade around excavation to prevent any one from falling in."

The plaintiff is a cartage agent, and has a shed for storing his waggons and a stable for his horses, the entrance to which is from the lane and opposite to one end of the excavation.

On the night of the accident, a rough and dark night, the plaintiff drove his horse and waggon in from Euclid avenue, which runs at right angles to the lane, got off his waggon,

*To be reported in the Ontario Law Reports.

and backed it into the shed. The shed was not deep enough to permit the horse as well as the waggon to be backed, so as to be entirely within it, and the neck and shoulders of the horse were outside the shed. The plaintiff then unhitched the horse; and, as he undid the last trace, the horse stepped out of the shafts too far, and fell into the excavation. There was a spring on the whiffle-tree which held up the shafts and kept the weight of them off the horse's back; and it was apparently the unfastening of this spring which caused the accident, as otherwise the horse would have turned around and gone into the shed, and through it into the stable. It was this that he was apparently intending to do when he stepped out of the shafts and turned; but he appears to have turned too far and in that way to have fallen into the excavation. According to the testimony of the plaintiff, there was no barricade on the side of the excavation which adjoined or encroached on the lane, and no light there.

It was not disputed that the excavation, if not protected by a sufficient barricade, constituted a source of danger to persons using the lane; and the testimony of the plaintiff was practically uncontradicted, except possibly as to a part of the barricade which was put up by the defendant Strath, pursuant to his contract, having been standing when the accident occurred.

The jury, in answer to questions submitted to them, found that there was "no sufficient barricade erected at the place where the horse fell in on the night in question," and that "the absence of the barricade was a negligent omission on the part of the defendants;" and there was ample evidence to support their findings.

It was argued at the trial and before us that the use the plaintiff was making of the lane when the accident happened was an unlawful one, and that he was, therefore, not entitled to recover; but it was found by the jury that he was "making the customary and proper use of the lane with his horse on the night of the accident;" and that finding was, we think, warranted. The cases cited by counsel for the defendant Brandham have no application to the circumstances of this case, and no case was cited by him which supports his contention. If the contention were well-founded, it would be unlawful for a merchant whose premises abut on a highway to use it for the purpose of unloading merchandise that was being taken into his warehouse or loading his waggon with merchandise that was being sent out; and many of the every-day uses of highways would be unlawful. . . .

[Reference to Harrison v. Duke of Rutland, [1893] 1 Q.B. 142, 146-7; Benjamin v. Storr (1874), L.R. 9 C.P. 400; Fritz v. Hobson (1889), 14 Ch.D. 542.]

In the case at bar, what the plaintiff did upon the lane inconvenienced no one; and the jury were, in our opinion, well warranted in finding that the use he was making of it was a reasonable one.

It was also contended that, the work of making the excavation having been intrusted to an independent contractor, the defendant Brandham was not liable. It is a well-established rule of law that "an employer cannot divest himself of liability in an action for negligence by reason of having employed an independent contractor, when the work contracted to be done is necessarily dangerous or is from its nature likely to cause danger to others, unless precautions are taken to prevent such danger:" Halsbury's Laws of England, vol. 21, par. 797, p. 474, and cases there cited.

The case at bar falls well within this rule of law, and the contract entered into between the defendants, by its provision as to the barricade, shews clearly that it was in the contemplation of the parties that it would be dangerous to others if the excavation were not guarded.

It was also contended that the plaintiff was guilty of contributory negligence in having unharnessed his horse in the way in which he did, and in close proximity to the excavation, which he knew was unguarded. The jury have, however, found against this contention; and we do not think that, having regard to all the circumstances, their finding should be disturbed.

There remains to be considered the question of the right of the defendant Brandham to relief over against his co-defendant. The provision of the contract as to the barricade is ambiguous. It is not, in terms at least, said that the barricade is to be maintained by the defendant Strath, nor is any provision made as to the time during which it should be maintained. The absence of any provision as to the time during which the barricade was to be maintained lends support to the contention of the defendant Strath that all he contracted to do was to erect the barricade. Though I am inclined to the opinion that the word "form" as used in the contract is synonymous with "construct," and that the defendant Strath is right in his contention, it is not necessary, in the view we take, to decide the question.

Strath testified that he kept up the barricade until the carpenters had come to work on the building, and that, when the

contract was signed, it was stated by the architect who acted in the matter for the defendant Brandham that the barricade was to be a temporary one and that it would be replaced by the carpenters when they came to work on the erection of the building. This was denied by the architect, but the jury apparently have accepted Strath's account of the matter, for they found that it was not the "duty of the defendant Strath to have maintained the barricade until his contract was completed."

It was contended that the evidence of Strath was inadmissible, but the learned Judge admitted it, and we think he was right in doing so. One of the exceptions to the general rule as to the admission of parol evidence is, where a contract, not required by law to be in writing, purports to be contained in a document which the Court infers was not intended to express the whole agreement between the parties, and the evidence is of an omitted term expressly or impliedly agreed upon between them before or at the same time, if it be not inconsistent with the documentary terms: Phipson on Evidence, 5th ed., p. 548.

It was also contended that the learned Judge left to the jury the question of the construction of the provision of the contract as to the barricade, instead of himself construing it. Although the form of the question submitted to the jury which was directed to that part of the case seems to indicate that that was done, reading it in the light of the evidence and the charge it was not so, but what was really left to the jury was the question whether it had been agreed between the defendant Strath and his co-defendant, as the former deposed, that his obligation to maintain the barricade was to be temporary, lasting only until the carpenters came to work on the building; and that was a question proper to be submitted to the jury.

The result is, that the appeals fail, and must be dismissed with costs.

NOVEMBER 3RD, 1913.

*RE NATIONAL TRUST CO. AND CANADIAN PACIFIC R.W. CO.

Railway—Expropriation of Land—Compensation — Award — Value of Land—Evidence — Expert Witnesses — Sales of Neighbouring Parcels—Admissibility — Weight — Market Value—Information as to Sales—Hearsay Testimony—Compulsory Purchase—Addition of Ten per Cent. to True Value —Interest—Appeal—Costs.

Appeal by the railway company from an award of arbitrators of compensation to the claimants for land at the corner of Peter and Wellington streets, in the city of Toronto, taken for the railway.

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

G. F. Shepley, K.C., and G. W. Mason, for the railway company.

Glyn Osler, for the National Trust Company, the claimants.

The judgment of the Court was delivered by HODGINS, J.A.:—Objection was made to the admissibility of the evidence of certain witnesses, on the ground that, while it professed to be expert testimony, it consisted only of information collected about sales in the neighbourhood and based on ideas flowing from the general experience of valuators and estate agents; not upon personal knowledge of the transactions.

The admissibility of evidence of the sales of other lands was also contested, on the ground that each was necessarily *res inter alios acta*. This is true in a sense, but that maxim does not exclude matters which are in fact relevant to the question in issue.

The illustration in Best on Evidence, 10th ed., p. 420, as to the effect of a receipt from a third person, shews this. See also Wills on Evidence, 2nd ed., p. 66; Broom's Legal Maxims, 7th ed., pp. 732, note (L), 735.

The issue, of course, is the value of the land taken; and value is a relative term; there must be some standard to which it is related. . . .

*To be reported in the Ontario Law Reports.

[Reference to Wigmore on Evidence, Can. ed. (1905), vol. 1, sec. 712, p. 810.]

In most of the United States, sales of similar properties are regarded as admissible evidence, in the absence of any market value: *e.g.*, in Illinois, Culbertson v. Chicago (1884), 111 Ill. 651, and Landquist v. Chicago, 200 Ill. 69; in Massachusetts, Paine v. Boston, 4 Allen 168, Sirk v. Emery (1903), 67 N.E. Repr. 668. In New York the rule is different (Jamieson v. K. County Electric R. Co., 147 N.Y. 322). But even there it has been held that a person claiming that his property has been damaged by the operation of an elevated railway may prove that damage by reference to the general course of values in properties situated in the neighbourhood, and shew that his property has suffered either by actual depreciation or by failing to share equally in the benefits accruing generally to the vicinity in an appreciation of values. This was the opinion of the Court of Appeal in New York in Levin v. New York Electric R. Co. (1901), 165 N.Y. 572, . . . Langdon v. New York (1892), 133 N.Y. 628. . . .

In England the practice is, speaking generally, in accordance with that adopted in New York: Wills on Evidence, 2nd ed., p. 66—though his statement of the third exception, to be found at p. 67, indicates that community of locality is sometimes the foundation for evidence not otherwise admissible: Doe v. Kemp (1835), 2 Bing. N.C. 102; Dendy v. Sampson (1856), 18 C.B. 831. . . .

[Reference to Sheen v. Bumpstead, 1 H. & C. 357, cited in Phipson on Evidence, 5th ed., p. 370; Dodds v. South Shields Union, [1895] 2 Q.B. 133; Cartwright v. Sulcoates, [1899] 1 Q.B. 667, [1900] A.C. 150; Phipson, 5th ed., p. 149; Secretary of State for Foreign Affairs v. Charlesworth, [1901] A.C. 373; Gosford v. Alexander, [1902] 1 I.R., at p. 142.]

In Canada, so far as I am able to see, there is little authority. In the Supreme Court "market value" is spoken of as evidenced by prior sales of the different parts of the property in question: see Dodge v. The King (1906), 38 S.C.R. 149, pp. 155, 156; and that has been applied by the Exchequer Court in The King v. Congdon, 12 Ex. C.R. 275, as covering evidence of purchases of adjoining properties. That class of evidence was there admitted without objection, and its weight and value pointed out by the learned Judge.

Previous to the Dodds case, one aspect of the matter had

been considered in this Court in the case of Re Small and St. Lawrence Foundry Co. (1896), 23 A.R. 543. . . .

I think the weight of judicial opinion, in cases of compensation or the like, is to admit the evidence of other sales, and to treat its weight, after cross-examination, as a matter for the tribunal to deal with. And when Mr. Justice Burton (in the Small case) points out that this class of evidence tends to raise "a multiplicity of collateral issues confusing the jury and acting as a surprise upon the parties," I think he states the full extent of the objection to it. Evidence of previous sales of the same property is open to many, if not all, of the objections raised to evidence of sales of neighbouring properties, and may involve issues no less confusing—even if the sales are recent and under similar circumstances.

In these business days, in which it is possible by means of adjournment or of conference to guard against surprise, that element may be safely left to the discretion of the presiding Judge or to the arbitrators. I am not convinced that the issues raised are wholly collateral. It is rather that the evidence may be of no practical value without knowledge of the circumstances in each case: per Meredith, J.A., in Re Toronto Conservatory of Music and Governors of the University of Toronto (1909), 14 O.W.R. 408, at p. 410. This is an objection to its weight rather than to its admissibility; and, as Wigmore, Can. ed., vol. 1, p. 463, points out, it is evidence which the commercial world perceives and acts upon.

No doubt, there are elements which such evidence must possess before it should be received. They are, substantial similarity in the conditions regarding the property, proximity of situation, and, where possible, a likeness in use or in potentiality, and the sales should be recent and under like terms. . . .

Dealing with the case in hand, upon the principle referred to in Re Ketcheson and Canadian Northern Ontario R.W. Co., ante 36, I do not think that any of the sales, except one, can be said to afford any safe basis of value. They are not shewn to come within the limitations which I have stated, and similarity of conditions is not proved.

It is said that the sale and purchase of an undivided half of the property in question here is the only relevant fact. I do not agree with this. It is evidence to establish a market value, under Dodge v. The King, supra. But, if the rule is adopted, as I think it should be, that sales of similar and near-by properties may be admitted in evidence, it is not the only factor.

The award seems to rest mainly upon the comparison afforded by the sales of the property on the corner of Peter and Mercer streets, about 80 feet north of Wellington street.

Judged by this standard, and having regard to the probable increase in value during a short period before the location of the railway was definitely settled, it is not difficult to arrive at a value of $335 a foot upon the Peter street frontage, on the 14th February, 1912. The difference in depth from Peter street is 67 feet, or about fifty per cent. greater in favour of the respondents' lot, and is enough to allow an independent frontage on Wellington street of 60 feet. But the fair result of all the evidence, admissible or inadmissible, does not warrant an advance beyond $335 a foot, and indeed renders it doubtful whether that is not too high.

It is not necessary to consider the question of the admissibility of the evidence objected to as based merely on information about reported sales and transactions without any first-hand knowledge, as the award, to the extent I have indicated, may be supported without it.

Nor is it incumbent on us to determine whether the proper conclusion to be drawn from the reasons given by the learned County Court Judge (one of the arbitrators) is that he arrived at the rate of $368.50 per foot by adding ten per cent. to what he thought was the true value of the land in question, or whether he merely intended to indicate that, viewed as a compulsory purchase, the rate of $368.50 per foot was justified, apart from that addition.

It may not, however, be out of place to point out that there is no express authority for adding ten per cent. except in one section of the Municipal Act. Mr. Justice Burbidge, in Symonds v. The King (1903), 8 Ex. C.R. 319, allows it as being usual in cases where the actual value of lands can be closely and accurately determined. It is said to be the practice in England, though it does not seem to be accepted as settled law. See Jervis v. Newcastle and Gateshead Water Co. (1895), 13 Times L.R. 14.

Mr. Cripps, a great authority upon compensation, speaks of it as "only justified as part of the valuation and not as an addition thereto:" 5th ed., p. 111. Arnold on Damages and Compensation, in his work published this year, adopts this statement, p. 230.

Both these questions can be left to be settled when they arise in such a way as to require determination.

The appeal should be allowed to the extent of reducing the award to a basis of $335 a foot on the Peter street frontage of 218 feet, *i.e.*, one-half of a total of $73,030, or $36,615.

No costs of the appeal.

Following Re Ketcheson and Canadian Northern Ontario R.W. Co., ante 36, the direction as to payment of interest should be stricken out of the award.

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*RE LIQUOR LICENSE ACT.

Liquor License Act—Local Option By-law—Voting on—Sec. 143a of Act (8 Edw. VII. ch. 54, sec. 11)—Application where By-law not Passed by Council.

Case stated for the opinion of the Court by the Lieutenant-Governor in Council, pursuant to 7 Edw. VII. ch. 52, as to the meaning and effect upon the issue of licenses of sec. 143*a* of the Liquor License Act, as enacted by 8 Edw. VII. ch. 54, sec. 11.

The case was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, and HODGINS, JJ.A., and RIDDELL, J.

J. R. Cartwright, K.C., and W. E. Raney, K.C., were heard against the power to issue licenses.

J. Haverson, K.C., contra.

The judgment of the Court was delivered by MEREDITH, C.J.O. (after setting out sec. 143a at length):—It is clear, we think, that the section has no application to anything but a by-law properly so-called; that is, one that has been finally passed.

There is no proceeding by which a proposed or inchoate by-law can be quashed or set aside or be declared invalid. Proceedings of that kind can be taken only with respect to something that has, at all events primâ facie, the force of law.

The steps taken with respect to a by-law submitted to the electors, which are mentioned in the section—the submission of the by-law to the electors and the declaration of the clerk or other returning officer that it has received the assent of three-fifths of the electors—are but steps, necessary ones, on the way to the passing of the by-law; and what is submitted to the electors and declared to have received the assent of three-fifths of those voting upon it, does not become a by-law until it is finally passed by the council.

*To be reported in the Ontario Law Reports.

NOVEMBER 5TH, 1013.

HOME BUILDING AND SAVINGS ASSOCIATION v. PRINGLE.

Mortgage—Judgment for Redemption or Sale—Reference—Parties—Assignees of Parts of the Equity of Redemption—Subsequent Incumbrancers—Addition of Parties in Master's Office—Account—Costs—Con. Rules 190, 716—*New Rules* 16, 404, 433, 468, 469, 490.

Appeal by the defendants McKillican and Smith from the order of BRITTON, J., 4 O.W.N. 1583, dismissing without costs an appeal from a report of the Local Master at Ottawa.

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

C. H. Cline, for the appellants.

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

The judgment of the Court was delivered by HODGINS, J.A.:—In this case the mortgagees began their action for sale as to the whole of the lands comprised in the mortgage, except three parcels released by them, and against thirty-three defendants. They discontinued against twenty-two. It is alleged that the thirty-three were not all that were interested in the equity of redemption. The action did not become fatally defective on the discontinuance; for, although it is quite clear that all parties interested in the equity of redemption must be parties, they may be made parties either by writ or in the Master's office: Jones v. Bank of Upper Canada, 12 Gr. 429; Buckley v. Wilson, 8 Gr. 566: "Where, after a mortgage being given, the equity of redemption is severed, so that different persons are entitled to redeem in respect of different parcels, these different persons must be made parties in a suit to foreclose the mortgage." See also, in England, Peto v. Hammond (1860), 29 Beav. 91; Caddick v. Cook (1863), 32 Beav. 70; Halsbury's Laws of England, vol. 21, p. 279; Griffith v. Pound (1890), 45 Ch.D. at p. 567; Gee v. Liddell, [1913] 2 Ch. 62.

Under Rule 190 (now 490), if it appears to the Court or Judge that, by reason of their number or otherwise, it is expedient to permit the action to proceed without the presence of all, the Court or Judge may give direction accordingly, and may order the others to be made parties in the Master's office. After

judgment the Master may order persons interested in the equity of redemption, other than those already named in the writ, to be added in his office. This is the proper practice after judgment. See Portman v. Paul, 10 Gr. 458.

The reason for requiring all parties to be before the Court, or to have notice, is, that the mortgage account may be taken so as to bind all parties and so as to appoint either one day or successive days for redemption, and to enable redemption to be had by any party interested.

As put in Faulds v. Harper (1882), 2 O.R. 405, "The equity of redemption is an entire whole, and, so long as the right of redemption exists in any portion of the estate, or in any of the persons entitled to it, it enures for the benefit of all." The Court endeavours to make a complete decree, that shall embrace the whole subject, and determine upon the rights of all parties interested in the estate: per Grant, M.R., in Palk v. Lord Clinton (1806), 32 Beav. at p. 58.

If this were not so, no one whose land is sold, if sale is asked, as it is in this case, can be sure, if he redeems the mortgage, that all other parties interested are bound by the account, nor can the Master properly determine whether only part of the property should be sold "as he may think best for the interest of all parties" (old Rule 716), unless he have all parties before him. Nor can the mortgagor, which term includes all those interested in the equity of redemption, properly perform the duty of seeing to the parcelling out of the land so as to secure that enough and only enough is sold to pay the claim of the mortgagee: Beaty v. Radenhurst, 3 Ch. Chrs. 344. The importance of seeing that all parties interested in the equity of redemption are before the Court, and the difficulties that arise from any departure from the proper practice, may be seen from the case of Street v. Dolan, 3 Ch. Chrs. 227, and Imperial Loan Co. v. Kelly, 11 A.R. 526, 11 S.C.R. 676.

It is further objected that all subsequent incumbrancers were not added by the Master.

The respondent, the mortgagee, relies upon the judgment pronounced in this action on the 25th February, 1911, which recites the discontinuance against the twenty-two original defendants. This discontinuance, although recited in the judgment, was the respondent's own act, and is not equivalent to an order or direction under Rule 190 (old Rule).

The judgment was proper, as there still remained the right to add these parties in the Master's office before the final order is made: see Municipality of Oxford v. Bayley, 1 Ch. Chrs. 272.

I have examined the orders and judgments of Mr. Justice Sutherland, the Divisional Court in appeal therefrom, and the judgment of Mr. Justice Britton, now appealed from, in order to see whether any of them make any reference to the state of facts which was made clear in this appeal. I do not find that there is anything in these orders or judgments that cures the defects now apparent. Any difficulty caused by the judgment of Mr. Justice Sutherland disappears in view of the order made by the Divisional Court on appeal therefrom.

The remarks of Vankoughnet, C., in Portman v. Paul, 10 Gr. 458, seem to express the present situation. "If parties," he says, "will not take the trouble, more or less according to circumstances, to bring the proper parties before the Court, they have only themselves to blame, but they have no right to cast that labour upon the Court, and turn it into a Court of inquiry for their convenience."

I can see no escape from the conclusion that this matter must go back to the Master, so that he may add all those interested in the equity of redemption as parties. This is not done by serving a warrant, the practice adopted by the Master, as his report of the 6th November, 1911, shews, but by formal order making and advising them as parties: see Rule 404 (new Rule). There should be added as well all those having any lien, charge, or incumbrance upon the mortgaged premises or any part thereof subsequent to the plaintiffs' mortgage. The Master's report of the 13th May, 1913, states that this is not necessary, and in this he is wrong. I do not think that Rule 77 (new Rule), as to representation of classes of defendants, was intended to apply or can be made use of when the parties, though numerous, have all separate and distinct interests in land, and rights to exoneration and contribution which differ according to their title and the date of its acquisition. But the Master has power to order substitutional service in a proceeding in his office under Rules 16 and 433 (new Rules).

No effective order, in the absence of these parties, can be made in this appeal on any of the other questions argued, which will have to come up again, unless those now agitating them can, by the exercise of discretion, settle them out of Court. Nor have we power to make any order now under Rule 490 (new Rule).

No doubt the plaintiffs thought by their proceedings to save costs; but the result has been otherwise. The Master reports that the abstract brought in before him did not shew all the mortgage incumbrancers, nor the properties sold and discharged

by the plaintiffs. This is contrary to Rules 468 and 469 (new Rules).

Had the defendants, who are the appellants in this Court, made their position clear, instead of clouding the issue before the Master by designating the others interested in parts of the equity of redemption as subsequent incumbrancers . . . and entitled to notice as such, they might have had their costs. But, under the circumstances, there should be no costs of the appeal to this Court or to Mr. Justice Britton.

The judgment appealed from and the Master's report will be vacated, and the action remitted to the Master to be dealt with by him as indicated in this judgment.

NOVEMBER 5TH, 1913.

RE IRWIN AND CAMPBELL.

Arbitration and Award—Appeal—Valuation.

Appeal by the trustees of the Irwin estate from the order of MIDDLETON, J., 4 O.W.N. 1562.

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

W. N. Ferguson, K.C., for the appellants.

N. W. Rowell, K.C., and George Kerr, for Campbell.

THE COURT agreed with the decision of MIDDLETON, J., which followed that of FALCONBRIDGE, C.J.K.B., in Re Irwin, Hawken, and Ramsay, 4 O.W.N. 1562, and dismissed the appeal without prejudice to the rights of the appellants in pending litigation.

NOVEMBER 7TH, 1913

DAHL v. ST. PIERRE.

Vendor and Purchaser—Contract for Sale of Land—Default of Purchaser—Time of Essence—Waiver—Recognition of Contract as Subsisting—Necessity for Notice before Terminating Contract—Default of Vendor—Specific Performance—Ascertainment of Amount Due.

Appeal by the defendant from the judgment of LENNOX, J., 4 O.W.N. 1413.

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

F. D. Davis, for the defendant.

M. K. Cowan, K.C., and J. W. Pickup, for the plaintiff.

THE COURT dismissed the appeal with costs, being of opinion that there had been a waiver of the condition that time should be of the essence of the contract.

HIGH COURT DIVISION.

LENNOX, J. NOVEMBER 3RD, 1913.

RE HAMILTON.

Trusts and Trustees—Investment of Trust Fund—Trustee Act, 1 Geo. V. ch. 26, sec. 65—Scope of—Application for "Opinion, Advice, or Direction"—Fund to be Settled—Security—Encroachment—Advance—Lien.

Application by the executor and trustee under the will of the Honourable Robert Hamilton, deceased, for the "opinion, advice, or direction" of the Court, pursuant to sec. 65 of the Trustee Act, 1 Geo. V. ch. 26.

L. M. Hayes, K.C., for the applicant.

B. D. Hall, for Annie Seaborn Hill.

LENNOX, J.:—Annie Seaborn Hill is entitled to a share of the moneys of the estate of the late Honourable Robert Hamilton, under his will. Mrs. Hill's share is said to amount to about

$20,000. As to the manner of dealing with this money the testator in his will says: "I wish all my money that my daughter Annie Seaborn may inherit from me should be settled upon herself so that in the event of her marriage it will be impossible for her or her husband to encroach upon the same."

The construction of this will has already been submitted to the Court (Re Hamilton (1912), 4 O.W.N. 441, 27 O.L.R. 445), and the Chancellor has determined that the provision quoted is binding upon the executor and the beneficiary; and, after referring to Loch v. Bagley (1867), L.R. 4 Eq. 122, and its effect, and the form of settlement there approved of, his Lordship adds (27 O.L.R. at p. 450): "Some such form is applicable to the present case; there should be a trustee of the settlement provided, and a proper conveyance settled by the Master or a conveyancing counsel, if the parties cannot agree, to whom the trustee of the will may discharge himself by a transfer of the fund." (The Chancellor's decision was affirmed by the Appellate Division: Re Hamilton (1913), 4 O.W.N. 1170, 28 O.L.R. 534.)

Nothing has as yet been done in the way of settling the money in question upon Mrs. Hill. The present application is to have it determined whether the applicant, the executor and trustee under the will, "has discretion to advance the above named Annie Seaborn Hill, out of her share of the testator's estate," $8,500 upon security of a mortgage upon a dwelling-house valued at $8,000 and a building-lot valued at $3,000, in Calgary; and the security of a lien upon "the income and corpus of the remaining trust property of the said Annie Seaborn Hill."

It would, perhaps, be enough to say that the thing to be done before these trust funds are otherwise dealt with in any way is to transfer them to a trustee of the settlement, as directed by the judgment just quoted. But, aside from this, I entertain a grave doubt as to whether this is a case for "opinion, advice, or direction," within the meaning of sec. 65 of the Trustee Act. It can hardly have been intended that the judgment of the Court should be substituted for the judgment of the trustee as to the merits or value, as a security, of the property offered.

However, dealing with it upon the merits, I think I must treat it, so far as the mortgage is concerned, exactly as if it were an application for a loan by a stranger. Much as I regret it, I cannot advise or direct the applicant to make this advance to his sister, Mrs. Hill, out of the trust funds. I quite sympathise with him in his desire to do so; I quite realise that it would be

a great advantage to Mrs. Hill; and I believe that it would be prudently used, and would probably be repaid. But, although I can believe that in the result it may be safe, yet, having regard to well-recognised rules governing investments generally, and particularly having regard to the recognised rules affecting investments of trust funds, I cannot advise or regard this as a prudent or proper investment of trust money.

As to the proposed lien upon the remainder of the trust money, whether principal or interest, this, of course, is out of the question, as Mrs. Hill is to be restrained by the settlement from anticipation or encroachment; and for the trustee to concur in a charge upon the fund would be in itself a breach of trust.

It would not be right to make the beneficiaries, generally, contribute to the costs of this application. The costs of all parties will be paid by the executor, and charged against the share of Mrs. Hill.

LENNOX, J. NOVEMBER 3RD, 1913.

RE HARRISON.

Will—Construction—Codicils—Devise to Widow in Trust for Sale—Effect of Codicils—Beneficial Estate of Widow—Remarriage—Use of Corpus of Estate for Maintenance—Encroachment upon Capital—Estates of Beneficiaries.

Motion, upon originating notice under Rule 600 (new Rules), by the executors of the will of Martha Cox, deceased, for an order determining certain questions as to the construction of the will and the disposition of the estate of Henry Harrison, deceased, who was the first husband of Martha Cox.

F. F. Treleaven, for the executors.

J. A. Soule, for an adult beneficiary.

J. R. Meredith, for the Official Guardian, representing the infants.

LENNOX, J.:—Martha Cox, the testatrix, who was the widow of Henry Harrison, is a trustee of his estate, and the real estate is vested in her, amongst other things, expressly for the purpose of sale and distribution. She has an absolute power of disposal, and this is in no way affected by her second marriage.

By the will itself, without the codicils, all the real and personal estate of the testator was vested in the testatrix and two others, upon trust, as to the real estate and such part of the personal estate as was not specifically bequeathed, to divide and distribute it amongst certain persons and classes of persons upon the death or second marriage of the testatrix.

It is not necessary to consider whether the devise in trust, coupled with the direction to divide and distribute, conferred a power of sale or not; for, by the first codicil to his will, the testator substituted the testatrix as his sole trustee in the place of the three originally appointed, and constituted her sole devisee in trust with express power to sell and dispose of the real estate and the personal estate aforesaid.

These provisions of the will and codicil have nothing to do with what the testatrix took beneficially under the will, and are not affected by her second marriage, except perhaps that the marriage accelerates the time for the proper exercise of her powers and duties as a trustee.

I am not able to detect that the third codicil affects the power of sale of the testatrix either way.

What I have said, I think, disposes of the first and second questions submitted.

I shall now take up the fourth question, namely, whether the provisions as to the vesting of the real estate are revoked by the third codicil, and with it the formidable proposition submitted during the argument, namely, that the effect of the third codicil is to enlarge the estate of the testatrix to the extent of conferring upon her an estate in fee beneficially. I cannot read this codicil as cutting out the four classes of beneficiaries mentioned in the will or as conferring an estate in fee upon the testatrix. The testator is dealing with the maintenance of his widow, *as a widow*, and with maintenance alone; and, in my opinion, he is manifestly dealing with and providing for this maintenance during the period that he already by his will and first codicil provided for and limited, namely, for so long as she shall remain his widow, or until her death, if she does not marry again; and he provides that, whereas she has up to that time been restricted to the income, she shall not be restricted to the income alone, but shall have "the right in addition thereto to use the principal or so much thereof as she may require, according to her own judgment, for her support and maintenance."

So far it is clear that the testator's sole object was to supple-

ment the provision he had already made; and I can find nowhere an indication that the testator intended to change the *character* of the provision he had previously made. The argument, if I correctly apprehend it, was based upon the circumstance that in this case the testator does not refer to a second marriage, but only to the death of the testatrix.

This clause I take to be mere surplusage, an introductory paragraph to the general confirmation of his will, always to be found in codicils; and I take it to be clear that all that the testator intended to effect—all he started out to do and was doing—was completed with the language I have already quoted, ending with "support and maintenance;" and that all subsequent words were introduced for the purpose of making clear *what he was not doing*, namely, that he was not further or otherwise altering the will. The change is to give his widow a mere power of encroachment upon capital, as in Re Davey, 2 O.W.N. 467. Here absolute estates, clearly expressed and defined, were conferred upon the testator's son Luke and others by the will itself.

Such estates cannot be cut out or cut down by subsequent clauses or words of equivocal meaning, either in codicils or in the will itself: In re Jones, Richards v. Jones, [1898] 1 Ch. 438.

I am clearly of opinion that the estates or shares of the various beneficiaries vest as and when they would have vested if the third codicil had not been added.

Costs out of the estate.

MIDDLETON, J. NOVEMBER 7TH, 1913.

WILSON v. CAMERON.

Contract—Parent and Child—Oral Agreement to Convey Land—Ascertainment of Terms by Reference to Document Signed by Parties—Statute of Frauds—Part Performance—Conduct of Parties—Enforcement of Agreement by Son after Death of Father—Evidence—Corroboration—Conveyance by Administrator.

Action by two of the heirs-at-law and next of kin of the late J. H. Donaven, against the administrator of his estate and his son Charles W. Donaven, to have it declared that a certain agree-

ment bearing date the 25th February, 1911, was not binding upon the estate, and to restrain the administrator from conveying to the son the lands therein mentioned.

The action was tried at Guelph on the 5th November, 1913.

W. I. Dick, for the plaintiff.

C. L. Dunbar, for the defendant.

MIDDLETON, J.:—There is no serious dispute as to the facts. The late J. H. Donaven had two sons and three daughters, Charles being the oldest of the family. Charles remained at home to work the farm—the others, no doubt, doing their part so long as they remained at home. In 1908, Charles married. His father and mother then left the farm, and went to live in a cottage owned by the father. Charles remained upon the farm with his wife, and paid a rental.

A formal agreement was made, bearing date the 25th February, 1911, which recites the desire of the father to secure and assure to the son "for special and tender services rendered to him" (the father), and to the mother, the transfer to him of the lands in question, after the decease of the father and mother. The agreement then provides for the payment of an annual rental of $150; and the father covenants to convey the lands to the son, upon condition that the son pay the rental stipulated during the life of the father and mother, or the survivor, and properly care for the land, buildings and fences, "in default of which the said lands of the said party of the first part shall forthwith revert to the said party of the first part."

The son unfortunately had some domestic difficulties, the details of which are quite unimportant here. As the result of these difficulties he made up his mind to leave the farm. In January, 1912, he sold the chattel property, paid off a mortgage upon it in his father's favour, and went to Guelph. The father and his son-in-law then farmed the land upon shares. The father endeavoured to sell, but did not sell; and finally entered into some negotiations with another son-in-law, Turner, to rent him the farm. Before this arrangement was completed, the father went to see his son Charles, explained to him his desire and the mother's desire that Charles should return to the land; and the son yielded, agreed to go back, and ultimately did return at the end of September or the beginning of October, 1912. In the meantime, at another interview, the son asked the father

upon what terms he was to come back, and it was arranged that the terms should be the same as those set out in the formal agreement of February, 1911.

After the son returned, he paid rent and lived up to his obligations under the agreement in question. The father and mother were both killed in a railway accident on the 21st July, 1913. The son now claims the land under the written agreement, or, in the alternative, under the verbal agreement made when he returned to the farm.

I accept the evidence of the son in its entirety, and I think it is amply corroborated, if corroboration is necessary, by the other evidence given on his behalf. I think there was part performance of the contract made at the time of the return of the son to the farm, so as to take the case out of the Statute of Frauds.

The plaintiffs rely upon Maddison v. Alderson, 8 App. Cas. 467. While in that case it was held that there was no part performance and that the statute must have its operation, the reasoning appears to me altogether in favour of the defendant. As put by the Earl of Selborne (p. 476): "So long as the connection of those res gestæ (i.e., res gestæ subsequent to and arising out of the contract) with the alleged contract does not depend upon mere parol testimony, but is to be reasonably inferred from the res gestæ themselves, justice seems to require some such limitation to the scope of the statute" as that recognised by the equitable doctrine or part performance.

Possession, the payment of the stipulated rent, the making of repairs upon the barn, the removing of the large stones from the land, are all acts, it seems to me, referable to the contract, and not consistent with any other relationship between the parties. See Hodgson v. Husband, [1896] 2 Ch. 428; Bodwell v. McNiven, 5 O.L.R. 332; Williams v. Evans, L.R. 19 Eq. 457; Dickinson v. Barrow, [1904] 2 Ch. 339.

Here there was undoubtedly a parol contract which could be specifically performed if in writing. There is no uncertainty as to its terms; because the former written document sets them out at length; and the whole conduct of the parties is consistent with the resumption of the former relationship and inconsistent with any other state of facts. This renders it unnecessary to consider any of the other arguments presented by the defendant.

The action fails, and must be dismissed with costs, unless the defendant sees fit to forego them.

McVEITY v. OTTAWA CITIZEN CO.—HOLMESTED, SENIOR REGISTRAR, IN CHAMBERS—NOV. 4.

Particulars—Statement of Claim—Immaterial Allegation — Libel.]—This was an action to recover damages for libel, which occasioned, as was alleged, the dismissal of the plaintiff from an office held by him. Paragraph 3 of the statement of claim was as follows: "3. With the intent to procure the dismissal of the plaintiff from his said office . . . the defendants for several years carried on against the plaintiff, through the columns of their said newspapers, a campaign of falsehood and slander." The statement then set out, in a subsequent paragraph, the alleged libel which occasioned the plaintiff's dismissal. Nothing was claimed in the way of damages in respect of the allegations in paragraph 3; which appeared to the learned Registrar to be immaterial. The defendants applied for particulars of paragraph 3, but did not ask to have the paragraph struck out. The Registrar said that, according to the decision of the Court of Appeal in Cave v. Torre, 54 L.T.R. 515, particulars ought not to be ordered of immaterial allegations in pleadings. The motion must, therefore, be refused, with costs to the plaintiff in any event. Stanley Mills, for the defendants. J. T. White, for the plaintiff.

RE KNOX AND CITY OF BELLEVILLE—FALCONBRIDGE, C.J.K.B.—NOV. 5.

Municipal Corporation—Sanitary By-law—Collection of Garbage—Delegation of Authority—Ministerial Matters.]—Motion to quash a city by-law. The learned Chief Justice said that the point on which Re Jones and City of Ottawa (1907), 9 O.W.R. 323, 660, turned, was felt by the Divisional Court to be a very narrow and technical one; no costs were awarded and only the objectionable sections of the by-law were quashed. The present by-law was intended to be and would be of great benefit to the citizens from a sanitary point of view, and it ought to be upheld, unless it was contrary to the general law of the land. The Ottawa by-law assumed to prohibit householders from disposing of their productive refuse to dealers. The present by-law seemed only to contain a direction to the garbage collector as to his duties. The alleged delegation of authority to the Sanitary Inspector and the Board of Health was as to matters purely ministerial. Motion dismissed with costs. E. G. Porter, K.C., for the applicant. S. Masson, K.C., for the city corporation.

RE MCDONALD—FALCONBRIDGE, C.J.K.B., IN CHAMBERS—NOV. 8.

Devolution of Estates Act—Sale of Land by Administrator—Approval of Adults Interested in Estate—Sale without Application to Official Guardian—Confirmation—Terms—Costs—Interest.]—Application in the matter of the estate of Ellen McDonald, deceased, for confirmation of a sale made by the administrator of the estate of Martha Beatty, in which no application was made to the Official Guardian, under the provisions of the Devolution of Estates Act. It appeared that all the adults interested in the estate were agreeable to the sale, having signified their approval by the execution of deeds to the purchaser, although it also appeared that Kathleen Weir did not now desire to carry it out. The purchaser had been in possession of the lands, and had made improvements thereon. While the evidence as to value was somewhat conflicting, there was no direct evidence to shew that, at the date when the contract for sale was made, the price agreed to be paid for the land was inadequate. The learned Chief Justice said that, in view of these facts, an order should be made confirming the sale and authorising the Official Guardian to approve of the deeds on behalf of the infants—the share of the infants in the purchase-money to be paid into Court. The sale was approved on condition that the purchaser pay, by way of rent, interest at the legal rate from the date when she went into possession to the date when the purchase-money is paid over. As no application was made to the Official Guardian, the administrator should not be entitled to any commission nor to any costs in connection with the sale prior to the date when the application was made to the Official Guardian. No costs of this motion except to the Official Guardian; his costs fixed at $15. W. Finlayson, for the purchaser. D. S. Storey, for Kathleen Weir. F. W. Harcourt, K.C., Official Guardian, for the infants.